



# **SCM CONTRACT MANAGEMENT POLICY**

**2023/2024 FINANCIAL YEAR**



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## 1. TERMS AND DEFINITIONS

Contract	The written agreement entered between the purchaser and the supplier, as recorded in the contract form signed by the parties, including attachments and appendices thereto and all documents incorporated by reference therein.
Contractor	The party to the contract that is required to provide goods or services according to the terms of the agreement.
Contract Management	The activities necessary to manage a contract throughout all stages in the contract life cycle to ensure that immediate action is taken effectively and efficiently to the change that may occur to the contract
Contract Management system	Computerised or manual system necessary to ensure proper Contract Management control and monitoring of performance of the contractors in terms of the contracts.
Contract Register	Manual or computerised system necessary to ensure proper Contract Management control.
Force Majeure	<p>An event beyond the control of the contractor and not involving the contractor's fault or negligence and not foreseeable.</p> <p>The burden is on the party claiming force majeure is to prove that the force majeure falls within the contract wording and that non-performance was a result of the outbreak.</p> <p>The party must also show there were no alternative means for performing its obligations and that it has taken all reasonable steps,</p> <p>The party will be seeking to be excused from liability for non-performance, which in most cases will mean renegotiating the terms of the contract by, for example, extending timelines for delivery.</p> <p>There are certain conditions that must be fulfilled in order for a force majeure to trigger the type of impossibility that extinguishes a party's contractual obligations.</p> <p>These are: -</p> <ul style="list-style-type: none"><li>○ The impossibility must be objectively impossible.</li><li>○ It must be absolute as opposed to probable.</li></ul>

- It must be absolute as opposed to relative (in other words, if it relates to something that can in general be done, but the one party seeking to escape liability cannot personally perform it, such party remains liable in contract).
- The impossibility must be unavoidable by a reasonable person.
- It must not be the fault of either party.
- The mere fact that a disaster or event was foreseeable, does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person.

Litigate	The act or process of contesting a lawsuit or seeking redress through the courts.
Parties	Parties that stipulate obligations to one another to ensure that the contract term and condition are fulfilled.
Specification	The statement that provide detailed description of goods, services and works characteristics and identify performance requirements prepared when procuring goods, services and works.
Transversal Contract	Term contracts that are facilitated and arranged by National Treasury or Provincial Treasury for goods and services that may be utilized by a Municipality.
Terms of Reference	The statement that define clearly the task directive (methodology), objectives, goals and scope of the assignment and provide background information, prepared when procuring professional services.
Institution	A Unit or Function in the organization as the role player to the procedures.
Division	Includes the divisional section within the municipality.
Firm Contract Price	Contract prices provide for a fixed price which normally are not subject to any further price adjustment.
Non-Firm Contract Price	Contracts prices that are subjected to changes if they are explicitly included in the agreement. based on the economic price escalations such as consumer price inflation (CPI)

## **Abbreviations**

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

## **2. INTRODUCTION**

Good contract management is essential for sound financial management and contributes greatly to effective and efficient service delivery. Contract management is concerned with monitoring contractor performance to avoid bid violations (e.g., submission and payment of fictitious invoices and abuse of the variation procedures). Contract management could be described as a systematic process that ensures that goods and services are delivered to the right place, in the right quantity, with the right quality, at the right cost and at the right time.

Furthermore, it is the process that enables both parties to a contract to meet their obligations in order to deliver the objectives required from the contract and invoices which builds a good working relationship between the parties. Contract management continues throughout the life of a contract and also involves managing proactively to anticipate future needs as well as reacting to adverse situations that may arise.

One of the objectives of contract management is to accelerate service delivery in accordance with the signed contract and the attainment of value for money whilst mitigating any risks.

## **3. PURPOSE**

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

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

## **4. TYPES OF CONTRACTS**

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

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

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

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

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

The price is determined at inception of the contract and remains fixed for the duration of the contract.

### **4.2 Time-Based Contract**

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

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

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

The rates for staff include salary, social costs, overheads, fees and, *where appropriate*, special allowances.

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

Time-based contracts need to be closely monitored and administered to ensure that the assignment is progressing satisfactorily, and payments claimed by the consultants are valid and in terms of the contract.

Guidelines on fees for Consultants issued by the Department of Public Service and Administration, as well as any other accredited and recognized associations or bodies (e.g. AG, ECSA, Law Society, SAICA etcetera.) should be used as a basis to establish whether the fees proposed are reasonable and market related.

### **4.3 Percentage Contract**

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

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

These contracts are negotiated on the basis of market norms for the services.

### **4.4 Time Based Contract (With Price Agreement)**

These contracts are used when the Accounting Officer or the municipality needs to have "on call" specialized services to provide advice on a particular activity, the extent and timing of which cannot be defined in advance.

These are commonly used to retain "advisers" for implementation of complex projects, expert adjudicators to serve on dispute resolution panels, advice on complex procurement, etcetera.

These appointments would normally be for a period of a year and generally not exceed three years.



## **5. CONTRACT CREATION**

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

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

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

Demand planning, procurement planning, items and specification management, and supplier management are critical phases in the pre-tendering stage. This stage ensures that goods, services, construction work and other purchases are properly planned and aligned to the municipality's procurement (plan) strategy and resource plan.

This alignment is critical to ensuring that goods are delivered at the right time, place and price, in the right quantity and of the right quality. It is at this stage that a comprehensive needs analysis is carried out in line with the strategic planning process.

Procurement plans indicate all purchases that will be undertaken in the short, medium and long-term periods. Proper planning should reduce delivery delays, eradicate recurring contracts and unnecessary extensions, and eliminate the need for emergency procurement.

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

This stage includes the invitation to tender, and evaluation and adjudication of bids. To avoid lack of competition and conflict of interest, all potential bidders must have access to the same tender information.

Information in the bid documents should include details of the product or service to be procured, specifications, actual or estimated quantities, the timeframe for delivery, realistic closing dates and times, where to obtain documentation, where to submit tenders and a clear, complete and non-discriminatory description of the selection and award criteria. These cannot be altered after the tender closing date.

## **6. CONTRACT MANAGEMENT LIFECYCLE**

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

An effective Contract Management life cycle constitutes planning, contract arrangement, administration, performance management and close out.

### **6.1 Stage 1: Planning**

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

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

Procurement plans containing all planned procurement for the financial year in respect of the procurement of goods, services and works which exceed R200 000.00 (*Capital Expenditure*) is submitted by Accounting Officers to Gauteng Provincial Treasury by the 31 July of each year.

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

Contract management function within the SCM unit will be responsible for monitoring of contracts in line with the projects listed in the procurement plans and approved budgets.

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

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

The Contract Management function, within the SCM unit will arrange for the signing of the contract as follows:

- Submit the tender document, which becomes the contract, to the Deputy Municipal Manager / delegated official for signature.
- Issue an appointment letter, signed by the CFO and relevant head of department, or by the Municipal Manager (for appointments above R10 Million VAT Included) to the successful bidder.
- Follow-up on the need for of a Service Level Agreement (*where appropriate*), between the municipality and the bidder.
- The SLA must be legally sound and vetted by the Municipality's Legal Services Department, prior to signing off by the parties;

- Capture contract award details in the Contract Management system of the Municipality and National Treasury's Contract Registration Application (CRA).
- Original signed contract resides within the Supply Chain Management Unit, copy of which will be scanned and archived in the SCM filing system of the municipality;
- A copy of the signed contract is issued to the end-user to prepare for acquisition.

### **6.2.1 Service Level Agreement**

Service level agreements are negotiated agreements for the delivery of specified services between the contractor and the Municipality. An SLA is not compulsory and is solely at the discretion of the user department, especially if the specifications in the tender document is not sufficient.

The SLA specifies services or goods required. The level of quantities and quality of service to which both parties agree and designed to indicate and evaluate the quality of the service delivered. Agreement is negotiated at the commencement of a contract and involves the understanding of the needs and constraints of both parties.

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

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

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

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

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

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

### **6.2.2 Legal Vetting of Service Level Agreement or the Formal contract**

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

The above includes legal vetting by the Legal Division of the municipality and such contracts or agreements must be actively managed in order to ensure that both the Municipality and the contractor meet their respective obligations.

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

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

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

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

### **6.3.1 Contract Register**

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

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

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

An effective contract register should have the following characteristics:

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

Contract register report will be established detailing status of contracts and the reports to be provided by the 5<sup>th</sup> working day of every month to the Head of SCM on the following:

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

### **6.3.2 Contract Payments**

Payments should be made in accordance with the provisions of the contract after delivery.

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

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

In cases where a discount is not a contract condition and the contractor offers a discount on the invoice, the discount if possible must be utilized for instance by making the payment within the time limit specified on the invoice. These are usually referred to as settlement discounts.

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

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

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

### **6.3.3 Contract Variation**

It is recognized that, in exceptional cases, an Accounting Officer may deem it necessary to expand or vary orders against the original contract. The reasons for the variation should be clearly documented and should occur in defined circumstances.

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

In order to mitigate against such practices, The Accounting Officer must ensure that contracts may only be expanded or varied by not more than 20% for construction related goods, services and / or infrastructure projects and 15% for all other goods and / or services of the original value of the contract. Furthermore, any variation beyond the abovementioned thresholds must be dealt with in terms of Section 116 of the Municipal Finance Management Act.

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

The SCM unit will forward the submission made in terms of a variation order to the BEC and BAC for consideration and recommendation to the Municipal Manager.

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

The Contract Management unit will update the contract register and applicable Contract Management system

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

Whilst the municipality may utilize the contract procured by another municipality or organ of state, under strict conditions and prescribed requirements, the Municipality strongly discourages the use of Regulation 32 of the Municipal SCM Regulations. If the need arises, the Municipality must make sure that it complies with the below as per MFMA Circular No. 96 as per below:

## **PRINCIPLES UNDERPINNING THE IMPLEMENTATION OF REGULATION 32**

Before MLM decides to become a participant in a contract secured by another organ of state, it must, as part of demand management, conduct a detailed analysis of the goods or services required. When procuring infrastructure, the municipality must also compare for example its topography or other features, to that of the other organ of state in order to ensure that the service provider will be able to deliver at an acceptable standard.

**The contract must have been secured by means of a competitive bidding process applicable to that other organ of state and the municipality or entity has no reason to believe that such contract was not validly procured**

This means that MLM must verify and satisfy itself that the contract was procured through a procurement process that was fair, equitable, transparent, competitive and cost effective consistent with the public sector procurement principles set out in section 217 of the Constitution.

In order to verify this, MLM must obtain copies of the bid advertisements, bid documents, minutes of evaluation and adjudication committee meetings, and any other relevant documents relating to the contract in order to review whether the other organ of state complied with applicable legislation and policies when it procured the contract. MLM's bid adjudication committee and the internal audit unit must review the obtained documentation from the organ of state, to certify that a competitive bidding process and due process was followed by the other organ of state in concluding the contract. MLM must maintain confidentiality when processing all documentation, as may be appropriate.

**There must be demonstrable discounts or benefits for the municipality or entity to procure goods or services under a contract procured by another organ of state**

MLM must assess the contract terms such as, unit of issue or type of service; delivery lead times and prices; length of contract in line with required goods or service; and undertake comparative research to determine if this form of procurement is more advantageous than advertising a competitive bid. This must include the determination of a reasonable price for the required goods or services; taking into consideration that the requesting municipality or municipal entity can only utilise the remaining portion of the contract that has not been utilised by the original contracting organ of state and not create an additional contract.

The value or price of MLM's required goods or services must not exceed the value or price of the original contract. The decision to participate must be informed by a detailed report that outlines the outcome of the above-mentioned assessment, confirming the legal status of the contract with the other organ of state, reasons for why MLM could not arrange its own contract through a competitive bidding process; and set out the value the participation will bring to the participating municipality or municipal entity.

The detailed report mentioned above must be submitted to MLM's bid adjudication committee for its consideration and recommendation to the accounting officer or delegated official, in terms of the municipality or municipal entity's delegation policy. Prior to the recommendation of the bid adjudication committee being submitted to the accounting officer or delegated official, it must be submitted to its internal audit unit to provide further assurance that the requirements as outlined in regulation 32 have been complied with, and thereafter submitted to the accounting officer or delegated official for his/her consideration and final approval of the participation.

## **The other organ of state and the service provider have consented to such procurement in writing**

MLM's accounting officer must first obtain written consent from the other organ of state as well as confirmation of the supplier's contractual performance. Once the accounting officer has obtained consent to procure under the contract and confirmation of the supplier's performance from the other organ of state; and has performed all internal due diligence checks, including ensuring compliance with the salient points listed below, may the accounting officer solicit the service provider's written consent.

Failure to obtain this written consent by the accounting officer requesting to procure under the contract secured by another organ of state will be construed as non-compliance with the regulations and associated expenditure being irregular expenditure.

## **SALIENT REQUIREMENTS APPLICABLE TO REGULATION 32**

Over and above the requirements stated in Regulation 32, there are also other salient requirements which must be considered by the MLM as well as the organ of state that is approving the procurement under its contract. These include the following:

### **The contract must be valid**

MLM will not enter into a new contract with the service provider/s but will become a participant in an existing contract. The contract must therefore not have expired, or its validity modified to accommodate the procurement from the contract and must be legally sound as proven in the motivated report mentioned above. The participating municipality or municipal entity will conclude an addendum to the agreement with the service provider/s that stipulates the duration of the participation agreement, which may not exceed the end date of the original contract.

### **The duration or variation of the contract**

MLM must confirm the duration of the contract between the service provider/s and the other organ of state and determine the remaining term of the contract. Once this has been confirmed, MLM must assess whether the remaining period will be sufficient for the service provider/s to deliver on its requirements. In other words, MLM will only be permitted to utilise the contract of the other organ of state for the balance of the remaining period of the contract. The contract cannot be extended or varied by MLM. It can only be extended by the original contracting parties in line with the contractual terms agreed to in the original contract. Should the contract between the original contracting parties be terminated for any reason before the contract end date, then that termination applies to MLM on the contract as well. The accounting officer consenting to the participation on the contract must therefore inform MLM's accounting officer of any contract amendments or variations made to the contract, in writing.



## **The goods or services must be the same and the quantity may not be increased**

MLM must assess whether the goods or services being provided to the other organ of state are similar to the goods or services required by the municipality. The goods or services required by MLM must be exactly the same as advertised and adjudicated by the other organ of state and may not be increased from the originally contracted quantity. Therefore, MLM will procure the required goods or services under the same scope or specification, terms and conditions as provided for in the original contract.

## **Contractual arrangements**

The shared contract must have the same dispute resolution mechanism to settle contractual disputes, a combined periodic contract management performance review to appraise the shared contract, and to regularly report to the council of MLM, as may be appropriate, on the management of the contract, service level agreement and the performance of the shared contractor/s.

The exercising of contractual rights, obligations or remedies in terms of the contract must be exclusively dealt with in terms of the dispute resolution mechanism as stipulated in the original contract. Each contractual party must uphold their legal obligations to the contract.

## **Implications for the organ of state who is the contract owner**

The application of regulation 32 in a procurement process effectively means that the accounting officer of the original contracting organ of state is willing to forfeit a portion of its contract that has not already been utilised to the accounting officer who is requesting to procure under that contract. It may also mean that the accounting officer may no longer procure goods or services from that contract anymore as the balance of the contract would have been allocated to the municipality or municipal entity that is requesting to procure under that contract. The accounting officer of the original contracting organ of state undertakes such decision with the knowledge that the original contracting organ of state no longer requires the remaining portion of that contract. The accounting officer of the original contracting organ of state must notify the accounting officer that is procuring under the original contract of all changes to the contract.

## **Panel of consultants/list of approved service providers and framework agreements**

MLM must not participate on a panel secured by another organ of state as a panel of consultants or a list of service providers or a panel of approved service providers is not a contract. Municipalities or municipal entities may only participate on framework agreements arranged by organs of state, for example, State Information Technology Agency (SITA), the relevant treasury; that are empowered by legislation to arrange such on behalf of other organs of state.

The above must not be confused with the use of transversal contracts secured by the National Treasury.

### **6.3.5 Contract Price Adjustment**

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

Approval of the price adjustment should be done within the municipality's delegation of authority framework or may be done by the Municipal Manager.

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

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

### **6.3.6 Contract Expiry Notification**

SCM unit in collaboration with Contract Management function is responsible for ensuring that timeous arrangement is made to notify end users of all contracts expiring within the next 6 months. Communication with the end users must be in writing and documentation must be properly filed.

Where procurement processes need to commence within a period exceeding six months (for example 12 months prior to expiry) such longer notice period will be given by the SCM unit to the relevant end user department.

### **6.3.7 Extension of Contract**

Extension of a contract is undesirable because it may lead to uncontrolled increases in the contract prices and it can also be a contributing factor to circumventing the procurement processes.

Lack of proper planning does not constitute a justifiable reason for dispensing with prescribed bidding processes by extending contracts.

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

When the need arises, and the reasons for an extension are sound, such an extension may only be done in line with Section 116(3) of the MFMA of 2003. Following full adherence to this, an item with full details must be prepared for BEC and BAC consideration and ultimately approval by the Municipal Manager.

After approval of the contract extension, the applicable Contract Management system must be updated.

### **6.3.8 Transversal Contracts**

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

These contracts have already been negotiated on behalf of government institutions and only best rates/prices are charged. The municipality must always consider participating in these contracts to benefit from the prices that have been already negotiated.

### **6.3.9 Records Management**

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

All tender documents and contract documents relating to a specific tender must be stored at the Supply Chain Management unit. Documents due for archiving will be transferred to the Gauteng Provincial Archives Centre through the Records Section.

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

Performance management involves, performance monitoring, collecting data on performance, performance assessment, deciding whether performance meets the entity's needs, and taking appropriate action – such as, correcting areas of under-performance and changes that may be required to meet the changing needs.

The Accounting Officer or delegated authority must monitor on a monthly basis the performance of the contractor under the contract or agreement. This is the responsibility of the user department.

Poor performance should be recorded appropriately after engagement with the contractor. It should be considered that if proper record is not kept, such non- performance cannot be deemed a sound reason for disqualifying such a contractor for future bids.

In addition to any contractual or other remedies that may be pursued, the municipality may commence action in terms of Municipal Supply Chain Management Regulation 15(2) (d), thus the Accounting Officer must:

- Inform the contractor or person(s) by registered mail or by delivery of the notice by hand of the intention to impose the restriction, provide the reasons for such decision and the envisaged period of restriction.
- Allow the contractor and / or person(s) fourteen (14) calendar days to provide reasons why the envisaged restriction should not be imposed.
- If requested, allow the contractor and / or person(s) the right to present evidence in person and consider reasons submitted by the contractor.
- Impose the restriction or amended restriction.
- Inform the contractor and / or person(s) of the decision; and

- Inform the National Treasury within five working days of such restriction, particulars of the person(s) to be restricted, (including, where applicable, names of the restricted persons, identity numbers, trade name of enterprises, company registration numbers, income tax reference numbers and vat registration numbers), the reason(s) for the restriction, the period of restriction and the date of commencement of the restriction.

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

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

#### **(a) Progress Reports**

- The end-user will complete a progress report indicating the stage of contract; achievement of milestones as per contract agreement; response time and deliveries within the contract period; quality of work, payments; poor performance; and actions.
- The progress report will be regularly submitted to the function responsible for Performance Management for deliberations, recording discrepancies and filing.
- Submission of progress reports will be determined by the nature and timeline of the project, and may not be on a monthly basis.

#### **(b) Expenditure Report**

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

### **6.4.1 Contract Relationship Management**

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

### **6.4.2 Contract Disputes Management**

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

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

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

### **6.4.3 Forms of Dispute Resolution**

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

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

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

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

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

### **6.4.4 Risks Related to Contract Management**

Contract risk must be appropriately managed such that:

- All contracts set out risk identification, monitoring and escalation procedures and mechanisms which are in line with the institution's enterprise wide risk management plan.
- All contracts identify contingency plans for supplier or buyer failure.
- For key suppliers and buyers, the contract manager monitors the financial health, tax compliance and overall performance of the supplier or buyer.
- Contract terms and potential ramifications around key issues including termination; warranty; indemnity; security; confidentiality; and dispute resolution are understood by the contract manager.

#### **6.4.5 Penalties**

Penalties between the Municipality and the contractor may include:

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

#### **6.4.6 Transfer and Ceding of Contracts**

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

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

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

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

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

The contractor will raise the issue with the user division in writing where after the user division must comment on the viability of the transfer / cession and submit the request to the SCM unit. The SCM department may solicit the views of the Legal Department on the matter.

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

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

The SCM unit will then prepare an item to be considered by the BEC and BAC prior to recommending to the Accounting Officer for Approval.

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

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

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

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

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

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

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

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

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

- Failure to meet the service performance targets for critical services on a repeated basis.
- Failure to meet a certain number of service performance targets during a specified period or supplier has engaged in corrupt and fraudulent practices during the bidding process or the execution of the contract.
- Material breach of terms and conditions with the breach being either irreparable or not having been remedied within a specified period.
- Major financial difficulties being encountered by the contractors (e.g. under liquidation).
- Failure to meet mandatory requirements or failure to acquire certain accreditation or license or approval during the period of the contract.

Exit provisions should be included in the contract to cover specific rights that will be required for termination.

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

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

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

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

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

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

The close out report will be submitted to Contract / Performance Management team for deliberation; filing purposes; recording discrepancies and where applicable a register and appropriate contract system will be updated. A close out report is applicable to contracts of a long-term nature, (exceeding 6 months), particularly construction related.

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

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

- Ensure completion of all administrative matters.
- Record that all technical issues have been completed.
- Determine the extent of any liquidated damages to be deducted from the contract price.
- Record the end of the retention and guarantee periods and the date of the final inspection carried out.
- Record the date of release of retention and / or bank guarantees.



- To agree a statement of specific limits on continuing contractual obligations after completion of work and any ongoing obligations following the end of guarantees or maintenance periods.
- Transfer any assets, including data and intellectual property, and any loan items.
- Transfer operational systems to the successful contractor.
- Record the process of final contract payments and a summary of the financial payments made and received.
- Summarise claims made against or received from the contractor.
- Ensure the retention of records relating to the contract to counter any subsequent claims that may be brought. The Limitation sets out the general periods for six years or twelve years according to the type of contract within which an action may be brought.

On completion of this activity, agreement should have been reached on all technical and commercial aspects of the contract.

The agreement should require the signature of the parties to a document which records the acceptance of the work or service, the obligations fulfilled, and the price paid or to be paid.

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

The review should also gather the lessons that can be learnt from the management processes and procedures followed during the contract and implemented in the future.

The review should include the views of all stakeholders and the report should relate to the costs and benefits set out in the original business