# Frequently Asked Questions - New Major Works Procurement and Contract Documents – August 2023

### What are the project benefits?

### Infrastructure Tasmania, in partnership with the Office of the Crown Solicitor, have undertaken a project to review and update the full suite of procurement and contract documents used by government agencies and entities to procure construction works and services (the project). This is a key action of the building and construction industry roundtable.

**Q: When contracts are presented with track changes it can be hard to read, will Contractors be provided with a clean version?**

**A:** The decision has been taken to purchase a full text licence from Standards Australia and present amendments to the standard documents as tracked changes within the full text. That presentation style is available under the terms of the licence. Care has been taken to ensure the changes are clearly identifiable and where possible in entirely new parts of clauses rather than being intermingled with existing text. This avoids the risk of releasing a clean document and people inadvertently assuming that no amendments have been made to the base AS document.

**Q: How will contract departures agreed between the parties be reflected in the new documents?**

**A:** The terms and conditions of the new AS major works contracts will be in PDF format. The terms and conditions will be consistent across all agencies. The documents have been developed reflecting on forms of contract currently used by each agency and common departures so it is expected that in general there will be less departures required. However, if the parties agree amends to the standard clauses, these can be reflected as special conditions, which are housed in the Formal Instrument of Agreement and have priority over the base terms. This has the advantage of enabling agencies to see and track commonly requested and agreed to amendments.

**Q: Noting that there will be a ‘complex project’ version of the new major works contract and a ‘business as usual’ version, how does an agency determine what is complex vs business as usual?**

**A:** Agencies will need to consider the complexity, duration and construction risks associated with their project and consider if it warrants the ‘complex projects’ version. Agencies will be given some guidance as to the things to consider, which may include construction duration, greenfield or brownfield site, integration with an operational facility, technical complexity, site constraints and overall value of the project. The base risk allocation of the two versions is the same, it is just that the complex projects version has available more process clauses that facilitate the principal having greater oversight of the project and the parties having a clearer understanding of how to deal with the technical complexities of the project.

**Q: In the new form of Consultancy Services Contract is proportionate liability excluded from contracts?**

**A:** Yes, this is still excluded. Note this is consistent with the practice in other jurisdictions who are permitted to exclude its operation.

**Q: What is the position in the new form of Consultancy Services Contract in relation to the ability to offset moneys owing against fees?**

**A:** As of 1 September 2023, the Treasurer’s Instructions will require the use of the OCS form of Consultancy Services Contract for building and construction related consultancy services, unless OCS approves use of another form of contract. That contract contains a standard set—off clause consistent with the OCS Goods and Services suite of contracts. The Consultancy Services Contract will be available with all other B&C procurement documentation and non-Australian Standard licensed contracts on the [www.purchasing.tas.gov.au](http://www.purchasing.tas.gov.au) website (follow the tabs from the home page to *Buying for Government> Resource Library > Procurement Template Documentation*).

**Q: When are the new forms of major works contract available?**

**A:** The new documents will be launched on 1 September 2023. As the major works contracts are presented as full text AS contracts, licensing restrictions mean that they cannot be published online in an uncontrolled manner (as every download of the documents generates a royalty payment). As such, in the interests of enabling industry to become familiar with the new form before they have to respond to a tender using the new documents, for a period of 6 weeks commencing 1 September 2023, an example form of the new major works contract will be available upon request from ITAS. See ITAS website for details. As royalty fees are payable on every release of this document it is requested that only one representative from each company or business requests the document. The documents are not to be further distributed.

**Q: Noting the upcoming training for contract administrators, why does industry not receive the same training as the contract administrators?**

**A:** Those contract administrators currently or commonly engaged by the Crown on its projects are receiving training on the aspects of the new major works contract relevant to their role as ‘Superintendent’ under the contract. The focus is on contract administration, not contract performance, with administrators being reminded of the fundamentals of the ‘dual hatted’ role of Superintendent and walked through the various provisions and processes relevant to that role. As such it would not be relevant nor appropriate for Contractors to receive this training. Note to address concerns over attendees representing companies who have both contract administrator and contractor arms to their businesses, attendees at the contract administration training will be required to sign and return a Confidentiality Deed prior to attendance reminding them of their responsibilities to the principal in their role as contract administrator.

**Q: The extension of time clause and associated definition of ‘Qualifying Cause of Delay’ in the base AS 4000 contracts has some ambiguous wording. How has that been dealt with?**

**A:** The definition of ‘Qualifying Cause of Delay’ has been amended (as is common in many AS 4000 contracts) to make it easier to understand. There are the same ‘hard wired’ grounds for extensions of time in relation to the actions of the Principal or the Superintendent as in the unamended standard, but with the ability for agencies to insert additional extension of time grounds where appropriate in an Annexure Part A variable item and/or the Specification. Agencies will be provided with guidance as to what they should be considering when completing this Annexure Part, A variable item.

**Q: Probity is often used as a reason for not having open engagement, or not providing detailed tender feedback following submission, with either successful or unsuccessful tenderer. Is there any change on this?**

**A:** Tasmanian Government procurement activity should conform to expected probity standards, as required by the Tasmanian Government procurement framework. The new form of RFT reflects this. Agencies are being provided with updated probity guidance documentation in addition to specific early market engagement guidance.

documentation, designed to assist agencies in undertaking successful early market engagement activities in the context of the procurement framework.

In addition, the Treasurer’s Instructions require agencies to debrief unsuccessful suppliers on request. The right to request a debrief is clearly set out in Part E (Lodgement of Tenders, evaluation, and complaints) of the new form of RFT for building and construction procurements.

**Q: Who can use the new contract suite? Agencies, GBEs, local government?**

**A:** The new contract suite is intended for use by central government agencies and other instrumentalities of the Crown who are required to comply with the Treasurer’s Instructions. It may be used by Crown agencies or instrumentalities who are not required to comply with Treasurer’s Instructions, however advice should be sought from OCS prior to use. It is not for use by government businesses nor by local government. If an entity is unsure of its status as to use of the documentations, they are encouraged to contact the Office of the Crown Solicitor.

**Q: From a contractor’s perspective, what is the balance of risk in the new major works contract?**

**A:** For substantive risks the risk allocation in the new amended AS 4000 major works contract is consistent with the risk allocation that was in the previous amended AS 2124, and both are fundamentally aligned with the base unamended AS risk allocation. However, in relation to process risk the new AS 4000 has a lighter process risk on the Contractor and as such is more favourable as it is easier to comply with from a process perspective.

**Q: Did the review of the ‘New Major Works Procurement and Contract Documents’ include a review of the insurance provisions, particularly in relation to professional indemnity insurance?**

**A:** Yes, there has been a review and modernisation of all the insurance provisions, and some improvements made to the processes around the obtaining of principal-arranged contract works and public liability insurance policies for building and construction major works contracts. In summary, from 1 September 2023 agencies will be responsible for the placement of policies for individual projects (including the payment of premiums). Previously, contractors have been responsible for this. Treasury has written to the Master Builders Association of Tasmania to outline these changes. The new form of RFT and contract documents reflect the new process.

**Q: What is the threshold from a traditional contract to a ‘do and charge’?**

**A:** There is no monetary threshold linked to the choice of lump sum vs ‘do and charge’ payment mechanics. That decision does not turn on the value of the project, but rather how the project risk profile is best priced. As is currently the case the majority of government contracts will involve lump sum pricing. There is a monetary threshold in relation to the use of the minor works or major works forms of contract. From 1 September 2023, the definition of building and construction minor and major works will change, as follows:

* major works will be defined as building and construction works valued at $500 000 or more (an increase from $250 000); and minor works will be defined as building and construction works valued at less than $500 000 (an increase from $250 000).

Roads and bridges minor and major works (currently already at the increased thresholds outlined above) will remain unchanged.

**Q: Is there a ‘Force Majeure’ contract clause in the new contract documentation?**

**A:** Consistent with current approach, and the base Australian Standard contracts there is no defined concept of ‘Force Majeure’ in the contracts. Force Majeure’ is not recognised by Australian Law unless you define it in the contract. Relief from ‘neutral’ events is provided through other mechanisms in the AS 4000 contract, including extension of time clause, latent conditions provisions and the concept of ‘Excepted Risks’ for which the principal takes responsibility if they eventuate and cause loss or damage to the works.