

Contracts for Services

Commissioner's Instruction 41

Statement of intent

Contracts for services are used temporarily only where direct employment is not practicable. Direct and permanent employment are preferred.

Scope and application

This Instruction applies to departments and Senior Executive Service (SES) organisations as defined in section 3 of the [Public Sector Management Act 1994](#) (PSM Act). It operates where employers engage the services of individuals on contracts for services, rather than via employment, to undertake ongoing functions or activities.

References

This Instruction should be read in conjunction with:

- section 100(1) of the PSM Act
- relevant provisions in applicable industrial instruments (including modes of employment and use of labour hire)
- [Using Contracts for Services](#)
- Department of Finance [procurement rules, directions and guidance](#)
- [Commissioner's Instruction 2: Filling a Public Sector Vacancy](#).

Definitions

Contract for service

A contract under which the services of an individual are supplied to an agency. The contract may be with an individual, labour hire company or other company/organisation.

Contractor

A person whose services are provided under a contract for service as opposed to being engaged as an employee.

**Employee**

A person employed by or under a public service employer on a permanent, fixed term or casual basis.

Employer

An employing authority as defined in section 5(1) of the PSM Act.

Engagement

Each contract for service constitutes an engagement. Every extension of an existing contract for service is a separate engagement.

Instruction

1. Use of contractors

- 1.1 An employer must determine that an employee cannot perform the work before engaging a contractor.
- 1.2 An employer may only engage a contractor (including extending an existing engagement) where at least one of the following circumstances applies:
 - a) Required technical and/or specialist skills are unavailable internally or in the public sector in the relevant location and at the time of need. The employer must assess the availability of the skills or expertise in the sector before engaging a contractor.
 - b) There is a need for impartiality and objectivity which requires the work to be performed by a person external to the sector.
 - c) Functions or activities need to be performed, or the position needs to be filled, urgently.
- 1.3 An employer must not use a contractor:
 - a) where the role involves management or executive decision making
 - b) where an employee can be provided with a development opportunity, upskilled or supported to undertake the task within a reasonable timeframe and at reasonable cost.
- 1.4 An engagement (including any extensions) must not continue for longer than 12 months unless both of the following are met:
 - a) A recruitment process to fill the position has been unsuccessful, is likely to be unsuccessful or is in progress.
 - b) The engagement is essential to meet a critical business need.



2. Decision making and recordkeeping

2.1 An employer must:

- a) approve an engagement before it commences or is extended and record that approval
- b) record the reason(s) that apply under clause 1.2 for engaging a contractor instead of using an employee within 10 working days of the commencement or extension of an engagement
- c) provide these records to the Public Sector Commission, Department of Finance and to sectorwide reviews on request
- d) provide information to relevant unions consistent with industrial instruments.

3. Exemptions

3.1 In exceptional circumstances an employer may seek the Commissioner's approval for an exemption from the requirements in this instruction. The Commissioner may:

- a) approve an exemption with or without conditions
- b) amend or revoke an exemption.