

# Clear Contracting: Key Issues for Local Governments in Making Agreements

Glenn Scott  
9 February 2017

**One of the most common issues facing Civic Legal's local government and private clients alike is the enforcement or interpretation of unclear agreements.**

It is tempting to limit time and money spent on preparing an agreement to ensure projects progress faster and cheaper. However, too often the parties miss an important point that leads to confusion, disputes and delays further down the track. These often cost much more than it would have cost to slow down the contracting process and making sure everyone is on the same page.

This article sets out some key issues to keep in mind when forming contracts so that there are less dramas and the government can get on with governing.

## Government obligations

Local governments have more obligations than companies or individuals when contracting. The *Local Government Act 1995* (WA) and other legislation provides for the roles and responsibilities of local governments in many different situations.

Most importantly, local governments need to engage in a tender process when contracting for another person to supply goods and services where the contract is worth more than \$150,000 (excluding GST) (reg 11(1) *Local Government (Functions and General) Regulations 1996* (WA)).

There are number of exceptions to the tender process in regulation 11(2), including emergency expenditures, the WALGA preferred supplier program and a number of specific types of suppliers or situations.

If the contract is not subject to tender, the regulations provide for a number of other obligations – including that the local government must have a purchasing policy containing certain provisions. These policies will include how many quotes to obtain and how to manage the process. An officer who fails to comply with their government's purchasing policy may be guilty of misconduct.

## Offer and Acceptance

A contract is formed when one party makes an 'offer' (an expression of willingness to enter into a contract on the terms stated) and the other 'accepts' that offer.

Generally speaking, the obligations need to be relatively clear for a contract to exist. However, a contract may not be clear enough – and that's where your enforceable contract creates problems for you.

## Making your contract clearer

Not all contracts are in writing. Contracts can also be oral – or a mixture of written and oral. To ensure that your contract is clearer, keep the following points in mind:

1. Identify whether you are the person making the offer or accepting the offer;
2. Ensure you know exactly who you are dealing with. Are you reaching an agreement with the individual you are talking with or their company, or are they representing someone else entirely?
3. Be clear about what you expect from the contractor and what they can expect from you. For example, if something needs to be delivered by a certain date, make sure this is understood. Remember to set a clear price and a clear description of the product or service being obtained. If you are agreeing only on rates – and not a fixed price – make sure you know how much time, resources or people are being allocated to the project;
4. Confirm your understanding of the agreement in writing. Depending on what your purchasing policy says, you may not need a written contract, but it **always** helps to set out your understanding of the contract in a letter or email to the contractor or, in the worst case, a note to yourself. People always have different memories about what was said in a conversation, but it is harder to argue about

what the words are if they were written down at the time;

5. Consider all aspects of the agreement and how you might resolve things if things go wrong. For example, do you know what the local government is entitled to under the contract if it pays the money but does not get the goods or services?
6. Proceed only once you have confirmation from the contractor – preferably in writing. It's always better to identify any confusion before someone starts work.



## Written contracts

As you are about to enter into a commercial relationship with someone you trust, it is often assumed that the contract is drafted fairly or accurately. This is not always the case – even if the contractor is acting properly.

You should always read the written agreement and check all the important terms. What do the local government and the contractor have to do under the contract? When can you terminate? If there's a delay in the project, does the local government have recourse against the contractor? What circumstances could change the contract?

## What to do if you do not know your position?

Sometimes a contract is not drafted properly. Other times, it is deliberately drafted so that you will not understand it. Sometimes, it may even be that the local government and contractor have misunderstood one another when entering into the contract.

If you do not think the contract reflects the deal – **don't sign it**. You have two options here: asking for amendments to the contract so it is clear, or, if in doubt, ask your lawyers.

“It is harder to argue about what the words are if they are written down.”

## Contact

Civic Legal provides pre-contractual and post-contractual advice. If something does not make sense in the contract and you are reluctant to sign – or if things start going badly – feel free to contact us and ask for our assistance. For more information please contact:



**Glenn Scott**  
Senior Associate  
T +61 9200 4900  
E [gscott@civiclegal.com.au](mailto:gscott@civiclegal.com.au)



**Anthony Quahe**  
Managing Principal  
T +61 9200 4900  
E [aquahe@civiclegal.com.au](mailto:aquahe@civiclegal.com.au)

*Disclaimer: This article provides a general summary of subject matter and does not constitute legal advice. The law may change and circumstances may differ. Therefore, you should seek legal advice for your specific circumstances.*