

MODULE 3: ONGOING MANAGEMENT

Purpose of module

This module has the following objectives:

- To emphasise the importance of ongoing management of any contract, and of meeting the University's contractual obligations;
- To explain how and why keeping a contract register can help you stay on top of your local area's contracting activities;
- To provide guidance to help you manage the University's end of the bargain;
- To summarise how to manage the other party when they are not keeping *their* end of the bargain;
- To introduce how contracts are varied and how disputes should be handled; and
- To explain the ways in which a contract can end – naturally, or through termination – and outline the “housekeeping” tasks that may be required once a contract has reached the end of its life.

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A. Introduction

Preparing, negotiating, drafting and signing the contract is only really the start of the contracting process: once the terms are agreed and the contract is signed, then the task of actually doing the things and performing the obligations agreed to commences and may, in some instances, continue for some time.

If the University fails to do the things and meet the obligations it agrees to, there can be very real and serious effects. Although contracting is a “voluntary” obligation (that is, the University has a *choice* whether to enter an agreement) once a choice has been made to enter a contract, the commitments under that contract become just as mandatory as any legislative or regulatory requirement – and often with more tangible and damaging consequences if they are not complied with. Equally, if another party agrees to do something for the University which they fail to do, then we can take action to remedy that breach. What happens when disputes arise or things go wrong is discussed in **Module 5: When things go wrong**.

The level of ongoing management required will vary from contract to contract, depending on the nature and circumstances of the agreement. The contract document itself may set out certain aspects of how ongoing management will occur (e.g. review meetings or performance measures) and for large, complex contracts, the contract “start-up” will warrant as much planning as the contract formation itself.

However, regardless of the size or complexity of the contract, at least *some* management is required to make sure that all those within the University who need to do anything to ensure the contract obligations are met understand the nature of the agreement, are fully aware of what they need to do, and actually do it.

B. Ongoing Contract Manager

During the course of developing and finalising the contract, thought should be given towards appointing an ongoing contract manager who will be responsible for managing the University’s obligations and rights under the agreement.

Depending on the kind of contract, this person may not be the same person who was the Contract Manager during the negotiation and formalisation phases – although that person must take responsibility during the finalisation of the contract for liaising with the Head of School or Branch where the contract will be performed to appoint an appropriate person as the ongoing contract manager.

The ongoing contract manager should have at least an oversight of the arrangement under the contract, if not day-to-day involvement.

C. Keeping a Contract Register

While key details of the contract, such as the subject matter, contract value, significant obligations (e.g. exclusivity), are captured in the *Legal Document Lodgement Form* and will be recorded in HPE Content Manager, these details only serve as high-level reporting tools – they do not really capture the essence of what it is that people have to *do* to meet the contract obligations.

To ensure that more complete information is captured and understood by relevant people within the local area(s) performing the contract obligations, each academic and administrative unit is required to maintain their own “contract register”, recording the contracts for which they are responsible with sufficient details to enable monitoring of key dates, tracking of the internal University actions required to be completed, and management of the relationship with the other contracting party.

The [University Contracts Register](#) has been developed as a simple, cost-effective, central, web-based contract register that can be utilised by areas of the University that do not have existing contract management software.

Contract register – typical contents

The following details should typically be recorded in the contract register, for each contract (or at least each major contract) in the Faculty/School/Branch:

- **Commencement and expiry dates**
- **Milestones and milestone dates**
- **Cut-off dates or contract review dates** (e.g. if the contract has an automatic roll-over provision, what is the last date by which you can give notice to terminate?)
- **Any requirements that must be fulfilled by certain dates** (e.g. obtain licence or approval from a regulatory body, provide progress or final reports)
- **Significant obligations** – not only those the University must meet, but also any that the other party must meet which would cause the University problems if they were not met (e.g. if by the other party failing to meet its end of the bargain, the University would then be unable to meet *its own* commitments to another party or funding body)
- **Financial arrangements under the contract**
- **Names and contact details** of the other party's contract representatives
- **Notes** as to whether the contract has been extended or varied

In short, the contract register contains a quick and relevant snapshot of what each contract is about, what is required to be done and by when, who is involved, and key dates and contacts. By having this information stored in one location, it will:

- Make it easier to keep track of your local contract obligations; and
- Serve as a tool for management reporting and risk assessment for the Faculty/School/Branch, reducing the need to “chase up” that information every time a major report falls due.

Please contact the Legal and Risk Branch to arrange access to the University Contracts Register or for further information.

D. Contract Management

Good relationship management is vital to the successful formation of a contract – and is equally important in the ongoing management of an agreement once finalised. Having professional, constructive relationships with everyone involved in the contracting process – both internal and external to the University – is a key ingredient in the successful completion of the contract's intended outcomes.

The aim of relationship management is to keep communication between the parties open, constructive, non-adversarial and based on mutual understanding. This should assist in preventing problems from arising, and in resolving them more smoothly should they arise. Maintaining a good relationship does not mean that issues of non-compliance or under-performance during the life of the contract cannot be discussed or acted upon; instead, it means that there is a greater likelihood that such issues can be discussed and resolved in an open, cooperative manner.

The other key to ongoing contract management is keeping sufficiently aware of the contract's progress to detect any performance issues as early as possible – and deal with them straight away.

Managing our own obligations – making sure we keep our end of the bargain

Keeping our own end of the bargain can be made easier through the following mechanisms:

- Keep those who will need to perform any aspect of the contract in the loop during the negotiations – as discussed in *Module 1*, this will help ensure that the commitments agreed to are realistically achievable by the University. It will also give those people a chance to cater for the time needed on the project in advance.
- Once the contract is signed, ensure the clear appointment of an ongoing contract manager, who takes responsibility (beyond the contract signing) for the management and performance of the contract. There should be one person who actively keeps track of the situation and can remind others what is required to be done and by when.
- As soon as a contract is signed, communicate with each of the people required to do something to confirm what they are doing and the time frame. Again, if they have been kept in the loop throughout the process, this should come as no surprise to them.
- Use a local contract register – as discussed above, a contract register contains a quick and relevant snapshot of what each contract is about, what is required to be done and by when, who is involved, and key dates and contacts. It does not need to be complex or lengthy; but it provides one place where people (including the ongoing contract manager) can consistently refer to get the most up-to-date information on any local contract.

Managing the other party when they are not keeping their end of the bargain

In any damage control situation, spotting and addressing issues *early* will always minimize the damage and make controlling it less onerous. In the case of contracting, providing the other party with early warning may make it easier to address the issues at low cost and with minimal disruption, and will draw out any misunderstandings over the requirements or expectations.

At the early stages of under-performance, agreeing informal remedial action will often be the best approach. Depending on the seriousness of the under-performance, more formal action may be required and could include:

- Withholding payments until performance returns to an acceptable level;
- Developing strategies to address the problem and formally documenting them (therefore creating an evidence trail to show the steps taken, just in case the dispute ends up in legal proceedings); or
- Invoking other rights or processes under the contract – don't forget that often the contract document itself will set out a procedure for dealing with exactly this situation, including through formal dispute resolution processes.

However, care should always be taken to not erode the University's rights by inadvertently amending the contract by oral agreement or conduct. It is good practice to always address under-performance issues in writing (even if it is a written follow-up to an informal conversation). Before taking any significant action aimed at remedying under-performance, it is recommended you discuss the situation with a legal advisor (preferably, the lawyer who helped you formalise the contract in the first place).

E. Contract Variations

Sometimes, it is necessary or desirable to change the terms of a contract mid-way through its completion. These could be changes to timeframes, description of deliverables, or even substantive clauses.

Almost all contracts will contain a provision that requires variations to the contract to be made **in writing**. Some contracts include a specific process by which variations can be proposed and accepted.

Minor variations (e.g. changes to dates and prices) may be formalised simply by exchange of letters or emails – and making it very clear in that document that this is intended to vary the terms of the contract. If the proposed variations are more significant, and have the potential to affect the scope and effect of the contract, then you may have to undertake similar steps in regard to planning, consultation, drafting and

approvals, as you would if developing a new contract. These more major variations should be enacted in a formal amendment to the contract – which your legal advisor can help draft.

Once a contract variation has been finalised and executed, ensure that you keep a copy of it on file and update your contract register as necessary. If the variation is made through a formal Variation Agreement or Deed, you should lodge it with RMO as a Legal Document (using the same process as for the original contract), indicating that it is a variation to the existing contract.

F. Disputes

Most disagreements and disputes arise when the parties cannot agree on issues related to the interpretation of contract provisions, the definition of deliverables, whether performance measures have been achieved, or the effect of unexpected events. As discussed above under Section 3.4: *Managing the other party when they are not keeping up their end of the bargain*, disagreements may be of a minor nature and can often be readily resolved as part of the contract management process – particularly if you have been working hard to maintain an open and constructive relationship with the other party.

If disagreements are unable to be resolved informally, you may wish to invoke the dispute resolution provisions of the contract, or take some other more formal step towards fixing the problem. If you wish to take this step, or if you receive notification from the other party that it wishes to take this step, please consult with the Legal and Risk Branch.

It is important that details of all discussions and negotiations relating to the dispute are recorded and a record maintained of any agreements reached. This will protect the University's position and provide tangible evidence of the resolution steps taken, in the event that legal proceedings eventuate.

Further information on how to handle disputes is contained in **Module 5: When things go wrong**.

G. The end of a contract

The most common way a contract ends is naturally – through completion of the agreed tasks, or upon its stated expiry date. However, contracts may also be terminated through any of the following ways:

Table 3.1: How contracts can be ended

Mutual agreement: The parties to the contract mutually agree that they no longer wish to continue with the contract. This agreement to terminate must be in writing and signed by both parties.

Release: where one party has completed all their obligations under the contract but the other has not. The party that has performed its obligations may choose to release the other party; generally by way of Deed.

Termination for convenience: The contract may provide for a party to terminate simply by providing written notice without having to provide a reason.

Termination for breach: This may either occur via provisions in the contract (in most cases, the contract will prescribe a rectification period), or pursuant to the common law which enables a party to terminate the contract if there is a breach by the other party of a fundamental condition of the contract. The breach may also give rise to a claim for damages.

Repudiation: occurs where one party suggests through words or conduct that it does not intend to perform its obligations under the contract. If the other party communicates acceptance of the repudiation, the contract is at an end and the accepting party can claim damages. If the repudiation occurs prior to the earliest date of performance (e.g. contract requires delivery by 1 March, but the contractor states before then that he will not deliver), then the other party may terminate on the basis of an anticipatory breach.

Frustration: occurs when an unforeseen event occurs which makes it legally or practically *impossible* for a party to perform its obligations under the contract. The parties are then discharged from the contract. Depending on the jurisdiction of the contract, there may be legislation which applies to frustrated contracts. Additionally, many contracts will contain a “force majeure” clause to deal with unforeseen events beyond a party's control.

Upon the completion or termination of a contract, the following administrative tasks may be required to be performed:

End of contract “housekeeping” checklist

- Satisfy yourself that the goods or services provided to you have met contract requirements.
- Request the return or destruction of any University documents, material or confidential information that were provided to the other party for the purposes of performing the contract.
- Arrange for the return of any equipment or other goods made available to the other party for the purposes of the contract.
- Record any intellectual property rights arising from the contract that the University gains ownership of (or a licence to use) pursuant to the contract, including any relevant documentation, technical data or reports that enable the University to use that intellectual property.
- As far as possible, ensure that any outstanding issues that may later result in a claim against the University are resolved.
- Make all final payments payable under the contract or submit all final invoices.
- Where personnel of the other party have been granted access to University premises or IT systems, ensure all access rights are terminated and security passes returned.
- Update the contract register to record when the contract was completed or terminated.
- Tidy up and archive the records associated with the contracting process.
- Undertake any “transitional” steps prescribed in the contract (e.g. contracts relating to teaching activities may prescribe that the University continue to teach out students already enrolled as at the date of termination).

When a contract ends:

Take care of the tasks on this “housekeeping” checklist, to make sure things are all resolved