

Essential elements of a contract

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Prerequisites

Competence.

For example signatories (Parties to the contract) must be sane and of legal age.

Consent.

Signatories.(Parties to the contract) must have the authority to commit themselves or there organization to a contractual arrangement.

Legality.

The contract must not involve illegal activities, eg theft and must be founded on sound legal practice eg not collusively tendered.

Essential elements

Offer/counter offer.

In our industry the offer is generally the (Principal's) tender or quote documentation and the response from the contractor (which can modify the terms of the contract) is a counter offer. Both form the terms of the contract assuming the other essential elements, listed below, are supplied.

Acceptance

This is when the contract has been accepted by the party who invited the original negotiations. ie the Principal.

Exchange

A contract has not been completed until both the promised service or good and the corresponding remuneration have been exchanged.

A common mistake in completing a contract

In order for the offer and acceptance elements to be legally relied upon their must be a ***meeting of minds***.

If there is not a meeting of minds then there is grounds for repudiating the contract ie there is grounds for claiming that the whole contract or a part of that contract never really existed.

Many of my contracts do not have a meeting of minds because the principal's representative is ignorant of the basic elements of the contract. Essentially the two contracting parties have different perspectives of the rights and obligations of the other party.

To facilitate the meeting of minds the terms of the offer and counter offer need to be clear and readily understood by both parties.

To impart clarity into a contract, common and legally tested, definitions should be used in providing a set of "General Conditions".

It is generally accepted that the contracting parties should be able to rely on the commonly used definitions in interpreting the contract terms.

These General Conditions of contract are often provided as a separate section within a tender document and set out the basic rules under which the principal wants to run the contract.

The technical specifications are often provided as another separate section.

The General Conditions (GC's) of Contract often include items such as:

The legislative jurisdiction within which the contract is bound.

Who the principle is

Who the agent is,

Time periods,

Liquidated damages,

OH&S, QA and EMS documentation and requirements,

Invoicing protocols /statements of claim

Reporting

Etc etc etc

There are many others and sometimes these GC'S can run into 100 page documents.

But there is one general condition that I believe is grounds for repudiation of many of my current contracts and it must be better understood by both contractors and more importantly by principals representatives and that is the ***Nature of the Contract***.

The nature of the contract is by definition an essential element in the meeting of minds.

Nature of the contract

I am not a lawyer and can only comment on the two Nature's of contract that I have dealt with, although I am sure that there must be others.

There are two types of Natures of contract that we see in our industry:

These are:

1. Schedules of rates, and
2. Lump sum.

Schedule of Rates Contracts

In Short Schedule of rates contracts require the first party to pay the second party for the provision of a service or good for an agreed rate per item.

Table 1

Item

Description	Unit	Quantity	Rate	Total
Labour	Hr	8	\$35.00	\$ 280.00
Tubestock	Each	1000	\$ 1.50	\$1,500.00
Mulch	M3	10	\$20.00	\$ 200.00

NB. This generally relates to a minimum qty so that the contractor can be confident that he is not going to be driving across town to install one item eg a minimum number of say 4 hours should be charged for overseeing a volunteer regeneration team. Additionally a minimum overall Quantity of work should be provided by the client so that the contractor can gauge the resource commitment and contract establishment costs that must be borne by the contractor when engaging in the contract.

Report writing and site meetings should also be specifically identified as billable items within the schedule.

The way this Schedule is constructed binds the contractor to providing Labour at a set Unit rate per hour. It does not bind the contractor to completing a set rate of deliverable work for each hour of Labour provided, for example a contractor cannot be held to weeding a quantifiable area per hour.

Conversely if the schedule has an Item described as weeding and the Unit is for a Square meter then the contractor is obliged to weed that area for the agreed rate regardless of how long that weeding takes.

Table 2

Item

Description	Unit	Quantity	Rate	Total
Weeding	M2	1,000	\$1.00	\$1,000.00
Tubestock	Each	1000	\$ 1.50	\$1,500.00
Mulch	M3	10	\$20.00	\$ 200.00

Principals are often under the erroneous belief that contractors must complete a set amount of work and that they will only be remunerated for the hours that the work took to complete up to the overall budget allocation for that type of work.

To further illustrate the point if a contractor submits a tender response for a tender that allowed 10 Hours of report writing and more report writing is required than the allocated 10 hours then the contractor is not obliged to spend more than 10 hours on that task and if more report writing is required by the principal then additional hours should be paid for by the principal.

As the second table above demonstrates Weeding can be included in a contract as an item that can provide the client certainty that a discrete area is weeded.

The performance requirements provided in the technical specification of the contract determine the extent or manner of weeding required.

Lump Sum Contracts:

- Provide a service or good for a set sum of money.
Examples include:
 1. regeneration of a defined area of bushland for that set sum.
 2. Prepare the soils, mulch and provide robust plants to required cover abundance within a defined area for a set sum.

In my experience most client representatives in government agencies don't know that the nature of the contract is an essential element of a contract nor do they understand that to validate a contract they must understand the difference between the types and use them appropriately.

In my opinion it is legally negligent of principles to have their representatives engage a contractor when the representative has no understanding of the most fundamental elements of the contracts they are committing their organisation to.

Schedules of Prices

Definition: A table within a Lump sum contract that breaks the job up into component parts so that the completion of discrete tasks can be quantified and invoiced separately.

The use of a Schedule of Prices within a Lump Sum contract.

Some confusion arises when a Schedule of Prices is included within a Lump sum contract.

This type of Schedule can be used to define the individual lump sums that make up an overall price. This is different to a Schedule of Rates. Schedules of Prices may also include Items whose units are described as Provisional Costs or Provisional Sums. These Items are for the provision of goods or services on the provision that they are needed. For example if it is believed that a site might be contaminated but the nature and extent of the contamination is unknown then a provisional sum might be included for the removal of the contaminants "if" they are found.

Schedules of rates within a lump sum contract.

Schedules of Rates can also be used within a Lump Sum contract to facilitate minor variations to the contract but not to change the nature of the contract without the consent of the contracted parties. ie not to negatively or positively vary the volume of work dramatically.

Many of my clients are inadvertently trying to double dip in the management of their contracts.

They ask for an hourly rate for an upper limited number of hours and then also expect a commitment from the contractor to complete a certain definable amount of work.

That is they:

- Demand that the contractor complete a set quantity of work and if the contractor does not complete it within the allocated time they expect the contractor to keep working to complete the works, but
- if the contractor completes the work within the set number of hours the client expects the remaining hours to be worked.

This is an unethical and legally indefensible practice.

How are Schedule of Rates contracts killing our bush.

Why are they used?

- First and foremost they are easy to document from the clients end,
- Secondly they load up the tenderers with the responsibility of undertaking the site assessment and providing budgets for the work,
- Thirdly, they more often than not, require the tenderer to write a plan of management as part of their tender response and so the principle is provided with free consultancy from multiple tenderers.
- Fourthly there are no empirical performance measures that need to be monitored by the client,

Having provided a free consulting service to clients for twenty years I can tell you it begins to grate. If Principals want a design and construct contract then they should be paying the qualified and experienced bushland management consultants within the industry to write plans and document contracts for them.

What are the downsides for the bush.

Firstly that the bushland areas are not regenerated with long term vision because,

- an ecologically rigorous assessment completed by the contract manager is generally not undertaken
- Bushland management plans are written to satisfy council's legal obligations under the Local Government Act and not for achieving practical ecological outcomes,
- an appropriate budget is not allocated to the writing or implementation of a long term management plan. Council staff have no justification for increasing / decreasing or reallocating their financial resources if they do not have a robust management plan. Instead contractors provide prices at the tendering stage which have no long term relevance.
- A long term work program that incorporates the financial resourcing is generally not being worked to,
- the cheapest price, not the best program, is often accepted and cannot be rejected given government procurement guidelines.
- the best approach submitted on the day is accepted, not necessarily the approach that is best for the longterm management of the bush,
- Comparing quotes is made very difficult if the scope of works is not exactly the same. The principals representative cannot be expected to make a quantifiable, defensible and transparent decision if too much information in the tender response must be assessed subjectively. The subjective nature of this decision

leaves the principal in the dubious position of accepting a tender in a biased manner.

- piece meal planning allows for political agendas to disrupt long term robust ecological management plans which are more defensible, against political desires, by the natural area manager,

Secondly the cheapest price is not the best for the bush because:

It under resources contractors and generally leads to cutting corners.

- Which companies do you know with 30 or more staff have a statutorily required OH&S Committee?
- What contractors have new vehicles owned by the company that are serviced to an acceptable OH&S Standard?.
- What contractors use their employees vehicles and do not check that they are in safe working order, let alone registered?
- Are all contractors honoring their Workers Compensation Insurance payments/commitments? There are two companies I know who sign forms that say they have paid their Insurance and Super debts who have not. This leaves the client vulnerable to paying the debt if the client has reason to believe that the contractor has not honored these payments/obligations.
- Other contractors have not paid their payroll tax.
- Poorly qualified and less experienced staff are employed and we lose our best people who have the long term knowledge of sites. This is a huge problem in the industry,
- Career regenerators are doomed to a life of poverty,
- People who are paid the minimum wage cannot be expected to work hard nor take on any substantial responsibility
- We cannot expect people to survive on their vocation alone.
- Many contractors (who had been working in the industry for up to 10 years) attended an AABR meeting about two years ago were ignorant of their legal obligation to engage their staff in accordance with a Government approved industrial relations instrument eg an Australian Workplace agreement, an Award or collective Bargaining agreement. Etc This happens because business owners are so overworked, writing unpaid BMP'S because they are under funded and they have no free time to investigate these matters. This creates further difficulties for contractors who do apply costly resources to complying with the legislation.

Thirdly

- There is no incentive to remove the weeds that are killing whole ecological communities instead we see most of the limited funding available to bushland management wasted on monthly visits to control annual weeds that annoy the weed phobes among us. While whole ecological communities , mature trees and shrubs die because schedules of rates do not have contractually definitive performance measures. It is almost impossible to push a contractor to do more than just turn up on site.

Lastly and very importantly

A contractor must be trusted to bill for the hours that they work.

Two contractors I know are fraudulent and bill for more hours than they work. This is a terrible thing and it should be stopped, the bush suffers directly for it. It is impossible for honest contractors who set high standards to compete with criminal contractors. Lump sum contracts can keep the bastards honest.

Lump sum contracts:

How can they remedy the problem?

They force the contract manager to work to a program that they have produced that matches their budgets, their legal obligations and the needs of bushland.

People with the best experience and qualifications write the management plan not contractors with a financial agenda.

You can compare Apples with apples and be more transparent about the tender assessment.

You can reduce the chance of fraud.

Staff will be paid what they are worth and will be paid according to their productivity.

Staff will stay in the industry and not live on the breadline.

There is scope for being better remunerated / rewarded for innovations.

A Proposed standard Contract for the bush regeneration industry.

Australian Standard Contract 2124 www.standards.org.au

AS 2124 is generally used by State, Federal and Local Government agencies and private companies to administer small to medium sized landscape management contracts . It is tried and tested in the courts and is updated in accordance with the Australian standards.

Government Agency legal departments and staff across the landscape management industry are familiar with the contract. It is frequently used by private agencies in administering lump sum and Schedule of Rates bush regeneration contracts.

AABR Contract.

AABR have provided guidance via a document available on its website [http://www.aabr.org.au/resources/manuals/Bush Regeneration Contract Management](http://www.aabr.org.au/resources/manuals/Bush%20Regeneration%20Contract%20Management) which includes an example of a contract that may be used.

AABR recommended that a schedule of rates based contract be used for it was believed that a schedule of rates would provide a flexible framework which could allow the work program to be adapted to changing ecological circumstances and would avoid “weed control” occurring rather than bush regeneration. This recommendation was well meant

however for the reasons above I believe that Schedules of Rates contracts “have some has some serious unforeseen ramifications.

An example contract provided in the documents has some flaws including an erroneous description of the nature of the contract. It is also deficient in explaining that variations can be both positive and negative. Additionally it provides an ambiguous interpretation of how labour can be included in a lump sum contract.

I have not seen this document referenced by any clients in spite of the hard work that went into it. However it does provide a useful overview of the reasons why and how contracts should be managed.

I recommend that contract principals use this document in conjunction with AS2124 to provide robust general conditions of contract (both Lumps sum and Schedule of rates) that are sympathetic to the needs of bush regeneration.