

Guide Note: Formal Instrument of Agreement

Contents

Contents	2
FORMAL INSTRUMENTS OF AGREEMENT	3
1. PURPOSE	3
2. WHAT IS A FORMAL INSTRUMENT OF AGREEMENT?	3
3. WHICH AGREEMENTS SHOULD BE FORMALISED BY A FORMAL INSTRUMENT OF AGREEMENT?	3
4. WHAT IS THE LEGAL EFFECT OF A FORMAL INSTRUMENT OF AGREEMENT EXECUTED AS A DEED?	4
5. PREPARATION OF A FORMAL INSTRUMENT OF AGREEMENT	4
6. EXECUTION OF A FORMAL INSTRUMENT OF AGREEMENT	4
7. CONTRACTS WHICH ANNEXE A PRO-FORMA FORMAL INSTRUMENT OF AGREEMENT	5

FORMAL INSTRUMENTS OF AGREEMENT

1. PURPOSE

Under Policy Requirement of 3 of the Building Policy Framework, agencies are required to use standard contracts, developed by the Department of Housing and Public Works, on all government building construction and maintenance projects. A number of these contracts provide an option for the parties to execute a Formal Instrument of Agreement.

This guide note provides guidance to agencies on the application, preparation and execution of a Formal Instrument of Agreement including advice on which government building construction and maintenance projects require a Formal Instrument of Agreement to be executed.

2. WHAT IS A FORMAL INSTRUMENT OF AGREEMENT?

When executed by the parties to an agreement, the Formal Instrument of Agreement is a legal document evidencing the agreement between them. For a government building construction and maintenance project, such an instrument is prepared to formalise the agreement between the parties and to annexe all contractual documents comprising the agreement. Further, the execution of a Formal Instrument of Agreement in the form annexed to the contracts developed by the Department of Housing and Public Works for use on government building construction and maintenance projects provides for the agreement between the parties to become a deed, evidenced in one document.

The Formal Instrument of Agreement, which, to take effect as a deed must be executed in accordance with relevant legislation, typically lists and annexes the principal's letter of acceptance, the conditions of contract, the drawings and specifications, the contractor's tender and any other documents forming part of the contractual agreement between the parties.

3. WHICH AGREEMENTS SHOULD BE FORMALISED BY A FORMAL INSTRUMENT OF AGREEMENT?

A Formal Instrument of Agreement does not need to be created and signed in order for a contract to exist between the parties, provided there is an offer and unequivocal acceptance, and the other legal requirements for contract formation are present. However, a Formal Instrument of Agreement is required on particular government building construction and maintenance projects because of the legal implications of executing a deed and the benefit of having all contract documents compiled in one formal document.

A Formal Instrument of Agreement should be executed on government construction and maintenance projects where:

- (a) the project value is \$20 million or more;
- (b) a Managing Contractor or Early Contractor Involvement form of contract is used, regardless of the value;
- (c) the project is significant, complex, or high-risk; or
- (d) the additional protection of a deed, would be desirable.

Contact the [Contract Services](#) unit of the Department of Housing and Public Works for guidance where there is any uncertainty as to whether a Formal Instrument of Agreement is required.

4. WHAT IS THE LEGAL EFFECT OF A FORMAL INSTRUMENT OF AGREEMENT EXECUTED AS A DEED?

In Queensland, legislation sets out a prescribed limitation period for particular classes of action and the time within which a legal proceeding must be commenced. For actions founded in contract, the time is six years from the date on which the cause of action arose. If a Formal Instrument of Agreement is executed as a deed, the statutory limitation period is extended to that applying to deeds, being twelve years.

As required under Policy Requirement 7 of the Building Policy Framework, agencies must consult with the [Contract Services](#) unit of the Department of Housing and Public Works before commencing any major dispute or litigation in respect of a government building construction and maintenance contract.

5. PREPARATION OF A FORMAL INSTRUMENT OF AGREEMENT

The Formal Instrument of Agreement in the form annexed to the contracts developed by the Department of Housing and Public Works for use on government building construction and maintenance projects should be completed with project specific details, including a list of all contractual documents which reflect the agreement between the parties. These documents must be compiled, marked for identification and bound behind the Formal Instrument of Agreement. It is important to ensure that the Formal Instrument of Agreement only lists and annexes documents which evidence the agreement between the parties with all relevant documents included.

Where a Standards Australia contract, or other contract conditions where the holder of copyright is not the State of Queensland, is used for the General Conditions of Contract, the General Conditions will only be included where a copy has been purchased for each bound copy of the Formal Instrument of Agreement, otherwise only the Special Conditions of Contract should be incorporated and by reference in that document the General Conditions of Contract are incorporated.

The documents annexed to the Formal Instrument of Agreement should be hard copy rather than electronic, with the exception of very large volumes of drawings (over 100). These may be included on an electronic medium bound with the annexed documents. However, significant drawings must be included in full scale hard copy form rather than at a reduced scale. Each page of the Formal Instrument of Agreement should be numbered consecutively.

It is also important that the Formal Instrument of Agreement and annexed documents be bound in a unique way, with a durable cover to be readily distinguished from other copies of the contract documents and to facilitate it remaining in sound condition for its required life. The resulting bound document is typically quite substantial. However, given the significance of the document including that it may be relied upon many years after it was first created, such as in the event of any dispute or audit of the project, these requirements are important.

Two identical, bound copies of the Formal Instrument of Agreement and annexed documents are required for execution by both parties.

6. EXECUTION OF A FORMAL INSTRUMENT OF AGREEMENT

For a Formal Instrument of Agreement to take effect as a deed, it must contain the legal requirements of a deed and be executed in accordance with legislation. The signature block in the Formal Instrument of Agreement annexed to the contracts developed by the Department of Housing and Public Works complies with the legislative requirements for execution of a deed by the principal.

The two copies of the Formal Instrument of Agreement should be prepared and executed by both parties at the time of the principal accepting the contractor's offer to carry out the project, or as quickly as possible thereafter, to avoid any later confusion or ambiguity over the documents which constitute the agreement.

The bound copies of the Formal Instrument of Agreement and annexed documents should be executed by the contractor first, in accordance with the contractor's execution authority for execution of deeds. On return of the executed bound copies from the contractor, each copy should be executed by an officer with the delegated authority to enter into contracts on behalf of the principal. If the cover page of the Formal Instrument of Agreement requires a date be inserted, it should be dated on the day it is signed by the principal (being the last party to sign). It is recommended that the front cover of each document annexed to the Formal Instrument of Agreement in the bound copies also be signed by both parties at the time they execute the deed.

Each party then retains a copy of the executed bound document as evidence of the entire agreement between them.

For the Managing Contractor and Early Contractor Involvement forms of contract which have more than one stage, a Formal Instrument of Agreement should be completed, and documents compiled as soon as possible after acceptance of Stage One. In the event the Managing Contractor or Contractor provides a Guaranteed Construction Sum (GCS) Offer or Stage Two Offer (as applicable to the contract) which is accepted by the principal with Stage Two proceeding, the principal should consolidate the GCS Offer or Stage Two Offer compiled by the contractor and accepted by the principal.

Following acceptance by the principal, the principal should consolidate the documents and put these with the original bound Formal Instrument of Agreement and annexed documents.

A subsequent formal instrument is not to be completed as the parties have already formalised the agreement and proceeding to Stage Two has already been foreshadowed as a possibility in the agreement.

7. CONTRACTS WHICH ANNEXE A PRO-FORMA FORMAL INSTRUMENT OF AGREEMENT

The Department of Housing and Public Works contracts which annexe a Formal Instrument of Agreement in the approved form include:

- Special Conditions of Contract to be read in conjunction with the Australian Standard General Conditions of Contract (AS 2124 - 1992)
- Special Conditions of Contract to be read in conjunction with Australian Standard General Conditions of Contract for Design and Construct (AS 4300-1995)
- Managing Contractor Design and Construction Management Contract
- Early Contractor Involvement Design Management and Construction Contract

FOR FURTHER INFORMATION

For further information on the use of standard government building contracts, contact:

Contract Services

Major Projects, Public Works

Department of Housing and Public Works

GPO Box 2457 Brisbane QLD 4001

Email: ContractServices@epw.qld.gov.au

For further information on the Building Policy Framework, contact:

BCM Strategy and Policy

Public Works, Major Projects

Department of Housing and Public Works

GPO Box 2457 Brisbane QLD 4001

Email: BCMsecretariat@epw.qld.gov.au

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