

# *Partnerships Victoria* Guidance Material

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## Contract Management Guide

June 2003

The diverse nature of *Partnerships Victoria* projects requires a diverse range of contract management strategies to manage a wide variety of risks that differ in likelihood and severity from one project to another. This Guide cannot and is not intended to provide all the answers to contract management issues. Instead, it has been designed to guide readers to ask the right questions for their particular *Partnerships Victoria* project to assist them in developing and implementing suitable contract management strategies. Different projects will have unique features and degrees of risk that require different levels of contract management and different strategies.

While this Guide sets out 'best practice' principles relevant to the management of a *Partnerships Victoria* contract, it is not a variation of or substitute for the terms of the contract. It is intended to better ensure the implementation of the contract. Neither this Guide nor any action taken or not taken in reliance on it is to be taken as a variation of contract, waiver or estoppel by the government party, unless the government party, by a person duly authorised to do so, expressly confirms in writing that it is varying the contract or waiving a specific right under the contract.

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# Part One: Introduction to *Partnerships Victoria* contract management

Part One (Chapters 1-3) provides an overview of *Partnerships Victoria* and the purpose of the *Contract Management Guide*. It outlines the structure of the Guide (in Section 1.3). Part One then broadly outlines the nature and function of contract management and critical elements for success.

Some of the issues covered in Part One are also discussed in Part Two – with a focus in Part Two on useful tools and processes for contract management.





# 1 Overview

This *Contract Management Guide* is one of a series of documents designed to assist in implementing the *Partnerships Victoria* policy framework for arrangements between government and private parties to provide public infrastructure and related ancillary services.<sup>1</sup>

## 1.1 The purpose of this Guide

This Guide is one of four components of the *Partnerships Victoria* contract management framework.<sup>2</sup>

The purpose of this Guide is to provide:

- general guidance for the government party's management of a *Partnerships Victoria* contract through the lifecycle of a project – to help achieve project objectives incorporating balanced long-term value for money outcomes; and
- direction for the procurement team involved in developing a *Partnerships Victoria* project – to enable them to address and support the principles of effective contract management in the executed contract for the project.

This Guide, and the tools and processes set out in it, were developed for:

- government departments and agencies proposing *Partnerships Victoria* projects
- procurement teams for *Partnerships Victoria* projects
- Contract Directors<sup>3</sup> and their staff within government parties responsible for *Partnerships Victoria* projects
- senior management of government parties responsible for *Partnerships Victoria* projects
- staff of government central agencies providing support for *Partnerships Victoria* projects
- other *Partnerships Victoria* project stakeholders within the public sector.

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<sup>1</sup> The *Partnerships Victoria* suite of documents includes an *Overview*, the *Practitioners' Guide*, a *Risk Allocation and Contractual Issues* guide, a technical note, *Public Sector Comparator*, the *Partnerships Victoria* policy document and the *Partnerships Victoria Contract Management Policy* document. These documents are available from [www.partnerships.vic.gov.au](http://www.partnerships.vic.gov.au).

<sup>2</sup> The other components of the contract management framework are the Victorian Government policy statement, *Partnerships Victoria Contract Management Policy*, a credentialed training program and a Contract Directors' forum. This Guide contains more details on these components.

<sup>3</sup> The Contract Director has overall responsibility for managing the contract from the date of its execution to achieve project objectives, incorporating long-term value for money outcomes. A contract management team, reporting to the Contract Director, will carry out many day-to-day contract management activities.

The underlying principles in this Guide should be considered 'best practice' at the time of publication.<sup>4</sup> They may also be useful in the management of non-*Partnerships Victoria* long-term service contracts by government departments and agencies.

It is assumed that readers are familiar with the matters covered in the *Practitioners' Guide*, which describes the procurement process that leads up to contract execution.

## 1.2 Contract management through the project lifecycle

A typical *Partnerships Victoria* project has several distinct stages:

- **procurement stage:** the process leading up to contract execution, during which the government party should establish sound foundations for its contract management over the life of the contract;
- **construction stage:** from the time construction (or implementation) starts through the commissioning process to the start of payments when delivery of the services required by the output specification begins;
- **service delivery stage :** covering the provision and use of the contracted services during the remaining life of the contract; and
- **contract expiry or termination stage :** the period leading up to and after contract expiry or termination.

For each lifecycle stage, there is a range of contract management activities that should be conducted within the government party if the contract is to be managed effectively. The key activities in each lifecycle stage are summarised in Figure 1.1.

This Guide contains material relevant to each lifecycle stage and each significant contract management activity that may occur within those stages.

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<sup>4</sup> While this Guide sets out 'best practice' principles relevant to the management of a *Partnerships Victoria* contract, it is not a variation of or substitute for the terms of the contract. It is intended to better ensure the implementation of the contract. Neither this Guide nor any action taken or not taken in reliance on it is to be, or is to be taken as, a variation of contract, waiver or estoppel by the government party, unless the government party expressly confirms in writing that it is varying the contract or waiving a specific right under the contract.

Figure 1.1 Contract management issues and the project lifecycle


Procurement	Contract execution	Construction	Service delivery	Contract expiry or termination
<b>Resourcing</b> <ul style="list-style-type: none"> <li>• Appoint Contract Director</li> <li>• Identify and budget for contract management resources</li> </ul>	<b>Manage performance</b> <ul style="list-style-type: none"> <li>• Manage performance by government</li> <li>• Monitor construction progress and management quality</li> <li>• Consider detailed designs</li> </ul>	<b>Manage performance</b> <ul style="list-style-type: none"> <li>• Manage performance by government</li> <li>• Monitor private party's performance, management etc.</li> <li>• Seek user feedback</li> </ul>	<b>Manage performance</b> <ul style="list-style-type: none"> <li>• Manage performance by government</li> <li>• Monitor private party's compliance with obligations on expiry/termination</li> </ul>	
<b>Planning and development</b> <ul style="list-style-type: none"> <li>• Develop contract management plan</li> <li>• Collect and analyse relevant information</li> </ul>	<b>Manage relationships</b> <ul style="list-style-type: none"> <li>• Continue and strengthen communications</li> <li>• Establish committees</li> <li>• Manage stakeholders</li> </ul>	<b>Manage relationships</b> <ul style="list-style-type: none"> <li>• Maintain and strengthen communications</li> <li>• Manage stakeholders</li> <li>• Ensure the right participants are involved in committees</li> </ul>	<b>Manage relationships</b> <ul style="list-style-type: none"> <li>• Maintain strategic relationship with sponsors etc.</li> </ul>	
<b>Develop tools</b> <ul style="list-style-type: none"> <li>• Develop performance monitoring</li> <li>• Develop contract administration manual</li> <li>• Develop other tools and processes</li> </ul>	<b>Manage change</b> <ul style="list-style-type: none"> <li>• Manage transition from procurement to contract management</li> <li>• Manage contractor claims</li> <li>• Manage commissioning issues</li> </ul>	<b>Manage change</b> <ul style="list-style-type: none"> <li>• Manage changes to output specifications</li> <li>• Manage automatic contractual changes, such as indexation of payments</li> <li>• Assess changes in service requirements and technology that impact on project service delivery</li> </ul>	<b>Manage change</b> <ul style="list-style-type: none"> <li>• Manage asset transfer (including transfer of necessary information and records) if assets are transferred to government</li> </ul>	
<b>Integrate contract management in the contract</b> <ul style="list-style-type: none"> <li>• Integrate reporting and KPIs</li> <li>• Integrate dispute and issue management mechanisms</li> </ul>	<b>Manage contingency events</b> <ul style="list-style-type: none"> <li>• Maintain contingency plans and review prior to commencement of service delivery</li> <li>• Respond to defaults and disasters</li> </ul>	<b>Manage contingency events</b> <ul style="list-style-type: none"> <li>• Maintain and review contingency plans</li> <li>• Scan environment for potential impacts</li> <li>• Respond to defaults and disasters</li> </ul>	<b>Manage contingency events</b> <ul style="list-style-type: none"> <li>• Maintain and review contingency plans</li> <li>• Scan environment for potential impacts</li> <li>• Respond to defaults and disasters</li> </ul>	
<b>Other issues</b> <ul style="list-style-type: none"> <li>• Is the Contract Director credentialed?</li> <li>• Do reality checks. Can the KPIs be measured etc.?</li> </ul>	<b>Other issues</b> <ul style="list-style-type: none"> <li>• Manage knowledge and project records</li> <li>• Review contract management practices</li> </ul>	<b>Other issues</b> <ul style="list-style-type: none"> <li>• Manage knowledge and project records</li> <li>• Review contract management practices</li> </ul>	<b>Other issues</b> <ul style="list-style-type: none"> <li>• Manage knowledge and project records</li> <li>• Review contract management practices</li> </ul>	
<b>Governance responsibility</b> <ul style="list-style-type: none"> <li>• Project Director ensures that: <ul style="list-style-type: none"> <li>- the Contract Director has access to resources and information required to prepare the contract management plan</li> <li>- the plan is prepared</li> <li>- governance, reporting arrangements are in place for commencement</li> </ul> </li> </ul>	<b>Governance responsibility</b> <ul style="list-style-type: none"> <li>• Project Director continues in role</li> <li>• Project Director ensures that contract management plan for the project is submitted to Cabinet</li> <li>• Contract Director implements the contract management plan</li> <li>• Contract Director reports to senior management and DTF</li> </ul>	<b>Governance responsibility</b> <ul style="list-style-type: none"> <li>• Contract Director continues in role, applying and regularly reviewing contract management tools and processes</li> <li>• Contract Director reports to senior management and DTF</li> <li>• Government entity plans succession</li> </ul>	<b>Governance responsibility</b> <ul style="list-style-type: none"> <li>• Contract Director continues in role</li> <li>• If required, accountable public sector entity provides or procures replacement services or assists in transfer of facilities and knowledge to government</li> <li>• Contract Director reports to senior management and DTF</li> </ul>	

## 1.3 Structure of this Guide

The Guide has two parts:

1. **Part One** outlines the nature and function of contract management and critical elements for a successful result
2. **Part Two** outlines the key contract management processes and tools for managing a *Partnerships Victoria* project.

By using the processes and tools described in Part Two, a Contract Director can develop an effective contract management strategy for a *Partnerships Victoria* project.

The Guide includes a series of templates that can be used as a basis for developing various tools discussed in Part Two. The symbol  in the text indicates that there is a template for a particular process or tool.

The Appendices provide additional information on some of the more complex or technical issues that appear in Part Two.

## 1.4 Updates

Updates to guidance documents will be published from time to time on the *Partnerships Victoria* website, [www.partnerships.vic.gov.au](http://www.partnerships.vic.gov.au).

## 2 The relationship between risk and contract management

### 2.1 What is risk?

In the context of infrastructure projects, risk has been defined as ‘the chance of an event occurring which would cause actual project circumstances to differ from those assumed when forecasting project benefit and costs.’<sup>5</sup> Risk is at the core of project profitability (for the private party) and efficiency (in delivering public sector objectives). Management of risks holds the key to project success or failure because ‘projects are about risks, ... their evaluation and their subsequent acceptance or avoidance’.<sup>6</sup>

**Risk** is the chance of an event occurring that would cause actual project circumstances to differ from those assumed when forecasting project benefits and costs.

### 2.2 Effective contract management manages risk

To be effective in the context of a *Partnerships Victoria* project, contract management must identify, monitor and manage all risks over the life of the project contract to achieve project objectives and value for money outcomes. This includes:

- quantifying actual and potential risks and their associated losses (or benefits) to identify those risks that must be managed over the contract lifecycle; and
- developing management strategies to assume, control, mitigate or eliminate these risks or losses.

Contract management builds on the allocation of project risk in the project contract. The framework for this risk allocation in *Partnerships Victoria* projects is set out in Chapter 4 of the *Risk Allocation and Contractual Issues* guide.

From time to time, the private party in a *Partnerships Victoria* project will approach the government party with proposals for changes to the contract or new opportunities that they believe will lead to mutual benefits. Effective contract management also helps the government party to assess and realise the benefits of these proposals.

**Effective contract management incorporates identifying, monitoring and managing all risks and opportunities over the life of the project contract to achieve project objectives and value for money outcomes.**

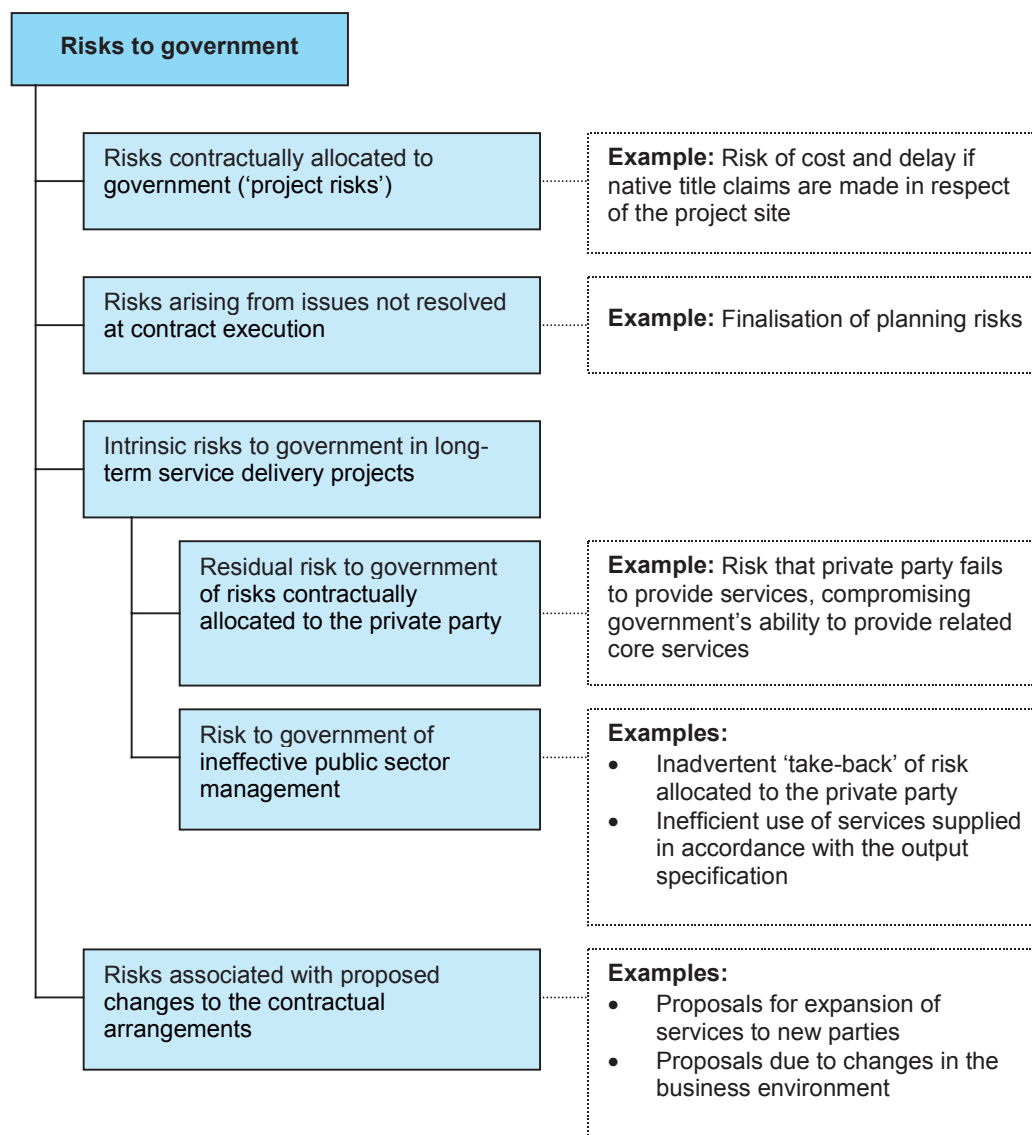
<sup>5</sup> Chris Furnell, ‘Risk identification and risk allocation in project finance transactions’, paper presented at the Faculty of Law, The University of Melbourne, May 2000, p. 1.

<sup>6</sup> Allen & Overy, from Furnell, *ibid.*, p. 3.

## 2.3 What risks must be identified and managed?

There are a number of sources of contract risk to government that may compromise or otherwise impact on the value for money outcomes of a *Partnerships Victoria* project.

Figure 2.1: Categories of contract risk in a *Partnerships Victoria* project



Thus, the range of risks that must be considered for contract management purposes ('contract risks') is broader than the range of risks considered by the procurement team for contractual risk allocation purposes ('project risks'). (Principles for the contractual allocation of project risks are discussed in Part One of *Risk Allocation and Contractual Issues*. Contractual allocation of specific project risks is discussed in Part Two of that publication.)

In order to identify and manage this range of contract risks, a contract management strategy should incorporate thorough information collection, analysis and management practices, and an ongoing review process. New and emerging risks through the project lifecycle must be identified and control action taken. Failure to develop and implement an effective contract

management strategy for the project is, in itself, a risk that must be managed. Part Two of this Guide provides assistance in the development and implementation of an effective contract management strategy.

Risks that must be identified and managed ('contract risks') in a Partnerships Victoria project are all risks that may compromise project objectives and value for money, including risks allocated to government, residual risk to government of risks allocated to the private party (for example, the residual risk to government of ineffective private party performance), and risks arising through ineffective public sector performance.

Risks not identified cannot be proactively managed. They can be very damaging. Risks cannot be correctly identified unless there are clear project objectives that provide an unambiguous description of success for the project.

## Key categories of contract risks

The following paragraphs describe in more detail the key categories of risk identified in Figure 2.1. However, these categories do not encompass all possible risks to government in a *Partnerships Victoria* project. Contract management teams must carefully consider the full range of risks in their specific project.

### 1. *Project risks contractually allocated to government*

Selected project risks that directly affect *Partnerships Victoria* project outcomes or deliverables are contractually allocated to government. These risks are set out in the project contracts and are discussed in detail in *Risk Allocation and Contractual Issues*. Aside from express allocation of risks, commercial contracts may contain contractual obligations implied by law. There may also be consequences arising from statute<sup>7</sup> or arising from the general law.<sup>8</sup> Government must appropriately manage those risks allocated to it by the contract and those that arise from implied duties under the contract<sup>9</sup> or from general law.

### 2. *Risks arising from issues not resolved at contract execution*

As a practical matter, not all issues that may arise in a *Partnerships Victoria* project will have been identified and expressly allocated in the project contracts. Some may not have been identified at all. For example, before 11 September 2001, unavailability of terrorism insurance in Australia was not generally identified as a project risk.

Other risks may have been identified, but were intentionally or unintentionally left unresolved. The fact that these issues are unresolved creates a risk that they may, in future, compromise the ability of the parties to achieve the project objectives. Government must appropriately manage the unresolved issues consistently with the risk allocation for the project generally, in order to minimise the impact of this risk upon the project objectives.

<sup>7</sup> For example, *Trade Practices Act 1974* (or its Victorian equivalent) issues of misleading conduct and unconscionable conduct

<sup>8</sup> For example, a failure to warn

<sup>9</sup> For example, where applicable, the duties to act in good faith and to act fairly

### 3. *Intrinsic risks borne by government*

A variety of risks are intrinsic in a long-term service delivery project and must be managed by government. These risks include:

- the residual risk to government of a failure by the private party (or its sub-contractors) to adequately control and mitigate risks contractually allocated to the private party; and
- risks arising from ineffective public sector management (including poor contract management).

#### **Residual risk to government of risks contractually allocated to the private party**

The nature of a *Partnerships Victoria* project results in all project risks that are not assumed by government implicitly falling to the private party<sup>10</sup> (whether expressly allocated in the contract or not).

Government may face significant residual risk where the services delivered by the project impact upon 'core'<sup>11</sup> services of the government party. In these circumstances, if the private party fails to deliver the contracted services, this may interfere with government's ability to provide the core services. Government's preferred position is that this 'interface risk' is allocated to the private party.<sup>12</sup>

Where interface risk is allocated to the private party, government may be entitled to financial compensation under the contract should a failure by the private party to deliver the contracted services interfere with government's ability to provide the core services. However, money alone may be insufficient to compensate government for failing to fulfil its obligations to third parties and deliver key outcomes. Thus, while the financial risk of non-performance is contractually allocated to the private party, government retains a residual risk should the private party fail to perform or pay compensation.

Government may also retain a significant residual risk if it has a continuing, non-delegable duty of care to people receiving services provided by the private party.<sup>13</sup>

There can be similar residual risks to government, in the absence of core service interface risk or a non-delegable duty, where a project risk allocated to the private party materialises and there is a political or public interest imperative for government to deliver the services.

#### **Risks arising from ineffective public sector management**

Consequential risks can arise if the public sector does not meet its general (non-contractual) responsibilities and mismanages the contract. These risks do not necessarily involve a failure by either party to perform its contractual obligations or impact upon the delivery of services in accordance with the output specification. They can, however, compromise the value for money outcomes of the project. They can also result in adverse political consequences for government, or damage to personal, organisational or broader government reputation.

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<sup>10</sup> See Section 4.1 of *Risk Allocation and Contractual Issues*.

<sup>11</sup> 'Core' services are discussed in Sections 1.4-1.5 of *Risk Allocation and Contractual Issues*.

<sup>12</sup> Interface risk and its allocation are discussed in detail in Chapter 13 of *Risk Allocation and Contractual Issues*.

<sup>13</sup> Risk allocation issues relating to non-delegable duties are discussed in detail in Section 1.10 of *Risk Allocation and Contractual Issues*.



Examples of such risks include:

- ‘take-back’ risk<sup>14</sup>, which can result in government ultimately bearing the financial responsibility for project risks originally allocated to the private party. (This may occur, for example, where government fails to respond to a private party request within a contractual timeframe or where the government party engages in a pattern of behaviour at odds with the contractual arrangements); and
- the inefficient use by the public sector of the contract outputs supplied by the private party in accordance with the output specifications.

#### 4. *Risks associated with proposed changes to the contractual arrangements*

Proposed changes to contractual arrangements involve two forms of risk:

- (i) The risk that the change process is not managed effectively.
- (ii) Risks to the ongoing success of the project that result from the proposed change.

Tools and processes for managing risks in the change process are discussed in detail in Chapter 11 of this Guide. As part of this process, the risks to the ongoing success of the project that result from the proposed change should be identified, assessed and allocated, and appropriate mitigation strategies should be put in place.

## 2.4 Contract management, the contract and the procurement process

The contract negotiation process must be conducted with the understanding that the contract will form part of a broader risk management framework for the project. It is vital to build a contract that not only identifies clearly the obligations of the private party and government, but also enables a productive relationship built on long-term perspectives and commitments.

The development of such relationships in the contract is an essential component of effective contract management. The contract should not be so rigid that it precludes flexible, constructive management or the natural maturing of the relationship between government and the private party.

As risk is a dynamic concept, contract management must evolve with the delivery of the contracted services throughout the project lifecycle. While contract management evolves, the contract itself should not evolve inadvertently. Through effective contract management, the government party should ensure that the contract is only modified by written agreement of the parties. For risk to be managed effectively, the foundations for contract management must be incorporated into the Project Brief and the draft contract provided to bidders, and maintained through the further development and finalisation of the contract. Doing so ensures that:

- a sound contractual basis for effective contract management is incorporated in the contract;
- there is adequate knowledge transfer from the procurement team to the contract management team; and

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<sup>14</sup> Take-back of risks is discussed in Sections 4.5 and 9.3 of *Risk Allocation and Contractual Issues*.

- the contract management strategy for the project is in place as soon as practical after the contract is executed.

To assist this process, it is essential to include the proposed Contract Director in the procurement team at an early stage, or at least allow that person to observe the procurement process and have access to procurement team members to enable an informed preparation of the contract management strategy. The procurement team should provide practical help in understanding the project and the risks inherent in it. The Project Director has overall responsibility to ensure that the Contract Director works with the procurement team to develop an effective contract management strategy that receives approval as described in Section 5.3 of this Guide.

Effective contract management must be initiated early in the procurement stage of the project and requires a strong understanding of the contract itself.

The Project Director succeeds by achieving a contractual arrangement that will deliver the project objectives. As the identification and management of risks is necessary to achieve the project objectives, the Project Director must support risk identification and management, and the development of an effective contract management strategy. The Contract Director succeeds by ensuring that the project objectives are delivered.

## 2.5 Contract management through the project lifecycle

Given the long-term duration of *Partnerships Victoria* projects, it is inevitable that the physical, business and technological environment in which a project operates will change over the life of the project. In addition, the project itself will pass through a number of stages and significant events. Each lifecycle stage and significant event involves particular risks and provides opportunities for the government party to implement particular control and mitigation strategies. The government party must ensure that its contract management strategy evolves through these lifecycle stages and change processes and is adapted to particular circumstances. Some of the significant contract management issues at each stage of the lifecycle are highlighted in Figure 1.1 in Section 1.2 of this Guide.

Effective contract management must take account of and adapt to changing circumstances and significant events through the project lifecycle.

## 2.6 Contract risk management resources

To ensure that the value for money outcome obtained in the initial contractual allocation of project risks<sup>15</sup> is not compromised and risk is managed over the life of the contract, the government party must devote adequate resources to contract management activities. Inadequate resourcing can lead to inappropriate contract management strategies and skill levels to control and mitigate risks borne by government. In addition, over time, a lack of

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<sup>15</sup> The framework for contractual allocation of risk is discussed in Chapter 4 of the *Risk Allocation and Contractual Issues* publication.

adequate contract management capabilities can lead to the unintentional 'take-back' of risks that have been allocated to a private party through the earlier procurement process.<sup>16</sup>

The resources required for good contract management include:

- an adequate budget
- experienced personnel with the knowledge and experience to manage relationships with the private party and other stakeholders

A standing arrangement providing access to senior advisers experienced in the project. As good contract risk management starts during the procurement phase with the development of appropriate risk management strategies, contract risk management resources should be available for use during the procurement stage, not simply after contract execution.

Where feasible, the Project Director (who has overall responsibility for delivery of the project through the procurement process) should either be the inaugural Contract Director, or should be engaged until commissioning, working with the inaugural Contract Director during this period.

Effective contract risk management requires the dedication of appropriate financial resources and experienced personnel to the establishment of a contract risk management strategy during the procurement phase of the project and the maintenance of that strategy throughout the project lifecycle.

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<sup>16</sup> Take-back of risks is discussed in Sections 4.5 and 9.3 of the *Risk Allocation and Contractual Issues* publication.

## 3 Key elements of effective contract management

This chapter outlines the key elements of effective contract management for *Partnerships Victoria* projects and describes how these elements assist the government party. Part Two of this Guide describes the tools and processes that can be used to implement each of these elements of effective contract management.

### 3.1 Planning, information collection and analysis

Planning, information collection and analysis are the key first steps towards effective contract management for *Partnerships Victoria* projects. These activities go hand in hand. Planning the contract management strategies that will be used for the project assists in determining the information that will be required to implement those strategies, while the information collected and analysed helps refine the contract management plan and helps the government party in identifying, understanding and managing project risks.

In a well-managed *Partnerships Victoria* project, robust contract management planning and information collection and analysis processes have the following outcomes:

- Contract management personnel understand the legislative, regulatory and commercial context of the project.
- All the key risks of the project are identified and are updated as necessary over time.
- The likelihood of each risk materialising, and its potential consequences and impact on project objectives have been assessed.
- Possible controls and mitigants for each risk have been identified, assessed and implemented.
- Interdependencies between risks are understood.
- The private party's ability to manage the risks allocated to it has been assessed.
- Potential changes in the project's risk profile over its lifecycle have been considered, planned for and responded to. Good contract management is not reactive, but aims to anticipate and respond to business needs of the future.

Planning, information collection and analysis commence during procurement and are ongoing iterative processes. Regular review of plans will help determine what new information should be collected and analysed and where it can be collected from, and regular analysis of the information gathered then helps to refine the overall contract management strategy.

Planning, information collection and analysis are key first steps towards effective contract management for *Partnerships Victoria* projects and must continue throughout the life of the project.

## 3.2 Contract administration

Contract administration is generally the most significant task (in terms of time and resources required) in managing a *Partnerships Victoria* project after contract execution. Contract administration requires an understanding of the legal documentation for the project and also:

- the commercial intent of the parties
- the operating, industry and community issues associated with service provision
- the legislative and regulatory context in which the project operates.

In a well-managed *Partnerships Victoria* project, the Contract Director, with assistance from the procurement team, prepares a comprehensive Contract Administration Manual that enables the Contract Director to understand the key contract provisions and the environment in which the contract must be administered. The Contract Administration Manual answers the following key questions relating to the project:

- **What needs to be done, by whom and when?** The Contract Administration Manual assigns accountabilities, identifies government's obligations, and mitigation and control of risks, and how it will monitor the private party's performance of its obligations. (Performance monitoring is discussed in detail in Section 3.3 below and in Chapter 7 of this Guide.)
- **How will government's role be performed?** The Contract Administration Manual identifies the resources, delegations and authorisations required for government to perform its obligations.
- **What are the ramifications of any non-performance or default by the private party or government, and how should these be addressed?** The Contract Administration Manual identifies contingency plans, and issue and dispute resolution mechanisms.

By answering these questions, the Contract Administration Manual assists the Contract Director to anticipate and mitigate risk, thus maximising the project outcomes. Ongoing review and periodic updating of the Contract Administration Manual is necessary to ensure it remains of value throughout the project lifecycle.

Effective **contract administration** in a *Partnerships Victoria* project enables the government party to anticipate and mitigate risk throughout the project lifecycle, ensuring that the project objectives are delivered.

## 3.3 Performance reporting and monitoring

*Partnerships Victoria* projects, by their nature, experience high levels of change. In a well-managed *Partnerships Victoria* project, the government party is able to sensibly control this dynamic situation because it has access to adequate information on which to base 'control' actions. This information is received through effective monitoring of the 'state of health' of the project as an integral part of the government party's overall contract management strategy.

In the absence of an effective performance monitoring and reporting strategy, the government party is unlikely to have an adequate understanding of the private party's business and will not receive early warnings of risks to the project outcomes. An effective performance monitoring and reporting strategy is built upon the following elements:

- The government party understands the business environment and the objectives of government in entering into the contract in the first place. Performance measures lie at the heart of performance management and it is important that performance measures are linked to strategic objectives, or to desired outcomes.
- The government party understands the private party's internal operating environment, such as its cash flows. It is through this understanding that the government party can derive an awareness of the private party's strengths and weaknesses, including financial performance.
- The government party monitors 'soft' indicators of the management quality of the private party, looking for weaknesses or trends that may provide an early indication of trouble ahead.
- The government party regularly reviews the quality of the service as measured against the KPIs and output specifications.
- Having assessed the data collected through these monitoring activities, the government party takes appropriate action to mitigate or control any risks that are materialising, and to maximise value for money from the project.

Effective **performance monitoring** in a *Partnerships Victoria* project provides access to relevant information on which to base 'control' actions intended to mitigate any risks that are materialising.

### 3.4 Relationship management, dispute resolution and issue management

Given the long-term duration of *Partnerships Victoria* projects, it is imperative to maintain a strong relationship between the government party and the private party. Good relationship management enables the parties to anticipate risk events more effectively and deal with those risks that do materialise.

Good relationship management in a *Partnerships Victoria* project creates a long-term relationship of mutual benefit between the parties. Common features of good *Partnerships Victoria* relationships include the following:

- The parties appreciate one another's objectives, strategy and point of view.
- The parties are prepared to work collaboratively when required in order to resolve issues and disputes that may arise during the life cycle of the project.
- There is open and clear communication between the parties at a number of levels.
- A degree of commercial trust has been established between the parties.
- The relationship is championed at senior levels in each organisation.

Good communication and a strong relationship are essential, especially if issues arise which go to the heart of the contract's operation. It is also important to recognise that disputes and service delivery issues most likely will arise and will need to be appropriately managed. If the parties have strong dispute and issue management principles and procedures in place, these will help minimise damage to the relationship and assist the parties to achieve success in the project.

Effective **relationship management** in a *Partnerships Victoria* project creates a long-term relationship of mutual benefit between the parties, enabling them to more effectively anticipate risk events before they occur, and deal with any risks, issues and disputes that do materialise.

### 3.5 Governance, probity and compliance

Proper management of a *Partnerships Victoria* project by the government party involves not only managing the contract and relationship with the private party, but also ensuring appropriate governance, probity and compliance practices are established within the government party and in its interactions with the private sector party and any other government stakeholders.

In a well-managed *Partnerships Victoria* project, the risks associated with government's ultimate accountability for the delivery of infrastructure and services is effectively managed through a project governance, probity and compliance framework. This framework assists the government party to manage the contract in the context of:

- Ministerial accountability to Parliament and the people (including accountability for government's contracting activities)
- the *Financial Management Act 1994* and related Regulations and Directions, designed to safeguard public money and to ensure that it is spent efficiently
- scrutiny of the Auditor-General
- government's obligation to act as a 'moral exemplar' in commercial dealings with the private sector
- the availability of administrative law remedies, including the Ombudsman's jurisdiction and the *Freedom of Information Act 1982*
- privacy obligations in relation to personal information in the hands of the government under the *Information Privacy Act 2000*
- political or commercial constraints in exercising legal rights for non-performing or defaulting contractors.

Effective **public sector governance and compliance practices** in a *Partnerships Victoria* project ensure that appropriate governance, probity and compliance practices are established within the government party and in its interactions with the private sector party and any other government stakeholders. This assists the government party to comply with relevant laws, regulations, and government policy.

## 3.6 Knowledge and information management

A government party's ability to successfully manage a contract can depend upon the Contract Director having an effective knowledge and information management strategy tailored to the project's needs. In a well-managed *Partnerships Victoria* project, the Contract Director ensures the information collected in relation to a project is maintained, periodically reviewed and organised for easy retrieval and access. These practices assist the government party to comply with:

- record-keeping obligations
- disclosure obligations, such as those under Freedom of Information legislation
- intellectual property laws and confidentiality obligations.

An effective **knowledge and information management strategy** in a *Partnerships Victoria* project ensures that information relating to the project can be easily retrieved and accessed, enabling the government party to comply with obligations relating to information retention, disclosure and protection.

## 3.7 Change management

During the lifecycle of a *Partnerships Victoria* project, it is likely that a number of changes will occur, requiring proper management. Changes may be contemplated at the time of procurement and provided for in the contract, or not contemplated during procurement but seen as desirable or necessary alterations to services or the contract. In either case, change events are both a source of risk and a potential opportunity to extract additional benefits from the project.

Good change management processes incorporate the following features:

- Appropriate protocols are in place to manage change.
- Appropriate staff have the authority to request and authorise changes.
- Potential changes are assessed thoroughly by suitably experienced personnel, having consulted with all relevant stakeholders.
- Changes are appropriately prioritised and their implementation is properly resourced.
- The implementation of changes is controlled and tested.
- Changes are appropriately documented.
- Changes do not compromise value for money outcomes.



In a well-managed *Partnerships Victoria* project, particular care is taken during change processes to ensure that there is no unintentional take-back of risk allocated to the private party. Take-back<sup>17</sup> can occur where the contract allocates risk associated with an aspect of a project (for example, design of the project facilities) to the private party, but the government party approves that aspect as part of the change process (for example, it approves designs for alterations to project facilities). Such an approval can result in the private party subsequently arguing that government has accepted the risk that that aspect of the project will be inadequate to enable the project to deliver the desired outputs.

Effective **change management** in a *Partnerships Victoria* project ensures that change events are managed smoothly without creating unnecessary risk or the unintended acceptance of risk by government.

### 3.8 Contingency planning

Contingency planning is vital to a *Partnerships Victoria* project because, as discussed in Section 2.3 of this Guide, it may not be possible to fully transfer responsibility for the risk of service delivery failure to the private party. If the private party fails to deliver services according to the requirements of the contract, the government party, and possibly government as a whole, may retain accountability, and potentially face adverse reaction from end users and third parties. In addition, the private party's obligation to provide services may be suspended through the operation of force majeure provisions. If so, the government party may be compelled or subjected to strong pressure to ensure that the public or other third parties are not inconvenienced by a disruption to the supply of those services.

In a well-managed *Partnerships Victoria* project:

- Potential contingency events have been identified and their financial consequences have been assessed.
- Information explaining the operation of the relevant contractual provisions is available for easy access and use by contract management personnel.
- Appropriate contingency plans have been developed. These may include disaster recovery and business continuity plans, step-in plans and default plans.

Effective **contingency planning** in a *Partnerships Victoria* project ensures government can react to unplanned events and control the impact of these events on service delivery value for money outcomes.

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<sup>17</sup> See Section 9.3 of *Risk Allocation and Contractual Issues*.

## 3.9 Ongoing review

Contract management processes must change and adapt throughout the lifecycle of a *Partnerships Victoria* contract, and therefore should be reviewed on an ongoing basis to ensure that management is sufficiently informed of current and emerging risks and issues. In addition to regular reviews, the impact of the following events should be considered as and when they occur:

- divergence between each party's expectations and actual project outcomes
- changes in the project itself through change events, contingency events, or as a result of the project moving from one stage to another in its lifecycle
- changes in the external environment in which the project operates.

Ongoing review of contract management practices and outcomes not only benefits individual projects, but can also provide knowledge to be shared across a range of *Partnerships Victoria* projects. The Department of Treasury and Finance, in pursuing its whole-of-government responsibility for supporting the contract management of *Partnerships Victoria* projects, will assist in this knowledge sharing process.

**Ongoing review** of contract management processes ensures that those processes change and adapt throughout the lifecycle of a *Partnerships Victoria* project and knowledge gained through those processes is retained and spread.


## 3.10 Contract management training

This Guide is only one component of the Victorian Government's contract management framework. A related and integral component of the framework is the contract management training to be established and maintained by the Department of Treasury and Finance.

For contract management to be effective, Contract Directors need not only a strong knowledge of this Guide, but also a detailed practical understanding of commercial and legal dimensions of contract management. The training will meet this second need. As this practical understanding is vital to the success of the Contract Director, and the Contract Director's contract management team, in implementing effective contract management practices, the training will be mandatory for public sector personnel involved in the management of *Partnerships Victoria* projects.

## Part Two: Managing the contract

Part Two (Chapters 4-14) outlines key contract management processes and tools of use for a *Partnerships Victoria* project. Templates have been outlined or developed in detail for a number of these tools and processes.

Wherever there is an appropriate template for organising a process described in this part of the Guide, you will see this symbol, . You will find the templates in the next part of the Guide following Chapter 14.



## 4 Developing the contract management strategy

### 4.1 Where do I start?

Developing and implementing a contract management strategy for a *Partnerships Victoria* project can be a complex task demanding significant resources. However, completing this task has significant benefits, as effective contract management assists the government party to achieve the project outcomes.

This chapter outlines the actions that government parties and Contract Directors need to identify to develop and implement an effective contract management strategy, including the development of a Contract Administration Manual.

The broader context is shown in the following figures:

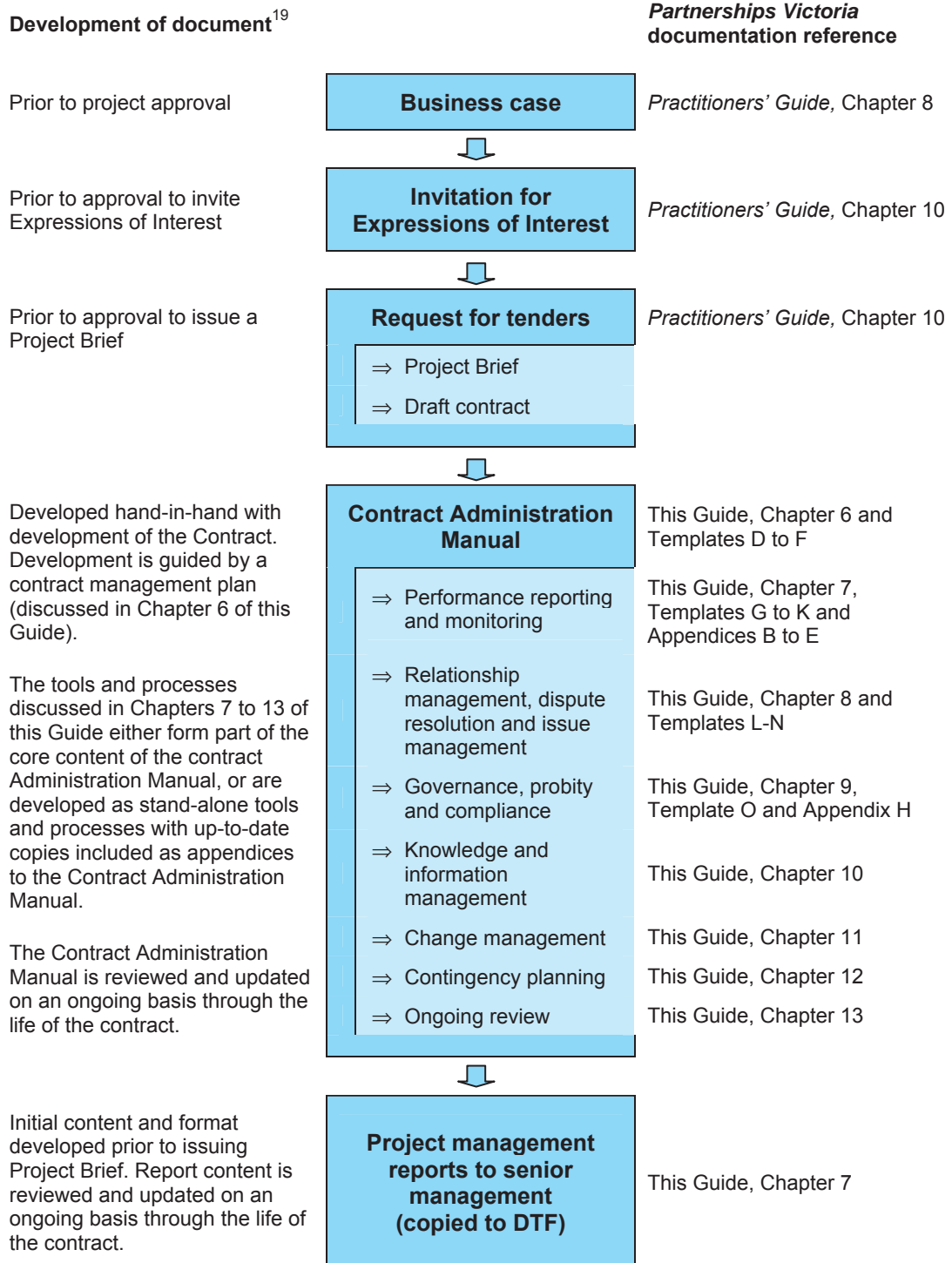
- Figure 4.1 outlines the development of project documentation within the lifecycle of a *Partnerships Victoria* project. (It does not include contract documents.)
- Figure 4.2 illustrates the relationship of the procurement process to contract management activities.
- Figure 4.3 outlines the three steps in developing and implementing a contract management strategy.

The following chapters provide guidance on processes and tools that can be used to develop an effective contract management strategy for *Partnerships Victoria* projects.<sup>18</sup>

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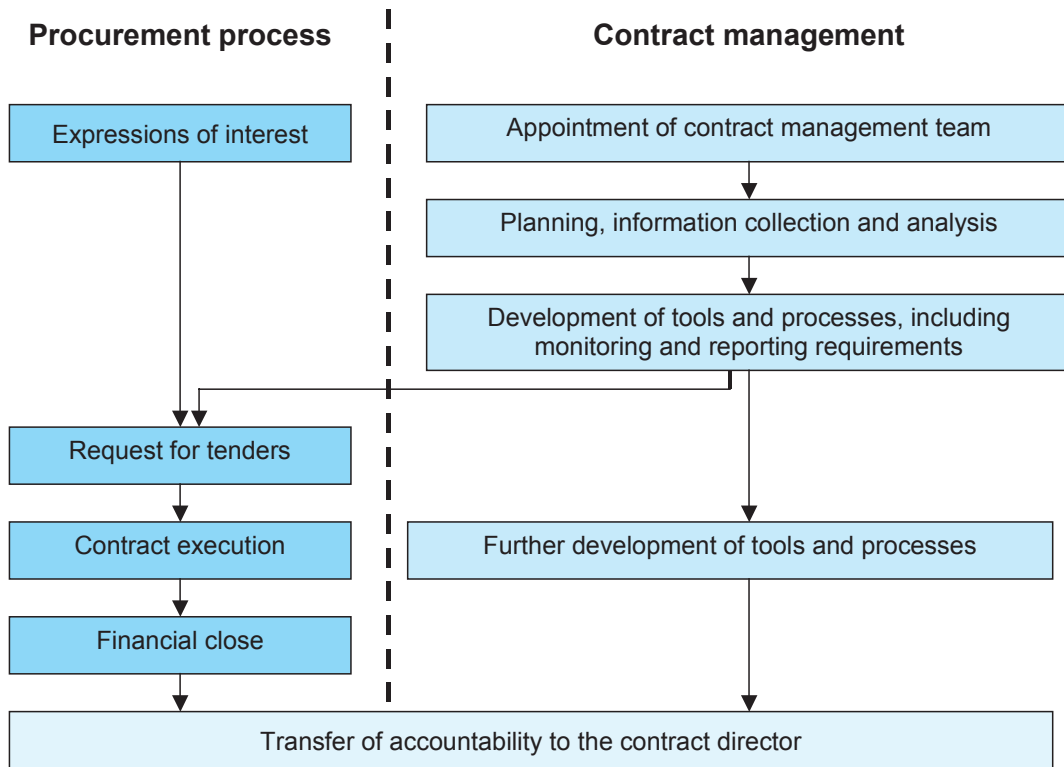
<sup>18</sup> The diverse nature of *Partnerships Victoria* projects requires a range of contract management strategies to manage a wide variety of risks that differ in likelihood and severity from one project to another. In these circumstances, this document cannot provide all the answers to contract management issues. Instead, it seeks to guide readers in asking the right questions to assist them to develop and implement effective contract management strategies in *Partnerships Victoria* projects.

**Figure 4.1: The development of project documentation in the lifecycle of a Partnerships Victoria project**



<sup>19</sup> The contract documents typically seen in a *Partnerships Victoria* project are listed in Appendix B of this Guide.

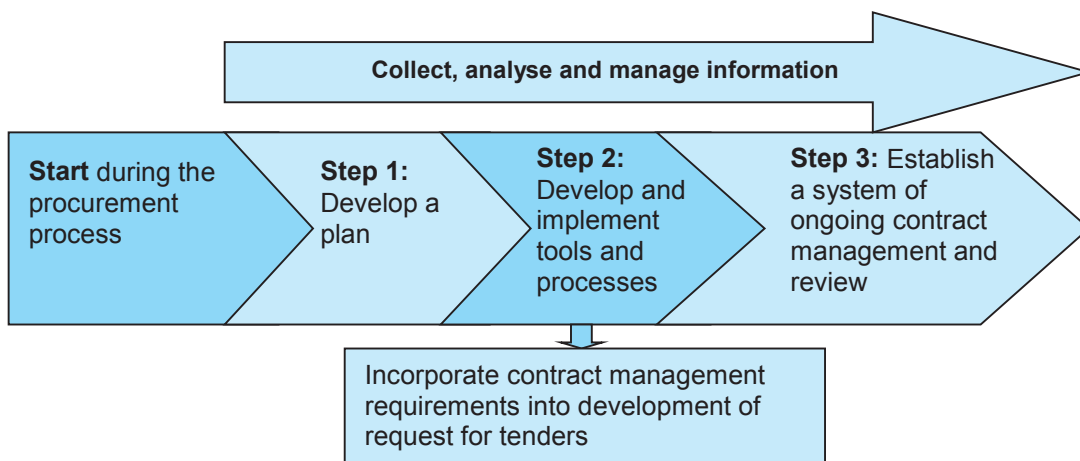
**Figure 4.2: The relationship between contract management and the procurement process**



## 4.2 The three steps to developing a contract management strategy

Developing and implementing a contract management strategy should start at an early stage during the procurement process so that contract management requirements are included in the draft contract developed by the government party. In particular, an effective performance monitoring regime requires reporting obligations to be included in the contract. The strategy should be developed and implemented through three steps.

**Figure 4.3: Three steps for developing and implementing the contract management strategy**



Each of these steps – to develop a plan, develop and implement tools and processes and establish a system of ongoing contract management review – relies on the essential processes of information collection, analysis and management.

Having identified the appropriate tools and processes, resources and time constraints, the Contract Director should collect and analyse information in a structured form so that the contract management tools and processes can be developed. The central task in this process is to identify and analyse the key risks to the project's success. The role of information collection and analysis in the development of contract management tools and processes is discussed in Section 5.4 of this Guide. Issues affecting ongoing information management are discussed in Chapter 10.

## Step 1: Develop a plan

The development of an effective contract management strategy must be carefully planned (see Chapter 5). The Contract Director can begin the planning process by asking the following questions:

- **What contract management tools and processes may be required for the project?**  
T<sub>1</sub> Template A lists the tools and processes discussed in this Guide, and may assist the Contract Director to identify those tools and processes relevant to a particular project.
- **What human, financial and technology resources are available?** The available resources may dictate the form taken by contract management tools and processes.
- **What time constraints should be set for the development of the contract management tools and processes?** The time constraints should be matched to both the available resources and the expected project delivery dates and milestones.

## Step 2: Develop and implement contract management tools and processes

After obtaining appropriate resources, and collecting and analysing relevant information, Contract Directors should proceed to develop and implement the necessary contract management tools and processes and also inform the development of the request for tender documentation for the project. In doing so, they should be guided by Chapters 6 to 12 of this Guide.

As noted in Section 3.2, the processes and tools developed and implemented for contract management purposes should be collated in a Contract Administration Manual. It may be appropriate to document some of the tools and processes separately from the Contract Administration Manual. For example, certain contract management processes may be contained in documents that apply across the relevant government entity, rather than applying specifically to contract management. If this is the case, an up-to-date copy of the separately documented tool or process should be included as an appendix to the Contract Administration Manual, so that documentation for all the tools and processes used in contract management is available in the one place.

The Contract Administration Manual and the performance reports produced over the life of the contract are key documents for the project. Figure 4.1 lists the key project documentation developed over the complete life of a *Partnerships Victoria* project, other than the contract documents. (The contract documents typically seen in a *Partnerships Victoria* project are listed in Appendix B.)



### **Step 3: Establish a system of ongoing contract management and review**

Step Three continues the process commenced in Step Two. In establishing a system of ongoing contract management and review, the Contract Director relies on the same tools and processes in Chapters 7 to 12 and in Chapter 13, which is dedicated to the review process.

Step Three also requires the Contract Director to establish a culture of ongoing contract management which includes the systematic review of the contract management strategy and tools and processes during the lifecycle of the project. Senior management should support the culture of effective contract management in the relevant government entity.

As part of establishing an effective contract management culture, Contract Directors and their teams should have undertaken training that provides skills and competencies in the contract management of *Partnerships Victoria* projects, including any Contract Director's participation in whole-of-government contract management forums.

# 5 Planning, information collection and analysis

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⇒ Planning, information collection and analysis	
⇒ Contract administration	Chapter 6
⇒ Performance reporting and monitoring	Chapter 7
⇒ Relationship management, dispute resolution and issue management	Chapter 8
⇒ Governance, probity and compliance	Chapter 9
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## 5.1 Introduction

As noted in Section 3.1, planning, information collection and analysis are the foundations of effective contract management for *Partnerships Victoria* projects. Proper planning of the project's contract management strategy will, in itself, reduce the risk of the project being poorly managed. Comprehensive information collection and analysis will assist the contract management team in understanding the risks involved in the project and in developing effective contract management strategies. Through proper planning, the contract management team establishes what information should be collected and analysed, and where it can be collected from. The information collected then helps them to refine the overall contract management strategy.

Planning, information collection and analysis are also ongoing processes. Throughout the lifecycle of a *Partnerships Victoria* project, the risk profile of the project will change. Sources of change in the risk profile include:

- the natural progression of the project through its lifecycle stages, such as construction, commissioning, service delivery and contract termination or expiry
- internal factors such as changes in the relationship between the parties or a change in law specific to the project
- external factors, such as technological change or a change in law of general application.

As these changes occur, the government party will need to:

- gather and analyse further information on the impact of the changes on the project's risk profile and contract management strategies
- if appropriate, develop new contract management strategies.

## 5.2 The contract management planning process

To be effective, contract management planning must start early in the procurement phase of a *Partnerships Victoria* project and be coordinated with the procurement process outlined in the *Practitioners' Guide*. Contract management builds on the process for the contractual allocation of project risks described in Chapters 4 and 5 of *Risk Allocation and Contractual Issues*. While the procurement phase places a strong focus on the risks, especially those being transferred to the private sector, contract management planning must place a strong focus on the project risks retained by government and on the risks associated with managing the contract.

The contract management plan should establish a process and an allocation of responsibilities for the development of a Contract Administration Manual. Planning can be structured by working through the following steps. Contract management plans and Contract Administration Manuals developed for other projects may be helpful to guide a Contract Director unfamiliar with these steps.

### 1. Identify significant contract risks

Identify (in broad terms) the significant risk issues raised by contract management (for example, 'Inadequate monitoring of private party performance'). As discussed in Section 2.3 of this Guide, the significant contract risks may be:

- risks allocated to government in the contract
- risks arising from issues not resolved at contract execution
- risks arising from ineffective public sector management
- risks associated with proposed changes to the contractual arrangements.

### 2. Analyse the risks

Ask the following questions:

- What strategy will be used to control that risk? (For example, 'Develop and implement a performance monitoring framework for the project'.)
- What is the date by which the government party needs to deliver and implement the strategy?
- What contract management tools or processes will be used as part of the strategy and incorporated in the Contract Administration Manual?
- Who will be responsible for implementing the contract management plan and delivering the contract management strategy? The Contract Director will lead the development and implementation of the contract management plan. However, the Project Director, the procurement team's legal adviser and the procurement team's commercial adviser will have the strongest knowledge of many of the issues to be addressed. They should develop the corresponding contract management tools and processes and prepare the relevant sections of the Contract Administration Manual.
- What process of review should be applied to the strategy throughout the project lifecycle?

### 3. Document the contract management plan

A suggested template for documenting the contract management plan is set out in **T** Template B.

### 4. Refine the plan

Refine the contract management plan as further information is gathered through the procurement process, the Contract Administration Manual is developed, and the project moves through different phases towards contract execution.

### 5. Obtain senior management sign-off

Obtain sign-off from senior management of the government party in relation to:

- the initial contract management plan, as early as possible in the procurement process, prior to commencing preparation of the Contract Administration Manual
- the finalised contract management plan, as soon as practical after contract execution. (This may be before the full content of the Contract Administration Manual is finalised.)

These tasks should be started as early as possible in the procurement stage, and should be completed during the transition from procurement to contract management.

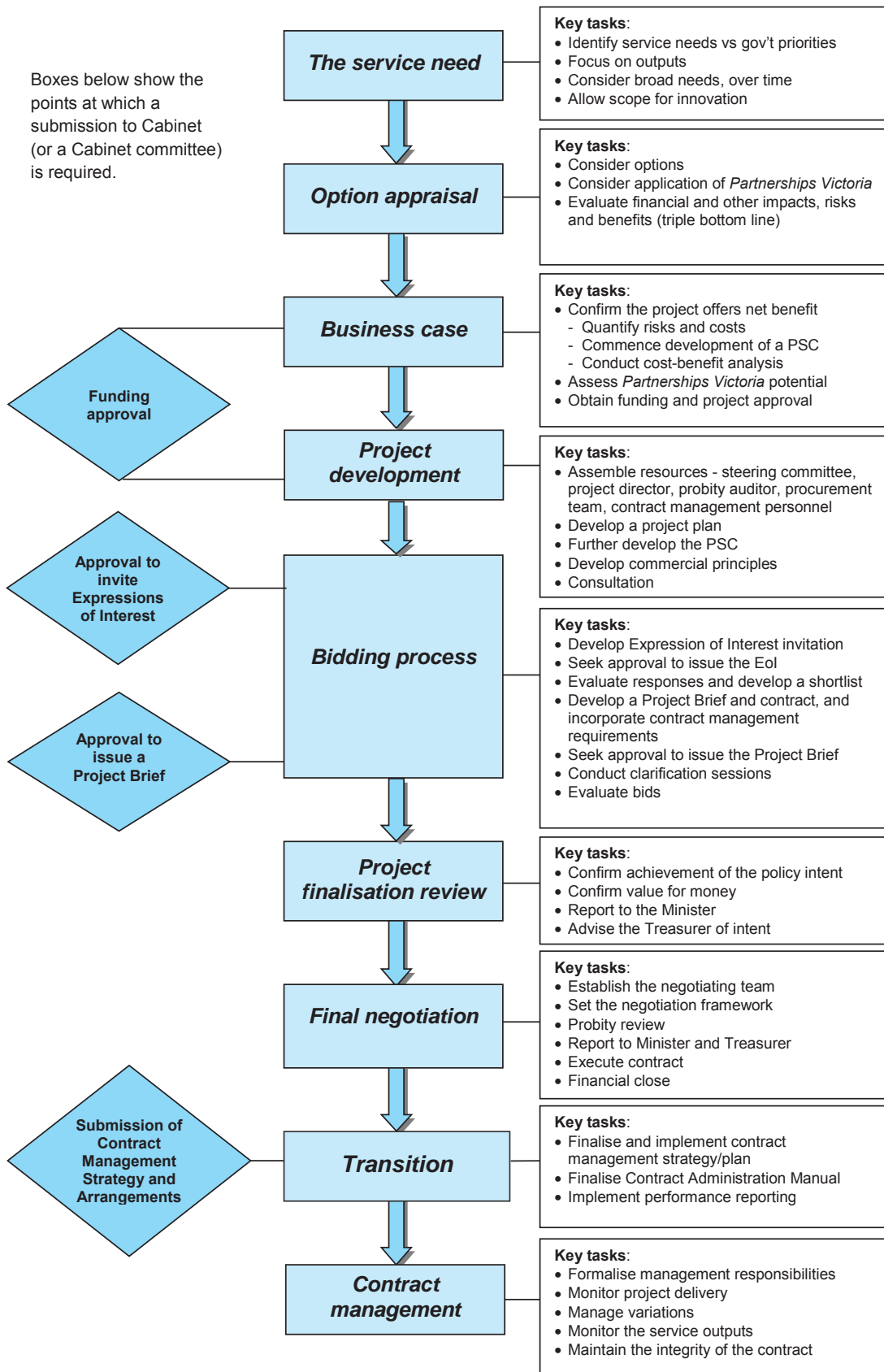
## 5.3 Approval of the contract management plan

Implementing a contract management plan by developing an effective Contract Administration Manual is a key activity for the government party during the procurement phase of the project and the transition from the procurement phase to construction and service delivery. As part of this process, the contract management plan and details of the Contract Administration Manual must be submitted to Cabinet within three months of contract execution to inform government of the proposed contract management strategies.

Assistance with the contract management planning process is available, on request, from the Department of Treasury and Finance (DTF). Before submitting the government party's contract management plan and details of the Contract Administration Manual to Cabinet, the government party should provide a copy to DTF so that it can review its consistency with this Guide and best practices identified by the Department.

Figure 5.1 illustrates when in the *Partnerships Victoria* project process the contract management plan and details of the Contract Administration Manual are submitted to Cabinet.

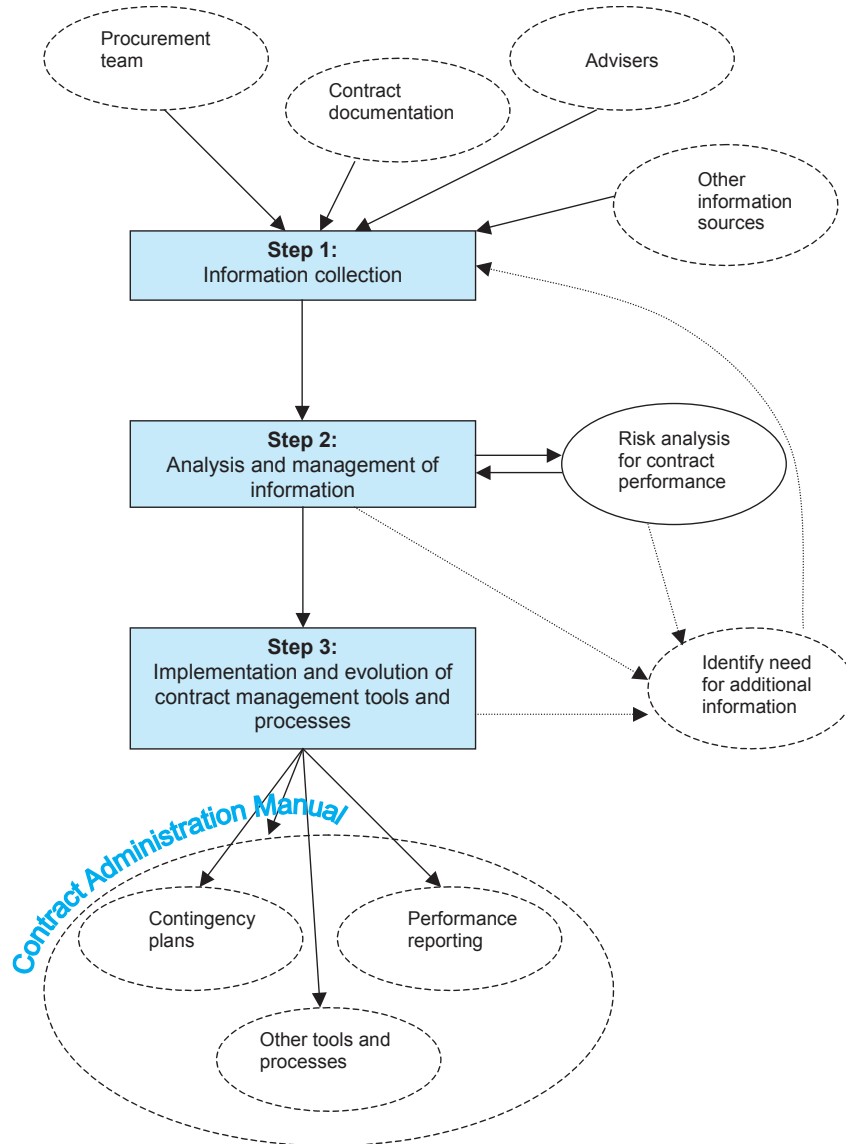
Figure 5.1: Major stages in developing a *Partnerships Victoria* project



## 5.4 Information collection and analysis

Information collection and analysis play a central role in developing and maintaining contract management tools and processes, as illustrated in Figure 5.2.

**Figure 5.2: The role of information collection and analysis in contract management**



### Sources of information

During the initial information collection process during the procurement phase, major sources of information for contract management purposes will include:

- the business case for the project
- the project risk analysis conducted by the procurement team for the purpose of developing the contractual allocation of project risk between the parties. (Note that this will not necessarily identify all contract risks to government during subsequent stages of the project.)

- the project contract documents (typical contracts in a *Partnerships Victoria* project are listed in Appendix B)
- associated financial, structural and organisational details
- interviews with the procurement team and their advisers
- existing risk management tools within the government entity.

Throughout the project lifecycle, the government entity will collect further information relevant to the contract management strategy.

Detailed guidance on collecting information relevant to contract administration and performance reporting is set out in Chapters 6 and 7. It is important to treat the information gathered in relation to the project as a whole. Information collected to establish a performance reporting regime for the project may also influence contract administration generally and affect other specific contract management issues such as contingency planning.

## Analysing the information

The government party will need to establish and maintain systems for recording and analysing the information collected.

A recommended tool for collating information in relation to the contract risks is a risk matrix or risk register. Each material risk is described in the risk matrix, together with an assessment of its likelihood and severity, and a summary of the relevant controls and mitigants. As discussed in Section 2.3 of this Guide, the relevant contract risks include:

- risks allocated to government in the contract (these risks may already be recorded in a risk matrix prepared by the procurement team in establishing the allocation of risk in the contract)<sup>20</sup>
- risks arising from issues not resolved at contract execution
- residual risk to government of risks contractually allocated to the private party
- risks arising from ineffective public sector management
- risks associated with proposed changes to the contractual arrangements.

By collating risk information in one place, a picture of government's overall risk exposure resulting from the project can be developed. The risk matrix should be a dynamic document, reviewed and updated regularly throughout the project lifecycle, to ensure it accurately reflects the contract risks faced. The example in **T** Template C shows a basic risk matrix, which can be tailored as required.

The government party should further analyse the collated information to develop the specific contract management tools appropriate to the project. The necessary analysis is discussed in the context of the specific tools in the following chapters. Part 3 of **T** Template A lists the relevant issues that may relate to a specific risk, and the tools and processes that may be of use in managing those issues.

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<sup>20</sup> The framework for contractual allocation of risk is discussed in Chapter 4 of *Risk Allocation and Contractual Issues*.

## Managing the information

Information collected to develop contract management tools and processes must itself be managed, along with the substantial volume of other information relating to the project. Information management issues are discussed in Chapter 10 of this Guide.



## 6 Contract administration

Developing the Contract Administration Manual	
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⇒ <b>Contract administration</b>	
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### 6.1 Introduction

Building on Chapter 5, this chapter outlines a framework and specific matters to be considered for the development of a Contract Administration Manual. The Manual should reflect the specific contract to be managed and meet the needs of the individual Contract Director and other contract management personnel.

Contract administration is about anticipating and managing risk. Effective and efficient public sector contract administration is essential to the delivery of project and government objectives. The *Practitioners' Guide* sets out five key tasks for contract administration throughout the project lifecycle.<sup>21</sup> For completeness, three further tasks have been added for the purposes of this Guide to produce the following list of key tasks:

1. Formalise management responsibilities for transition between the project stages.
2. Monitor project delivery, service outputs and contract performance.
3. Manage variations.
4. Maintain the integrity of the contract.
5. Maintain strong working relationships with the project parties and service providers.
6. Resolve project issues and disputes fairly and efficiently.
7. Ensure that standards of probity, governance and compliance are adhered to.
8. Conduct regular contract and project reviews to ensure continuous improvement.

<sup>21</sup> See Chapter 13 of the *Practitioners' Guide*.

The processes and tools described in Chapters 5 to 13 of this Guide will aid the Contract Director and the contract management team in their ongoing monitoring of contractual and financial issues with a view to identifying emerging risks to the project and government.

This chapter sets out a development framework for developing and maintaining a Contract Administration Manual that reflects the specific contract to be managed and meets the needs of the individual Contract Director. While the development framework is generic, each Contract Administration Manual will be unique to the specific project. This development framework is not a guide to managing the contract. Rather, it is a system for Contract Directors themselves to develop their own Contract Administration Manuals.

## 6.2 Purpose of the Contract Administration Manual

The Contract Administration Manual identifies:

**What needs to be done, by whom and when.** The Contract Administration Manual assigns accountabilities, identifies government's obligations, and mitigation and control of risks, and how it will monitor the private party's performance of its obligations (performance monitoring is discussed in detail in Chapter 7 of this Guide).

**How government's role will be performed.** The Contract Administration Manual identifies the resources, delegations and authorisations required for government to perform its obligations.

**The ramifications of any non-performance or default by the private party or government, and how these should be addressed.** The Contract Administration Manual identifies contingency plans and issue and dispute resolution mechanisms.

The Contract Administration Manual is also a centralised collection for the contract management team of the documentation for all of the tools and processes used in managing the contract.

The Contract Administration Manual is not a substitute for the terms of the contract. It reflects the contract and, when using the Contract Administration Manual, the Contract Director should refer back to the contract whenever this is appropriate to give a full understanding of the content of the Contract Administration Manual.

To minimise the risk of default by the government, the hindering of the project by actions of government and inadvertent take-back of risk, Contract Directors need to become familiar with the obligations, both express and implied, which fall or may fall upon government. After identifying these obligations, Contract Directors must ensure that these obligations can be fulfilled and the contract can be managed efficiently and effectively. A Contract Director needs to:

- understand how government's obligations will be met, the consequences if they are not met and their time sensitivity
- ensure that there are resources available to undertake these obligations and that relevant staff have appropriate authority.

The Contract Administration Manual is a key tool to enable Contract Directors to carry out these tasks. It forms a dynamic system developed by Contract Directors to assist them in ensuring that the outputs sought by government through the *Partnerships Victoria* process are delivered by the private party. The Contract Administration Manual should assist the Contract Director to understand the contract and the environment in which the contract must be administered.

Where other public sector entities are the end users of the services, the Contract Administration Manual also informs those entities of the government party's rights and obligations.

As noted at the start of this section, the Contract Administration Manual will provide answers to the key issues for delivery of project objectives:

- What needs to be done, by whom and when?
- What are the ramifications of any default by the proponent or government and how should these be addressed?
- How will government's role be performed?

It is essential that the Contract Administration Manual reflects the commercial, legal and regulatory environment in which the contract needs to be managed. The Contract Administration Manual should therefore include a summary of 'the deal' that illustrates the intent behind the contract and its key provisions, rather than simply defining or describing the meaning of a contract clause. In this sense, it should capture what the contract is trying to achieve and whether it is in fact being achieved. If the intent is not clear, then future negotiations over contract variations may jeopardise government's financial position, the integrity of the existing project risk allocation, or the public interest generally.

To fulfil its purpose, the Contract Administration Manual will need to reflect the current stage in the project's lifecycle and be reviewed and updated during the life of the project. As development of the Contract Administration Manual is a continual and dynamic process, the Contract Director should implement procedures for reviewing and updating the Manual at regular intervals, at predetermined points in the project's lifecycle (for example, at financial close and at service commencement) and in response to predetermined events (for example, the departure of key contract management staff or if there is a material default by the private party).

## 6.3 What assumptions underlie the development framework?

The Contract Administration Manual development framework outlined in this chapter is a generic framework for the development of a project Manual. As with any generic framework, the development framework is premised upon certain assumptions.

These assumptions are:

- There will be a Contract Director appointed who will be ultimately responsible for the management of the contract and, therefore, for the development of the Contract Administration Manual.
- There will be a succession of staff during the life of the project.

- The life of the project may be up to 25 years.
- There may be a combination of public officers and external advisers involved in managing the contract.

Where these assumptions are not valid for a specific project, the Contract Director should develop the Contract Administration Manual with the alternative environment in mind. In all cases, the development of the Contract Administration Manual should be planned in accordance with Section 5.2 of this Guide.

## 6.4 Collecting information for the Contract Administration Manual

The information to be gathered for preparing the Contract Administration Manual should answer the question 'What does government need to know in order to administer the contract?'

### 1. *What information needs to be gathered?*

As noted, the key question the Contract Director must answer in identifying information to be gathered for preparing the Contract Administration Manual is 'What does government need to know in order to administer the contract?'

Answering this question will require knowledge of the contract and the environment in which the contract needs to be administered. In collecting the information, the Contract Director should keep in mind that, while the contract is central, there are extra-contractual issues, such as the relationship between the parties, which the Contract Director must also manage. Similarly, while the Contract Director is collecting and synthesising information and developing the Contract Administration Manual and other tools and processes, he or she should recognise the fundamental distinction between the contract and the extra-contractual matters and determine how information from both sources should be integrated to develop appropriate contract management tools and processes.

The information that the Contract Director needs to gather and synthesise will relate to the three questions: What needs to be done, by whom and when? What are the ramifications of any non-performance or default by the proponent or government and how will these ramifications be managed? How will government's role be performed?

### 2. *What are the best sources of this information?*

The best sources of information are the Project Director, members of the procurement team, the procurement team's legal adviser and the procurement team's commercial adviser.

### 3. *Other sources of information*

Other sources of information regarding the contract and the environment in which the contract is managed will vary between projects. They may include:

- the risk matrix developed to allocate project risk under the contract
- the Public Sector Comparator for the project (for the allocation and quantification of retained and transferred risk)

- the contract documents (Appendix B lists typical contracts in a *Partnerships Victoria* project)
- documents relating to approvals obtained during the procurement process
- the public interest test (as documented in accordance with Chapter 18 of the *Practitioners' Guide*)
- members of the procurement team
- external advisers
- independent assessors/reviewers
- the Department of Treasury and Finance
- other relevant government agencies
- input from any committee relevant to the project. (The role of committees in the management of the relationship between the parties is discussed in detail in Chapter 8 of this Guide.)

## 6.5 Content of the Contract Administration Manual

The Contract Administration Manual should, on a rolling basis, highlight immediate and critical actions to be taken in administering the contract and align the available resources with the most time-critical and materially significant risks at the various stages during the project lifecycle.

The Contract Administration Manual needs to build on the contract management plan (see Chapter 5), to also be practical and relevant to both the day-to-day and the longer term management of the project contract. Therefore, it must:

- **Highlight actions:** The Contract Administration Manual must highlight, on a rolling basis, the most immediate and critical actions that must be taken by the Contract Director while administering the contract. These actions need to be set in the context of a clear understanding of the commercial intent of the parties, and the relevant commercial, legislative, regulatory and policy background.
- **Align resources:** The Contract Administration Manual must enable the Contract Director to identify the resources required to perform necessary tasks and manage the most time-critical and materially significant risks at various stages during the project lifecycle.
- **Support governance:** The Contract Administration Manual must support public sector governance practices, including communications, accountability and decision making processes.
- **Collate contract management tools and processes:** The Contract Administration Manual must provide a single point of reference for contract management tools and processes. Some of these tools and processes may be developed separately from the Contract Administration Manual. For example, the government party's business continuity plan for the project may be integrated with the government party's agency-wide business

continuity plan. If a contract management tool or process is developed separately from the Contract Administration Manual, an up-to-date copy of the documentation for that tool or process should be included as an appendix to the Contract Administration Manual.

- **Change:** The Contract Administration Manual must be a dynamic document, updated regularly so that it remains relevant throughout the project lifecycle.

By collecting and synthesising the information set out in the preceding sections, the Contract Director should have developed an understanding of the actions that contract management personnel will need to take in order to manage the contract. The Contract Administration Manual should directly and clearly outline these actions. It should identify:

- the specific action
- the individual responsible for the action
- the time or date by which the actions will be done (including whether the action is required once only, recurrently, or in response to specific events)
- the reasons for undertaking the action
- the status of the action.

The Contract Director may find it convenient to set out this information in tabular form. A sample table is contained in **T** Template D.

## 6.6 Template for the Manual and methodology for development

The content of the Contract Administration Manual should be arranged in an accessible and useful format. **T** Template E sets out a recommended arrangement of the information. A methodology for developing the content of the Contract Administration Manual using this template is outlined in **T** Template F.

## 6.7 Government's implied obligations

Government may have implied obligations in addition to its express obligations under a *Partnerships Victoria* contract.

The contract for a *Partnerships Victoria* project will expressly impose a variety of obligations on government. Given government's myriad activities, it is likely that government will also have obligations that are not reflected expressly in the contract. These obligations may apply to the government party specifically, in relation to contract management, or the State generally, in relation to the delivery of the project services and the role of the government. It is important that the Contract Director consider whether there are any common law or non-delegable duties<sup>22</sup> or implied contractual obligations relevant to government. Such obligations or duties may include:

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<sup>22</sup> Non-delegable duties are discussed in section 1.10 of *Risk Allocation and Contractual Issues*

- (a) to refrain from engaging in any activity which would hinder the ability of the private party to fulfil its contractual obligations or deprive the private party of the benefit of the contract; or
- (b) to act fairly, reasonably and in 'good faith' when performing obligations or exercising discretions under the contract.

## 6.8 The involvement of other public sector entities

Proper contract administration involves coordinating the actions of other public sector entities where necessary.

Managing the contractual obligations of government can be more complex than managing the obligations of a private party in certain cases. The government party in a project is just one component of government. Acting on its own it may not be able to deliver government's obligations under the contract. The Contract Director may, therefore, need to coordinate the actions of other public sector entities in order to ensure that government:

- can deliver on its obligations under the contract; and
- does not inadvertently act so as to hinder or prevent the private party from meeting its obligations under the contract.

(The role of other public sector entities is discussed in detail in Chapter 9 of this Guide. Section 2 of Appendix A sets out a service delivery structure in which a government party contracts to receive services that are ultimately used by a number of other public service entities.)

A project or reference committee may be established, with members from various public sector stakeholders, for the purposes of the contract. However, the Contract Director must be fully supported and authorised to perform the government party's contractual obligations in a timely manner, and must be able to act expeditiously when required to ensure government does not breach the contract.

## 6.9 Risk analysis for contract administration

Risk analysis plays an integral role in contract administration.

In order to administer the contract, the Contract Director needs to identify the potential contract risks and assess the likelihood of each risk eventuating and the magnitude of consequences should the risk eventuate. (The relationship between risk and contract management generally, and the distinction between project risks and contract risks in the *Partnerships Victoria* context, are discussed in Chapter 2 of this Guide.)

A risk analysis would have been carried out in determining how project risks should be allocated under the contract. In preparing the Contract Administration Manual, the Contract Director may need to further develop this risk assessment to:

- identify (using the information collection and analysis process in Chapter 5 of this Guide) and incorporate those contract risks not included in the existing risk analysis. (These are risks that are not project risks considered in the contractual risk allocation process,<sup>23</sup> but which are relevant to contract management. They are discussed in Section 2.3.);
- consider issues other than the allocation of the risk which may not have been considered previously (for example, those risk issues listed in Part 3 of T<sup>1</sup> Template A); and
- assess the likelihood of the risk occurring and the magnitude of the consequences, to the extent that these issues have not been addressed previously.

In order to undertake this contract management risk analysis, the government party should:

- identify the project risk allocation under the contract;
- identify other contract risks. The classes of contract risks that should be considered are discussed in Section 2.3 of this Guide, and include
  - risks arising from issues not resolved at contract execution
  - risks arising from ineffective public sector management
  - risks associated with proposed changes to the contractual arrangements
- develop risk and contingency management processes and tools as listed in T<sup>1</sup> Template A for the most critical risks. (See Chapter 12 of this Guide for details on developing contingency plans.)
- determine whether the fact that a risk event occurs should trigger a review of the Contract Administration Manual.

## 6.10 The relationship between contract administration and performance monitoring

Contract administration includes the steps necessary to monitor the performance by the private party of its obligations.

Contract administration involves not only ensuring that government's obligations are fulfilled, but also monitoring the performance by the private party of its obligations. Performance monitoring and reporting are discussed in detail in Chapter 7 of this Guide. The Contract Administration Manual should include actions required to implement the performance monitoring and reporting strategy developed according to Chapter 7.

The private party's reporting obligations to government should have been identified during the procurement process and incorporated in the contract. The private party may have other obligations under the contract that should be monitored by the government party. Therefore, with an eye to the reporting required, the government party should:

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<sup>23</sup> The framework for contractual allocation of risk is discussed in Chapter 4 of *Risk Allocation and Contractual Issues*.



- review the contract
  - confirm the reporting obligations on the private party
  - identify other obligations of the private party that should be monitored
  - identify the timeframes in which these obligations must be undertaken
- identify any obligation which should be implied into the contract by law or through the private party's conduct.

In some projects, other members of the private party's consortium will have obligations to government through a direct contract with government (for example, a tripartite agreement, a project contractor's deed or a guarantee). The government party must review obligations to government under these documents in the same way it reviews the private party's obligations under the project contract.

## 6.11 Management of unresolved issues

In administering a contract, the government party must manage those issues left unresolved at contract execution.

The signing of the contract does not mean that all issues that were important to the parties have been resolved at contract execution or by financial close. These unresolved issues may create problems when administering the contract. For example, the contract may specify that equipment is to be procured by the private party. The specification for the equipment is to be developed and agreed by the parties within certain parameters. However, the interests of government and the private party may not align fully.

The Contract Director should:

- identify and record any compromises made by the parties as the deal was negotiated
- identify and record aspects of the deal which have been left intentionally for future development
- identify and record aspects of the deal which will be subject to other processes (for example, subject to the conditions of a planning approval or permit)
- consider whether there are any matters which have been unintentionally forgotten
- determine the likely ramifications of these unresolved matters.

## 6.12 Contract administration resources

The government party must ensure that adequate resources are devoted to contract administration.

The government party must be allocated sufficient and appropriate resources to enable efficient and effective contract administration, including the development and updating of the

Contract Administration Manual. (Contract management resources are discussed in detail in Chapter 9 of this Guide.) Determining the appropriate resources will require the government party to:

- consider the volume and magnitude of risks, particularly critical risks, which require monitoring
- identify the expertise required to monitor and respond to those risks
- determine whether that expertise should be sourced internally or from external consultants
- consider whether the government party has appropriate non-personnel resources (for example, appropriate information technology)
- consider whether the allocated budget for the contract management task is sufficient.

## 6.13 The authority of contract management staff

The government party must ensure that staff involved in contract administration have appropriate levels of authority to administer the contract effectively.

Contract management staff require sufficient authority, in the form of delegations or otherwise, to fulfil their roles in managing contracts. (Delegations and authority are discussed in detail in Chapter 9 of this Guide.) The government party must:

- identify the role of staff in administering the contract, particularly the actions contract management staff are required to undertake on behalf of government
- identify the source of authority of the contract management staff (for example, legislation or regulation, Ministerial delegation)
- identify the scope of the authority of all staff involved in administering the contract
- determine whether existing authorities are sufficient for staff to carry out the tasks required to manage the contract
- identify the capacity and ease with which the authority of contract management staff can be increased as the need arises or circumstances change.

## 6.14 Reviewing and updating the Contract Administration Manual

A Contract Administration Manual must be regularly reviewed and updated to ensure its ongoing relevance to the project.

A *Partnerships Victoria* project generally involves the delivery of services to or on behalf of government under a long-term contract. The contract lifecycle may include a number of stages. An effective contract administration strategy must recognise and reflect the current stage in the contract lifecycle. The typical stages in the contract lifecycle are:

- procurement
- construction and commissioning
- service delivery
- contract expiry/termination.

Parties' obligations and the risks if these obligations are not fulfilled vary at different points in the contract management life cycle. The Contract Administration Manual must take account of these variations and should be relevant to the immediate environment in which the contract is to be managed. It should be forward looking and should take into account the project in its entirety, but must reflect the current state of play. The currency of the Contract Administration Manual can only be maintained if it is regularly reviewed and updated. There should be a formal review:

- at the expiry of the timeframe allocated to the Contract Administration Manual
- at pre-determined milestones
- in response to significant events affecting the project.

As recommended in Section 6.5, the Contract Director should record in the Contract Administration Manual the status of each action and whether the action is required once only, recurrently, or in response to specific events. This will assist the Contract Director to identify actions outstanding.

A review of the Contract Administration Manual should include an assessment of the variations in the contract and the environment in which the contract has been managed since the last review of the Contract Administration Manual. The review should critically assess the Contract Administration Manual and determine whether it is adequate to manage these changes.

If a contract management tool or process is developed separately from the Contract Administration Manual and the documentation for that tool or process is included as an appendix to the Contract Administration Manual, the Contract Director should ensure that the appendix is kept up-to-date as the tool or process develops over time.

The Contract Director, in reviewing the Contract Administration Manual, has to consider complex issues that arise under the contract. It is likely that the Contract Director will need access to ongoing legal advice. In identifying the required contract management resources (as discussed in Section 6.12), the Contract Director should ensure there is an adequate budget for this ongoing legal advice and representation.

# 7 Performance reporting and monitoring

Developing the Contract Administration Manual	
⇒ Planning, information collection and analysis	Chapter 5
⇒ Contract administration	Chapter 6
⇒ <b>Performance reporting and monitoring</b>	
⇒ Relationship management, issue management and dispute resolution	Chapter 8
⇒ Governance, probity and compliance	Chapter 9
⇒ Knowledge and information management	Chapter 10
⇒ Change management	Chapter 11
⇒ Contingency planning	Chapter 12
⇒ Ongoing review	Chapter 13

## 7.1 Introduction

*Partnerships Victoria* projects, like all long-term contracts for service delivery, can be impacted by changing priorities and the business environment. If the government party is to control this dynamic situation sensibly, it is important that it has access to adequate information on which to base 'control' actions. The government party must therefore effectively monitor the state of health of the project as an integral part of its overall contract management strategy.

## 7.2 General framework for performance monitoring and reporting

The government party's ability to monitor the performance of the private party largely depends on the private party being required to report appropriately under the project contract. Consequently, it is essential that reporting requirements are considered early in the procurement stage, are written into the Project Brief and the draft contract provided to bidders, and are retained in the executed contract.

In developing an appropriate performance monitoring and reporting strategy, the government party needs to consider the following issues in the context of the particular project:

- **The timescale for monitoring and reporting:** The government party must consider how its monitoring and reporting activities should change over time. In a *Partnerships Victoria* project, the level and type of monitoring and reporting required during the construction period is likely to be quite different from that required during the subsequent operating period.

- **The nature of the monitoring and reporting:** The type of project and any external regulatory controls influence monitoring and reporting requirements. The requirements for a hospital project are different from the requirements for a waste water treatment project. Monitoring requirements also depend on the project delivery structure and project documentation. For example, appropriate financial reporting for a special purpose vehicle may be different from financial reporting where the private party is a substantial publicly listed company carrying out the project on its own balance sheet.
- **Level or type of action envisaged based on monitoring and reporting:** The government party's monitoring and reporting should enable it to effectively focus control on key areas. Normally, controls are put in place for managing payment. Therefore, the monitoring system needs to supply relevant information in relation to the payment mechanism (including the service standards that underpin the payment mechanism).

Staff who perform these tasks should understand the private party's business and have experience in performance monitoring of service delivery projects.

## The purpose of performance monitoring and reporting

In the context of *Partnerships Victoria* contracts, the role of performance monitoring and reporting is to:

- confirm that the private party is performing according to the output specifications in the contract; and
- give the government party an understanding of the sustainability of the contract.

Performance monitoring and reporting provide the government party with information on which to base 'control' actions.

Monitoring, reporting and subsequent control actions can only be really effective if the government party can relate them to project objectives. The government party can then implement control actions to ensure better outcomes in the future.

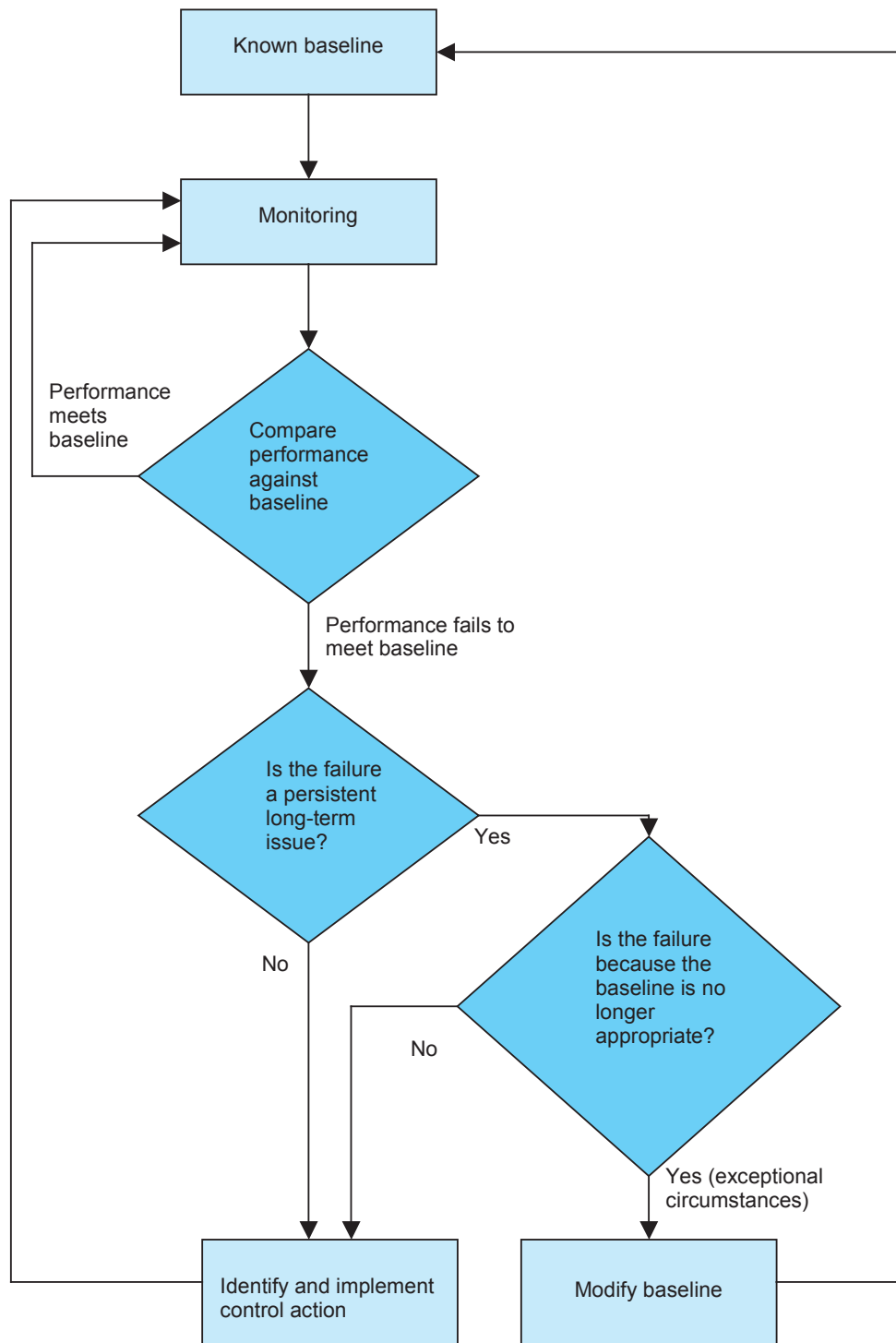
Monitoring and reporting should be ongoing activities that feed information into an assessment process and provide a coherent basis for exercising control actions. In the context of *Partnerships Victoria* projects, these control actions are, broadly:

- decrease payments (abatements for under-performance)
- change management (discussed in detail in Chapter 11)
- increased monitoring and/or reporting requirements
- triggering default scenarios and consequent government actions under the contract (for example remedies, such as replacement of a specific service provider) (discussed in detail in Chapter 12)
- contingency planning for ensuring continuity of services and potential government step-in under the contract (discussed in detail in Chapter 12).

In some instances, circumstances may change over the life of the project so that a specified baseline for performance monitoring (for example, a required level of service) becomes difficult or impossible to achieve, resulting in a persistent failure of the private party's performance to meet the baseline. If this occurs, the government party should consider

whether the baseline remains an appropriate measure of performance, or whether it should be modified to reflect a different level of performance sought by government in the changed circumstances. For example, a modification might be appropriate if the private party's failure to meet the existing baseline is not detrimental to the end users of the services, and the replacement baseline accurately reflects a level of service below which there is detriment or inconvenience to end users. Figure 7.1 is a flowchart illustrating the role of performance monitoring.

**Figure 7.1: The performance monitoring process**



## Information required

The government party should ensure that it collects adequate information to confirm that the private party is performing according to the output specifications in the contract, and to give the government party an understanding of the sustainability of the contract.

Performance monitoring in a *Partnerships Victoria* contract should focus on what the private party is required to achieve rather than how it achieves it. However, from the government party's perspective, monitoring outputs is unlikely to be sufficient to provide all the information needed to assess the full range of control actions that may be appropriate. For example, solely monitoring performance against the output specification may not alert the government party to issues that may eventually result in project failure, such as the private party experiencing financial distress.

As discussed in Section 2.3, ultimately, the risk of non-delivery of services under a *Partnerships Victoria* contract may rest with government. It is therefore essential that the government party has access to information that goes beyond the monitoring of service performance standards towards understanding the sustainability of the contract (for example, information about the business performance of the private party).

### *Hard and soft data*

The information the government party needs to effectively monitor a contract is likely to contain both 'hard' and 'soft' data:

- **Hard** in the sense that there is quantifiable and measurable data available that can be compared against past performance or benchmarks; and
- **Soft** in the sense that it is not easily quantified. Detection of soft data can largely depend on the skills, training and experience of the Contract Director.

A sole focus on process (that is, contract reporting of hard data) does not and cannot replace good contract management skills and nous. Good contract management does require reporting, but it also requires experienced Contract Directors who are capable of identifying soft information, interpreting it and implementing effective control actions.

### *Information obtained outside the contract*

In addition to the information collected through reporting processes specified in the contract, the Contract Director should look outside the contract for information relevant to performance monitoring.

The private party should be obliged by the contract to provide further information as well as information on delivery against outputs,<sup>24</sup> but the Contract Director also needs to separately obtain and analyse additional information. This additional information obtained by the Contract Director (outside the contract) will often be ad hoc, may not be neatly presented and absolute, and will usually be highly dependent on the Contract Director's experience. The process of identifying the information to be collected must start with three fundamental questions:

1. What is known or measurable and can be used?
2. What is unknown and potentially immeasurable, and needs to be clarified and obtained?
3. What are the best sources of information (outside the contractual reporting requirements) to validate project objectives?

The answers to these questions are likely to be project-specific.

## Framework for performance monitoring

A framework for collecting information, reporting and monitoring *Partnerships Victoria* projects can be built around three essential steps:

**Step 1:** Understand the private party's business (that is, understand the factors that will influence the private party's strategic and project level performance).

**Step 2:** Analyse the underlying quality of the project measured in terms of:

- financial health of the project 'business'
- management quality
- service performance
- government's relationship with the private party

**Step 3:** Determine the reporting requirements for the project, including both hard data and soft data. The sources of this data should be identified.

These steps should be taken early in the procurement process so that the private party's reporting requirements can be included in the draft project contract provided to bidders. As discussed above, not all the data will be provided by the private party under the contract. The Contract Director will collect some data (particularly soft data) from other sources.

The next section looks at each step in this framework in detail.

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<sup>24</sup> The private party's willingness to provide information may be conditional on appropriate protection of confidentiality in the project contract. The extent of the confidentiality protection for the private party will have been considered during the procurement process as part of the public interest test. (The public interest test is discussed in detail in Chapter 18 of the *Practitioners' Guide*.) The confidentiality provisions in the project contract will reflect the balance between transparency and confidentiality inherent in the public interest test.



## 7.3 The stepped approach to performance reporting

This section explains in detail the steps required to develop a reporting regime for a *Partnerships Victoria* project. These steps should be taken during the procurement process so that the reporting requirements can be included in the project contract.

### Step 1: Understanding the business

Contract Directors need to understand the business environment and government's objectives in entering into the contract in the first place. Performance measures lie at the heart of performance management. It is important that performance measures are linked to strategic objectives, or to desired outcomes. Understanding the business is the first and perhaps the most important step in building a performance framework for a *Partnerships Victoria* project during the procurement process. This means that the Contract Director must have a very good appreciation of the project contracts (plus the Contract Administration Manual), the Project Brief and the tender responses, and the private party's contractual structure.<sup>25</sup>

The Contract Director needs to identify those processes most critical to delivering business success. Doing so will create a clearer picture of what needs to be measured (which should be embedded in the project contract).

#### *Strategic and project level performance*

To fully understand the business, the Contract Director needs to consider performance at both a strategic and a project level. Strategic performance is primarily concerned with outcomes. In contrast, project-level performance is primarily concerned with outputs. Sections 1 and 2 of Appendix C set out the issues to be considered and tools and processes that can be used to develop an understanding of strategic and project-level performance.

Each project will have different strategic outcomes and project outputs. In particular, cash flows and the impact of risks are highly project-specific.

#### **Cash flows**

Cash flow is central to the private party's success in a *Partnerships Victoria* project. The project must have clear and defined revenues to cover its cost structure and debt service obligations, which are likely to comprise:

- **project costs**
  - operating costs
  - maintenance and replacement capital expenditure costs
  - insurance premiums
  - tax costs

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<sup>25</sup> The contracts typically found in a *Partnerships Victoria* project are described in Appendix B.

- **debt service obligations**

- interest expense
- principal repayments
- fees and charges.

In addition, investors will expect to receive a return on equity commensurate with the development and long-term project risk they have taken.

In order to monitor the underlying business health of a *Partnerships Victoria* project, the Contract Director must have a deep understanding of cash flows and, in particular, the drivers for revenue streams. For example, a user-pays revenue stream (such as that for a toll road or public transport system) is significantly different from an availability charge mechanism (such as a government accommodation project). Essentially the user-pays system transfers demand risk to the private party, whereas the availability mechanism transfers performance risk and not demand risk.

Cash is the key driver of business health and vitality. By monitoring the cash flow impacts on the project, the Contract Director will be in a better position to identify the early warning signs of a project potentially in financial stress.

To fully understand the cash flows, the Contract Director needs to consider both past performance and projected future performance of each of the elements in the cash flow. Section 3 of Appendix C sets out the issues to be considered and tools and processes that can be used to develop an understanding of a project's cash flows.

## **Risks**

The nature of the contract management risks that must be managed through the lifecycle of a *Partnerships Victoria* project was discussed in Chapter 2. Effective contract management requires an understanding of all the material risks, analysis of their changing impact on the project and the formulation of dynamic contract management plans. From a performance monitoring perspective, it is most useful to distinguish between contract risks (including project risks) that are borne by government and project risks that have been transferred to the private party. The risks borne by government include:

- risks contractually allocated to government
- the residual risk to government of risks transferred to the private party
- the risk of ineffective public sector management.

Effective contract management requires an understanding of the project risks that have been transferred to the private party. Understanding these risks is essential to understanding the private party's business.

Sections 4 and 5 of Appendix C set out the issues to consider and tools and processes that can be used to develop an understanding of risks borne by government and risks transferred to the private party.

### *Understanding the business throughout the project lifecycle*

The factors affecting project level performance, including cash flows and risks—and how they influence the private party (and its management, sponsors or parent company)—will change over the project lifecycle. For example:

- The release of performance bonds or guarantees at particular stages in the project lifecycle can significantly alter the risk profile of the project from the private party or its parent's perspective.
- Towards the end of the contract term, the private party may have little incentive to fulfil maintenance and replacement capital expenditure requirements. If government wishes to take ownership of the asset at the end of the contract term, it may receive a poorly maintained asset.

The Contract Director should maintain an up-to-date understanding of the factors that may influence project level performance. When these factors change, the Contract Director should consider how the change affects the performance reporting and monitoring regime for the project, and make any necessary changes to this regime.

## **Step 2: Analyse the underlying quality of the project**

### *Financial health*

A review of the private party's internal operating environment is a crucial step towards understanding the underlying credit-worthiness (or solvency) of the business. By reviewing this environment, the government party can derive an awareness of the private party's financial strengths and weaknesses.

Indicators of financial health will vary from project to project. To identify appropriate indicators for a project, the government party should review the private party's organisational structure and financial position, including gearing. Sections 6 and 7 of Appendix C set out the issues to consider and tools and processes that can be used to analyse the private party's organisational structure and financial position.

The government party's personnel responsible for analysing the private party's financial position need a strong understanding of the private party's cash flows. The government party may also require legal advice on the extent to which it undertakes financial analysis. It needs to consider rights of interference in monitoring of businesses. For example, if the business is going badly, government may be under an obligation to report it. Accounting advice may be required where the private party's solvency is threatened.

### *Management quality*

Monitoring management quality is difficult and largely falls into the 'soft' indicator category. Nevertheless, an experienced Contract Director should regularly monitor the quality of the private party's management and operating personnel, looking for weaknesses or trends that may provide an early indication of trouble ahead.

Sections 8 and 9 of Appendix C set out the issues to consider and tools and processes that can be used to analyse the quality of the private party's management and operational personnel.

### *Service performance*

To be confident in the service performance of the project, the Contract Director should regularly review the quality of the service as measured against the Key Performance Indicators (KPIs) and output specifications. Sections 10 and 11 of Appendix C set out the issues to consider and tools and processes that can be used to analyse the private party's service performance and service trends. In setting service performance measures during the procurement process, the Contract Director should have a strong understanding of the business to be conducted by the private party. The performance measures should not be set so high as to require an unreasonable level of service.

### *Monitoring government's relationship with the private party*

Monitoring of government's relationship with the private party is discussed in Section 8.3 of this Guide. Section 12 of Appendix C sets out issues to consider and tools and processes that can be used to analyse government's relationship with the private party.

## **Step 3: Reporting requirements**

Performance reporting includes the day-to-day process of monitoring trends, assessing whether the services are being delivered to the required standards (assessed against KPIs) and assessing any remedial action taken by the private party when the performance standards are not met.

Government's performance monitoring processes are likely to be performed differently under a *Partnerships Victoria* arrangement, compared to more traditional procurement. In a traditional procurement, government may need to monitor inputs, processes and outputs. In a *Partnerships Victoria* project, government's monitoring primarily focuses on the private party's outputs. In this sense, the scope of performance monitoring in a *Partnerships Victoria* project is narrower than in a traditional project, although the financial stakes are higher. Contract Directors must avoid inappropriate monitoring action, such as monitoring inputs and processes, that could result in risk being inadvertently taken back by government.

The private party must have adequate performance monitoring, quality management and management information systems. The Contract Director should audit these systems by receiving planned reports and undertaking random spot checks to ensure that performance is being measured and reported reliably, accurately and comprehensively.

Government should require the private party to provide regular performance reports along the lines suggested in the following table (Table 7.1).<sup>26</sup> The reports should be in a form that enables easy analysis by the Contract Director. The obligation to provide these reports, and their format, should be included in the contract during its development in the procurement phase of the project. Care should be taken to ensure the required content of performance reports is focused on information that is relevant. If the reporting requirements are not focused, the regime may be onerous for the private party and ineffective for government.

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<sup>26</sup> The private party may only provide limited cost information as this may be highly sensitive and confidential. Its willingness to provide information may depend on the nature of the confidentiality arrangements in place. The extent of the confidentiality protection afforded to the private party is considered during the procurement process as part of the public interest test. (The public interest test is discussed in detail in Chapter 18 of the *Practitioners' Guide*.) The confidentiality provisions in the project contract will reflect the balance between transparency and confidentiality inherent in the public interest test.

**Table 7.1 Suggested reports and frequency for different stages of Partnerships Victoria projects**

Project element or stage	Suggested reporting	Suggested frequency
<b>Construction stage</b> See Template H	<ul style="list-style-type: none"> <li>• Construction progress</li> <li>• Commissioning and hand-over</li> </ul>	Largely depends on the complexity of the project but regular monthly progress reports are likely to be required
<b>Service delivery stage</b> See Template I	<ul style="list-style-type: none"> <li>• KPIs</li> <li>• Health and safety</li> <li>• Training</li> <li>• Employment</li> </ul>	Likely to be quarterly or even incident based
<b>Finance element</b> See Template J	<ul style="list-style-type: none"> <li>• Cash flow, including ratios and budgets</li> <li>• Service providers</li> <li>• Dividend</li> </ul>	Likely to be semi-annual or annual depending on the frequency of information available to update the analysis
<b>Payment element</b> See guidelines in Template K	<ul style="list-style-type: none"> <li>• Payment</li> <li>• Special audits</li> </ul>	In accordance with the payment schedules, but likely to be either monthly or quarterly
<b>Contract expiry or termination stage</b>	<ul style="list-style-type: none"> <li>• Details of all assets and information the private party is required under the contract to hand over at contract expiry or termination</li> </ul>	At contract termination or expiry

## Performance monitoring for large and complex projects

In large and complex projects, monitoring performance may necessarily involve the analysis of large quantities of data to distil relevant performance information. Various mechanisms can assist the parties to manage this task. For example:

- It may be in both parties' interests for the government party to be provided with an electronic feed of relevant performance data from the private party's management information systems, avoiding the need for the private party to manually provide this data.
- During the construction stage, the parties may jointly appoint and fund an independent reviewer with construction expertise to monitor construction performance.
- During the service delivery stage, the parties may jointly appoint and fund an independent reviewer with service performance expertise so that the government party is provided with relevant exception reports by the independent reviewer, and is relieved of the task of detailed review of the raw performance data.

These mechanisms should be identified at an early stage in the procurement process so that necessary provisions can be included in the project contract, and bidders can consider the technology requirements for their information and reporting systems.

## 7.4 Performance monitoring and sub-contractors

In a *Partnerships Victoria* project, the government's primary contractual relationship is with the private party, which is usually a special purpose vehicle (SPV). Generally, the SPV will sub-contract many of its obligations to other entities. The Contract Director should consider whether it should monitor the business health of particular sub-contractors, as well as the SPV. The need to monitor sub-contractors will depend on:

- the extent and nature of the obligations sub-contracted
- the ease with which the sub-contractor could be replaced by the SPV if the need arose
- the size, financial standing and experience of the sub-contractor.

While government may wish to monitor a sub-contractor as part of its monitoring of the overall health of the project, the Contract Director must remember that it is the SPV that is obliged to provide the services and has the direct contractual relationship with government. Government should not involve itself in the SPV's management of its relationship with the sub-contractor. (In some projects, however, government has direct contractual relationships with key sub-contractors and can deal with them directly to the extent provided for in the relevant contracts.)

## 7.5 Reporting to senior management and the Department of Treasury and Finance

Depending on the nature of the project, the Contract Director may receive a number of reports from the private party, and produce considerable additional information through other monitoring mechanisms. The Contract Director therefore needs to carefully consider what information should be communicated to senior management of the government party. It is expected that regular reporting, at least monthly, to senior management will take place in an 'exceptions' format, identifying benchmarks or requirements not met and any issues of significance.

Best practice entails that such regular reports, at least monthly in an 'exceptions' format, will be produced and signed-off by the Contract Director regardless of whether a reportable event has taken place or is emerging. Such regular reports are important to maintain ongoing accountability and focus on scanning the contract management environment.

In developing the reporting regime for the project, the Contract Director should identify:

- trigger points at which exceptions should be reported to senior management outside the regular reporting cycle and the appropriate format for those reports;
- what constitutes a reportable 'exception' in respect of information collected outside the contract and other issues monitored by the Contract Director. The Contract Director should monitor each of the issues listed in Figure 1.1 for the current stage of the project lifecycle, and any other identified contract management issues.

In particularly large and complex projects, consideration should be given during the procurement process to appointing a specialist individual or body, such as an independent reviewer or a project coordination group, to monitor performance, support the Contract Director and report to senior management of the government party.

Under the *Partnerships Victoria* contract management policy, performance reports to senior management should be copied to the Department of Treasury and Finance. The Department of Treasury and Finance is available to assist the public sector party in responding to any issues raised in these reports. However, the primary responsibility for identifying issues and responding to them remains with the public sector party.

## 8 Relationship management, dispute resolution and issue management

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⇒ <b>Relationship management, dispute resolution and issue management</b>	
⇒ Governance, probity and compliance	Chapter 9
⇒ Knowledge and information management	Chapter 10
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### 8.1 Introduction

In light of the long-term duration of *Partnerships Victoria* projects (which can be more than 25 years), it is imperative to maintain a strong relationship between the government party and the private party throughout the entire project lifecycle. Open and clear communication are fundamental to effective contract management and delivering successful project outcomes in *Partnerships Victoria* projects. However, it is also important to recognise that inevitably disputes and service delivery issues will arise and need to be appropriately managed.

### 8.2 Relationship management

#### Key factors in establishing good relationships

There are a number of key factors in establishing a good relationship between the government party and the private party and other project stakeholders:

- **Mutual benefit:** The parties must approach the project as a mutually beneficial arrangement between the government and the private party.
- **Understanding of objectives:** The government stakeholders in the project on the one hand, and the private party and other consortium members on the other, must appreciate each other's objectives and those they have in common.
- **Open communication:** Open communication is a key to maintaining a good relationship. It fosters a spirit of cooperation and the alignment of common interests between the parties. Open communication does not mean the parties must share all information relating to the project. However, a party should share an item of information if there is no good public interest, commercial, or legal reason to not share it, and sharing the information will enhance the relationship.



## Establishing relationship management structures

Factors to be considered in establishing management structures for the relationship include:

- **Senior management support:** The relationship should be championed at senior levels in both organisations. Senior management attitudes and actions will signal to other personnel how they should treat the relationship.
- **Peer to peer communication:** Working relationships between the parties should be conducted between peers. Decision and issue escalation procedures should be established so that, if a timely decision or resolution cannot be made at one level, it is referred to peers at a more senior level.
- **Separation of roles:** While introducing multiple formal management levels is unnecessary, day-to-day contract management and service delivery should be separate from management of the overall strategic relationship and long-term strategic issues. In major projects, it may be desirable to separate the detailed contract management functions from the strategic relationship management functions by having a senior executive officer (the Contract Director) responsible for strategic relationship management, with other staff responsible for day-to-day issues. This will prevent day-to-day issues swamping the Contract Director.
- **Appropriate and clear roles and responsibilities:** Roles and responsibilities should be clear and personnel involved in managing the relationship need an appropriate level of authority to carry out their jobs effectively. (These issues are discussed in detail in Chapter 9, Governance, probity and compliance.)
- **Escalation paths:** Issue and decision escalation paths should be understood and used appropriately so that problems are resolved early.

## The 'partnership' aspect of a *Partnerships Victoria* project

The intention of the parties to a *Partnerships Victoria* contract should be to enter into a contract that creates a long-term relationship, recognising that each party starts the project expecting that it will receive certain benefits from the project. This is not a 'partnership' in the strict legal sense, but rather is a relationship in which the parties understand the importance to one another of project performance, but do not compromise their respective contractual rights and obligations.

The government party should recognise the importance of the commonality of interest involved in a *Partnerships Victoria* project, but must also be careful to:

- enforce contractual compliance and penalty mechanisms for poor (or non-) performance to ensure that the performance specifications are maintained and contractual rights are not undermined or inadvertently waived; and
- avoid action that could result in project risk being assumed or transferred back to the public sector. For example, during the construction stage, the government party should not normally approve any detailed drawings or designs. Rather, it should focus on monitoring the private party's performance of its construction obligations under the contract. (See Chapter 7 in relation to monitoring construction performance and see Chapter 8 of the *Risk Allocation and Contractual Issues* guide for further discussion of unintentional take-back of design risk during the construction stage.)

### *Joint management forums*

Whether provided for in the contract or not, an inter-party project review and improvement team or project control forum is a key tool to assist parties in developing and maintaining a mutually beneficial relationship over the life of the contract. Inter-party project review forums provide significant benefits during the construction and service delivery stages of projects. They provide a valuable reporting mechanism to the government on the progress of a project.

An inter-party project review forum should have a clearly defined role. The parties should ensure that the forum remains focused on its role, and does not become an environment for the discussion of issues best dealt with through other channels or mechanisms. It may be preferable to provide the basic framework for the inter-party project review forum in the project contract. For example, the contract could outline the forum's charter and objectives, membership and chair (which may alternate), and powers to create sub-committees. It may be possible to develop the forum's procedure and specific areas of responsibility as the project itself develops. The appointment of an independent chair for the meetings and to help resolve inter-party issues may also be of value.

This forum should meet regularly to ensure that any problems are addressed quickly and that solutions are recommended by the parties jointly. A clear escalation path for the resolution of problems ensures that responsibility is directed to the appropriate level of management. The seniority, technical skill levels, decision-making capacity and project familiarity of forum participants are all important considerations in determining the make-up of the forum or any sub-committees that spring from the original inter-party project forum.

## Understanding one another

An appreciation of one another's objectives, strategy and point of view, and good communications are important to the success of *Partnerships Victoria* projects. The government party gains from understanding the private party's strengths and weaknesses, and focusing contract management efforts where the return on effort is maximised.

A strong relationship can be developed partly by engendering a culture of appropriate sharing of information where there is no public interest, commercial or legal reason for not sharing the information. The categories of information that can be of benefit if shared include the following:

- **Objectives and expectations** should be made explicit and discussed openly. This should be a feature of the procurement phase, but there is a need to keep objectives and expectations in view and revisit them from time to time. Detailed service expectations are specified in the contract, but it is important that the parties also understand one another's higher-level expectations and strategic objectives. By managing each other's expectations, the parties can minimise unpleasant surprises and better manage the project for their mutual benefit.
- **Plans and information about potential future directions** can help ensure the parties develop the relationship in line with changes in business needs. At the start of the relationship, senior management must ensure that both parties have similar aspirations in relation to their approach to business (for example, the relative importance of commercial approaches to resolving contractual issues), common goals and strategic ambitions. This needs to be developed throughout the project lifecycle. This should be a two-way process.

An understanding of where the private party sees its business heading is as important as the government party's own expectations when it comes to maximising opportunities for consistent objectives and better managing divergent positions.

- **Concerns about the wider relationship** should be discussed frankly, whether they relate to contract performance, progress, or people. If this is not done, there is a risk that problems will increase in seriousness.
- **Information about how the private party views the government party** should also be sought. Here again, a candid approach should be encouraged—although there is a need to avoid being defensive about criticism. The focus should be on providing and seeking information with a view to improving the relationship over time rather than unnecessarily apportioning blame.

Information received about the private party should not just be passively received by the government party. It should also be analysed and then synthesised into the contract management tools and processes. A useful tool to assist in understanding the private party's business is a SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis.

The information collected also forms part of the broader information matrix of factual background for other contract management processes and tools. (Information collection for overall contract management purposes is discussed in detail in Section 5.3.)

## Establishing and using communication channels

### *Formal and informal contact points*

A *Partnerships Victoria* contract normally identifies one or more formal points of contact between the government party and the private party. However, to ensure a good relationship is maintained, a number of other contact points may be needed. For example, as suggested above, a committee that meets regularly may be a useful vehicle to coordinate the change processes that occur through the project lifecycle. These contact points themselves may change through the project lifecycle. (Further guidance on managing the risks inherent in change processes is outlined in Chapter 11.)

It is important that communication channels are properly managed so as not to confuse the responsibilities of the parties to the contract or compromise contract management.

The degrees of formality used in dealing with issues between the parties should vary depending on the degree of control required, the nature of the issue, and the stage of the project lifecycle in which the issue arises. For example, an issue related to the day-to-day delivery of services should be handled very differently from a strategically significant issue, such as the occurrence of a force majeure event. The government party should also be aware that, if the private party, its parent company or another entity involved in the project is publicly listed, it will have continuous disclosure obligations that may impact upon communications.

If appropriate, other government departments or agencies that are stakeholders in the project should be represented on committees dealing with communications issues.

The Contract Director should consider establishing a communications plan to include in the Contract Administration Manual (see Chapter 6). This plan should reflect the communications strategies in contingency or disaster plans and the extent to which the processes differ (see Chapter 12).

### *Establishing contact points during the procurement phase*

Initial contact between the government contract management team and the private party's project management team should be established during the project procurement phase and progressively developed from the time of contract execution.

### *Horizontal communication between the parties*

In many *Partnerships Victoria* projects, the relationship between the parties operate at a number of different organisational levels. Communication channels tend to run 'horizontally' between people at equivalent levels in each. The Contract Director may communicate with senior management of the private party infrequently, but at regular intervals, on strategic matters. In contrast, the contract management personnel who report to the Contract Director, and their private sector equivalents, may communicate frequently on operational matters.

The private party's management will much prefer to hear criticisms and find out about issues directly from their public sector counterparts, rather than through indirect channels.

For horizontal communication to function effectively, the parties must agree on protocols for these communications. Where necessary, these protocols should also provide for consultation between the parties in relation to communications between either of them and third parties. For example, it may be appropriate for the parties to consult each other on the content of any public communication in relation to the project. In the case of larger projects with significant public profiles, the parties should have regular formal meetings to discuss public relations.

### *Vertical communication within each party*

To ensure consistent communication through the various communication channels, particularly at middle and senior management levels, it is essential that there are consistent 'vertical' internal communications. For example, the government party's contract management personnel must communicate with the Contract Director to ensure they have a common understanding of the status of the relationship and are delivering consistent messages to their private sector counterparts. If this is not done, differences in perspective may create or mask problems in the relationship. For example, the Contract Director may regard the relationship as successful, unaware of significant friction between junior contract management personnel and their private party equivalents.

### *Proximity as an aid to communication*

Proximity is an important aid to communication, and makes it easy for the parties to meet face to face. However the government party's Contract Director should not be co-located with the private party's project team, as this may compromise the parties' independence and confidentiality.

### *Documenting verbal communications*

While good communication should avoid excessive formality, particular care should be taken to document verbal communications where it may be necessary to retain an agreed record of what was said. For example, if it is verbally agreed that each party will consider a proposed variation to a service delivery KPI, a written record of the discussion is critically important to clarify that no party has yet committed to the variation.

Appropriate practices for documenting verbal communications include the following:

- For informal discussions, record the key outcomes and action points, and provide this to the other party as confirmation of the discussion.

- For formal meetings, prepare minutes of the meeting, circulate these to all attendees, and obtain confirmation that the minutes are accurate.

The written record or minutes should be prepared or reviewed by a person with a strong understanding of the context of the discussions before being circulated to the other party. The potential consequences of a document being prepared without this input can include the following:

- The document may summarise the discussion using accurate statements, but omit important details that may be disputed in future.
- The document may inaccurately reflect discussions, which may undermine the future position of the party preparing the document or may result in a take-back of risk allocated to the other party.

The documents created as a consequence of verbal discussions form part of the pool of information underlying the broader contract management strategy for the project. They also have the critical potential of changing the contractual agreement. They should be recorded and managed in this light and should, where appropriate, influence other contract management strategies.

(See also Chapter 10 in relation to governance and compliance requirements for project records.)

### *Adequacy and matching of skills*

For horizontal communication channels between the parties to function effectively, the individuals responsible at each level must have adequate and appropriate skills. If skills are not properly matched at a particular level, the effectiveness of communication at that level may be compromised. A Contract Director who believes there is a skills mismatch at a particular level should re-evaluate staffing or seek to alter the communication channels to correct this problem.

### *Communication with the parent company or sponsors*

In many *Partnerships Victoria* projects, the private party will be a special purpose vehicle (SPV) or a subsidiary of a larger company. While the project contract may provide for formal communication channels between the government party and the private party, the government party should also consider regular communication with the private party's sponsors or parent company. For example, it may be appropriate to invite representatives of the parent company to attend performance review meetings on a regular basis and to participate in induction workshops or government process seminars to foster better private sector understanding of government objectives and processes.

When communicating with the parent company or sponsor, the Contract Director should ensure that confidentiality and privacy obligations are observed. Particular care should be taken where the parent or sponsor is not the sole owner of the private party.

## **Relationship management and succession planning**

The lengthy contract terms of *Partnerships Victoria* projects can pose continuity problems. Rarely will the initial contract management team still be in place at the end of the contract. Contract management staff are likely to change several times, with changes occurring throughout the entire project lifecycle. Consequently, forward thinking succession planning by both parties is important to ensure an appropriate relationship and project understanding is maintained. Effective succession planning with well-managed project role hand-overs between incoming and outgoing personnel (with appropriate induction and exit procedures)

can assist in ensuring that the vitality of the relationship extends throughout the lifecycle of the project and beyond the tenure of the individuals responsible for managing each side of the relationship. It is important that advice from outgoing personnel on the management of the relationship is documented to assist in this succession process.

### Monitoring the relationship

As well as measuring performance against financial and service performance measures, the government party should put in place a means of assessing the quality of the working relationship and management processes. For example, attendance by the private party’s representatives at steering committee meetings can easily be monitored, as attendance should be recorded in the minutes of meetings. If attendance by the private party’s representatives falls away, the Contract Director should consider whether this indicates that the relationship between the parties is losing strength, or that the committee is not an effective communication and management forum.

Monitoring the parties’ working relationship and management processes is valuable in highlighting aspects of the relationship that are perceived to be working well and those that require greater attention.

## 8.3 Issue management and dispute resolution

In a *Partnerships Victoria* project there is a clear distinction between service delivery issues and disputes. This is summarised in the following table.

**Table 8.1: *Partnerships Victoria* projects: Differences between service delivery issues and disputes**

Service delivery issues	Disputes
Need not involve any difference of opinion or position between the parties	Involves a difference of opinion or position between the parties (by definition)
Involve an interruption or other disturbance to service delivery	Need not involve any interruption or other disturbance to service delivery
May trigger an abatement of service fees or other remedies	Generally will not in themselves trigger an abatement of service fees

Despite these differences, strategies for managing service delivery issues and resolving disputes in *Partnerships Victoria* projects still have much in common, as do the consequences of not implementing these strategies. Most obviously, if left unresolved, a major service delivery issue or dispute may cause an irreparable breakdown in the parties' relationship and a failure of the project. Similarly, a failure to properly manage minor service delivery issues or disputes may damage the relationship and hence limit the benefits to the parties of the project.

## Issue management

However sound the relationship between the government party and the private party, service delivery problems will arise. Clear procedures for raising these issues and handling problems should be established. This will ensure that issues are dealt with at the earliest possible stage and at the appropriate level in each organisation. The primary objective is to ensure that problems are recognised and then resolved quickly and effectively. As a rule, issue management procedures should be in the project contract (and hence should be incorporated in the Contract Administration Manual – see Chapter 6). If they are not contained in the contract, or are inadequate, the Contract Director and the private party should work together to establish and agree on issue management procedures acceptable to both, shortly after contract execution, and these should form an appendix to the Contract Administration Manual.

Issue management procedures should incorporate the following requirements:

- Service delivery issues are recorded as they occur, in order to highlight any trends and to help in assessing overall contract performance and value for money. It is recommended that the private party maintain an issues register and that all new and outstanding issues be jointly reviewed on a regular basis by the parties. A sample of headings to use in an issues register is set out in **T** Template L. This can be modified to suit a particular *Partnerships Victoria* project.
- Where the government party or other end users of the services identify issues, the private party should be notified of the issue through an appropriate path and at an appropriate level.
- Where the private party identifies issues that may affect service delivery, the Contract Director should be promptly notified of the issue through an appropriate path.
- Approaches and efforts taken to resolve problems should be documented clearly and precisely.
- Escalation procedures should be followed where escalation is appropriate to resolve the issue. A sample decision and issue escalation procedure is set out in **T** Template M. This can be modified to suit a particular *Partnerships Victoria* project.

The Contract Director should collate information on the number and severity of problems, as well as the way they were resolved, during the life of the contract. This information should be used to cross-check the accuracy and flavour of service delivery performance reports. In addition, trends in the frequency with which service delivery issues arise and the speed and effectiveness of their resolution are a useful soft indicator of private party performance. (Performance reporting and soft indicators of performance are discussed in detail in Chapter 7.)

Serious or persistent service delivery issues may trigger a right for government to terminate the contract. (Responses to private party defaults are discussed in detail in Chapter 12.)

## Dispute resolution

In a well-planned and well-managed *Partnerships Victoria* project, disputes between the parties should be infrequent, but may occur because of unforeseen outcomes or circumstances. Like service delivery issues, disputes should be dealt with as early as possible and at the appropriate level in each organisation, so that they can be resolved quickly and effectively. Care is needed to ensure that issues are resolved at the correct level. The solution should be critically considered by someone who has an understanding not only of the immediate context of the dispute, but also of the broader possible consequences of the solution adopted.

A crucial role for the Contract Director is to try to ensure through prompt efforts that formal protracted disputes are avoided. If a dispute cannot be speedily resolved informally, it is important that it is promptly dealt with through a formal dispute resolution process. The process should be appropriate in the long-term relationship context of a *Partnerships Victoria* project. The parties should not allow disputes to unnecessarily drag on unresolved, as this will further damage the relationship.

In seeking to resolve disputes through informal means, the Contract Director should consider the commercial context of the dispute as well as the contractual context, as both are important in the early stages of a dispute.

If a party resorts to an inappropriate dispute resolution process, the process can worsen the damage to the relationship resulting from the dispute. For this reason, it is vital that an appropriate dispute resolution process is set out in the *Partnerships Victoria* contract for the project. Contractual issues in relation to dispute resolution are discussed in Chapter 27 of the *Risk Allocation and Contractual Issues* publication. (The dispute resolution process established in the contract should be incorporated in the Contract Administration Manual. See Chapter 6.) The arrangements should encourage negotiation between the parties and provide incentives for the parties to discover a solution themselves. A formal resolution process should be made difficult to access, as formal court or arbitration proceedings may not lend themselves to an early or negotiated outcome.

The parties should review the formal dispute resolution procedure and consider whether it is appropriate to agree on a process for dealing with disputes before the formal procedure is invoked. Alternatively, it may be desirable for the parties to agree on a process for invoking the contractual dispute resolution procedure if this process is not detailed in the contract. A sample dispute resolution procedure is set out in **T** Template N. This can be modified to suit a particular *Partnerships Victoria* project. The documented procedure should be included in the Contract Administration Manual as an appendix.

## Department of Treasury and Finance's role in issue management and dispute resolution

The Department of Treasury and Finance is available to assist government parties to manage issues and resolve disputes. Where there is an emerging potential difficulty with State budgetary implications, or the sustainability of the project's contractual and commercial arrangements becomes questioned, the Department of Treasury and Finance must be informed.



# 9 Governance, probity and compliance

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## 9.1 Introduction

Proper management of a *Partnerships Victoria* project by the government party involves not only managing the contract and relationship with the private party, but also ensuring appropriate governance, probity and compliance practices are established within the government party and its interactions with the private sector party and any other government stakeholders.

In the context of a *Partnerships Victoria* project:

**Governance** is concerned with processes for project decision-making. It defines the behavioural controls within an organisation that ensure accountable project outcomes and processes. Governance is concerned with accountability and responsibilities, and encompasses authority, stewardship, leadership and control.

**Probity** underlies good governance and involves honest, proper and ethical conduct in project dealings, and is often used in government to mean 'good process'.

**Compliance** involves ensuring that the project meets the requirements of laws, regulations, and government policy.

Each of these concepts and relevant guidance materials is developed in this chapter.

## 9.2 What are the risks to government?

Government is exposed to a variety of commercial, political, legislative and regulatory considerations in ensuring performance of its own obligations in each *Partnerships Victoria* project. Further, despite the transfer of contractual responsibility for certain actions, the residual and overarching accountability of government for the delivery of government services represents the most significant retained risk to government in *Partnerships Victoria* projects.<sup>27</sup>

**Ultimate accountability** in *Partnerships Victoria* projects for the delivery of government services may rest with government, even though the contractual responsibility for certain deliverables is transferred to the private party.

Government's ultimate accountability for managing the project contract and providing services creates additional risks. The reporting and procedural standards imposed on the public sector in relation to the delivery of projects are more demanding than those imposed on private sector operators. The sources<sup>28</sup> of the more demanding obligations include:

- Ministerial accountability to Parliament and the people (including accountability for government's contracting activities)
- the *Financial Management Act 1994* (the FM Act) and the FM Act Regulations and Directions, designed to safeguard public money and to ensure that it is spent efficiently
- scrutiny of the Auditor-General
- government's obligation to act as a 'moral exemplar'<sup>29</sup> in commercial dealings with the private sector
- the availability of administrative law remedies, including the Ombudsman's jurisdiction and the *Freedom of Information Act 1982*
- privacy obligations in relation to personal information in the hands of the government under the *Information Privacy Act 2000*
- political or commercial constraints in exercising legal rights for non-performing or defaulting contractors.

These demanding reporting and procedural standards make service provision under a *Partnerships Victoria* project very transparent.

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<sup>27</sup> Government's potential residual accountability for the delivery of services is discussed in Section 2.3 of this Guide and Section 1.10 of *Risk Allocation and Contractual Issues*.

<sup>28</sup> *Audit Review of Government Contracts: Contracting, Privatisation Probity & Disclosure in Victoria 1992-1999, An independent report to Government*, State Government of Victoria, May 2000, p. 81.

<sup>29</sup> See Seddon, N, 1999, *Government Contracts*, 2<sup>nd</sup> edition, The Federation Press, Sydney, pp 11 - 12 and for further information regarding the application of this principle to the tension that exists between the obligation to act as a 'moral exemplar' and the desire for a commercial outcome, see also *Audit Review of Government Contracts*, cited above, p. 94.

## 9.3 How can these risks be managed effectively?

Appropriate standards of accountability in *Partnerships Victoria* projects must be maintained throughout the project lifecycle. The importance of accountability safeguards is enshrined in the *Partnerships Victoria* policy and guidance materials. The policy requires that each *Partnerships Victoria* project satisfies a broad-based public interest test as an integral part of the project option appraisal and ultimately the bidding process. (For detailed information on the public interest criteria in *Partnerships Victoria* projects, see Chapter 18 and Appendix D of the *Practitioners Guide*.)

The risks to government associated with ultimate accountability can be more effectively managed by developing a project governance, probity and compliance framework and integrating it into the management of the contract. This is because the framework can ensure that individual risks associated with government accountability are identified and that appropriate standards of project accountability and performance are established, measured and maintained. This framework should also be incorporated into the development of the Contract Administration Manual (discussed in Chapter 6) and can be incorporated into project performance and reporting measures (discussed in Chapter 7). As a consequence, the risk to government of inefficient and improper practices associated with contract administration and project delivery is minimised.

The procurement team must ensure that the draft contract prepared during the procurement process contains appropriate provisions to protect the public interest, and that these protections are retained in the executed contract. The government party must then ensure that the private party complies with its obligations related to the public interest test, and must implement its governance, probity and compliance framework throughout the life of the project.

The risks associated with meeting standards of accountability in *Partnerships Victoria* projects can be managed by the development of a project governance, probity and compliance framework.

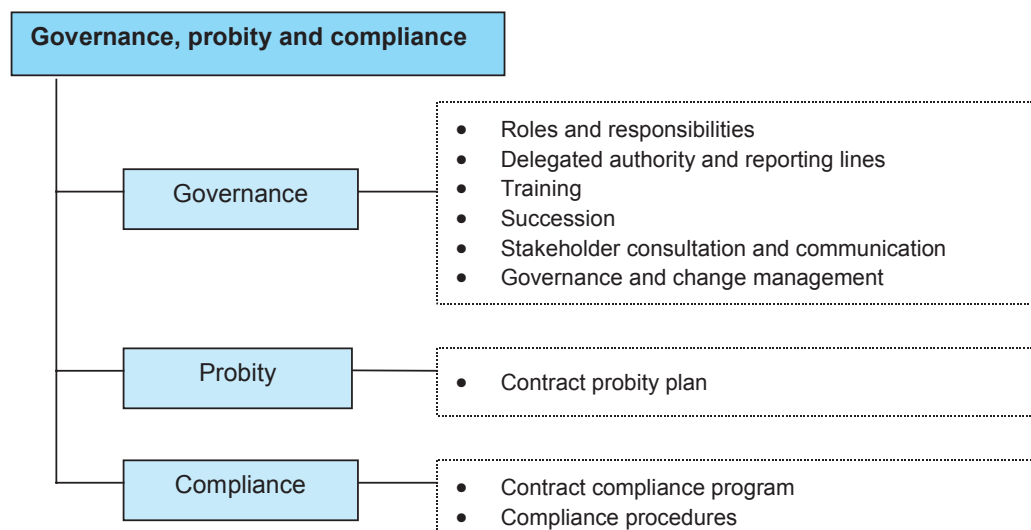
## 9.4 Developing a governance, probity and compliance framework

The task of developing a comprehensive governance, probity and compliance framework (referred to below as the governance framework) for a *Partnerships Victoria* project is a systematic process. The task is best divided into the three discrete concepts of governance, probity and compliance. Each of the three components of the governance framework relies on an analysis of the same four questions:

1. What does government need to know in order to ensure appropriate standards of governance, probity and compliance are met?
2. What needs to be done, by whom and when, to ensure adherence and that the risk to government is managed effectively?
3. What are the consequences to government and project outcomes if the standards are not met?
4. How should the consequences of a failure to meet these standards be effectively managed?

To complete the governance framework, the government party should first collect and analyse the information relevant to each of the three components of the framework. (Information collection and analysis is discussed in detail in Chapter 5 of this Guide.) This process should ensure that each of the risks associated with the components is identified, recorded and incorporated into the framework. When collecting and analysing this information, it may be useful to organise the information in each of the categories outlined in Figure 9.1. This will assist the government party to develop separate governance, probity and compliance tools and processes to manage the risks of each category of issues.

**Figure 9.1: Governance framework**



Appendix H contains additional compliance information that may be useful when developing a project compliance program and procedures.

After analysing the collected information, the government party should consider the division of public/private responsibility. This enables the government party to identify those tasks that are the government’s sole responsibility and those that are its residual responsibility only.

The government party can then develop specific governance, probity and compliance tools and processes.

## 9.5 Governance

**Governance** is concerned with processes for project decision-making. It defines the behavioural controls within the government party that ensure accountable project outcomes and processes. Governance is concerned with accountability and responsibilities. It encompasses authority, stewardship, leadership and control.

Governance is critical to ensure the effective coordination of service delivery between government, private parties and customers. A comprehensive governance framework should address interfaces between these groups to ensure seamless service delivery.

## Roles and responsibilities

For good governance of a *Partnerships Victoria* project within the government party, the relevant staff must have:

- clearly defined roles and responsibilities
- an appropriate mix of skills, experience and training
- enough time, resources and support from their government entity to fulfil their responsibilities.

Without clearly designated accountability, based on a comprehensive understanding and an appropriate allocation of responsibilities, contract management tasks could ‘fall through the cracks’. Roles and responsibilities relating to the administration and fulfilment of the project contract should be identified in the Contract Administration Manual (discussed in Chapter 6). Any other roles and responsibilities should also be identified and should be recorded so that the allocation of responsibility is clear.

### Key roles

The resources required to manage a *Partnerships Victoria* project after contract execution will vary significantly from project to project and over the lifecycle of individual projects. The key roles within the government party in such a project are those of the senior manager, the Contract Director and the contract management team.

#### The senior manager

The senior manager is usually the Chief Executive Officer or a Deputy Secretary of the government entity responsible for the project. The senior manager has overall responsibility for the successful delivery of government services.

The senior manager is responsible for ensuring that:

- the project’s significance is appropriately elevated
- the government entity’s board or Minister is periodically briefed
- the government entity’s senior management group take an active interest in the ongoing delivery of the project services during the life of the project
- the appropriate Contract Director, and contract management team, is in place to satisfactorily deal with the project complexity and challenges.

#### The Contract Director

The government entity responsible for the project should appoint a Contract Director. The Contract Director has overall responsibility for managing the contract from the date of its execution to achieve project objectives, incorporating long-term value for money outcomes.

Given the long term of *Partnerships Victoria* contracts, the Contract Director is likely to change through the project lifecycle.

During the service delivery stage of the project, it may not be necessary to have the Contract Director's role devoted entirely to one project. However, the Contract Director should retain responsibility for progress reporting to the government party's senior management and for the general support of the project during its lifecycle. The Contract Director's role may also include relationship management responsibilities. Alternatively, a separate relationship management role can be created at an appropriately senior level.

### **The contract management team**

A contract management team, reporting to the Contract Director, will carry out many day-to-day contract management activities. For larger projects, a large contract management team may be required, including a separate relationship manager and various technical experts. The size of this team may vary over the life of the contract. Demands on the contract management team's time increase considerably during times of significant change (for example, transition from one contract lifecycle stage to another).

A senior member of the contract management team for a project should be identified early in the procurement process, so that work can begin on developing contract management tools and processes, and relevant provisions can be included in the contract.

### **Appointment of the inaugural Contract Director**

The appointment of a Contract Director should be settled prior to the execution of a *Partnerships Victoria* contract. Ideally, the inaugural Contract Director should be the Project Director responsible for the project's procurement process. If this is the case, the Project Director should appoint personnel (the contract management team) with responsibility to develop the contract management tools and processes during the procurement process, as the Project Director's time is likely to be occupied with other matters.

If the Contract Director and Project Director are not the same person, the Project Director and the procurement team and their advisers should assist the Contract Director to establish contract management tools and processes. The Contract Director should be appointed during the bidding process or project finalisation review, if this is practical, and in any event should be appointed prior to contract execution. The Project Director must ensure that the procurement team's knowledge is transferred to the contract management team. Where feasible, the Project Director should be engaged until commissioning, working with the inaugural Contract Director during this period.

## **Delegated authority and reporting lines**

### *The nature and function of delegations*

Good governance requires that powers to enter into and administer government contracts are only exercised by people with the authority to do so. Under this principle, a *Partnerships Victoria* contract is executed following compliance with a series of government approval requirements, set out in Chapter 23 of the *Practitioners' Guide*. The contract requires government, or the government party (if it is a separate legal entity), to exercise various functions, rights and powers.

However, as a practical necessity, contract management personnel exercise many of these functions, rights and powers. These personnel, reporting to the Contract Director, have been given legal capacity to act on behalf of government or the government party, and authority to make the financial commitments, within certain parameters, necessary to manage the project.

It is vital that the Contract Director has delegated authority to take any action necessary to comply with the government party's obligations under the contract. In some projects, action by other stakeholders may be required for government to comply with its obligations under the

contract. In these circumstances, a mechanism must be established so that an appropriate person – for example the Contract Director or a Minister – can direct those stakeholders to take action that is necessary to ensure that government complies with its obligations.

### *Delegations in the context of a Partnerships Victoria project*

Appendix G to this Guide provides background information on delegations. In the context of a *Partnerships Victoria* project, the government party should give an appropriate member of its staff responsibility for the management of delegations relating to the project. The following discussion assumes that person is the Contract Director.

The Contract Director should ensure that they have thorough knowledge of the regulatory and policy frameworks that apply to delegation of legal power and financial capacity in the government party.

### **Delegation of legal power**

It is common for a *Partnerships Victoria* contract to include delegations by the Minister who executes the contract, or by the government party if it is a separate legal entity. These delegations allocate particular functions, rights and powers under the contract to the holders of specified positions or specified individuals. For example, some powers may be delegated to the Secretary of the relevant department, and others to a person nominated as the Project Director or Contract Director. There may be a clause or schedule to the contract that identifies all the delegated functions, rights and powers. A typical clause delegating functions, rights and powers in this way is:

'The State may from time to time appoint a person to be Contract Director. The Contract Director will have the functions, rights and powers set out in Schedule xx.'

Alternatively, specific clauses in the contract may confer specific functions, rights or powers on the holders of specified positions or an identified individual.

In some instances, legislation applying to a project will also delegate functions.

In addition to delegation in the contract or legislation, particular functions, rights or powers may be delegated in separate instruments of delegation. For example, the Minister of the relevant department may give a separate delegation of a particular power conferred on the Minister by the contract.

The Contract Director should maintain a Delegations Register identifying the functions, rights and powers delegated under or in relation to the project. A template Delegations Register is set out in **T** Template O.

The Contract Director should also keep a record of authorisations in which one person authorises another to exercise any function, right and power relating to the project on behalf of the first person. The authorisation should be in writing. If there are numerous authorisations relating to the project, these should be summarised, either by identifying in the Delegations Register who is authorised to exercise each delegated function, or by establishing a separate Authorisations Register and storing this with the Delegations Register.

If a member of the contract management team is exercising a function that involves making a financial commitment on behalf of government, they must have capacity to make that financial commitment, as well as legal authority to exercise that function.

## Delegation of financial capacity

If the government party is subject to the *Financial Management Act 1994* (the FM Act), the entity's personnel should only make financial commitments according to conferrals under that Act. If the government party is not subject to the FM Act, the entity's personnel should only make financial commitments within their authority according to the entity's policies concerning the authorisation of expenditures. The conferrals or authorisations established for contract management personnel should ensure that appropriate personnel will be able to:

- authorise payment of service charges under the contract; and
- up to appropriate limits, meet other expenses incurred in the management of the contract.

The delegations of financial capacity (also referred to as conferrals in Regulation 10 of the Financial Management Regulations) relevant to a *Partnerships Victoria* project are usually relatively simple compared to the delegations of legal authority. Nevertheless, the Contract Director should ensure that the relevant financial delegations are recorded in a single accessible document, and this document is kept up to date.

Payments and other expenses should be recorded and reported according to the FM Act or other requirements that may apply.

## *Review of delegations and authorisations*

It is likely that, at various times through the project lifecycle, the Contract Director will need to arrange for the execution of new delegations and authorisations relating to the project, and update the Delegations Register accordingly. The Contract Director should review delegations and identify any necessary changes in the following circumstances:

- **Regular review:** As part of the Contract Director's regular review of contract management issues, the Contract Director should consider whether existing delegations and authorisations are sufficient for effective contract management at the time of the review and in the medium term. If the existing delegations and authorisations are insufficient, the Contract Director should consider what changes are necessary and arrange for these to be implemented. Changes in delegations and authorisations should be communicated to relevant people to ensure that their authority to act is current and valid and has not lapsed or been revoked. (Ongoing review of contract management issues is discussed in detail in Chapter 13 of this Guide.)
- **Personnel changes:** When there is a change in contract management personnel, or in their position titles, the Contract Director should consider the impact this will have on existing delegations and authorisations. The Contract Director should be alert to any changes in personnel, within or outside the contract management team, and should identify and respond to any changes that result in the lapsing of any relevant authorisations.
- **Contract variations:** When there is a contract variation, the Contract Director should consider the impact this will have on existing delegations and authorisations, and whether any new delegations or authorisations are required. (Change management, including contract variations, is discussed in detail in Chapter 11 of this Guide.)



## Training

Personnel involved in contract management must be adequately trained to effectively and competently carry out their roles and responsibilities. Inadequately trained or inexperienced personnel represent a significant risk to effective contract management, public sector accountability and successful project outcomes.

As noted in Section 3.10, the Department of Treasury and Finance will establish a formal training program to provide Contract Directors and contract management team members with relevant skills. It is expected that the government party will supplement this training with ongoing training for skill development such as:

- project and time management
- negotiation and communication skills
- probity and compliance
- dispute and issue management
- relevant computer software.

## Succession

Given the long term of *Partnerships Victoria* contracts, the personnel involved in management of the contract are likely to change several times through the project lifecycle. New personnel will take considerable time to become sufficiently familiar with a project to effectively manage it.

The government party should establish a succession plan for key personnel to manage personnel changes efficiently. For example, it should aim to limit concurrent departures and ensure that the retained team has a good mix of new and old hands. It should integrate its Contract Administration Manual (Chapter 6) and knowledge management system (Chapter 10) into its succession planning. The succession plan must be sufficiently flexible to provide quality ongoing management and accommodate change, including:

- the possibility of personnel choosing to leave their positions prematurely or being absent on leave (for example, maternity, study or long service leave) for significant periods of time
- the need for incoming personnel to have completed appropriate training (preferably with the involvement of the incumbent Contract Director)
- the need to replace unsuitable staff
- the likelihood that roles and workloads will change over the lifecycle of a *Partnerships Victoria* project.

The need for a comprehensive succession plan is related to broader government objectives of supporting contract management as a recognised career path and the career advancement of contract management personnel.

## Stakeholder consultation and communications

Many *Partnerships Victoria* projects have a range of government stakeholders. These stakeholders may include areas of the government party that are not directly responsible for the management of the contract, or other public sector agencies that receive services or perform monitoring or whole-of-government functions (for example, the Department of Treasury and Finance).

Appropriate consultation and communication with stakeholders is an important component of good governance. It also assists the government party to ensure that the project conforms with public interest considerations. Consultation and communications plans should be agreed with stakeholders and documented in the Contract Administration Manual (Chapter 6), and (if stand-alone plans are appropriate) in contingency plans (Chapter 12), which should be added to the Contract Administration Manual as appendices.

In determining what level and forms of consultation and communication are appropriate, the government party should consider the following questions:

- Who are the stakeholders for the project?
- What are the objectives of each stakeholder?
- Who are the appropriate contacts within the stakeholder group?
- What matters should each stakeholder be consulted about?
- What is the likely involvement and role of each of the stakeholders?
- What information should be provided to each stakeholder?
- Have the stakeholder arrangements been discussed and agreed with the stakeholders?
- How should the stakeholder arrangements be documented?
- Who within government should be asked for input into the stakeholder communication and consultation plans?

Section 2 of Appendix A sets out a service delivery structure in which a government party contracts to receive services ultimately used by a number of other public service entities. As noted in Section 3.1 of **T** Template F, in such a project the Contract Director should enter into a Memorandum of Understanding with the other public service entities. This Memorandum of Understanding should set out the communication and consultation processes between the Contract Director and these stakeholders.

## Governance and change management

Good governance is particularly important during the change events that occur throughout the *Partnerships Victoria* project lifecycle. There is increased risk and exposure during times of significant project change. The government party needs to ensure that change processes do not compromise the project's delivery of value for money or other project and policy objectives, despite the increasing demand placed on the project team's time.

Forward planning is essential to ensure that the government party allocates sufficient time and resources to the project to satisfy public sector governance and compliance standards. The government party can best achieve this by developing and implementing effective governance, probity and compliance practices well before contract execution.

Responsibility for authorising different types of change may rest with different people, and the government party's documented internal procedures should reflect this, while ensuring overall coordination and review of change processes.

The relevant procedures should be documented in the body of the Contract Administration Manual (Chapter 6) or included as an appendix to the Contract Administration Manual.

## 9.6 Probity

The government party should develop a probity plan and introduce probity practices to ensure that the project is delivered throughout its lifecycle with fairness of process. No person should improperly achieve personal advantage or disadvantage through involvement in the process. For example, the Contract Director should not be induced to act improperly (such as by failing to act in response to non-performance under the contract) by gifts offered by the private party.

Victorian government policy information concerning probity is discussed in detail in the Victorian Government Purchasing Board (VGPB) *Probity Policy and Guidelines*. This document is available on the VGPB website ([www.vgpb.vic.gov.au](http://www.vgpb.vic.gov.au)). Specific probity issues in relation to *Partnerships Victoria* projects are also discussed in Chapter 22 of the *Practitioners' Guide*.

The principles of probity in government contracting contained in the *Probity Policy and Guidelines* were originally developed to introduce a consistent public sector set of probity rules.

The principles of probity are:

- fairness and impartiality
- use of a competitive process
- consistency and transparency of process
- security and confidentiality
- identification and resolution of conflicts of interest
- compliance with legislative obligations and government policies (discussed in the compliance section in this chapter).

The government party should apply each of these principles throughout the project lifecycle.

### Developing a probity plan for contract management

The government party should use Appendix 3 of the *VGPB Probity Policy and Guidelines* as a template for developing its contract management probity plan.

The contract management probity plan should address:

- internal organisation and decision-making processes
- confidentiality and disclosure

- dealing with proprietary information
- dealing with conflicts of interest (see also Chapter 22 of the *Practitioners' Guide*)
- consultation with the government
- establishing a probity culture
- queries on probity (including scrutiny by the Attorney General, Parliament, and the Ombudsman)
- the requirements of the *Public Sector Management and Employment Act 1998*
- the standards of conduct (including the duty of confidentiality) for all public servants under the Code of Conduct for the Victorian Public Sector.

## 9.7 Compliance

Compliance ensures that the project meets the requirements of laws, regulations, and government policy.

The government party should develop a contract compliance program as an integral part of its broader strategic framework for project delivery and contract management. A compliance program helps the government party to identify, document and manage compliance risk throughout the project lifecycle. The document outlining the compliance program and compliance procedures forms part of the project's governance framework. It should be included as an appendix to the Contract Administration Manual (Chapter 6).

### Developing a contract compliance program

The Australian Standard on Compliance programs, AS/3806, is a benchmark for such programs. When developing a contract compliance program, the government party should refer to the methodology in AS/3806.

According to AS/3806, a compliance program is an essential element in the good governance of an organisation (or project) and should:

- aim to prevent, and where necessary, identify and respond to breaches of laws, regulations, codes or organisational standards in the organisation
- promote a culture of compliance within the organisation
- assist the organisation in remaining or becoming a good corporate citizen.

An effective compliance program requires dynamic and strategic management of the project's regulatory environment. Accordingly, the person responsible for the compliance program should either have a high level of status and authority within the organisation or be supported by a suitably senior executive.

The AS/3806 guidelines reinforce compliance as an ongoing process and require:

- the identification of compliance issues
- the development of compliance operational procedures
- implementation of a compliance program
- regular monitoring and assessment
- the periodic review of the compliance program.

## **Developing compliance procedures**

The government party should develop and document compliance procedures. These should address:

- the roles and responsibilities of management and staff
- areas where compliance failures are likely to arise and anticipatory procedures to prevent such failures
- action plans to deal with problems and faults that may arise
- ongoing monitoring assessment and reporting to ensure staff compliance
- knowledge and information management systems (separately dealt with in Chapter 10)
- the incorporation of compliance standards into:
  - computer systems
  - forms
  - contracts
  - administrative procedures
- specific arrangements for reporting instances of compliance failure
- educational and training requirements.

The government party should ensure that the compliance procedures contain:

- a practical summary of relevant laws, regulations and organisational standards
- operational procedures to ensure that the government party's own compliance and governance standards have been met both internally and when managing the project interface with the private sector party
- practical examples of compliance applicable to the government party's management of the contract.

The compliance procedures should be readily available to all personnel involved in the management of the project.

# 10 Knowledge and information management

Developing the Contract Administration Manual	
⇒ Planning, information collection and analysis	Chapter 5
⇒ Contract administration	Chapter 6
⇒ Performance monitoring and reporting	Chapter 7
⇒ Relationship management, dispute resolution and issue management	Chapter 8
⇒ Governance, probity and compliance	Chapter 9
⇒ <b>Knowledge and information management</b>	
⇒ Change management	Chapter 11
⇒ Contingency planning	Chapter 12
⇒ Ongoing review	Chapter 13

## 10.1 Why manage knowledge and information?

The effective management of knowledge and information is essential to:

- ensure the continuity and availability of project knowledge and information assets for effective contract management throughout the project lifecycle
- meet legislative, policy and contractual requirements.

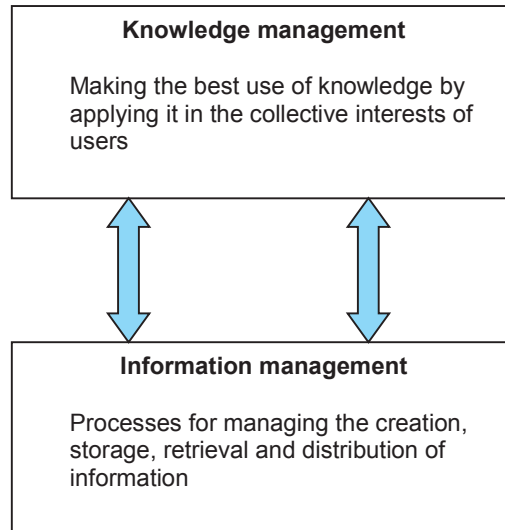
This chapter outlines the considerations necessary to develop an integrated project knowledge and information management strategy.

- **Information** is data in context that can be used for decision making.
- **Knowledge** is the body of understanding and skills mentally constructed by people.
- **Information management** is the means and processes by which an organisation manages the creation, collection, storage, retrieval and distribution of information resources. It is technically part of a larger continuum of managing knowledge in an organisation or project.
- **Knowledge management** is a multi-disciplined approach to achieving organisational objectives by making the best use of knowledge.
- **Records management** is a component of information management and is concerned with corporate records that document and verify business activities.<sup>30</sup>

<sup>30</sup> Definitions adopted or adapted from those contained in Standards Australia International Ltd, *Interim Australian Standard AS 5037 (int)-2003*, Sydney.

As the key definitions suggest, knowledge management and information management are closely connected.

**Figure 10.1: The relationship between knowledge management and information management**



Knowledge management and information management are intimately linked to a government party's governance and compliance arrangements (see Chapter 9) due to the legislative requirements, policies and procedures, business rules and the contractual obligations between the parties. Initially, the contract management team should identify the government party's knowledge assets and the various knowledge activities related to the project. This will assist the government party to effectively use and manage the knowledge and information related to the project.

## 10.2 What are knowledge assets and knowledge activities?

Knowledge assets include:

- electronic documents such as word documents, spreadsheets, correspondence, presentations
- emails
- hard copy records such as signed contracts, submissions, briefings and correspondence
- web-based information
- corporate memory (the sum of individual memory and expertise relevant to the project)
- records of conversations, meetings etc.

Knowledge assets can be classified into two basic types:

1. **Explicit knowledge** is that which has been physically embodied or recorded in a document, image or some other medium.

2. **Tacit knowledge** is that which resides in a person's mind and may include aspects of culture or 'ways of doing things'.<sup>31</sup>

Knowledge activities involve:

- discovering, creating and receiving knowledge
- capturing and storing knowledge
- presenting, distributing and sharing knowledge
- reviewing, maintaining and disposing of knowledge.

## 10.3 How do I manage knowledge and information effectively?

Managing knowledge and information effectively requires:

- **A system:** The system should include the use of an electronic document and records management system, network drives etc. To minimise costs, wherever possible, the government party should seek to leverage existing technological systems. Establishing a new technology platform can be an expensive process. The system needs to reflect different requirements for each phase of a *Partnerships Victoria* project; that is, the procurement, construction, service delivery, and contract expiry or termination stages.
- **Appropriate tools and processes:** Appropriate knowledge and information tools and processes are required, particularly if sophisticated systems are unavailable due to resource or other constraints. Examples of tools or processes include protocols, guidelines, policies and procedures. Tools or processes should reflect the specific requirements of the particular phase of the project for which they are developed. Many public sector agencies have policies on managing information, records and documents. These should be used as a starting point in developing consistent contract management information processes that conform with the government party's existing practices. If, however, the government party's existing tools and processes are limited, it may need create new ones.
- **An appropriate culture:** The contract management team must have a culture that ensures adherence to the processes, tools and systems, otherwise the mechanisms designed to manage knowledge and information will have limited success. Fostering an appropriate culture is also useful to ensure that tacit knowledge and expertise is transferred to the organisation. This can facilitate effective change management and maximise the continuity of contract management information when there are changes in contract management personnel.

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<sup>31</sup> Standards Australia, *Interim Australian Standard AS 5037 (int)-2003*, op.cit.



## 10.4 Developing a knowledge and information management strategy - considerations

When determining how to manage knowledge and information effectively and identifying appropriate systems, processes and cultural levers, the government party should consider the following issues:

### 1. Discovering, creating and receiving knowledge and information

- Who creates the information?
- What information will be collected?
- What types of documents and information are there, and what are their attributes and relationship with other information?
- Who owns and controls the information?
- What specific provisions must be included into the project contracts to ensure that the knowledge and information requirements are legally enforceable between the parties?
- How will information that may be difficult to collect—such as emails, outcomes of conversations or meetings—be captured?

### 2. Capturing and storing knowledge and information

- How will knowledge and information be stored and maintained (both electronically and physically)?
- What metadata<sup>32</sup> will be attached to the information to assist with its retrieval?
- What are the security requirements for the information?
- How should the information be classified when it is stored? Does the project justify the cost of a bar-coding or other sophisticated identification system?
- Will different types of documents and information have specific storage requirements? For example, copies of disaster recovery and business continuity plans, and copies of difficult to replace documents (such as land titles, technical plans and certificates of insurance) should be stored on-site and in other locations off-site. There may be different requirements for formal or commercially/legally sensitive documents compared to informal emails.

### 3. Presenting, distributing and sharing knowledge and information

- What are the purposes for which this information is likely to be used by the contract management team or by others during the various phases of the project (procurement, construction, service delivery, and contract expiry or termination stages)?

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<sup>32</sup> Metadata or metatags are keywords or information about the information. For example, using a tag or label like 'lifecycle' or 'risk' that enables other information about lifecycle or risk to be retrieved.

- Are there common tasks (such as document, communication and version control) for all phases of the project?
- How will the information be accessed and by whom?
- Are there types of information maintained by the private party (for example, operating and maintenance manuals, design, engineering and survey plans) that the government party will need to access? If so, in what stages during the project? In what form?
- How will the information be transmitted between team members, stakeholders and contractors, and in what form?
- What internal records, document and information management policies, procedures and guidelines should be adhered to?
- What information or documents will the government party need to share regularly with stakeholders (for example, contact lists and organisational charts)? In what format? How will the information or documents be transmitted?
- Are stakeholders clear on their information provision responsibilities?
- What information does the government party need to satisfy stakeholders' performance reporting requirements?
- In what electronic and/or hard-copy format is this information required? How will the information be transmitted?
- What agreed information formats should be established between parties to reduce double handling of information and resource duplication?

#### **4. Reviewing, maintaining and disposing of knowledge and information**

- How will the quality of the information be monitored over the life of the project (for accuracy, consistency and currency) and during the various stages of the project and transitions between stages?
- Who will be responsible for the various processes of information management? How will they know the scope of their responsibilities?
- How can the relationship between electronic and physical records be maintained effectively?
- How will the information be disposed of? Under whose authority?
- What knowledge, information, tools and processes need to be delivered to the government party on termination, step-in or expiry of the project?
- What access restrictions (internally and between the parties) are appropriate?
- How can the government party best comply with its governance, compliance and legislative responsibilities (for example, obligations under Freedom of Information legislation)?

## 10.5 Measuring the success of a knowledge and information management plan

The government party can measure the success of its information and knowledge management strategy by evaluating whether:

- Relevant personnel have ready access to information and documents are easy to identify and retrieve.
- Information or knowledge is fully exploited by mechanisms for knowledge and information sharing.
- The quality of information is accurate and current.
- The information satisfies legislative and policy requirements.
- Double handling of information is effectively minimised.
- The tools and processes for managing knowledge and information have been designed to fit a particular stage of the project while also catering for common tasks for all stages.
- Information and documents are submitted and transferred between stakeholders in the appropriate form and at the appropriate time.
- The project contract enshrines into legally enforceable rights those components of the knowledge and information management strategy that require the cooperation of the private party throughout each stage of the project.

## 10.6 Regulatory and compliance requirements

The government party should:

- create and maintain authentic, reliable and useable records of knowledge and information created, received, retrieved and used in conducting contract management activities; and
- protect the integrity of those records for as long as they are required.

This will support the ongoing management of the contract and enable the government party to comply with regulatory requirements for retaining records. The government party should integrate the records management requirements into its contract management knowledge and information management strategy. The Contract Director should ensure that these processes, however they are documented, are included in the Contract Administration Manual.

### Record-keeping obligations

In a public sector record management system, project records are divided between contract records and contractors' records.

**Contract records** document the process of establishing and managing a contract.

**Contractors' records** are those which are generated by the private party while performing the contract.

Adequate and accurate contract records are required for scrutiny of the contracting process. They support effective contract management, including appropriate performance monitoring. Relevant records include:

- records of contract negotiations
- changes to the agreements
- agreed performance measures
- ongoing performance/management reports
- complaints or dispute documents.

The government party should require the private party to keep, make available necessary records and maintain separate back-up copies of essential documents, so the government party can meet its accountability requirements to Parliament, the Auditor-General and the public.<sup>33</sup> These requirements should be identified early in the procurement process to enable the government party to include any relevant clauses in the draft contract provided to bidders.

Before beginning to develop its record-keeping strategy, the government party should seek the advice of the Public Records Office Victoria (PROV) and incorporate any policy and guidance materials available for this purpose.

The records management strategy should also satisfy probity in contract requirements which apply to contract records. These requirements are set out in Section 12 of the probity plan template in the *VGPB Probity Policy and Guidelines*.

## Protocols for creating documents

As part of its records management strategy, the government party should establish internal protocols for creating documents. Protocols should include guidance on:

- the prospect that documents may be subject to a court or Freedom of Information discovery process
- prohibitions on defamatory, unnecessarily colourful, inappropriate or offensive language
- potential project concerns, which should be noted and actioned – unwarranted or unsubstantiated conclusions should be avoided
- taking care with the preparation of official documentation
- using concise language
- ensuring the documents accurately reflect discussions etc and, where the document is not a final document, its stage in the process (for example, drafts)

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<sup>33</sup> See section 12 of the *Public Records Act 1973* (Vic) (discussed further in Appendix H).

- ensuring that documents that record confidential discussions or information obtained in confidence are appropriately identified as such
- ensuring that documents subject to Cabinet in Confidence or legal professional privilege are appropriately identified as such and that separate protocols for dealing with such documents are adhered to.

## 10.7 Access to information and the Freedom of Information Act

A Contract Director for a *Partnerships Victoria* project should have a working knowledge of the application of the *Freedom of Information Act 1982* (the FoI Act) to knowledge and information management. Appendix H of this Guide discusses some of the issues relevant to this area of public sector compliance. The Contract Director should seek advice from the FoI or Legal Branch within the government party when developing this component of a knowledge and information management strategy. Advice from the FoI or Legal Branch should also be sought on training to ensure that contract management personnel can comply with FoI requirements. This should be done early in the procurement process to equip the Contract Director to:

- manage FoI issues when they arise
- achieve records management that complies with the project knowledge and information management system
- ensure that the contract reflects government policy of maximising public access to project information.

## 10.8 Intellectual property and confidential information

**Intellectual property** includes various classes of rights protected by legislation (such as copyright, patents and registered designs), together with confidential information and trade secrets protected at common law or under contract. In any *Partnerships Victoria* project, there is a possibility of intellectual property passing between the government party and the private party. Chapter 20 of the *Practitioners' Guide* discusses the intellectual property issues that arise during the procurement process. Appropriate provisions should be included in the project contract to govern intellectual property rights after contract execution. Intellectual property can be a source of complex issues, and legal advice should be sought where necessary.

### Managing intellectual property

As part of its knowledge and information management strategy, the government party should identify and manage the intellectual property relating to the project.

The Contract Director should have an understanding of the nature of the intellectual property that government may hold or receive in relation to the project, and should also understand the legal principles applying to the protection of that intellectual property.

Chapter 20 of the *Practitioners' Guide* presents an overview of the identification and treatment of intellectual property in *Partnerships Victoria* projects and outlines the interaction of the *FoI Act* and the protection of trade secrets. Only trade secrets or genuinely confidential information should be withheld from versions of the contracts which are disclosed.

The appropriate intellectual property management strategy will depend upon the nature of the intellectual property and the contractual provisions applying to it. The Contract Director should ensure that the Contract Administration Manual specifies the actions necessary to fulfil government's intellectual property obligations under the contract. Actions and processes that may be relevant include:

- ensuring confidential information is kept in secure storage and personnel are aware of its confidential nature
- restricting access to particularly sensitive information held by the government party so that only a select group of personnel can access it
- identifying confidential information as such in the government party's information management systems
- maintaining a register of all intellectual property affected by the project contract
- ensuring any licences and sub-licences of intellectual property are reviewed and renewed when necessary.

## The private party's intellectual property management

In monitoring the private party's fulfilment of its obligations under the contract (discussed in Chapters 6 and 7), the government party should monitor the private party's compliance with any obligations that relate to its possession and handling of government's intellectual property.

## Private sector confidential information held by government

The protection the law provides to confidential information depends on whether the information is private or public sector information. Confidential information in the private sector will generally be protected if disclosure would be detrimental to the owner of the information. In contrast, confidential information in the public sector generally will not be protected unless government can establish that disclosure is likely to injure the public interest. However, if the government party in a *Partnerships Victoria* project receives information from the private party, and government has a contractual obligation to keep that information confidential (for example, the information is 'commercial in confidence'), the government party must comply with that obligation unless it is subject to an overriding disclosure obligation.

## Confidential information and overriding disclosure obligations

The different levels of protection for confidential information in the public and private sectors do not detract from the private sector's concern that doing business with the government will result in public disclosure of information that the private party would prefer to keep confidential. This is partly because of government policy and partly because a contractual obligation to keep information held by government confidential can be overridden through various statutory means.

The Government's policy in relation to contract disclosure (discussed in Appendix H of this Guide and in Section 20.6 of the *Practitioners' Guide*) allows trade secrets and confidential information to be withheld from the versions of the contracts that are disclosed. However,

such information may be made public as a result of an application under the FoI Act (see Appendix H of this Guide and Section 20.6 of the *Practitioners' Guide* for a detailed discussion of the mechanism for disclosure). The Auditor General, the Ombudsman and Parliamentary Committees, under their statutory powers and functions, can also access and publish what would otherwise be confidential information.

Government policy in relation to confidential information and disclosure is discussed in detail in Chapter 22 of the *Practitioners' Guide*. Further information is available:

- in the Victorian Government Purchasing Board *Probity Policy and Guidelines* and on the VGPB website ([www.vgpb.vic.gov.au](http://www.vgpb.vic.gov.au))
- a whole-of-government policy in relation to intellectual property management is currently being developed within the Department of Innovation, Industry and Regional Development
- in Chapter 20 of the *Practitioners' Guide* (specifically in relation to intellectual property).

As confidential information may be made public through the Freedom of Information Act, or by the Auditor-General, the Ombudsman or Parliamentary Committees, a Contract Director should avoid giving the private party absolute assurances about the confidentiality that will be accorded to information the private party provides to government.

### *Further information*

Further information on the creation of a knowledge and information management strategy, incorporating a records management strategy, is available from:

- Chapter 10 of *A Guide to the Project Management Body of Knowledge*, 2000 edition, Project Management Institute, Newtown Square, USA
- the UK Office of Government Commerce website at:  
[www.ogc.gov.uk/sdtoolkit/reference/deliverylifecycle/delivery.html](http://www.ogc.gov.uk/sdtoolkit/reference/deliverylifecycle/delivery.html)
- Interim Australian Standard AS 5037 (int)-2003, from Standards Australia
- AS ISO 15489.1 Australian Standard Records Management Part 1: General
- AS ISO 15489.2 Australian Standard Records Management Part 2: Guidelines.

The government party can find further information on the use of electronic document management systems on the Victorian Electronic Records Strategy website at [www.prov.vic.gov.au/vers/projects/projects.htm](http://www.prov.vic.gov.au/vers/projects/projects.htm).

The Public Records Office of Victoria records management standards (which can be found at [www.prov.vic.gov.au](http://www.prov.vic.gov.au)) set out general requirements for records management standards.

# 11 Change management

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## 11.1 Introduction

During the lifecycle of a *Partnerships Victoria* project, there are likely to be a number of change events requiring proper management. These change events may have been contemplated at the time of procurement and provided for in the contract, or may relate to matters not contemplated during procurement but seen as desirable alterations to the output specifications or the contract. Change management involves similar issues to contingency planning, which is discussed in detail in Chapter 12 of this Guide. (Contingency planning concerns unplanned or unexpected events that threaten the ongoing provision of services.) Managing variations is also discussed in Section 13.3 of the *Practitioners' Guide*.

## 11.2 Change events

A key feature of *Partnerships Victoria* projects is the focus on the delivery of services according to an output specification. Consequently, the government party is not generally interested or wanting to influence the means of providing the services, so long as the services meet the output specification. Depending on the relationship between the parties and whether the requested output specification change results in increased cost to the operator, the government party may be able to agree with the private party to implement the changes. There are, nevertheless, a range of change events, some specified in the contract and some not, which the government party must manage during the project lifecycle.

### Events provided for in the contract

A *Partnerships Victoria* contract may provide for a variety of change events, including:

- transition from construction to service delivery stages
- transfer of assets at the end of the contract term



- changes in output specifications at the request of a party to the contract
- changes in payment amounts through benchmarking or other mechanisms.

## Events not provided for in the contract

Given the long-term nature of *Partnerships Victoria* projects, it is to be expected that, from time to time, one of the parties will seek an amendment to the project contract. By negotiating and agreeing to appropriate amendments, the parties can increase the likelihood that the relationship will adapt to changing circumstances and continue to be of mutual benefit to the parties.

## 11.3 Change control procedures

Changes in a *Partnerships Victoria* project, whether initiated by the private party, the government party or a third party, will be easier to deal with if appropriately prepared and if appropriate procedures are in place. In the case of changes provided for in the contract, the appropriate change control processes should have been included in the Contract Administration Manual for the project when this was prepared. (The Contract Administration Manual is discussed in detail in Chapter 6.) In the case of other changes, similar contract management issues arise and similar processes are required. The process for managing the other changes should also be incorporated in the Contract Administration Manual.

The issues that need to be considered in preparing any change management process for a *Partnerships Victoria* project include:

- Who can request a change?
- Who should be involved in assessing the impact of the change?
- Who can authorise the change?
- How is the change prioritised?
- How is implementation of the change controlled and tested?
- How is the change documented?

The change management process should establish a central point through which all changes are coordinated.

### Who can request a change?

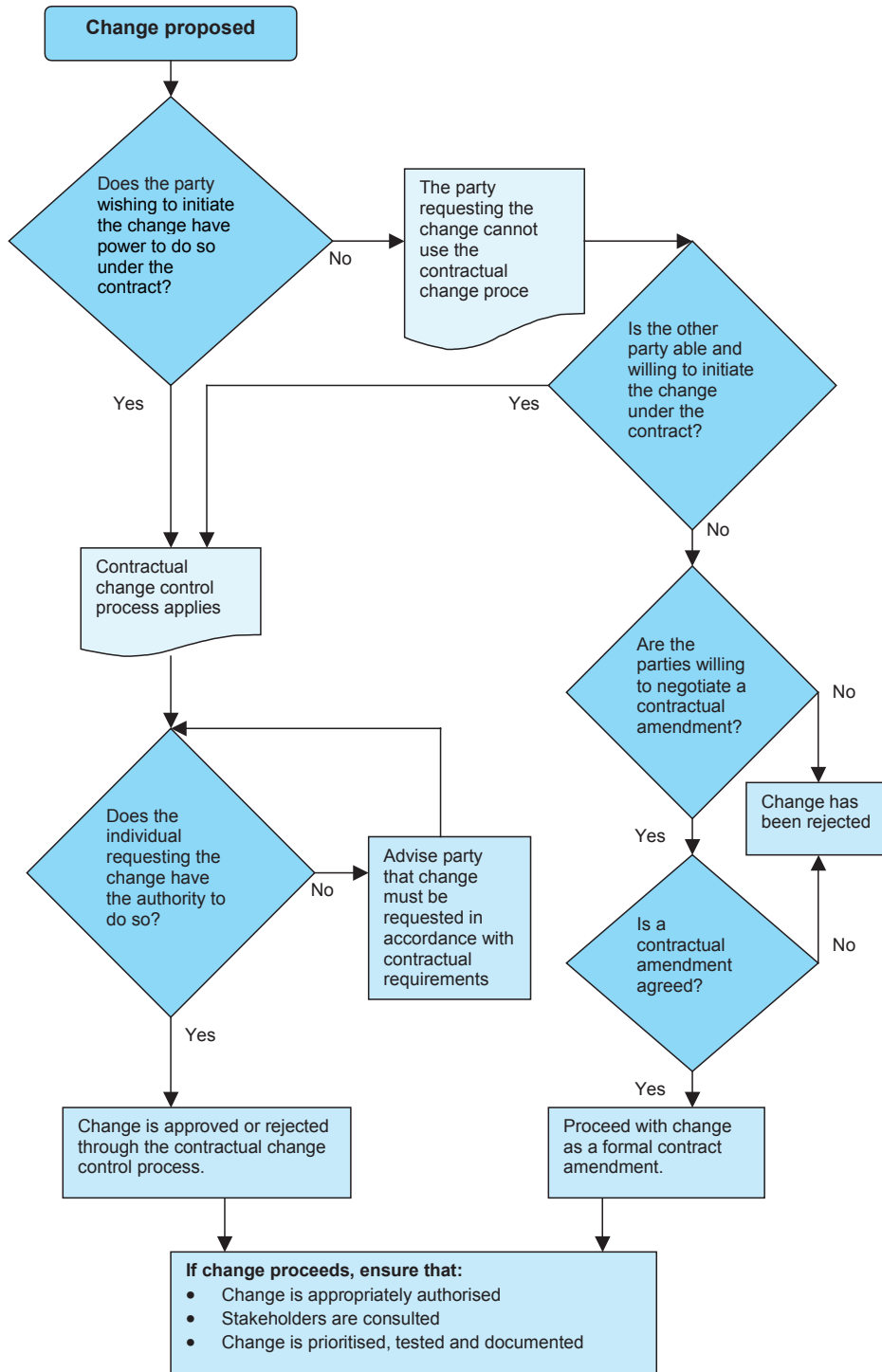
This question has two parts:

- **Does the party wishing to initiate the change have power to do so under the contract?** If the answer is 'yes' then the change control procedure in the contract should be followed. If the answer is 'no', the party wishing to initiate the change can still raise the proposed change with the other party, but the change will only proceed if the other party is willing and able to initiate the change through an acceptable change control procedure, or is willing to agree to the change as a variation of the contract.

- **Does the individual requesting the change have the authority to do so on behalf of the relevant party?** The government party should ensure that changes are only requested by those of its personnel authorised to do so (this is an aspect of governance, discussed in more detail in Chapter 9), and that change requests received from the private party comply with any contractual requirements specifying which of the private party’s personnel can request a change.

The flowchart (Figure 11.1) illustrates the steps in determining whether a change can be made through a contractual change control process, and who can request the change.

Figure 11.1: The process for initiating a change



The government party should carefully control additional demands placed on the private party. Most change requests should only be submitted through the Contract Director. However, it may be preferable in some instances for other personnel (for example, managers of the end users of the services) to have limited authority to submit and manage change requests within specified budgetary and technical constraints, as agreed by the Contract Director.

## Who should be involved in assessing the impact of the change?

There may be a range of individuals in the government party and other government stakeholders who should be consulted to fully assess the impact of a proposed change. In addition, it may be appropriate to work jointly with the private party to assess the potential impact of the change.

In assessing any change request, careful consideration should be given to the impact of the change on other contract management tools. For example, some performance measures may become irrelevant if one output specification is changed. In these circumstances, the government party should consider whether an amendment to the contract to introduce a new performance measure would be appropriate. The Contract Administration Manual should also be updated to take account of each change. Furthermore, variations in output requirements which increase costs can lead to price variations and compromise value for money outcomes from the project.

## Who can authorise the change?

Contractual changes may have to be authorised or approved by a person other than the person who requested the change. Responsibility for authorising different types of change may rest with different people. In the case of contractual amendments, the amendment should be authorised by each party according to relevant legislative, regulatory and governance requirements. (Governance is discussed in detail in Chapter 9.) However, where a project contract has been given the effect of force of law through legislation (for example, the *Melbourne City Link Act 1995*), changes to the contract may only be made by Parliamentary amendments unless the Act provides some other change mechanisms. Managing change processes under such contracts requires special consideration. Wherever possible, the Act should incorporate contractual change mechanisms (for example, provisions for regulatory change) to give effect to what can be classified as essentially 'housekeeping' or non-substantive events (for example, increasing prices in line with indexation provisions).

Changes that create budgetary or risk allocation issues normally need to be approved by the Treasurer (through the Department of Treasury and Finance).

## How is the change prioritised?

Some changes may require significant work and outlay to implement. For example, a change may mean the private party has to alter the facilities used to provide services. There must be some means of determining how the change is prioritised with other work carried out by the private party. A variety of methods can be used to prioritise appropriately, depending on the nature of the change. Possible methods include:

- imposing a time limit for implementing the change
- specifying that it be given priority over certain other responsibilities of the private party
- providing financial incentives for implementing the change

## How is implementation of the change controlled and tested?

What was intended to be a minor change to services may, if not properly implemented, compromise the delivery of the services as a whole. For example, if a private party provides communications services, a poorly implemented upgrade to the communications hardware used to provide those services may cause the hardware to cease functioning. Consequently, the implementation of changes should be carefully controlled and, where appropriate, the changes should go through a rigorous testing process before being fully implemented. Any control and testing process specified in the contract should be highlighted in the Contract Administration Manual.

For major change processes, including transfer of the project assets back to government at the conclusion of the contract term, the parties should jointly develop and agree on a detailed implementation plan for the change (in some circumstances referred to as a transition plan). Development of the plan should commence well in advance of implementation. A copy of the plan should be included as an appendix to the Contract Administration Manual.

Suitable testing processes will depend on the nature of the services concerned. Any acceptance testing procedure used for commissioning the project may be a useful guide. For change control processes within the contract, the process should specify the appropriate testing process.

## How is the change documented?

Both the specifications of the change itself, and correspondence and discussions with the private party in relation to the change, should be fully documented and kept to avoid subsequent disputes as to what was agreed. This is an aspect of appropriate communication planning and management, which is discussed in detail in Chapter 8.

It is vital that changes modifying a *Partnerships Victoria* contract are documented as formal amendments to the contract. Where the change is negotiated between the parties, rather than made to follow a procedure in the contract, the change should be negotiated on the basis that the amendment will not be effective unless and until it is formally agreed. The parties should not rely on informal agreements for non-compliance with the terms of the contract. However, occasionally a proposed amendment will impose no new or additional obligations on the government party, and will not relieve the private party of its existing obligations. In these circumstances, it may be appropriate for the parties to treat the amendment as being effective before the formal documentation is executed.

As noted above, major change processes require a detailed implementation plan, which should be documented well in advance of implementation and should be included as an appendix to the Contract Administration Manual.

## 11.4 Change and contractual risk allocation

It is important that contractual changes do not inadvertently undermine the original contractual allocation of project risks established during the procurement process. Changes over time to the project and its external environment may result in attempts by the private party to shift the overall allocation of project risk or transfer particular risks. For example, if changed circumstances necessitate a change in output specifications for services, the private party may ask the government party to approve its proposed method of meeting those changed circumstances. If the government party gives such an approval, it may inadvertently take back the risk that the private party's service delivery methods are unable to meet the output specifications. While approvals of such changes should not be given, the Contract Director may seek prior access to proposals so that proposals can be opposed if necessary.

An adjustment in project risk allocation is an acceptable outcome of a change process in some circumstances. For example, the private party may be able to offer the government party a better value for money proposition if a risk borne by the private party is reallocated to the government party. However, this reallocation should entail a corresponding reduction in the service charges the government party pays to the private party. Any proposal of this type should be carefully analysed by the government party in conjunction with representatives from the Department of Treasury and Finance. A cost-benefit analysis can assist in analysing such a proposal.

## 11.5 Change and succession planning

Continuity of key personnel is particularly important during the major change processes of a *Partnerships Victoria* project lifecycle. These processes can significantly increase demands on the government party's contract management staff, as well as temporarily increasing the level of risk inherent in the project. Consequently, future change management activities for a project should be factored into the succession plan for the key government party personnel involved.

# 12 Contingency planning

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## 12.1 Introduction

Contingency planning is vital to a *Partnerships Victoria* project because, as discussed in Section 2.3, it may not be possible to fully transfer responsibility for the risk of service delivery failure to the private party. If the private party fails to deliver services as required under the contract, the government party may face significant reputational damage, and the failure may inconvenience end users and possibly other third parties. In addition, force majeure regimes may relieve the private party of its obligation to provide services, but the government party may be compelled or subject to strong pressure to ensure the public or other third parties are not inconvenienced.

## 12.2 Potential contingency events

The range of contingency events that may occur will vary from one *Partnerships Victoria* project to another. Generally, contingency events can be divided into three overlapping categories:

- **events that interrupt service delivery but do not involve default by the private party:** for example, force majeure events
- **events that interrupt service delivery and involve a default by the private party:** for example, the private party fails to maintain the facility as required by the contract, and consequently fails to deliver services meeting the output specifications.
- **private party defaults that do not result in an interruption to service delivery:** such defaults could include failure by the private party to maintain professional indemnity insurance as required by the contract, and subsequent insolvency of the private party because of a negligence claim.

The government party should identify all significant potential contingency events in a *Partnerships Victoria* project so that appropriate contingency plans can be established and maintained. The potential contingency events should be identified through the information collection and analysis process discussed in Chapter 5.

## 12.3 Contingency processes

There are three primary (and overlapping) contingency processes relevant to *Partnerships Victoria* contracts:

1. **Business continuity and disaster recovery planning** in preparation for any interruption to service delivery
2. **Step-in planning** in preparation for the exercise of any step-in rights in the *Partnerships Victoria* contract, whether as a result of an interruption to service delivery, a default by the private party, or another event negotiated as a step-in trigger
3. **Default planning** in preparation for any default by the private party.

As step-in rights and rights upon default are specified in the contract, step-in and default plans should form part of the Contract Administration Manual (discussed in detail in Chapter 6). Business continuity and disaster recovery plans may also be incorporated into the body of the Contract Administration Manual, although in some cases it may be preferable for them to form part of the government party's wider business continuity and disaster recovery plans. If there are separate business continuity and disaster recovery plans, up-to-date copies of these should be included as an appendix to the Contract Administration Manual.

There may be contingency events that are not covered by a business continuity plan, disaster recovery plan, step-in plan or default plan. In these circumstances, the government party should consider how planning for the contingency can best be integrated into the overall contract management framework for the project. The Contract Administration Manual should incorporate the plans developed for the contingency.

### Business continuity and disaster recovery planning

Business continuity planning in a *Partnerships Victoria* project is a tool to mitigate the impact – on the government party, other government stakeholders, and the public – of an interruption to the provision of the services specified in the contract. Disaster recovery planning, in this context, is a similar tool used to restore critical service functions following an event with a catastrophic impact on the project.

It is generally necessary in a *Partnerships Victoria* project for each party to establish and maintain a business continuity plan, and for the private party to establish and maintain a disaster recovery plan. However, the risk to government of catastrophic events may be sufficiently controlled through the government party's normal business continuity processes, applied simultaneously with the private party's disaster recovery plan. The risk of catastrophic events may not always justify the government party having a separate disaster recovery plan. Where the government party itself provides services that are dependent upon the private party's provision of the contracted services and that cannot be provided through other means, it is more likely that the government party will require a disaster recovery plan. This is because, in these circumstances, catastrophic events will impact on government's ability to itself deliver services, not just the private party's delivery of the contracted services.

The following table outlines the key differences between a business continuity plan and a disaster recovery plan in the context of a *Partnerships Victoria* project.

**Table 12.1: Business continuity and disaster recovery plans – key differences (Partnerships Victoria projects)**

	Business continuity plan	Disaster recovery plan
<b>Aim</b>	<ul style="list-style-type: none"> <li>To prevent and mitigate impacts on government and users by interruptions to service delivery</li> </ul>	<ul style="list-style-type: none"> <li>To restore critical service functions following a catastrophic event</li> </ul>
<b>Scope</b>	<ul style="list-style-type: none"> <li>Generally relevant to the government party in all <i>Partnerships Victoria</i> projects, as these projects involve delivery of services to, or on behalf of, government</li> </ul>	<ul style="list-style-type: none"> <li>Not required for the government party in all <i>Partnerships Victoria</i> projects, as restoring critical service functions may be entirely within the private party's control</li> </ul>
<b>Testing</b>	<ul style="list-style-type: none"> <li>Can be tested in a planned way</li> </ul>	<ul style="list-style-type: none"> <li>Can be 'walked-through', but often cannot be fully tested</li> </ul>

In many instances, the government party will provide core services, or will have its own facilities through which it provides services similar to those provided by the private party under a *Partnerships Victoria* contract. (For example, a government health services authority may receive hospital accommodation services from a private party under a *Partnerships Victoria* contract, and may also operate and maintain other hospitals without private sector involvement.) The government party should already have a business continuity plan and may have a disaster recovery plan in place for the services it provides. The business continuity and disaster recovery plans relating to the *Partnerships Victoria* project can build on these existing plans.

### *Developing a business continuity plan*

In developing a business continuity plan, the government party should bear in mind that the plan will be activated at short notice in circumstances in which the personnel responsible for the plan's implementation may be under significant pressure. Consequently, the plan should be short, clear, easily understandable and easily available.

The key issues to consider in developing and maintaining a business continuity plan in the context of a *Partnerships Victoria* project include:

- What are the potential events that may trigger activation of the business continuity plan?
- What immediate actions should be taken to respond to an interruption to service delivery, before taking steps to stabilise or restore critical services?
- How should various components of the services be prioritised under the business continuity plan?
- What are the time periods or targets for stabilising or restoring critical components of the services?
- What service specifications and service level targets should be set for each critical component of the services under the business continuity plan? Have relevant stakeholders been informed that these specifications and targets will apply while operating under business continuity plan conditions? In some cases during such temporary operating conditions, acceptable service specifications and service levels may be less stringent than those imposed on the private party in the relevant *Partnerships Victoria* contract.



- What are the roles and responsibilities of the government party personnel responsible for activating and implementing the business continuity plan? Do these personnel understand their roles and responsibilities? Do they have appropriate delegated authority for their roles and responsibilities?
- Who is authorised to activate the plan?
- What resources are required to implement the business continuity plan for each critical component of the services? How will these resources be mobilised?
- What information is required when implementing the business continuity plan? (These information requirements should be considered when developing the government party's knowledge and information management strategy, discussed in Chapter 10.)
- What communications are required to activate and implement the business continuity plan?
- What communications to stakeholders, the public and the private party are required when the business continuity plan is implemented? A pro-active communication strategy can prevent the government party becoming inundated with incoming queries from concerned end users, the public and the media.
- How will the government party exit from the business continuity plan? This may be by the private party restoring services, consistent with the output specification, or by establishing an ongoing source of alternative services.
- Is the business continuity plan available to the people who need to invoke it?
- Is the business continuity plan integrated with business continuity plans for core or similar services provided by the government party?
- How and when will the business continuity plan be tested? Testing is essential to ensure the business continuity plan can be implemented as planned and personnel are familiar with its operation.

### *Developing a disaster recovery plan*

If a disaster recovery plan is required, the process for preparing it is similar to that for a business continuity plan. However, in preparing a disaster recovery plan, the government party should bear in mind the different purpose and context of this plan, as outlined in the comparison above between business continuity and disaster recovery plans.

### *The private party's business continuity and disaster recovery plans*

A *Partnerships Victoria* contract should oblige the private party to maintain its own business continuity and disaster recovery plans. It is important that the parties have a basic understanding of one another's plans for these events. This way, should services be interrupted, they are not working at cross-purposes in seeking to restore the services or mitigate the effects of a catastrophic event. Where a degree of coordination appears necessary, the parties should also cooperate in testing their business continuity and disaster recovery plans.

## Step-in planning

Most *Partnerships Victoria* contracts give the government party a right to 'step in' in certain circumstances and temporarily enter or take control of the private party's facilities used to provide services. Contractual issues in relation to step-in are discussed in detail in Chapter 25 of the *Risk Allocation and Contractual Issues* guide. Careful planning is required to put government in a position to effectively exercise step-in rights should the need arise, and then step out.

If step-in rights enable the government party to restore or maintain service delivery, step-in planning is a specialised form of business continuity planning. For example, step-in rights may be available if a force majeure regime excuses the private party from its obligation to deliver the services, and the government party is in a position to restore or maintain the services but the private party is not able to do so. A critical part of step-in planning is planning how and when to step out without creating legal problems.

If step-in rights are available where there has been a default by the private party, step-in planning overlaps with default planning. (Default planning is discussed later in this chapter.)

Where step-in rights exist in a *Partnerships Victoria* contract, a step-in plan should be developed in conjunction with (and possibly as part of) the business continuity and default plans for the project. It is unlikely that a detailed step-in plan covering all circumstances can be developed, but the basic requirements can be addressed.

### *Developing a step-in plan*

Issues to consider in developing a step-in plan include:

- What are the events that can trigger the government's step-in rights?
- What contractual conditions must be satisfied before the step-in rights can be exercised?
- What are the roles and responsibilities of the government party personnel responsible for activating and exercising step-in rights? Do these personnel understand their roles and responsibilities? Do they have appropriate delegated authority for their roles and responsibilities? What are the limits within which step-in rights are exercisable?
- What internal authorisations are required before exercising step-in rights?
- What third-party acknowledgements or consents might be needed to enable the government party to effectively exercise its step-in rights? Should those consents be obtained in advance of any step-in situation arising?

This should be discussed with the government party's legal advisers at the time the step-in rights are negotiated. Should a step-in situation arise, the government party must act quickly and cannot waste time satisfying the private party's landlords and suppliers of the existence of those rights and the scope of the government party's authority.

Consequently, it may wish to seek an acknowledgment of the existence of the step in rights from those landlords and suppliers, together with any necessary consent, before any step-in situation arises.

- What obligations and liabilities may be incurred in exercising step-in rights? Is adequate insurance in place? Has the risk of public sector employees being deemed to be directors of the private party for *Corporations Act 2001* (Cwlth) purposes been considered? (The Corporations Act provides that certain people involved in the management of companies

may be deemed to be directors of the company. This creates risks for the individuals concerned. During the procurement process, the government party should seek confirmation that the exercise of step-in rights in the context of a particular project will not result in public sector employees being deemed to be directors of the private party.)

- What are the taxation consequences of exercising step-in rights? Step-in may have significant taxation consequences for the private party. These consequences may affect the future of the project or result in taxation costs being passed back to government. Advice should be sought from government's tax advisers at the time the step-in rights are negotiated.
- What resources are required to implement the step-in plan? Does the government party have access to sufficient skilled personnel to enable it to effectively exercise its step-in rights? How will resources and personnel be mobilised?
- What information is required when implementing the step-in plan? (These information requirements should be considered when developing the government party's knowledge and information management strategy, discussed in Chapter 10.)
- What communications are required to activate and implement the step-in plan?
- What communications to stakeholders and the public are required when step-in rights are exercised? A pro-active communication strategy can prevent the government party becoming inundated with incoming queries from concerned end users, the public and the media.
- How will government 'step out'? Is step-out possible or feasible in this project?
- Can government step in and not step out? If so, can it (from both legal and practical perspectives) re-tender the project? Should government step in and not step out?
- Is the step-in plan available to the people who need to invoke it?

Generally, it is not possible to fully test a step-in plan. However, consideration should be given to 'walking through' a range of step-in scenarios as a means of testing the plan's validity.

## Default planning

*Partnerships Victoria* contracts generally give government the right to invoke a default provision if the private party fails to meet its contractual obligations in a material way. Contractual issues in relation to default are discussed in detail in Chapter 26 of *Risk Allocation and Contractual Issues* guide.

While it is fundamental that a *Partnerships Victoria* project be treated as a mutually beneficial relationship between the parties, the government party must adequately prepare for any default by the private party.

A default plan for a *Partnerships Victoria* contract should be developed in conjunction with the business continuity plan for the project and (if government has step-in rights) the step-in plan.

### *Developing a default plan*

In developing a default plan, the government party should bear in mind that it may have to activate the plan at short notice in circumstances in which the personnel responsible for the plan's implementation may be under significant pressure. Consequently, the plan should be short, clear, easily understandable and easily available. The plan should form part of or be an appendix to the Contract Administration Manual.

The key issues to consider in developing and maintaining a default plan for a *Partnerships Victoria* project include:

- What are the potential default events?
- To what extent does each default event affect the provision of the services, both immediately and in the longer term?
- What time periods (if any) must expire before the government party can act in response to the default? Are there cure periods available to the private party (or its financiers)?
- What remedies are available under the contract? What are the potential consequences of each remedy?
- What are the roles and responsibilities of the government party personnel responsible for activating and implementing the default plan? Do they understand their roles and responsibilities?
- What resources are required to implement the default plan? How will these be mobilised?
- What information is required when implementing the default plan? (These information requirements should be considered when developing the government party's knowledge and information management strategy, discussed in Chapter 10.)
- What communications are required to activate and implement the default plan?
- What communications to stakeholders, the public and the private party are required when the private party is in default? A pro-active communication strategy can prevent the government party becoming inundated with incoming queries from concerned end users, the public and the media.
- How will the government party exit from the default process? This may be through a return to 'business as usual' service provision by the private party, a negotiated outcome, termination of the contract, or another outcome specified in the contract.
- Is the default plan available to the people who need to invoke it?
- What notices have to be given to clear away any estoppels or waivers which have arisen in contract management?
- Are there any duties of good faith applicable? If so, what notices do these duties require government to give before it can take further action?

### *Responding to trivial defaults*

Not every default necessarily justifies the government party seeking the full remedies provided for in the contract. The action taken under the default plan needs to be determined in light of the overall relationship with the private party.

In some instances, it may be appropriate to take no action in response to a particular default. However, in doing so, the government party should be careful not to give up its right to act freely in respect of future defaults of the same kind or of any other kind, or in respect of other existing defaults. It should avoid informal waivers. The government party should seek legal assistance in preparing a written waiver letter. If the government party wants to be able to act freely in respect of future defaults, the waiver letter should clearly communicate to the private party that:

- the private party was in default under the contract
- in this particular instance, the government party has chosen not to take action
- the private party will be expected to fully comply with the contract in future
- future defaults may result in the government party taking any action available to it under the contract.

If the government party is willing to give up the right to take any action relating to similar future defaults, this should be documented as a variation to the contract or waiver of the right to act in that instance.

## 13 Ongoing review

### Developing the Contract Administration Manual

⇒ Planning, information collection and analysis	Chapter 5
⇒ Contract administration	Chapter 6
⇒ Performance reporting and monitoring	Chapter 7
⇒ Relationship management, dispute resolution and issue management	Chapter 8
⇒ Governance, probity and compliance	Chapter 9
⇒ Knowledge and information management	Chapter 10
⇒ Change management	Chapter 11
⇒ Contingency planning	Chapter 12
⇒ <b>Ongoing review</b>	

### 13.1 Introduction

Contract management processes must change and adapt throughout the lifecycle of a *Partnerships Victoria* contract, as the project will be subjected to:

- divergence between the party's expectations and actual project outcomes
- changes in the project itself – through change events, as a result of contingency events, or as a result of the project moving from one stage in its lifecycle to another
- changes in the external environment in which the project operates.

As part of its overall contract management strategy for the project, the government party should establish a process for ongoing review of its contract management tools and processes.

### 13.2 Keeping knowledge and information up to date

Just as comprehensive information collection, analysis and management provides the initial foundation for understanding the risks involved in a *Partnerships Victoria* project and developing effective contract management strategies, keeping that information up to date is a necessary foundation for ongoing review of the project's contract management framework.

Knowledge and information gathered through the project lifecycle should be used in conducting regular reviews of the project's risk profile. Chapter 10 Knowledge and information management outlines various considerations relevant to review of knowledge and information throughout the project. These reviews should consider:

- whether new risks have emerged. (This requires a consideration of the entire project context, including the business and policy context.)
- whether the likelihood or severity of existing risks has changed significantly
- whether there has been any intended or unintended shift in the allocation of a risk
- whether existing risk controls and mitigants remain effective
- whether any new risk controls and mitigants should be implemented.

### 13.3 Review and testing of existing plans, processes and tools

Using up-to-date knowledge of the project's risk profile, the government party should regularly review and test (where appropriate) its individual contract management processes and tools.

Issues to consider in reviewing such a process or tool include all those issues considered in originally developing it, together with the following:

- **Do assumptions remain correct?** Have there been any changes in the underlying assumptions on which the process or tool was based? (For example, while it may be correct to assume that the private party has a strong incentive to fulfil its maintenance obligations early in the contract term, this assumption may not hold toward the end of the contract term, and closer monitoring of maintenance performance may be appropriate at that time.)
- **Are resources adequate?** What resources are required to effectively use the process or tool should a risk materialise in the future? Does the government party have these resources?
- **Have contract management tools and processes been effective?** If risks have materialised and were managed using the process or tool, how effective was it? (See the discussion below in relation to 'lessons learned'.)

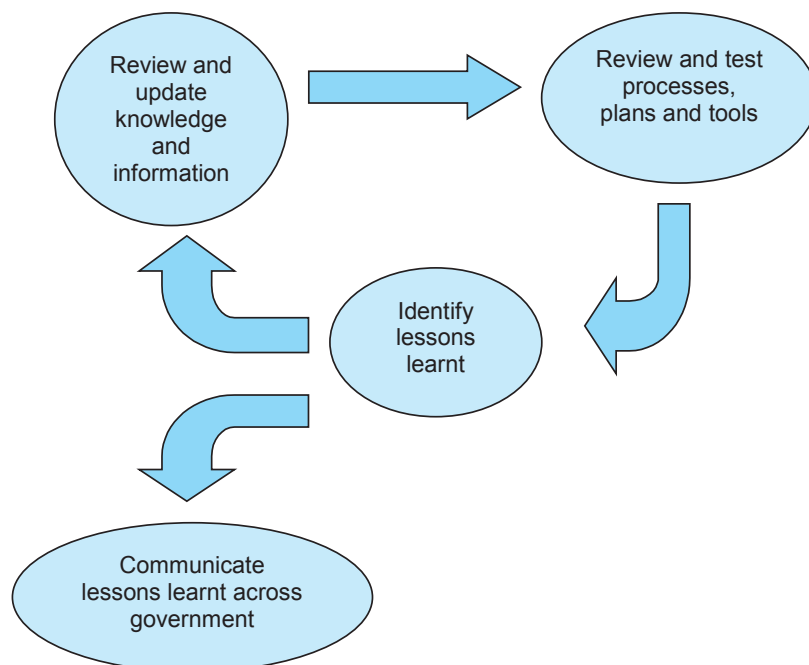
A useful part of the ongoing review process is a regular stocktake of issues to identify trends, reassess risks, and review the effectiveness of processes for dealing with those issues.

### 13.4 Identifying and recording 'lessons learned'

Identifying and recording 'lessons learned' is both an information collection process and a contract management review process. By identifying risks that have materialised and their consequences, the government party deepens its understanding of the likelihood and severity of the risk. By examining the contract management strategies used to control and mitigate that risk, it can assess the effectiveness of that strategy and identify potential improvements.

The Department of Treasury and Finance, through the Contract Directors' forum, which is part of the *Partnerships Victoria* contract management framework, will assist in communicating lessons learned across government.

**Figure 13.1: The ongoing review process**



## 13.5 Formal review of the project and outcomes

A formal review of the project and its outcomes, including the appropriateness of the KPIs, should be completed in the first year after commissioning. The review should start as early as possible, to take advantage of the availability of the procurement team.

The formal review may establish that the actual project circumstances differ from the circumstances jointly expected by the parties at the time of contract execution. If so, the government party should consider:

- whether the consequences of the unexpected circumstances should be borne according to the contractual allocation of project risk; or
- whether an amendment to the contract should be negotiated to better ensure the achievement of the project objectives.

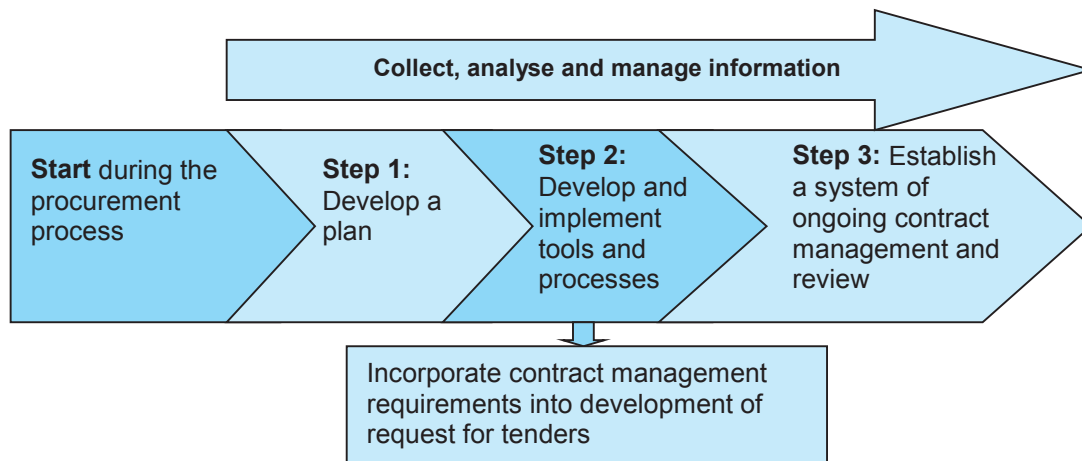
For example, it may be appropriate to recalibrate the KPIs documented in the contract to ensure they are meaningful and relevant to the project.



# 14 Where to from here?

To develop and implement an effective contract management strategy, contract management teams should follow the three-step process outlined in Chapter 4.

**Figure 14.1: Three steps for developing and implementing the contract management strategy**



## 14.1 Preliminary tasks

To be effective, the development of an effective contract management strategy should have begun early in the procurement process. Three preliminary tasks to be undertaken before commencing the three-step process are:

1. **Appoint the inaugural Contract Director:** The Contract Director, and the contract management team, should be enrolled in, or should have previously completed, the contract management training established by the Department of Treasury and Finance. This training will provide the Contract Director with skills to assist them to implement effective contract management.
2. **Identify and secure resources:** The government party must make available sufficient resources, including financial and human resources, for the development of the contract management strategy, tools and processes during the procurement period. In addition, resourcing requirements for contract management over the contract term should be incorporated into the business case for the project and ongoing funding approved.
3. **Contract Director's authority:** The government party must ensure that the Contract Director has sufficient authority to manage the contract. (See the discussion of delegated authority in Section 9.5 of this Guide.)

## 14.2 Contract management issues should be reflected in the draft contract

The development of contract management tools and processes needs to begin early enough in the procurement process to enable contract management requirements to be included in the draft contract developed by the government party. The tools and processes that depend to some extent on the inclusion of appropriate contractual provisions include:

- **Performance monitoring and reporting** , as the private party's reporting obligations should be set out in the contract (see Chapter 7)
- **Relationship management**, as the contract will generally set out particular communication channels and inter-party committees or forums (see Section 8.2)
- **Issue management**, as the contract will generally set out an issue management process (see Section 8.3)
- **Dispute resolution**, as the contract will generally set out dispute resolution procedures (see Section 8.3)
- **Change management**, as change control procedures and restrictions on changes may be set out in the contract (see Chapter 11)
- **Contingency planning**, as rights on default and step-in are set out in the contract (see Chapter 12 of this Guide)
- **Governance, probity and compliance** , as government's ability to implement appropriate governance, probity and compliance practices requires that certain matters be dealt with in the contract (see Chapter 9.)
- **Knowledge and information management** , as it may be necessary to impose record-keeping obligations on the private party to enable the government party to fulfil its own obligations (see Chapter 10.)

## 14.3 Assistance from the Department of Treasury and Finance

Assistance with contract management planning and development is available, on request, from the Department of Treasury and Finance and via the website, [www.partnerships.vic.gov.au](http://www.partnerships.vic.gov.au).

## 14.4 Contract management training

The training program established and maintained by the Department of Treasury and Finance is an integral part of the *Partnerships Victoria* contract management framework. The training supplements this Guide. It will develop the 'soft' competencies that are essential for the successful application of the tools and processes described in this Guide.

As noted in Section 3.10 of this Guide, the training is mandatory for Contract Directors and their contract management teams within six months of taking up their positions. The government party should take this requirement into account when appointing the inaugural Contract Director for a project and establishing the contract management team.

# Templates



# Template A: Contract management processes and tools

## 1. Templates in this Guide

Template	Title	Relevant chapter
Template B	Contract management plant template	Chapter 5 (Planning, information collection and analysis)
Template C	Risk matrix template	
Template A, Section 3	Risk issues and related contract management tools and processes	
Template D	Contract administration actions template	Chapter 6 (Contract administration)
Template E	Contract administration manual outline	
Template F	Methodology for preparing the Contract Administration Manual	
Template G	KPI Template	Chapter 7 (Performance reporting and monitoring)
Template H	Construction stage reporting guidelines	
Template I	Service delivery stage reporting guidelines	
Template J	Finance reporting guidelines	
Template K	Payment reporting guidelines	
Template L	Sample issues register template	Chapter 8 (relationship management, dispute resolution and issue management)
Template M	Sample decision and issue escalation	
Template N	Sample dispute resolution procedure	
Template O	Sample delegations register	Chapter 9 (Governance, probity and compliance)

## 2. Other processes and tools discussed in this Guide

Process or tool	Relevant chapter
Cabinet provided with contract management plan Records management technology	Chapter 5 (Planning, information collection and analysis)
Analysis of business case and Project Brief Audited accounts Credit analysis Dividend monitoring Exception reporting Financial model Financier's reporting requirements Flow charts Industry analysis Interviews with procurement team Macro environmental analysis Operational and special audits Organisational charts Physical inspections Probability analysis Product/Market analysis Public Sector Comparator Rating agency ratings Scenario analysis Sensitivity analysis Strategic issue analysis Trends analysis User feedback	Chapter 7 (Performance reporting and monitoring)
Communication plan Joint review and improvement team Records of conversations/Minutes of meetings SWOT analysis	Chapter 8 (Relationship management, dispute resolution and issue management)
Compliance procedures manual Compliance program Delegations and authorities Identifying and recording roles and responsibilities Probity plan Succession planning	Chapter 9 (Governance, probity and compliance)

Process or tool	Relevant chapter
Knowledge and information management strategy	Chapter 10 (Knowledge and information management)
Change control procedures Contract variation register Testing process Transition plan	Chapter 11 (Change management)
Business continuity plan Default plan Step-in plan	Chapter 12 (Contingency planning)
Review of contract management tools and processes Stocktake of issues	Chapter 13 (Ongoing review)

### 3. Risk issues and related contract management tools and processes

Risk issue	Tool or process	Chapter/Source
Risk	<ul style="list-style-type: none"> <li>Information collection and analysis</li> <li>Contract administration</li> <li>Knowledge and information management</li> </ul>	Chapter 5 Chapter 6 Chapter 10
Has the risk/risk allocation altered since the signing of the contract?	<ul style="list-style-type: none"> <li>Governance of change management process</li> <li>Ongoing review</li> </ul>	Chapter 11 Chapter 13
What is the likelihood of the risk occurring?	<ul style="list-style-type: none"> <li>Risk analysis</li> </ul>	Chapter 2 & Section 5.4
Who is responsible for averting the risk?	<ul style="list-style-type: none"> <li>Contract administration</li> </ul>	Chapter 6
What needs to be done to avert the risk?	<ul style="list-style-type: none"> <li>Contract administration</li> </ul>	Chapter 6
How will it be done?	<ul style="list-style-type: none"> <li>Contract administration</li> <li>Audit of private party's quality management system</li> </ul>	Chapter 6 Chapter 8
When must it be done?	<ul style="list-style-type: none"> <li>Project timetable/ milestones</li> </ul>	<i>Practitioners' Guide</i>
What do we need to do?	<ul style="list-style-type: none"> <li>Contract administration</li> </ul>	Chapter 6
Do we need to monitor compliance?	<ul style="list-style-type: none"> <li>Risk analysis</li> <li>Governance, probity and compliance</li> </ul>	Chapter 2 & Section 5.4 Chapter 9
How do we know if the private party has complied?	<ul style="list-style-type: none"> <li>Performance monitoring</li> <li>Reporting mechanisms</li> </ul>	Chapter 7 Chapter 7
What do we need to do to avert the risk?	<ul style="list-style-type: none"> <li>Contract administration</li> </ul>	Chapter 6
Do we have the authority, power, resources and expertise?	<ul style="list-style-type: none"> <li>Budget</li> <li>Delegations register</li> <li>Succession planning</li> <li>Allocation of roles and responsibilities to contract administration staff</li> </ul>	Chapter 9 Chapter 9 Chapter 9 Chapter 9
What are the consequences if the risk eventuates?	<ul style="list-style-type: none"> <li>Contract administration</li> <li>Risk analysis</li> <li>Default plan</li> </ul>	Chapter 6 Chapter 2 & Section 5.4 Chapter 12
What is the magnitude of the consequences if the risk occurs?	<ul style="list-style-type: none"> <li>Risk analysis</li> </ul>	Chapter 2 & Section 5.4
How do we mitigate the consequences?	<ul style="list-style-type: none"> <li>Issue management procedures</li> <li>Contingency plan</li> </ul>	Section 8.3 Chapter 12
Who else is affected by the risk eventuating	<ul style="list-style-type: none"> <li>Stakeholder communication and consultation plan</li> </ul>	Chapter 9
What should we do if the risk eventuates?	<ul style="list-style-type: none"> <li>Contract administration</li> <li>Contingency plan</li> <li>Business continuity plan</li> <li>Disaster recovery plan</li> <li>Step-in plan</li> </ul>	Chapter 6 Chapter 12 Chapter 12 Chapter 12 Chapter 12
What sanctions, remedies are available?	<ul style="list-style-type: none"> <li>Contract administration</li> </ul>	Chapter 6



Risk issue	Tool or process	Chapter/Source
Who do we tell?	<ul style="list-style-type: none"><li data-bbox="746 241 986 271">• Escalation procedures</li><li data-bbox="746 275 1061 304">• Internal reporting mechanisms</li></ul>	Chapter 8 Chapter 9

# Template B: High level Contract Management Plan template

(See Section 5.2 for more on the contract management planning process.)

Issue	Control/Mitigation strategy			Tools/Processes to be used	Review strategy
	Who?	What?	When?		
Contract management not put into practice	<ul style="list-style-type: none"> <li>Contract Director</li> </ul>	<ul style="list-style-type: none"> <li>Develop overall contract management strategy; Identify risks and controls/mitigants</li> </ul>	<ul style="list-style-type: none"> <li>By [date]</li> </ul>	<ul style="list-style-type: none"> <li>This contract management strategy document</li> <li>Risk register</li> </ul>	<ul style="list-style-type: none"> <li>Contract Director to review [regularly]</li> </ul>
	<ul style="list-style-type: none"> <li>Senior management of government party</li> </ul>	<ul style="list-style-type: none"> <li>Sign off on this contract management strategy and commit to its implementation</li> </ul>	<ul style="list-style-type: none"> <li>By [date]</li> </ul>		
Inadequate understanding of contract	<ul style="list-style-type: none"> <li>Contract Director</li> </ul>	<ul style="list-style-type: none"> <li>Prepare Contract Administration Manual</li> </ul>	<ul style="list-style-type: none"> <li>By [date]</li> </ul>	<ul style="list-style-type: none"> <li>Contract Administration Manual</li> </ul>	<ul style="list-style-type: none"> <li>Contract Director to review [regularly]</li> </ul>
Inadequate performance monitoring	<ul style="list-style-type: none"> <li>Contract Director</li> </ul>	<ul style="list-style-type: none"> <li>Prepare reporting framework</li> </ul>	<ul style="list-style-type: none"> <li>By [date]</li> </ul>	<ul style="list-style-type: none"> <li>Performance reporting framework</li> </ul>	<ul style="list-style-type: none"> <li>Contract Director to review [regularly]</li> </ul>
		<ul style="list-style-type: none"> <li>Implement reporting framework</li> </ul>	<ul style="list-style-type: none"> <li>By [date]</li> </ul>		
	<ul style="list-style-type: none"> <li>DTF</li> </ul>	<ul style="list-style-type: none"> <li>Approve reporting framework</li> </ul>	<ul style="list-style-type: none"> <li>By [date]</li> </ul>		
etc.					

## Template C: Simple risk matrix template

(See Section 5.4 for more on analysing information, including information about risks.)

Risk category	Description	Consequence	Likelihood	Severity	Allocation	Mitigants and controls (Note 1)
		<b>Sample only</b>				

Note 1: Although a risk may be contractually allocated to the private party, for contract management purposes the government party needs to consider mitigants and controls for any residual risk to government and controls to prevent inadvertent take-back of the allocated risk. (Residual risk to government and take-back risk are discussed in Section 2.3 of this Guide.)

# Template D: Contract administration actions template

(See Section 6.5.)

Obligation/Issue/Risk	Who?	What?	When? (Note 1)	How?	Status
<b>Example:</b> Government to provide unencumbered land for the project	Contract Director	Confirm that all land required for the project has been acquired and that all interests in that land have been extinguished	By [time/date] ( <i>Occurrence:</i> Once only)	Liaise with [ ]; etc	Contacted [ ] on [date]. [ ] will check status and respond by [date].
<b>Example:</b> Accuracy of private party's service performance data	Contract Director	Spot check performance data against other information on KPIs	Each calendar quarter ( <i>Occurrence:</i> Recurrent)	Review records of end users of services etc.	To commence upon commencement of service delivery
<b>Example:</b> Serious service delivery interruption occurs	Contract Director	Implement business continuity plan	Within [time] of becoming aware of interruption ( <i>Occurrence:</i> Incident based)	Refer to separate business continuity plan	Service delivery has not commenced
etc.					

Note 1: Identify when the action must be completed, and whether it is required once only, recurs at fixed or variable intervals, or must occur in response to specific events or incidents. Doing this will assist the Contract Director in identifying actions that remain relevant when the table is updated.

# Template E: Contract Administration Manual - content outline

(See Section 6.6 for more information.)

## 1. Preliminary details

- 1.1 Responsibility for developing the Contract Administration Manual
- 1.2 Stage of the project
- 1.3 Sources of information for developing the Contract Administration Manual
- 1.4 Reviewing and updating the Contract Administration Manual

## 2. What needs to be done, by whom and when?

- 2.1 Summary of the deal
- 2.2 Parties to the contract
- 2.3 Obligations of government
- 2.4 Obligations of the private party – reporting and monitoring
- 2.5 Unresolved issues
- 2.6 Variation of obligations

## 3. Risk analysis

- 3.1 Contingency plans
- 3.2 Issue escalation to other public sector agencies/entities

## 4. How will government's role be performed?

- 4.1 Resources
- 4.2 Delegations/authority

## 5. Appendices<sup>34</sup>

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<sup>34</sup> Where the documentation for a contract management tool or process is not incorporated under another heading in the Contract Administration Manual, that documentation should be included as an Appendix to the Manual.

# Template F: Methodology for preparing the Contract Administration Manual

(See Section 6.6.)

A suggested methodology for using the Contract Administration Manual outline of contents (Template E) is set out below. The methodology is numbered consistently with the outline.

At the beginning of each section of this methodology there is a shaded box (like this), containing a summary of what should be included in the corresponding section of the Contract Administration Manual.

## 1. Preliminary details

### 1.1 Responsibility for developing the Contract Administration Manual

The identity of the person responsible for developing the Contract Administration Manual should be established during the development of the contract management strategy for the project and should be noted in this section of the Manual.

The person responsible for coordinating the development of the Contract Administration Manual should be identified during the contract management planning process. (This process is discussed in detail in Chapter 5 of this Guide.) The person responsible will usually be the Contract Director. This template assumes that to be the case.

The person identified in the contract management plan as being responsible for coordinating the development of the Contract Administration Manual must:

- determine the information which needs to be gathered
- identify the best sources of this information
- allocate responsibility for the collection of the information
- coordinate the synthesis of the information and development of the Contract Administration Manual
- determine the risk and contingency management tools and processes which need to be developed and implemented to include in the Contract Administration Manual
- liaise with other Contract Directors to peer review the Contract Administration Manual.

## 1.2 Stage of the project

The stage of the project for which the Contract Administration Manual is current should be recorded in this section of the Manual. Version control should be used to distinguish between versions of the Manual developed at different times for different project stages.

Before the Contract Director begins collecting information to prepare or update the Contract Administration Manual, they should:

- identify the current stage of the project; and
- consider how the current stage of the contract impacts upon previous risk analysis.

## 1.3 Sources of information for developing the Contract Administration Manual

This section of the Contract Administration Manual should list the sources of information used in developing the Manual.

Identifying appropriate sources of information is discussed in detail in Section 6.4 of this Guide.

## 1.4 Reviewing and updating the Contract Administration Manual

This section of the Contract Administration Manual should include details of the strategy for reviewing and updating the Manual.

The timing and function of reviews of the Contract Administration Manual is discussed in Section 6.14 of this Guide. To ensure adequate review and updating of the Manual, the Contract Director should:

- determine the times at which a review of the Contract Administration Manual should occur
- identify the triggers which will cause an earlier review of the Manual
- allocate resources to reviewing and updating the Manual
- coordinate the review process
- update the Manual to reflect the outcomes of the review.

The reviewing and updating of the Contract Administration manual is a discrete task, as well as part of the wider review of knowledge assets outlined in Chapter 10.

## 2. What needs to be done, by whom and when?

### 2.1 Summary of the deal

This section of the Contract Administration Manual should summarise the intent behind the contract and its key provisions, capturing what those provisions aim to achieve and whether the underlying intent is in fact being achieved.

The importance of the Contract Director understanding both the contract and the environment in which the contract needs to be managed is discussed in Section 6.2 of this Guide. To develop this understanding, the Contract Director should identify and consider:

- the parties to the contract (including pre-existing project dealings)
- the individual members of the various project parties (including sub-contractors) during each project stage, their titles, roles and contact details, and the relevant organisational charts for each of the parties
- the intention, objectives and philosophy of the project parties and the deal
- an outline of the financial, legal, commercial and organisational structure of the project during each stage of the project lifecycle
- the roles of each of the project parties and their various interfaces with government
- the nature and parameters of the relationships (including method and timing of communications) between government and the private party and identification of the needs and key drivers of the parties during the various stages of project delivery
- the obligations and rights of the government party or other government agencies under the project contract cross-referenced with other key related obligations or rights
- the obligations and rights of the private party cross-referenced with other key related obligations or rights
- key elements of the Public Sector Comparator and the contractual allocation of project risk
- mechanisms by which the private party may transfer risk to third parties, and the risks of these mechanisms being ineffective or not implemented (for example, contractual indemnities, insurance, financial guarantees etc.)
- mechanisms within the contract for access to information, reporting and monitoring
- administration requirements for invoicing and payments under the contract
- mechanisms for issue management (including an outline of the role and details of project committees), dispute resolution and the remedies open to the parties under the contract, including an explanation of the operation of any financial or commercial models that have been developed for dispute resolution (for example, material adverse effects regimes)



- mechanisms, procedures and remedies for poor or non-performance and default under the contract
- quality assurance processes and the procedures for actioning defects, faults etc.
- reportable and non-reportable incidents and their respective communication requirements
- unresolved issues
- variation in the obligations of the parties
- matters requiring immediate action or that are project pre-requisites (for example, approvals, permits etc.)
- actions required in the short to medium term
- critical actions/events under the contract or that may impact on project delivery.

As Contract Directors address each of these matters, they should be able to determine the practical steps that they will need to undertake to ensure that the contract is effectively managed. While a list of the actions required are listed as distinct matters, they are all interrelated and should form part of the Contract Administration Manual.

## 2.2 Parties to the contract

This section of the Contract Administration Manual should identify the parties to the contract and any special characteristics of a party or any special history that is relevant to ongoing administration of the project.

Identifying the parties to the contract should be straightforward. The more complex task is to consider whether there are any special characteristics of any party, or any history of dealing, or pre-existing relationships which may impact upon the management of the contract. For example, where the government party to a contract is not the Crown but a statutory authority, the Contract Director may need to consider whether any special authority, coordination or other issues arise from this status.

If the Contract Director identifies any special characteristics or history relevant to the practical steps needed to manage the contract, these matters should be incorporated into the Contract Administration Manual.

## 2.3 Obligations of government

This section of the Contract Administration Manual should identify government's contractual and non-contractual obligations, and specify the actions to be taken—including coordination with other public sector parties—to ensure that these obligations are met. Each action should be classified according to the timeframe within which it must be performed.

The role of the Contract Administration Manual in enabling government to meet its obligations is explained in Section 6.2 of this Guide. To ensure that the Manual fulfils this role, the Contract Director should:

- review the contract and identify
  - the obligations on government
  - the timeframes in which these obligations must be undertaken
  - whether the obligation must be undertaken once only, is recurrent, or only arises if a specific incident occurs
- identify any obligation which by law or through government conduct is likely to be implied into the contract. (For example, the private party may have an obligation to supply certain specific equipment as part of the project. If that equipment cannot be procured from any reasonable source, then it may be that a court would determine as an implied term that the private party should be relieved of its obligation to perform, but not be paid by government for that equipment.)
- identify any implied obligations on government. (These are explained in Section 6.7 of this Guide.)
- identify who is able to deliver the obligations of government under the contract and who is contractually required to deliver the obligations
- identify the role that other public sector entities may have in influencing the ability of the responsible person or organisation to delivery government’s contractual obligations
- identify any other government projects, activities or responsibilities (including statutory functions) which may impinge on the ability of either government or the private party to meet its obligations under the contract
- identify any processes which must be undertaken as a pre-condition to fulfilling the obligations of government or the private party. (For example, the obligations of the private party may only arise after planning approval for a project has been procured by the private party, on the basis of the physical project as specified by the private party and agreed with government.)
- consider the extent to which the government party can expedite or otherwise facilitate these processes
- consider the resources necessary to undertake these obligations.

Once the Contract Director has gathered information relating to the obligations of government under the contract, they should include in the Contract Administration Manual actions required to ensure that government’s obligations are met. For example, in the specific case where government is obliged to provide unencumbered land for the project, this could be incorporated as follows:

Obligation/Issue/ Risk	Who?	What?	When?	How?
Government to provide unencumbered land for the project	Contract Director	Confirm that all land required for the project has been acquired and that all interests in that land have been extinguished	By [date/time] (Occurrence: Once only)	Liaise with [ ]; etc.

### *Implied obligations of government*

Government's possible implied obligations are discussed in Section 6.7 of this Guide. The Contract Administration Manual should include actions required to ensure that government's implied obligations, as well as its express contractual obligations, are met.

### *Other relevant public sector parties/persons*

The need to coordinate actions of other public sector entities is discussed in Section 6.8 of this Guide. To prepare for coordinating the actions of other public sector entities, the Contract Director should:

- identify which public sector entities/officers, other than the government party, have a role in delivering the obligations of government under the contract
- consider the best means of coordinating and/or monitoring this involvement.

Once the Contract Director has gathered information relating to the involvement and obligations of other public sector entities, this information should be used to supplement the Contract Administration Manual in relation to 'What government must do'. For example, in the specific case where the private party cannot start construction until another public sector entity completes off-project site works.

Obligation/Issue/ Risk	Who?	What?	When?	How?
Private party cannot start construction until [public sector entity] completes off-project site works.	Contract Director	Contact [public sector entity] to discuss timetable and budget. Follow up as required.	By [time/date] ( <i>Occurrence:</i> recurrent follow-up until approval is received)	Contact person is [name]; Contact number is [number].

In some instances, the performance of government's obligations will require extensive coordination by the Contract Director with other public sector entities. For example, a government party may acquire services from the private party for use by a number of public sector entities, each of which will have a significant role in performing government's obligations (see Section 2 of Appendix A). In these situations, the Contract Director should enter into:

- a Memorandum of Understanding with the relevant public sector entities setting out the general principles for coordinating performance
- Service Level Agreements with the relevant public sector entities to specify how and when the Contract Director and the other entities will act to perform specific obligations of government.

The Memorandum of Understanding should be developed and signed by the chief executive officers of the entities or other appropriate senior officers. The Memorandum of Understanding should be consistent with this Guide and will require the approval of the relevant Minister and the Treasurer as part of the Request for Tender documentation.

### *Timeframes for performance of actions*

For each action identified in the Contract Administration Manual, there should be a corresponding timeframe for its performance. To assist in managing performance of these actions, the Contract Director should group or classify the actions so that their relative urgency is clear. For example, appropriate categories may be:

- those tasks requiring immediate action
- those requiring action in the short to medium term
- those tasks to be performed in the longer term.

*Risk of non-fulfilment of government obligations*

Risks that arise from government not fulfilling its contractual and implied obligations should be analysed as described below in Part 3 of this methodology. (Implied obligations are explained in Section 6.7 of this Guide.)

## 2.4 Obligations of the private party – reporting and monitoring

This section of the Contract Administration Manual should specify the actions to be taken to ensure that the private party’s reporting obligations are fulfilled, and the performance monitoring and reporting strategy for the project is properly implemented and coordinated with overall contract administration.

The relationship between contract administration and performance reporting is discussed in Section 6.10 of this Guide. To establish government’s reporting and monitoring mechanisms, the Contract Director should:

- identify mechanisms within the contract for monitoring and reporting on whether the private party’s (or other consortium member’s) obligations are being met
- consider whether these mechanisms are sufficient for ensuring that the private party (or other consortium member) is meeting its obligations under the contract
- develop mechanisms for determining whether the private party’s (or other consortium member’s) obligations are being fulfilled. It is undesirable for such a mechanism to require the private party to provide information it is not contractually obliged to provide. The Contract Director should be involved in the procurement process, and develop monitoring mechanisms at that time, so that the information requirements can be included in the project contract.

For example, the following action item for conducting spot checks of the service performance data contained in service reports from the private party could be included in the Contract Administration Manual.

Obligation/Issue/ Risk	Who?	What?	When?	How?
Accuracy of private party's service performance data	Contract Director	Spot check performance against three KPIs	Each calendar quarter (Occurrence: Recurrent)	Review records of end users of services etc.

The inclusion in the Contract Administration Manual of actions relating to the performance monitoring and reporting strategy will ensure that these two key contract management tools are used in a coordinated manner.

## 2.5 Unresolved issues

This section of the Contract Administration Manual should list unresolved issues that have been identified, and cross-refer to those actions, risk mitigants and risk controls elsewhere in the Contract Administration Manual that will be used to manage those unresolved issues.

The identification of unresolved issues and the need for their careful management is discussed in Section 6.11 of this Guide. Once Contract Directors have identified and considered any unresolved matters, they should:

- determine the likely consequences of unresolved matters
- incorporate the unresolved matters into the risk analysis which is described in Part 3 below
- develop, as part of the contingency plans, strategies to mitigate the risks arising from matters not resolved by the contract.

## 2.6 Variation of obligations

This section of the Contract Administration Manual should outline the process for managing and documenting variations of the project contract, and cross-refer to those actions, risk mitigants and risk controls elsewhere in the Contract Administration Manual that will be used to manage that process.

Obligations under the contract may be varied either intentionally or unintentionally. The Contract Director should develop a process to ensure that the contract is only varied intentionally and that these variations are documented.

The Contract Director should:

- identify the procedures under the contract for varying the contract
- envisage the circumstances in which there will be the greatest risk of unintentional variation
- incorporate these risks into the risk analysis undertaken in Part 3 below.

The strategies that the Contract Director develops to deal with these risks should be included in the part of the Contract Administration Manual dealing with the critical risks and contingency plans as discussed in Part 3 below. The actions that the Contract Director identifies to instigate or control variations in the contract should be included in the part of the Contract Administration Manual relating to obligations of government (as described in Part 2.3 above).

Change management (including contract variations) is discussed in detail in Chapter 11 of this Guide.

### 3. Risk analysis

#### 3.1 Contingency plans

This section of the Contract Administration Manual should outline the actions that will be taken should a critical risk event occur.

Along with identifying the actions that must be taken for government to perform its obligations, it is imperative that the Contract Director identify critical contract risks and establish contingency plans to be invoked should a critical risk event occur.

In order to identify the relevant risks and develop contingency plans, the Contract Director should:

- identify the most critical contract risks by considering the likelihood of each risk occurring and the magnitude of the consequences
- develop contingency plans for addressing each of these critical risks (factors to consider in developing contingency plans are discussed in detail in Chapter 12)
- identify the ‘triggers’ or ‘thresholds’ for activating the contingency plans.

The contingency plans should be included in the Contract Administration Manual. Where a specific contingency plan exists as a separate document, an up-to-date copy of that document should be included as an appendix to the Contract Administration Manual. For example:

Obligation/Issue/ Risk	Who?	What?	When?	How?
Reporting mechanisms do not enable effective monitoring of private party's service delivery performance.	Contract Director	Determine why the mechanisms are not effective;  Discuss these deficiencies and how to rectify them with [DTF/ peer review];  Develop and implement new performance monitoring measures to address the deficiencies.	Within [time] of identifying that mechanisms do not enable effective monitoring (Occurrence: Incident based)	Review existing performance monitoring strategy.  Analyse existing reporting mechanisms.  Identify cause of failure etc.
Serious service delivery interruption occurs	Contract Director	Implement business continuity plan	Within [time] of becoming aware of interruption (Occurrence: Incident based)	Refer to business continuity plan

## 3.2 Issue escalation to other public sector agencies/entities

This section of the Contract Administration Manual should outline the actions that will be taken should it be necessary to inform or involve other government agencies in responding to the occurrence of a critical risk event.

If certain critical risks eventuate it may be necessary to inform or involve other government agencies (for example, the Department of Treasury and Finance or the Department of Premier and Cabinet). To facilitate this process the Contract Director should:

- identify the requirements of other government agencies
- incorporate into the Contract Administration Manual mechanisms for meeting the reporting requirements of these agencies as to the management or status of critical risks
- incorporate into the Contract Administration Manual any relevant contingency plan the 'triggers' or 'thresholds' which should cause the matter to be referred to the other relevant government agency.

Generally, the Department of Treasury and Finance's interest lies in two areas:

1. impacts, or potential impacts, on the State Budget (funding and output targets). This includes the risks associated with potential breaches of contract, litigation, price and failure to achieve project objectives
2. changes to the contractual arrangements between the private party (or other consortium members) and the government party, and changes to any contract management agreements between the government party and other public sector entities.

## 4. How will government's role be performed?

### 4.1 Resources

This section of the Contract Administration Manual should outline the actions that will be taken to ensure that there are sufficient resources allocated to enable efficient and effective contract administration.

Issues of relevance to the resourcing of contract administration for *Partnerships Victoria* projects are discussed in Section 6.12 of this Guide. Once Contract Directors have considered these issues, they should incorporate in the Contract Administration Manual appropriate actions related to the resources needed to meet the government's obligations. For example:

Obligation/Issue/ Risk	Who?	What?	When?	How?
Need to allocate responsibility for monitoring critical risks	Contract Director	Allocate responsibility to appropriate members of the contract management team.	By [date] (Occurrence: Once only)	Identify staff with appropriate skills. Ensure workloads allow sufficient time for monitoring. Document allocation of responsibility. Brief staff on responsibilities.

## 4.2 Delegations/authority

This section of the Contract Administration Manual should outline the actions that will be taken to ensure that contract management staff have the appropriate level of authority to carry out their responsibilities.

Issues of relevance to authority of staff involved in contract administration for *Partnerships Victoria* projects are discussed in Section 6.13 of this Guide. Once these matters have been investigated, the Contract Director should develop procedures for inclusion in the Contract Administration Manual relating to the authority and delegations in place to manage the contract. For example:

Obligation/Issue/ Risk	Who?	What?	When?	How?
Delegations must be documented and accessible.	Contract Director	Establish a delegations register.	By [date] (Occurrence: Once only)	Obtain template of register. Identify delegations. Document delegations in register.
Delegations register must be maintained.	Contract Director	Allocate responsibility for maintenance of delegations register.	By [date] (Occurrence: Once only)	Identify staff member with appropriate skills. Ensure workload allows sufficient time for task. Document allocation of responsibility. Brief staff member on responsibilities.

## 5. Appendices

This section of the Contract Administration Manual should contain up-to-date documentation for the contract management tools and processes that have been developed separately from the core content of the Contract Administration Manual.



# Template G: KPI Template

(See Part 10 of Appendix C.)

The KPIs for a *Partnerships Victoria* project are established during the procurement stage. Whatever level of performance they are intended to measure, they should be:

- focused on key measures that are directly relevant to the outcomes and outputs being sought from the service. KPIs need to be useful
- reliable and accurate, not least because payment and management decisions depend on it
- worthwhile in terms of being in proportion to the effort required to measure it
- balanced for all important areas, and at all levels
- set to avoid perverse or unintended incentives
- ready for change or robust enough to be relevant both before and after likely foreseeable changes.

The following template may provide a useful starting point for recording KPIs.

KPI Template	
Service	Descriptor of the service category, e.g. Facility maintenance
Component	Detailed description of the component of the service category including cross-reference to the output specifications
SMART KPI	Description of the KPI in terms of being Simple, Measurable, Achievable, Relevant and Timed
KPI weight	Weighting of KPI (if applicable – depends on the payment mechanism)
KPI priority	Priority level of KPI (if applicable – depends on the payment mechanism)
Incident measure	What is actually being measured?
Performance bands/Points (depends on the payment mechanism)	
Bands/Points	Incidents
No penalty	Detailed description of how the KPI interrelates with the payment mechanism
A	
B	
C	
D	

# Template H: Construction stage reporting guidelines

(See Section 7.3.)

## Construction progress report

In a *Partnerships Victoria* project, the overall responsibility and risk associated with construction will almost certainly reside with the private party, who under usual circumstances will pass this risk on to the construction contractor via a fixed price lump sum turnkey contract.

Nevertheless, the government party should still monitor construction progress and performance as part of its overall contract management strategy. The government party may also have certain roles and responsibilities to discharge during the construction stage. These should be set out in the Contract Administration Manual (see Chapter 6). Part of this role will be to receive construction progress reports that are likely to contain (at a minimum) the following information:

- project progress, including status of design and construction activities compared to program
  - significant events achieved
  - significant events that have not been achieved and the action being taken
  - significant events in the near future, particularly where they require specific action
  - progress against the development, design and construction programs
- planning, building regulations, EPA consents (if required) and fire officer consents
- public utilities
- project master program (updated)
- design, construction and commissioning programs
- tendering report including status report on sub-contracts
- inspections, testing, samples, mock-ups and acceptance
- government change requests
- service company change requests
- financial report, incorporating status and cash flow for the project and availability of funds statement
- risk report
- health and safety report
- insurance.

## Commissioning and hand-over report

Commissioning must be given consideration throughout the project, starting during procurement. Although commissioning does not actually occur until the final stages of project implementation, its planning and preparation should take place much earlier.

The objective of the commissioning is to ensure that the facility is equipped and operating as planned upon completion of construction. Commissioning, completion and hand-over are very much interlinked.

Some *Partnerships Victoria* projects involve 'core'<sup>35</sup> service delivery by government and non-core or ancillary service delivery by the private party. In these projects, government's involvement in commissioning planning and hand-over becomes much more pronounced than if the private party delivers the whole of the services.

The actual commissioning, completion and hand-over procedures required will be specific to each *Partnerships Victoria* project. However, the main aspects of commissioning, completion and hand-over will generally cover the following reporting requirements:

- preparation of lists identifying deficiencies
- program for carrying out all remedial and completion work
- status of training, including training of public sector staff
- the provision of
  - as-built drawings and installed record drawings, plans, schedules, specifications, performance data, test results
  - commissioning and test reports, calibration records, operating and maintenance manuals, including related health, safety and emergency procedures
  - planned maintenance schedules
  - statutory inspections and approvals
- certification of and possession at each stage
- copies of any reports (such as independent engineer's reports) required by the financiers.

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<sup>35</sup> Core services are discussed in detail in Sections 1.4 to 1.5 of

# Template I: Service delivery stage reporting guidelines

(See Section 7.3.)

## Health and safety report

It is the responsibility of the *Partnerships Victoria* private party to formulate policy for the operation of the facility and reach agreement on specific standards of working. These are supplemented by legal requirements and regulations governing health and safety. Health and safety reports and incident reports may be required on a regular basis but more usually would be provided on an exception basis.

Typically these reports might include:

- non-compliance reporting of incidents, including precise details
- lost time and non-lost time incidents
- hazardous situations requiring work stoppage and in extreme cases, shut-down of the facility
- remedial action and long-term rectification planning
- hazard reports.

## Training and employment reports

Training and employment activities should be regularly reported on, including the following information:

- details of training undertaken or to be undertaken
- any recruitment, promotion, redundancy or dismissal of any employee, including any proposed key appointments requiring government approval
- amendments to the Enterprise Bargaining Agreements
- industrial disputes.

# Template J: Finance reporting guidelines

(See Section 7.3.)

## Cash flow, including ratios, budgets and dividends

The lenders to a *Partnerships Victoria* project will require the private party to prepare detailed financial summaries at varying frequencies. This information will be used to monitor progress, assess trends in performance and review the private party's cash flow position and financial robustness.

Given these requirements are onerous, the government party should not expect the private party to make available any additional information to that specified in the contract or required to satisfy the key provider of funds to the project. However, it is important to realise that there will be an element of confidentiality around some of the information between borrower and lender. Consequently, the government party will not be given full access to all the information passing between the private party and the lenders unless satisfactory confidentiality arrangements are in place. The information typically prepared for the lenders will include:

- a periodically updated financial model to show the actual position and that forecast for the remainder of the project
- an annual budget for the private party
- reconciliations of variations between actual cost incurred and the budgeted cost
- quarterly management accounts
- annual audited accounts of both the private party and the parent companies
- a commentary on the performance of the service delivery under the payment mechanism.

As part of the ongoing communication and monitoring of the long-term project, there should be an open discussion on the financial performance of the private party. The contract should require the private party to provide:

- summary financial statements based on management accounts. This will allow ratio analysis (discussed in Appendix F) to be undertaken.
- details of the extent to which dividends have been paid and are forecast to be paid. This is the best evidence of a financially strong entity. If dividends are being paid, all construction, operational, funding and taxation costs have been met, cover ratios are satisfactory and still there is cash in the vehicle to be paid out to shareholders.
- a comparison of the income actually received through the service payment against the maximum that is achievable. (This will link to the level of deductions made under the Payment report in Template K.)
- details of the private party's performance against budget and reasons for variances
- confirmation that the private party is meeting the requirements set out by the lender.

# Template K: Payment reporting guidelines

(See Section 7.3.)

## Payment reports

Payment reports for a *Partnerships Victoria* project should be prepared in good faith using good industry practice, and should include as a minimum:

- details of payment including the aggregate amount of any performance deductions for the relevant period
- levels of failure which trigger a notification event under the contract
- any adjustments to reflect under- or over-payments made in previous payment periods
- information recorded or logged by the help desk (if applicable, for example in an accommodation project)
- test results recorded or logged (if applicable, for example in a water project)
- a summary of the overall performance of the services across service type and facility (as applicable)
- a breakdown of the performance of each service—service by service, facility by facility, and facility by service (as applicable)
- graphs showing trends in performance of the services for the payment period in question, compared with performance over each previous payment period
- details of all monitoring of the performance of the services including when they were undertaken or are to be undertaken, by whom and the results (where available)
- details of corrective actions taken or to be taken to remedy any deficiencies in the performance of the services
- details of training undertaken or to be undertaken, any recruitment, promotion, redundancy or dismissal of any employee and/or any industrial disputes
- record of all accidents and health and safety incidents
- details of any utility services consumed (if paid for separately by government)
- a summary of any changes agreed between the parties under the change management procedures set out in the contract
- details of complaints received from end users and other stakeholders, along with any action taken
- such other information as the Contract Director may reasonably require as part of the regular payment report.

# Template L: Sample issues register template

(See Section 8.3.)

Issue ID	Description	Reported by	Date/Time reported	Severity	Cause	Proposed resolution	Person responsible for resolution	Date/Time resolved

Sample only

# Template M: Sample decision and issue escalation procedure

(See Section 8.3.)

Initial consideration of decision or issue <sup>36</sup>	
<b>Relevant personnel</b>	Private party's site personnel  Government party's contract management personnel
<b>Triggers for escalation to Escalation Level 1<sup>37</sup></b>	Either party may escalate issues that may significantly impact on delivery of services according to the output specification at any time.  Other issues and decisions may be escalated: <ul style="list-style-type: none"> <li>• by agreement of both parties at any time, or</li> <li>• by either party if the issue is not resolved or the decision made within [X] days.</li> </ul>
Escalation Level 1	
<b>Relevant personnel</b>	Private party's project manager  Government party's Contract Director
<b>Triggers for escalation to Escalation Level 2<sup>38</sup></b>	Issues and decisions may be escalated to Escalation Level 2: <ul style="list-style-type: none"> <li>• by agreement of the project manager and Contract Director at any time, or</li> <li>• by either of the project manager or the Contract Director if the issue is not resolved or the decision made within [Y] days.</li> </ul>
Escalation Level 2	
<b>Relevant personnel</b>	Project Coordination Group

<sup>36</sup> This escalation procedure is intended for the resolution of operational decisions and issues requiring some form of agreement or cooperation between the parties. A separate dispute resolution procedure should be developed for disputes. See Template O for an example.

<sup>37</sup> Different triggers may apply for different categories of issues or decisions. The triggers and the categories of issues or decisions to which they apply should be agreed and documented.

<sup>38</sup> Further escalation levels may be agreed and documented.



# Template N: Sample dispute resolution procedure

(See Section 8.3.)

Initial consideration of dispute <sup>39</sup>	
<b>Relevant personnel</b>	Private party's project manager Government party's Contract Director
<b>Triggers for escalation to Escalation Level 1<sup>40</sup></b>	Either party may escalate the dispute to Escalation Level 1 if it is not resolved within [X] days.
Escalation Level 1	
<b>Relevant personnel</b>	Private party's relationship manager Government party's relationship manager
<b>Triggers for escalation to Escalation Level 2</b>	Either relationship manager may, by written notice, escalate the dispute to Escalation Level 2 if it is not resolved within [Y] days.
Escalation Level 2	
<b>Relevant personnel</b>	Dispute Resolution Panel
<b>Triggers for escalation to Escalation Level 3</b>	<p>If the Panel does not meet, resolve the dispute or reach a unanimous decision within [Z] days, the dispute shall be referred to:</p> <ul style="list-style-type: none"> <li>• expert determination if [list circumstances in which expert determination is appropriate], or</li> <li>• arbitration if [list circumstances in which arbitration is appropriate.]</li> </ul> <p>In referring disputes to expert determination or arbitration, the parties shall comply with clause XX (Dispute resolution) of the project agreement.<sup>41</sup></p>

<sup>39</sup> This escalation procedure is intended for the resolution of disputes between the parties.

<sup>40</sup> Different triggers may apply for different categories of disputes. The triggers and the categories of disputes to which they apply should be agreed and documented.

<sup>41</sup> The dispute resolution procedure should be consistent with the contract, but may include procedures that apply prior to the contractual dispute resolution procedure being invoked, or that add to the contractual dispute resolution procedure.

# Template O: Sample delegations register

(See Section 9.5.)

Contract clause	Function	Delegated to	Source of delegation
[XX (Modifications)]	[The State may request modifications by notice to the Contractor.]	[Secretary]	Contract clause ZZ.1; Schedule A
[YY (Audit)]	[The State may require the Contractor to provide an audit report.]	[Contract administrator]	Contract clause ZZ.2; Schedule B
Etc.			

# Appendices

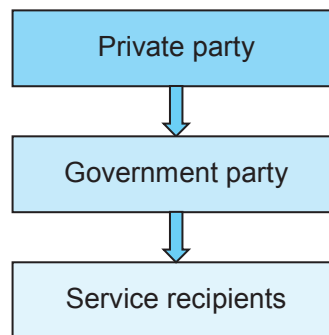


# Appendix A: Service delivery structures in typical Partnerships Victoria projects

## 1. Typical Partnerships Victoria projects

In a typical *Partnerships Victoria* project, the government party (which may be a department, statutory authority or other government entity) acquires services from the private party, and enables appropriate service recipients to use the services. The ultimate service recipients may be public servants, community members or targeted sections of the community.

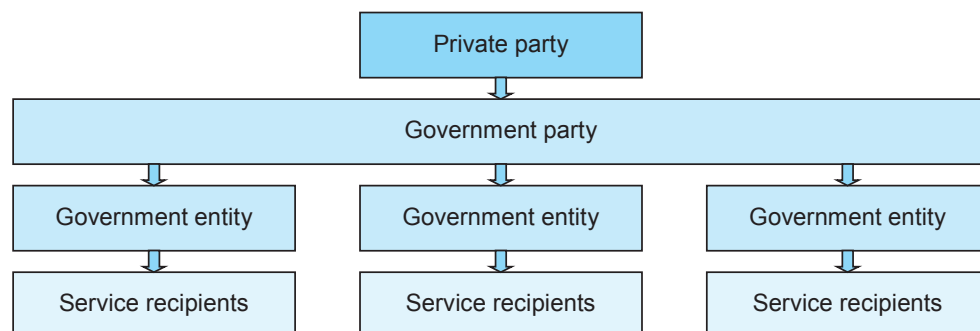
Figure A.1: Typical *Partnerships Victoria* service delivery flow



## 2. Multiple government entities receiving services

In some *Partnerships Victoria* projects, the government party (commonly a department) acquires services from the private party for use by a number of government entities (for example, a group of statutory authorities.)

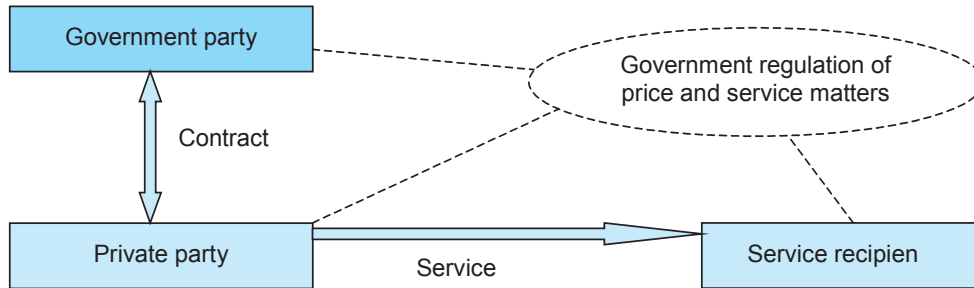
Figure A.2: Service delivery to multiple government entities



### 3. User-pays arrangements

In user-pays public private partnership arrangements, such as the CityLink project, the private party provides a service direct to users. Government regulates various matters relating to the price and performance of the service.

**Figure A.3: Service delivery in user-pays projects**



## Appendix B: Contract documents in a typical Partnerships Victoria project

Document	Parties	Purpose
Project agreement (may be named 'Concession Deed' or similar)	<ul style="list-style-type: none"> <li>Government party</li> <li>Private party</li> </ul>	The core project contract, setting out the terms on which the private party provides the contracted services to the government party
Real property lease (may be named 'Ground lease' or similar)	<ul style="list-style-type: none"> <li>Government party</li> <li>Private party</li> </ul>	Provides the private party with access to government property on which project facilities are located
Construction contract	<ul style="list-style-type: none"> <li>Private party</li> <li>Construction contractor</li> </ul>	The document in which the private party's construction obligations under the project agreement are sub-contracted to the construction contractor
Operating agreement	<ul style="list-style-type: none"> <li>Private party</li> <li>Operator</li> </ul>	The document under which the private party's core service delivery obligations under the project agreement are sub-contracted to the operator
Facilities maintenance agreement	<ul style="list-style-type: none"> <li>Private party</li> <li>Facilities maintenance contractor</li> </ul>	The document under which the private party's facilities maintenance obligations under the project agreement are sub-contracted to the facilities maintenance contractor
Loan agreement	<ul style="list-style-type: none"> <li>Private party</li> <li>Lenders</li> </ul>	The document under which the lenders provide debt finance to the private party
Security documents	<ul style="list-style-type: none"> <li>Private party</li> <li>Lenders</li> </ul>	Documents providing the lenders with security for the debt finance provided to the private party
Completion guarantee	<ul style="list-style-type: none"> <li>Sponsors</li> <li>Lenders</li> </ul>	Guarantees the completion of construction of the facility
State security agreement	<ul style="list-style-type: none"> <li>Private party</li> <li>Government party</li> </ul>	Provides the government party with security to support the exercise of step-in rights
Tripartite agreement	<ul style="list-style-type: none"> <li>Private party</li> <li>Lenders</li> <li>Government party</li> </ul>	Regulates the exercise of cure rights and step-in rights by the lenders and the government party
Subscription agreement (may be known as a 'Shareholders' agreement' or similar)	<ul style="list-style-type: none"> <li>Sponsors/Private party's parent company</li> <li>Private party</li> </ul>	The document under which the sponsors or the private party's parent company provide equity finance to the private party
Insurance policies	<ul style="list-style-type: none"> <li>Private party</li> <li>Insurers</li> </ul>	Policies insuring the private party against specified risks

# Appendix C: Issues to consider in developing a performance monitoring regime

(See Section 7.3)

## 1. Strategic performance

Strategic performance is primarily concerned with outcomes. The following table outlines the key performance issues that will need to be addressed at the strategic level.

Issues to be considered	Tools or processes
<p>Is the business strategy robust?</p> <p>Are the key stakeholders identified?</p> <p>Do the planned (and current) change initiatives contribute to the strategy?</p> <p>Have priorities been established?</p> <p>Does the private party have the capability and capacity to deliver?</p> <p>Has the private party taken up opportunities to improve performance?</p> <p>What is and has been achieved?</p> <p>Are the high-level goals being met?</p> <p>What are the anticipated benefits and outcomes and are they as planned?</p> <p>Are the anticipated benefits and outcomes being realised quickly enough?</p> <p>What is the financial strength of the industry as a whole?</p> <p>What is the financial strength of any project guarantors?</p> <p>Is government policy in this area changing?</p>	<p><b>Industry analysis:</b> Review of competitors, substitutes, customers, suppliers, government policy to understand key business drivers and risk. (Information can be obtained from Bloomberg/ABS/specialist broker reports/press/annual reports/talking to management.)</p> <p><b>Strategic issue analysis:</b> Identify external environmental signals and examine the impacts on the project, for example, Strengths, Weaknesses, Opportunities, Threats (SWOT) analysis</p> <p><b>Macro-environmental changes:</b> How are external factors likely to change in the future, over what time span and what is the potential impact on the project? e.g. economic conditions, demographic trends, technological changes, social/cultural factors, legal factors</p> <p><b>Product/Market analysis:</b> Analysis of product and/or market growth opportunities</p> <p><b>Business case and Project Brief; Interviews with procurement team:</b> Analysis of the business case and Project Brief, and interviews with the procurement team assist in understanding the anticipated benefits and commercial drivers of the project</p> <p><b>Policy watch:</b> Identification of changes in government policy that may affect the project</p>



## 2. Project level performance

Project level performance is primarily concerned with outputs. The following table outlines the key performance issues that will need to be addressed at the project level.

Issues to be considered	Tools or processes
<p>What are the core products/services being delivered?</p> <p>Who are the customers?</p> <p>What is the private party's capital structure?</p> <p>Is the project achieving its objectives?</p> <p>Are the services being provided according to the output specification?</p> <p>Does the private party have sufficient cash flow?</p> <p>What are the key risks and how are they affecting the project?</p> <p>Does the service represent continuing value for money?</p> <p>Is there a need to change the output specification?</p> <p>What security is there for government?</p> <p>Does the structure cut government out if things go wrong, and can government 'walk away' if things go wrong?</p> <p>Does the structure allow the government to step in if things go wrong?</p> <p>Even in receivership, a business may still operate with its management team. When is the right time to intervene?</p>	<p><b>Flow charts:</b> To fully understand a project, it may be helpful to analyse it in terms of inputs and outputs, and the relationships between them; it may be useful to create flow charts</p> <p><b>Risk matrix:</b> regular monitoring and updating of the risk matrix and management plan developed during the procurement stage. (See Section 5.4 for a discussion of risk matrix development.)</p> <p><b>Performance monitoring:</b> monitoring of performance against the key performance indicators (KPIs)</p>

### 3. Cash flows

To fully understand the cash flows, the Contract Director needs to consider both past performance and projected future performance of each of the elements in the cash flow. The following table outlines the key performance issues that should be addressed.

Issues to be considered	Tools or processes
<p>What are the private party's real sources and uses of cash?</p> <p>What are the real sources of revenue and gain an appreciation of how revenue is likely to change over the project term?</p> <p>What are the revenue drivers?</p> <p>What is the underlying cost structure?</p> <p>What is the underlying capital structure?</p> <p>What are the project risks and how will they impact on the cash flows?</p> <p>At what point are dividends paid/payable?</p> <p>What constraints are there on dividends?</p> <p>How does the payment mechanism work including, where applicable, any abatements for non-performance?</p> <p>What are the project's 'pinch points'?</p> <p>How does the structure and constitution of the private party change over the project lifecycle?</p>	<p><b>Financial Model:</b> The financial model usually required for inclusion with bids is a useful starting point for understanding the cash flows. (Extract forecast from financial model for rolling annual basis and compare actual for forecast.)</p> <p><b>Risk matrix:</b> Regular monitoring and updating of the risk matrix and management plan developed during the procurement stage and application of the quantification techniques to the financial model</p> <p><b>Sensitivity analysis:</b> Tests the effect on the cash flows of changes in value of underlying costs and revenues (and other variables such as risk as appropriate)</p> <p><b>Scenario analysis:</b> Tests likely combinations of changes in variables to establish downside (and upside) scenarios.</p> <p><b>Probability analysis (for example, Monte Carlo simulation):</b> Used to consider the effects of a range of values applied to underlying project costs, revenues and debt service obligations (and other variables such as risk as appropriate) using appropriate probability distributions and computer aided simulation techniques.</p> <p><b>Typical cash flows:</b> Some typical cash flow profiles for various classes of projects are contained in Appendix D.</p>

## 4. Risks borne by government

The following table sets out key issues to be considered and tools and processes that can be used in analysing risks borne by government to develop a performance reporting plan.

Issues to be considered	Tools or processes
What risks have been retained and where is each one likely to have its most significant impact?  What risks have been transferred to the private party and which have significant residual risk for government?  Has government taken back any transferred risks?  What are the quantified impacts of the risks borne by government?  Has the risk profile changed?	<b>Risk matrix:</b> Regular monitoring and updating of the risk matrix developed during the procurement stage

## 5. Transferred risks

The following table sets out key issues to be considered and tools and processes that can be used in analysing transferred risks to develop a performance reporting plan.

Issues to be considered	Tools or processes
What risks have been transferred and where is each one likely to have its most significant impact?  What are the quantified impacts of retained risks?  Has the risk profile changed?  Where does the risk reside in the project? Which risks lie fully with the private party and which risks get pushed down through the structure to suppliers or sub-contractors?  What mechanisms have been used to allocate risk within the private party's project structure, e.g. service level contracts, parent company guarantees, liquidated damages clauses, letters of credit etc?  What are the private party's relationships with sub-contractors, such as the construction contractor, operator and facilities maintenance contractor? Have they been in similar projects together?	<b>Risk matrix:</b> Regular monitoring and updating of the risk matrix developed during the procurement stage  <b>Organisational chart:</b> Which entities should be monitored depends largely on where the risk resides. For example, it may be pointless monitoring at the level of a special purpose vehicle if government is heavily reliant on the operator and its financial health. Where a parent company has given performance guarantees, monitoring of the parent company's financial health is necessary.

## 6. Organisational structure

The following table outlines the key organisational structure issues that should be considered, and appropriate tools or processes to be used.

Issues to be considered	Tools or processes
<p>What is the organisational structure?</p> <p>Is there a formal organisation chart that is regularly updated?</p> <p>Are authority and responsibility relationships clearly established?</p> <p>Are plans and controls in each organisational unit inadequate, adequate, or over-developed (red-tape)?</p> <p>Is there a culture throughout the organisation of reducing costs and improving quality?</p> <p>Do all the organisational units operate effectively in working towards the overall objectives or are they non-cooperative or competitive with one another?</p>	<p><b>Organisational chart:</b> In a complex structure, the analysis of financial health should focus on which organisation/s has/have ultimate responsibility for service delivery, taking into account parent company guarantees for subsidiaries. This chart is likely to require regular updating.</p>

## 7. Financial position

The following table outlines the key financial position issues that should be considered, and appropriate tools or processes to be used.

Issues to be considered	Tools or processes
<p>What strengths or weaknesses emerge from analysis of trends in key financial figures?</p> <p>What do the trends in the financial figures indicate about the organisation's financial position?</p> <p>What profits come from where?</p> <p>What is the rate of return, both achieved to date and projected?</p> <p>Have dividends been paid?</p> <p>Is there a program for increasing return on investment?</p> <p>Has the management projected operating statements and balance sheets into the future?</p> <p>Is there an effective cash management system?</p> <p>Are existing and projected capital expenditures appropriate for future operational needs?</p> <p>Is the organisation knowledgeable and aggressive in tax planning?</p> <p>Will any anticipated regulatory changes affect the organisation's financial position?</p>	<p><b>Financier's reporting requirements</b> (See Note 1.) What are the financiers monitoring and how often are they receiving reports - for example, cash flow monitoring, key debt service ratios, working capital requirements and repayments schedules (see Note 2).</p> <p><b>Covenant monitoring:</b> What financial covenants has the private party agreed to? How will these be monitored?</p> <p><b>Dividend monitoring:</b> Dividend payments by the private party usually indicate a healthy financial position</p> <p><b>Credit analysis:</b> What is the financial position of the organisation(s), e.g. activity analysis, liquidity, long-term debt solvency, profitability and valuation? (See Note 3.)</p> <p><b>Audited accounts:</b> either for the private party and/or the underlying service companies covering the last three years (where available)</p> <p><b>Moody's/Standard &amp; Poor's</b> ratings if available. (Note that these ratings are based on extensive financial analysis and industry knowledge.)</p> <p><b>Newspaper clippings</b></p> <p><b>Financial Key Performance Indicators:</b> Contracts should include financial Key Performance Indicators, e.g. cash flow monitoring, key debt service ratios, working capital requirements and repayments schedules etc.</p>

Note 1: There is an alignment of interest between government and the financiers to see that the project succeeds. However, government should be cautious that it is not seen to be the 'underwriter' of the project. The government party must understand the extent to which the financiers are managing risk. Default monitoring may be preferable as the government party may be able to leverage off the banks monitoring systems.

Note 2: See appendix E for definitions of debt service ratios.

Note 3: See Appendix F for definitions of key financial ratios.

The extent of financial analysis undertaken by the government party may require legal advice regarding rights of interference in monitoring of businesses. For example, if business is performing badly, government may be under an obligation to report it.

## 8. Quality of management personnel

The following table outlines the key performance issues that should be addressed in reviewing the quality of management personnel.

Issues to be considered	Tools or processes
<p>What person or group constitutes top management?</p> <p>Has present top management been responsible for performance over the past few years or are they relatively new?</p> <p>What style of management is being used (e.g. autocratic or participative)?</p> <p>What influence or control does the board of directors exercise?</p> <p>What are the capabilities of the board of directors?</p> <p>What is the age of top management personnel and how long are they expected to remain?</p> <p>What is the quality of the middle management and supervisory personnel in terms of planning and controlling work, with regard to meeting schedules, controlling costs, improving quality and performance?</p> <p>What are the private party's relationships with sub-contractors, such as the construction contractor, operator and facilities maintenance contractor? Have they been in similar projects together? How is the private party managing those relationships? Are there any significant issues?</p>	<p><b>Operational Reports:</b> There should be a requirement placed on the private party to regularly provide updates on the management structure, including any changes in personnel.</p> <p><b>Operational audit:</b> Where necessary, government should conduct its own audit of the management structure, including where appropriate following up references for key managerial staff (in accordance with privacy laws and regulations).</p> <p><b>Regular payment reports:</b> discussed in detail later in this appendix</p>

## 9. Quality of operating personnel

The following table outlines the key performance issues to be addressed in reviewing the quality of operative personnel.

Issues to be considered	Tools or processes
<p>What are the skills and abilities of the workforce?</p> <p>Are these skills adequate for meeting the needs of the contract?</p> <p>What is the general attitude and level of motivation of employees?</p> <p>How responsive are staff to meeting deadlines?</p> <p>What is the level of employee turnover?</p> <p>Does the organisation have enough skilled workers to meet the needs of the contract?</p> <p>What is the wage policy of the organisation? (For example, are they paying the highest wages in the sector?)</p> <p>What training has been undertaken or is to be undertaken?</p> <p>What recruitment, promotion, redundancy or dismissal of any employee and/or any industrial disputes have occurred?</p> <p>What accidents and health and safety incidents have occurred?</p>	<p><b>Operational reports:</b> There should be a requirement placed on the private party to regularly provide updates on operating personnel, including any changes in personnel</p> <p><b>Operational audit:</b> Where necessary, government should conduct its own audit of the operations, including where appropriate following up references on operating personnel (in accordance with privacy laws and regulations)</p> <p><b>Regular payment reports:</b> Discussed in detail later in this appendix</p>

## 10. Service performance

The following table outlines the key performance issues, tools, and processes that can be used in developing and assessing performance against KPIs. (The development of KPIs occurs during the procurement process.)

Issues to be considered	Tools or processes
<p>Existing KPIs for similar projects can be used as a basis in forming KPIs but each project is sufficiently different to warrant further project-specific refinement.</p> <p>A starting point in developing KPIs is to assess what level of service (if any) existed previously and what is achievable. What the contractor thinks can be achieved and how performance can be practically measured may be very different from existing practices.</p> <p>The KPIs need to be right at the point of contract signing. However, as the project progresses and early in the service delivery stage, there should be sufficient flexibility in the contract to amend and review contract KPIs.</p>	<p><b>KPI Template:</b> Standard approach to measuring and recording KPIs on a project. (See Note 1.)</p> <p><b>SMART:</b> Good performance targets should be Specific, Measurable, Achievable, Relevant and Timed. (See Note 2.)</p> <p><b>Regular payment reports:</b> Discussed in detail later in this appendix</p> <p><b>Physical measurement:</b> The measurement of quantitative elements within individual specification standards</p> <p><b>Inspection:</b> Physical inspections of operational activities to determine the quality of performance of the service</p> <p><b>Logged failure/Rectification time:</b> That is, the time from when government makes a request to the time when the private party attends the incident</p> <p><b>User feedback:</b> Complaints and/or service user interviews</p> <p><b>Periodic review and audit:</b> Combination of spot check reviews of performance and regular audits of systems</p> <p><b>Exception reporting:</b> May be appropriate, however there is also a need to identify whether KPIs are being missed due to poor performance or whether it is because the KPIs themselves are poorly defined. Also, if the exception to the KPI is important, then it should be included as a KPI.</p>

Note 1: An example of a standard KPI template is contained in Template G as an illustration of the type of information that may be required for performance monitoring.

Note 2: SMART performance targets are: **Specific** – clear, unambiguous and easy to understand by those who are required to achieve them; **Measurable** – set a target for success that can be gauged by referring to a specific measure or measures; **Achievable** – express specific aims that can realistically be achieved, bearing in mind that this may be a function of the level of performance that government is willing to pay for; **Relevant** – to those personnel who will be required to meet the target. They must have enough control over their work to be able to meet their targets or motivation may suffer; **Timed** – there should be a set timescale for achieving a target. Open-ended targets may not encourage focused effort on improving performance.



## 11. Performance trends

The following table outlines the key performance issues, tools, and processes that can be used in assessing performance trends.

Issues to be considered	Tools or processes
<p>What is the overall performance of the services?</p> <p>What is the performance of each component of the services – service by service, facility by facility, and facility by service (as applicable)? Repeated failure will usually trigger default obligations and/or notifications under the contract.</p>	<p><b>Regular payment reports:</b> discussed in detail later in this appendix</p> <p><b>Trends analysis:</b> Graphs showing trends in performance of the services for the payment period in question, compared with performance over each previous payment period by service/facility. Rolling averages of performance over extended periods.</p>

## 12. Government's relationship with the private party

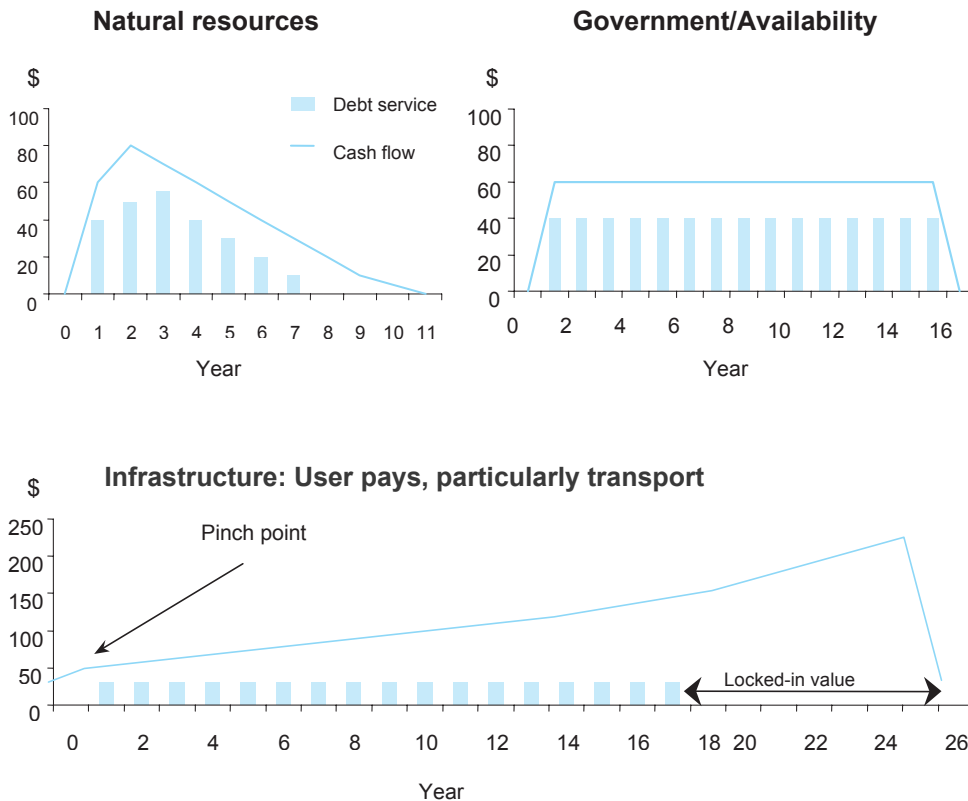
The following table outlines the key performance issues, tools, and processes that can be used in assessing government's relationship with the private party. (Relationship management is discussed in detail in Chapter 8.)

Issues to be considered	Tools or processes
<p>What is the overall quality of the relationship?</p> <p>Are appropriate communication channels being used?</p> <p>Are roles and responsibilities clear?</p> <p>Are committees functioning well?</p> <p>Are skills well matched?</p> <p>Is there regular communication with the private party's parent company or sponsors?</p> <p>Are issues and disputes being dealt with promptly and effectively?</p>	<p><b>Issues register:</b> Trends in the occurrence and speed of resolution of issues may reflect changes in the relationship.</p> <p><b>Review of communications channels:</b> Trends in the occurrence and speed of resolution of issues may reflect changes in the relationship.</p> <p><b>Interviews with government and private party personnel involved in the project</b></p>

# Appendix D: Typical cash flows for different types of projects

(See Part 3 of Appendix C.)

Cash flow profiles for *Partnerships Victoria* projects are project-specific. However, there are some common cash flow profiles. These are illustrated in the graphs below.



Revenues from natural resource projects tend to peak early on and decline thereafter. Loans for such projects tend to be shorter term and require significant upfront principal repayments.

In contrast, user-pays infrastructure projects tend to incorporate significant growth from a relatively low starting point. It is not uncommon for such projects to experience some financial pressure in their early years (indicated above as a pinch point). Uncertainties over the potential for growth tend to be the focus for lenders to such projects.

A significant number of *Partnerships Victoria* projects have been structured with availability and performance elements of a unitary payment. Compared to the other two project types, the revenues in these projects tend to be more easily definable and only subject to performance of the private party. Consequently, there is little opportunity for significant upside in such projects and the lenders will focus their attention on the ability of the private party to meet the required performance criteria.

## Appendix E: Debt cover ratios

(See Part 7 of Appendix C.)

*Partnerships Victoria* projects will often involve project finance techniques. Project financing is the funding of a major asset in which the lender looks principally to the cash flows of the project as the source of funds for repayment, and to the assets of the project as collateral for the loan. The general credit of the project sponsor is usually not a significant factor, either because the private party is a corporation without other assets (a special purpose vehicle) or because the financing is without direct recourse to the sponsor.

For lenders, project financing carries rather a different risk for credit assessment than a conventional full recourse loan (where the enforcement of security by the lender is additional to its ability to sue the borrower, and the lender can assess the value of the assets as collateral). With project financing, the assets may not have a capital or market worth to which the lenders are willing to attribute value, as they usually cannot realise sufficient proceeds to repay the loan through selling off the assets. The lenders therefore tend to take a pessimistic view of risk, require a tight financial reporting regime, and will insist on being able to step in and rescue a failing project. (Lenders have more flexibility in the construction stage of limited recourse projects where a sponsor has guaranteed project construction and completion.)

A typical *Partnerships Victoria* project structured using availability and performance elements of a unitary payment (see Appendix D) has a revenue level that is fixed and a cost base which is similarly fixed through the use of sub-contracts and financial hedging agreements. Therefore, lenders pay particular attention to anything that can either reduce the finite level of income or increase the cost base, as both have the effect of eating into cash flow and potentially affecting the ability to make debt service payments. As a result, the funding documents put a significant onus on the private party's management team to provide documentation to allow regular review of the its financial position.

Common requirements include the provision of:

- an updated financial model every six months to show the actual position and that forecast for the remainder of the project life
- an annual budget for the entity
- reconciliations of variations between actual cost incurred and the budgeted cost
- quarterly management accounts
- annual audited accounts of both the private party and its parent companies
- a commentary on the performance under the payment mechanism.

While there will be trigger levels within the contract for warning notices and termination thresholds, lenders will have a lower tolerance of poor performance. They will seek to replace the sub-contractors and possibly step in to try and remedy the situation before government may look to step in and/or terminate the contract. An even lower tolerance of poor performance will then filter through to the sub-contracts because the SPV will want the opportunity to rectify service performance issues before the bank starts to apply pressure.

Therefore, where such project finance techniques are used under *Partnerships Victoria* projects, there is no reason why government should not rely on the financial performance monitoring standards set by the lenders to give themselves comfort that the performance and financial strength of the SPV is being monitored in detail on a regular basis.

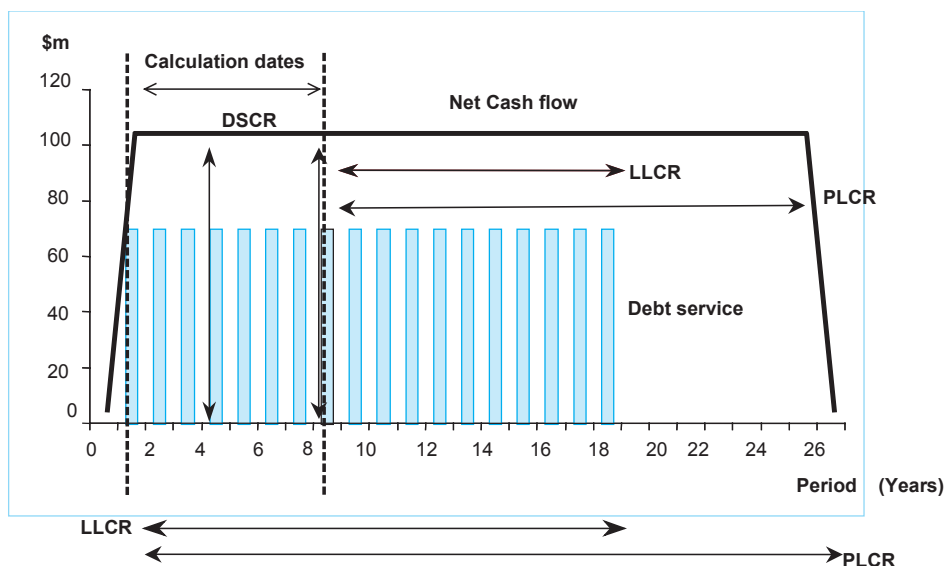
### Key measures

Project lenders focus heavily on the level of cover afforded by the income stream over the cost to service the loan. Lenders analyse risk within each individual project to establish the level of cover ratio they desire to ensure all debt service obligations are met. These are looked at over three distinct timeframes:

- the cover afforded in any one period
- over the life of the loan
- over the life of the whole project.

The diagram below illustrates the key debt service ratios typically used to monitor the performance of a non-recourse/limited recourse project finance structure.

**Figure E.1: Debt service ratios – non-recourse/limited recourse project**



Precise definitions of these coverage ratios change from project to project and the Contract Director should refer to the financing documents for the definition. Typical definitions for the coverage ratios are as follows:

$$\begin{aligned} \text{Debt service cover ratio (DSCR)} &= \frac{\text{Pre finance post tax cash flow}}{\text{Debt service payment}} \\ \text{Loan life cover ratio (LLCR)} &= \frac{\text{NPV of pre finance post tax cash flow}}{\text{Loan outstanding}} \\ &\quad \text{for the remainder of the loan life} \\ \text{Project life cover ratio (PLCR)} &= \frac{\text{NPV of pre finance post tax cash flow}}{\text{Loan outstanding}} \\ &\quad \text{for the remainder of the project} \end{aligned}$$

The DSCR is an historic ratio that measures the cash flow for the previous period in relation to the amount of loan interest and principal payable for that period. As an historic measure, it will usually indicate financial difficulties after the event, but a clearly declining trend should be acted on.

The LLCR provides a snapshot on a given date of the Net Present Value (NPV) of the projected cash flows from that date until retirement of the loan relative to the loan outstanding on that particular date. This forward-looking ratio is only meaningful if revenue and cost forecasts are regularly reviewed and updated in the financial model.

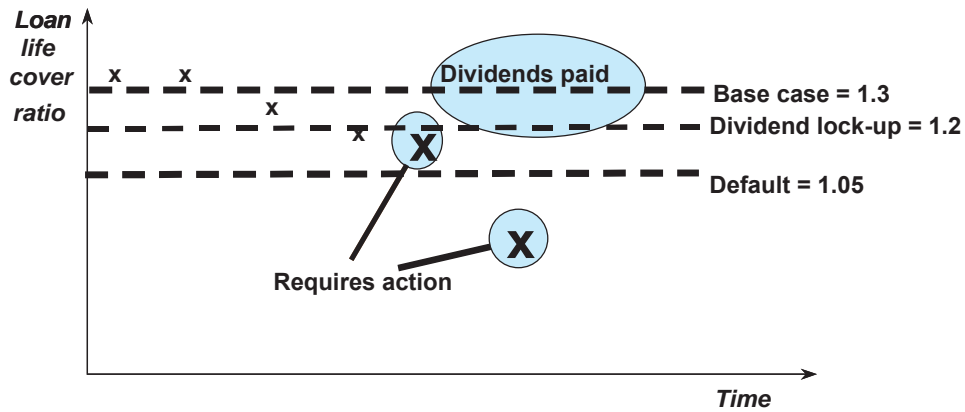
The PLCR provides a snapshot on a given date of the NPV of the projected cash flows from that date until the end of the project, relative to the loan outstanding on that particular date. Like the LLCR this is a forward-looking ratio which also gives the lenders some comfort that cash flows available after the loan is scheduled for retirement may be available to service debt, in the event that the loans need to be extended for whatever reason.

Lenders will usually set three levels of DSCR and LLCR for any project. These are:

- **base case:** This is the level the lender will wish to see all forward projections meeting and is required for both ratios before funds will be advanced at financial close.
- **dividend lock-up:** This level is below the base case level and triggers a suspension of dividend payments going out to shareholders. This forces the special purpose vehicle to retain any spare cash going forward until the financial ratios are returned to a specified level above the lock-up level.
- **default:** This is level at which the special purpose vehicle is in breach of the funding document and the lender can call in the loan, exercise its step-in rights or enforce its security. This may effectively be the death of the project.

In terms of performance monitoring and taking control actions, the lenders' approach is illustrated in simple terms by Figure E.2.

Figure E.2: Debt service and loan life cover ratios – typical lenders’ levels



Lenders will focus on any ratio not meeting the base case level. Between the base case and dividend lock up level there is no real need to take any action other than to understand the cause of the dip in the ratios. Below the dividend lock-up level, the shareholders cannot take any cash out of the special purpose vehicle. This provides a good incentive for management to sort out the problem and improve the ratios to re-establish the base case position.

When projected and actual ratios move towards the default level the lenders will become more concerned and start to probe why the ratios have fallen. The lender may investigate remedies such as developing ‘cure plans’ to rectify the position, removing management or advisers or suspending further advances. Typical cover ratios for projects are illustrated in Figure E.3.

Figure E.3: Typical debt cover ratios for infrastructure projects

Decreasing price risk

	Natural resources	Roads User-pays	Power	Water	Government accom.
DSCR minimum	1.25	1.25	1.25	1.20	1.15
LLCR minimum	1.75	1.50	1.35	1.30	1.25
PLCR expected	2.00	1.80	1.50	1.40	1.35

The level of competition between lenders wishing to be involved in a project and extract fees and margins can also affect the ratios set for the project.

Lenders analyse risk within each individual project to establish the level of cover ratio they desire to ensure their loan is safeguarded. However, Figure E.3 illustrates how the ratios increase with increases in pricing risk. This provides some general rules of thumb that can be applied to projects.

Market-driven projects (such as natural resources) tend to have higher revenue risk and therefore the ratios tend to be higher than for the other categories of project. User-pays roads can be regarded as partially regulated monopoly projects with a fairly high degree of revenue risk, though not as high as under free market conditions. The regulated power sector tends to decrease the revenue risk, while pure contracts for service such as might be found in water and government accommodation projects contain significantly less revenue usage risk and correspondingly have lower cover ratios.

## Appendix F: Key financial ratios

(See Part 7 of Appendix C.)

Historically, much of the interpretation of a company's financial position has been based on ratio analysis. Accounting ratios condense the data in a company's accounts and relate different items of data to each other, so that pictures of the company's financial affairs expressed in just a few key numbers can be compared.

Ratios can be interpreted in one of three ways:

1. A company's actual ratios achieved can be compared with an acceptable or safe norm.
2. A company's ratios in the current and most recent years can be compared with the same ratios it achieved in earlier years, to detect an improving or declining trend, so-called horizontal analysis.
3. A company's ratios can be compared with similar ratios for other companies of a similar type in the same industry, so-called cross-industry analysis.

Ratio analysis can help to indicate whether a company's situation is getting better or worse, or is staying much the same. Ratios can also help to indicate areas of weakness in a company.

Ratios by themselves are of little use. The key to obtaining meaningful information from ratio analysis is comparison—comparing ratios over time with the same business to establish how things are changing, or comparison with similar businesses to see whether the company is better or worse than average within a particular sector. However, each business should be considered separately, as a ratio that is meaningful for one type of company (say a construction company) may be completely misleading if compared with another type of company (say a facility maintenance company). The key to ratio analysis lies in understanding what the purpose of the analysis is and continually returning to this reference point.

It is also important to appreciate that ratios can provide useful information, but they are unlikely to be completely accurate or tell the whole story.

Different types of financial ratios can be used for different purposes:

- **Activity analysis** considers the trend in sales and an upward trend could indicate expansion or may be a result of inflation. Any downward trend could be the result of such factors as business rationalisation, deflation, a lack of competitiveness, technical obsolescence or marketing problems.
- **Liquidity ratios** are used as a measure of cash flow, or having sufficient cash to meet short-term commitments. They therefore refer to the amount of assets held in cash or near cash, usually in relation to the size of debts payable in the near future. There is no ideal level for these ratios, although it has been suggested that the range 1.5 to 2.0 for the current ratio and 0.8 to 1.0 for the quick ratio represents a good standard.
- **Long-term debt and solvency ratios** can be used to assess a company's capital structure. A high proportion of debt capital could indicate that the company is at some financial risk.



- **Profitability analysis and valuation ratios** typically relate to the performance of the company and are usually of most interest to shareholders, who naturally want to know how well their investments are doing.

The table below contains some example of the types of financial ratios typically used to monitor the financial performance of company.

**Table E.1: Monitoring company performance – typical financial ratios**

Type	Ratio	Calculation	Explanation
Activity analysis	Receivables turnover	Sales/Average trade receivables	Measures the effectiveness of the firm's credit policies.
Liquidity analysis	Current ratio	Current assets/Current liabilities	Measures cash resources with cash obligations.
	Quick ratio	(Current assets - Stock)/Current liabilities	Excludes inventory from cash resources.
	Defensive interval	365 x ((Current assets - Stock)/Operating cash flow)	Indicates the number of days the firm could maintain the current level of operations with its present cash resources.
Long-term debt and solvency analysis	Debt to equity	Total debt/Total equity	Examines a firm's capital structure and, indirectly, its ability to meet current debt obligations.
	Times interest earned	Earnings before interest and Taxes/Interest expense	Measures the extent to which earnings available for interest 'cover' interest expense.
Profitability analysis	Return on assets	(Net income + After-tax interest cost)/Average total assets	Return on assets indicates how capital-intensive a company is, that is how much income is the company generating given the amount of assets.
	Return on equity	Pre-tax income/Average stockholders' equity	Return on equity measures the rate of return on shareholders' investment.
Valuation	Earnings per share	Earnings available to common shareholders/ Weighted-average number of shares of common stock outstanding	This is the amount of profit on ordinary activities after tax and preference dividends expressed on a share basis.
	Dividend payout ratio	Dividends/Net income	Percentage of earnings paid out as dividends
	P/E Ratio	Current mid-market price/ Earnings per share	Market price of shares as a multiple of the earnings per share

The commercial adviser for each specific project can advise on the most appropriate ratio and range for that type of project.

# Appendix G: Delegations - additional information

(See Section 9.5.)

## 1. Delegation of legal power to exercise relevant functions, rights and powers

As a general rule, the primary person or people authorised to act on behalf of a government party in exercising legal rights or fulfilling legal obligations of the government party will be:

- the relevant portfolio Minister, acting under government administrative arrangements or under legislation applicable to the project, or
- senior management of the government party, empowered by legislation applying to the entity or the project.

As it can be inconvenient for all functions, rights and powers to be exercised by the Minister or senior management, certain functions, rights and powers are delegated to other government party personnel.

A difficulty can arise where legislation delegates a function, right or power to the Minister or senior management. In these circumstances, the law dictates that the Minister or senior management cannot sub-delegate to another person unless the legislation specifically allows for a right of sub-delegation.

## 2. Authorisation to exercise relevant functions, rights and powers as an agent

Regardless of whether a function can be sub-delegated, the person with delegated power to carry out that function is able to authorise another person to act for them (as their agent) in carrying out the function, provided the function is not one that, by its nature, must be exercised by the delegate in person.

## 3. Capacity to make financial commitments

Where the exercise of a function, right or power involves incurring an expense or creating a financial obligation, legal authorisation to exercise that function, right or power is not the only requirement that must be met. Generally, the government party is subject to legislation or policies regulating financial commitments, under which the person exercising the function, right or power must also have the capacity to make the financial commitment resulting from the exercise of the

function, right or power. For example, the ability of staff of certain public authorities and bodies to make financial commitments is subject to regulations and directions under the *Financial Management Act 1994* . Approval may also be required from Cabinet's Expenditure Review Committee.

# Appendix H: Compliance and public sector accountability – additional information

(See Chapters 9 and 10.)

## 1. Public sector accountability and access to information in government contracts<sup>42</sup>

In May 2000 the Report of the *Audit Review of Government Contracts: Contracting, Privatisation, Probity & Disclosure in Victoria 1992-1999*, an independent report to government, was released. A copy of the Audit Review Report is accessible at [www.contracts.vic.gov.au](http://www.contracts.vic.gov.au). It is a useful resource that examines accountability, probity and disclosure issues generally in relation to government contracts.

Report No. 42 of the Commonwealth Administrative Review Council, *The Contracting Out of Government Services. Report to the Attorney-General*, August 1998, provides an analysis of the application of private law and administrative law in situations where services are provided by private sector contractors. It is available via [www.law.gov.au/arc](http://www.law.gov.au/arc).

## 2. Classifying project information for disclosure and access

When classifying information for developing a knowledge and information management strategy with various rights of access, the *Audit Review of Government Contracts*<sup>43</sup> adopts four classes of information relevant to disclosure and access to project information:

1. information that is published by government and is publicly available and which does not present a disclosure issue
2. information provided to the government by third parties, such as the public and businesses. An exemption from disclosure may be available to particular classes of documents or information under the Information Privacy Act or from the *Freedom of Information Act 1982* (Vic) (the FoI Act)

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<sup>42</sup> The information contained in this appendix is for guidance purposes only. Legal advice should be sought when applying this information to a specific project. This material is not an exhaustive list of all compliance legislation and government policy. Relevant legislation and policies applicable to a project must be considered individually within the context of the method of project delivery and the services provided.

<sup>43</sup> *Audit Review of Government Contracts: Contracting, Privatisation Probity & Disclosure in Victoria 1992-1999*, May 2000 at p.119 (citing P. Finn, *Official Information, Integrity in Government Projects*, Interim Report (1991) ANU, pp 19-27).

3. information generated within government, but not falling into the first category
4. information that is proprietary in nature (analogous to trade secrets in the private sector).

Members of the public may seek access to government documents through the FoI Act.

The categories of information described above are also reflected in various exemptions from release under FoI legislation. Further, the Government, in the Premier's policy statement of October 2000, *Ensuring Openness and Probity in Victorian Government Contracts*, adopted the same conclusion reached by the Audit Review; that is, the current FoI legislation strikes an appropriate balance in determining which contractual information ought to be disclosed and accessible to people who seek access to it.

### 3. The Freedom of Information Act and commercial in confidence materials

Despite the title of the legislation, the FoI Act applies to documents, not information.

The definition of 'document' under the FoI Act is very broad and includes written and electronic documents, maps, graphs, drawings etc.

There is a presumption of release and general right of access to the government party's documents under the FoI Act, unless the government party can establish a specified exemption from disclosure. Bearing this in mind, when a document is created its content should reflect the fact that any release granted under the FoI Act is a release to the world at large.

This right of access exists irrespective of the purpose of the request.

Under the FoI Act, certain documents are exempt from access. The categories of exemption potentially relevant to contract and project management include:

- Cabinet documents (section 28) of the FoI Act
- internal working documents (section 30)
- documents affecting legal proceedings (section 32)
- documents affecting personal privacy (section 33)
- commercial in confidence documents (section 34)
- documents containing material obtained in confidence (section 35)
- disclosure contrary to public interest (section 36).

Contract disclosure is subject to criteria contained in the FoI Act allowing material to be withheld in some circumstances. (This topic is discussed further below.) In particular, Section 34 of the FoI Act provides a limited exemption in respect of third parties' business information acquired from a business, commercial or financial

undertaking. Agencies must demonstrate that the disclosure of information would be likely to unreasonably expose the undertaking to disadvantage. Section 34(2) outlines the considerations that a decision maker may take into account when deciding this issue.

Subject to the public interest override capacity of section 50(4) of the FoI Act, section 34 now protects the following classes of documents potentially relevant to government contracting/projects:

- documents containing information acquired from a business undertaking that relates to trade secrets (section 34(1))
- documents containing information acquired from a business undertaking that relates to other business, commercial or financial matters, which, if disclosed – having regard to the matters listed in section 34(2) – would be likely to expose the undertaking unreasonably to disadvantage (section 34(1))
- documents which contain a trade secret of an agency or information of business, commercial or financial nature relating to a trading agency. In these cases, FoI protection would depend in each case on whether disclosure would be likely to expose the agency unreasonably to disadvantage (section 34(4)(a))
- documents containing the results of certain scientific or technical research undertaken by an agency (section 34(4)(b)).

## 4. Disclosure of contractual information

Of special significance to both private sector parties and government in *Partnerships Victoria* projects are the limits to claims of confidentiality in contractual dealings in light of the Premier's *Ensuring Openness and Probity in Victorian Government Contracts* policy statement. This statement introduced a range of measures to increase openness and transparency in Victorian Government contracts (including *Partnerships Victoria* contracts) and was supported by amendments to the FoI Act that took effect on 1 January 2000.

The Government's commitment to openness and transparency in its dealings extends to the public disclosure of tender and contract related information. The contract disclosure requirements of the Premier's policy statement were given effect through the introduction of Direction 9.6 of the *Financial Management Act 1994*. Direction 9.6 provides for mandatory disclosure of contracts, in full, by government departments—where the contract value exceeds \$10 million. Direction 9.6 reflects the minimum standard.<sup>44</sup>

The policy's objective is to maximise disclosure but reflects a fair balance between the public's right to know and recognition that limited circumstances exist where certain information should not be disclosed in the public interest.

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<sup>44</sup> Revised Standing Directions and Financial Reporting Directions will come into effect from 1 July 2003.

The policy provides that:

- Once the contract is signed and financial close is achieved, the government party (other than public sector agencies) is required to place the contract (over \$10 million) on the Contracts Publishing System ([www.vgpb.vic.gov.au](http://www.vgpb.vic.gov.au)). Public sector agencies are required to benchmark their policies and procedures for disclosure against those of the VGPB;
- Disclosure is subject to the application of the criteria contained in the FoI Act which allows material to be withheld in some circumstances;
- If contract materials are excluded from disclosure based on FoI criteria, a note explaining the reason for non-disclosure should be included and the proposed disclosure release date of the exempt information;
- Agencies are to advise tenderers of the strict limitations of confidentiality that will apply to government contracts and should avoid providing bidders with absolute assurances about the confidentiality that will be given to the information they provide; and
- A standard clause should be included in contracts requiring the private sector party to provide any information that the government party or the State may require to comply with requests from the Auditor General.

Further information concerning the State's contract disclosure policy is available in the *Probity Policy and Guidelines for Government Tendering and Projects* and at [www.vgpb.vic.gov.au](http://www.vgpb.vic.gov.au).

## 5. The Whistleblowers Protection Act 2001 (Vic)

The *Whistleblowers Protection Act 2001* (the WP Act) came into force on 1 January 2002. The purpose of the WP Act is to encourage and facilitate disclosure of improper conduct by public officers and public bodies.

The WP Act protects whistleblowers who make disclosures in accordance with the Act, and establishes a system for investigating the matters disclosed and taking rectifying action.

Section 104 of the WP Act requires the government party to report certain information (including its current procedures for the handling of disclosures of improper conduct) in its annual report.

Compliance with the WP Act and the development of procedures to ensure compliance are an essential part of a government party's project compliance program. Compliance has a significant role in ensuring the transparency and accountability of an entity's administrative and management practices by supporting disclosures that reveal corrupt conduct, conduct involving a substantial mismanagement of public resources, or conduct involving a substantial risk to public health and safety or the environment.

## 6. The *Public Records Act 1973* (Vic)

The *Public Records Act 1973* (the PR Act) was enacted to ensure the proper preservation, management and use of public records. The PR Act and the records management authorities issued by the Keeper of Public Records under Section 12 of the PR Act contain provisions that agencies must follow in managing these records.

Section 13 of the PR Act states that a public officer must 'make and keep full and accurate records of the business of the office'. This obligation does not cease because a third party undertakes a service or activity of a government party under a contract. Contract activities are still the government party's business.

Standards relating to storage requirements, retention periods for classes of records, management of electronic records, and processes for the legal destruction of records by public agencies have been developed under the PR Act. These standards are available at [www.prov.vic.gov.au](http://www.prov.vic.gov.au). These standards can be used as guidance for the range of issues that should be incorporated into a contract.

The government party should consider what part of the private party's records the government party might need to access to ensure compliance with Section 13 of the PR Act and other record-keeping objectives.

## 7. Cabinet documents

All Cabinet and Cabinet committee documents, working and briefing papers are to be treated as confidential. Cabinet documents are exempt from release if requested under the Victorian FoI Act. They are also exempt under the doctrine of 'public interest immunity' where documents are sought from government as part of general litigation. Further information concerning the protocols regarding access to, storage and disposal of Cabinet in Confidence materials are available from the Cabinet Secretariat of the Department of Premier and Cabinet (DPC). It is also available at [intranet.vic.gov.au/Parliament/parliament.htm](http://intranet.vic.gov.au/Parliament/parliament.htm) through the electronic Cabinet Handbook.

## 8. Privacy legislation in Victoria

The *Information Privacy Act 2000* (the IP Act) came into effect on 1 September 2001 and contains a set of ten information privacy principles (the IPPs). The IPPs were enforceable from 1 September 2002 and attract penalties for non-compliance. The list of IPPs and further relevant information can be obtained from the Privacy Victoria website at [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au).

Separate legal advice should also be obtained from within the government party in relation to its IP Act compliance program.

The IP Act aims to increase public confidence in government's ability to protect and manage the personal information that it collects and stores. It applies to contractors to government (referred to in the Act as 'contracted service providers') as well as public sector agencies (referred to in the Act as 'organisations').



Accordingly, within the *Partnerships Victoria* context, consideration needs to be given to the sort of information collected and stored in relation to the project services. The application of the IP Act is only relevant where either or both the parties to the contract collect and store personal information (including 'sensitive information') about individuals. If the IP Act is relevant to the project, then the compliance obligations required by the Act need to be satisfied and incorporated into the government party's information management plan, compliance program and project contracts.

Section 17 of the Act provides that the public sector agency is responsible for breaches of IPPs<sup>45</sup> or an applicable code of practice by a private sector party unless two conditions are satisfied:

1. The government contract must impose on the private sector party the same obligations relating to the IPPs or code that apply to the public sector agency.
2. The IPPs or code must be enforceable against the private sector party, whether or not the first condition is satisfied.

In order to ensure that the private sector party is held responsible for breaches of the IPPs, a provision calling on the protection of limited indemnity in section 17 of the IP Act should be inserted into the project contract. This is the case whether or not the private sector party is also bound by the national privacy principles in the *Privacy Act 1988* (Cwlth).

A government party can also be liable for breaches of the IPPs by sub-contractors of a private party. The contract between the government party and the private party should therefore prohibit sub-contracting by the private party unless the government party consents, or the sub-contract includes a pre-agreed clause that applies the IP Act to the sub-contractor.

By including these clauses in the contract, the government party binds the contracted service provider and any later sub-contractor to the IPPs in the same way and to the same extent as the government party is bound. A separate contractual financial indemnity owed by the private party to the government party should also be included to support the non-compliance indemnity provided for by section 17 of the IP Act.

As in the IP Act, the *Health Records Act 2001* establishes standards called health privacy principles (HPPs) for the collection, handling and disposal of health information in the public and private sectors. For further details, visit the website of the Office of the Health Services Commissioner at [www.health.vic.gov.au](http://www.health.vic.gov.au).

## 9. The Information Privacy Act, the Public Records Act and the Fol Act - overlap

When developing a compliance program or information management plan that involves the interaction of the IP Act with other legislation, section 6(1) of the IP Act is significant.

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<sup>45</sup> Or an applicable code of practice as an alternative to the IPPs if one is approved by the Privacy Commissioner for use by an organisation.

Section 6(1) of the IP Act provides that if a provision made by or under that Act is inconsistent with a provision made by or under any other Act (for example the PR Act or the FoI Act), then the relevant provision of the PR Act or the FoI Act should be followed, but only to the extent required to resolve the inconsistency.

# Appendix I: Glossary

The Glossary contains explanations of terms used in *Partnerships Victoria Contract Management* guidance material.<sup>46</sup>

<b>Business case</b>	The business case sets out the overview of the rationale supporting a <i>Partnerships Victoria</i> approach and a preliminary view on how the project will be delivered. It also provides an analysis of the various impacts of the project and an indication of the likely level of market interest. The business case provides information allowing government to decide whether to support a proposed project, before significant resources are spent on its development.
<b>Cabinet</b>	A reference to Cabinet in this publication includes a Cabinet committee, or other body or person exercising authority delegated by Cabinet.
<b>Commissioning</b>	Commissioning refers to the proving processes involving the start-up of operations, to deliver the contracted services as specified.
<b>Contract Director</b>	The Contract Director acts as government's (or the relevant public sector entity's) agent in managing contractual arrangements between government and the private party. The Contract Director acts on behalf of government in relation to the exercise of government's rights, discretions and obligations under the contract.
<b>Contract management</b>	In the context of <i>Partnerships Victoria</i> projects, contract management incorporates all the activities required to identify, monitor and mitigate all risks over the life of the project contract to maximise value for money.
<b>Contract risks</b>	Contract risks are those risks which may cause actual public sector outcomes to differ from those expected when a <i>Partnerships Victoria</i> contract is entered into. They include project risks and other risks that government faces in <i>Partnerships Victoria</i> contract management.
<b>Cure period</b>	A specified period of time for a party to rectify/cure a default (that can be rectified or cured) before the government has the right to enforce any remedies for default specified in the contract.

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<sup>46</sup> These explanations are not necessarily the same as definitions adopted in authoritative documents, such as accounting standards, or in other *Partnerships Victoria* guidance material, as the context in which the terms are used may differ in this document.

<b>Default</b>	The failure of a party to perform a contractual requirement or obligation, including failures to meet deadlines, to perform to a specified standard, to meet a loan repayment or to meet its obligations in relation to a materialised risk.
<b>Estoppel</b>	<p>The legal principles known as estoppel arise in government contracts where government has:</p> <ul style="list-style-type: none"><li>(a) made a representation (oral or by conduct) which is not included in the actual agreement; or</li><li>(b) where after the agreement is signed, government agrees not to exercise a discretion in a certain way. In such circumstances, government may be bound by that representation or action.</li></ul> <p>For example, in the context of a <i>Partnerships Victoria</i> project, if the government party leads the private party to expect that the government party will not require the private party to achieve a particular contractual KPI, and private party acts in reliance on this expectation, the government party may be unable to later abate payments for failure to meet the KPI.</p>
<b>Force majeure</b>	Acts of God and other specified risks (for example, terrorism) which are beyond the control of the parties to the contract and as a result of which a party is prevented from or delayed in performing any of its non-financial obligations under the contract.
<b>Government party</b>	A generic term for the department or any other public sector entity sponsoring a <i>Partnerships Victoria</i> project.
<b>Material adverse effect regime</b>	The designation of particular categories of risks which, if they materialise, will have a material adverse effect on the project and are to undergo a special process of assessment and allocation between the parties.
<b>Output specification</b>	The output specification sets out the range of services that government is seeking to procure and the performance levels required for each of those services.

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<b>Private party</b>	The private sector entity with which government directly contracts. Traditionally the private party has been a special purpose vehicle created specifically for the purposes of the project. The private party is not limited to this form and can be set up under a number of structures, including a joint venture and a trust structure. Behind the contracting party, however, there may be a number of private sector interests at play, seeking to be represented through the contracting party. (See also special purpose vehicle.)
<b>Procurement team</b>	Under the guidance of a steering committee, the procurement team is responsible for the day-to-day administration of the project until commissioning, to ensure deadlines are met and technical difficulties resolved.
<b>Project Director</b>	The Project Director has overall responsibility for delivery of the project through the procurement process, and management of all members of the procurement team, including external advisers and consultants.
<b>Project risks</b>	Those risks which may cause actual project circumstances to differ from those assumed when forecasting project benefit and costs.
<b>Public Sector Comparator (PSC)</b>	The Public Sector Comparator (PSC) represents the most efficient public procurement cost (including all capital and operating costs and share of overheads) after adjustments for Competitive Neutrality, Retained Risk and Transferable Risk (for definitions of these terms please refer to the <i>Public Sector Comparator</i> technical note) to achieve the required service delivery outcomes. This is used as the benchmark for assessing the potential value for money of private party bids in <i>Partnerships Victoria</i> projects.
<b>Risk</b>	The chance of an event occurring which would cause actual circumstances to differ from those assumed when forecasting benefit and costs.
<b>Risk allocation</b>	The allocation of responsibility for dealing with the consequences of a project risk to one of the parties to the contract, or agreeing to deal with the risk through a specified mechanism which may involve sharing the risk.
<b>Risk assessment</b>	The determination of the likelihood of identified risks materialising and the magnitude of their consequences if they do materialise.
<b>Risk identification</b>	The process of identifying all the relevant risks.

<b>Risk management</b>	The identification, assessment, allocation, mitigation and monitoring of risks. The aim is to reduce their variability and impact.
<b>Risk matrix</b>	A method of presenting all possible significant risks likely to be encountered, the magnitude and likelihood of the risks occurring, their areas of impact, and the risk mitigation techniques to be employed.
<b>Special purpose vehicle (SPV)</b>	In establishing a project consortium, the sponsor or sponsors typically establish the private party in the form of a special purpose vehicle (SPV) which contracts with government. The SPV is simply an entity created to act as the legal manifestation of a project consortium. The SPV itself has no historical financial or operating record which government can assess.
<b>Step-in</b>	Government's election to assume all or some of the service delivery obligations of the private party under the contract for a period of time. The circumstances where government may have the right under the contract to exercise rights to step in may include a need to: prevent or mitigate a serious risk (to the environment; public health; the safety of persons or property); guarantee continuity of an essential service; discharge a statutory duty; or deal with a default by the private party under the contract.



