

Financial Management Practice Manual 713

Policy and Procedures

ENGAGING AND MANAGING CONSULTANTS AND CONTRACTORS

Scope

This Finance Procedure sets out the procedures to be followed when engaging and managing Consultants and Contractors.

This Finance Procedure is to be read in conjunction with the other Finance Policies and Procedures that relate to Purchasing, the relevant Human Resources' Policies and Procedures (including "Determining Employee/Contractors Employment Status"), the State Purchasing Policy and the Queensland Government Better Purchasing Guides (most notably "Engaging and Managing Consultants").

Exclusions

Under the University's Enterprise Bargaining arrangements, the University cannot outsource core activities. The University cannot appoint a consultant or a contractor where the nature of the appointment would represent an outsourcing of core activities. The Human Resources' Office should be contacted for further information regarding "outsourcing of core activities".

This Procedure does not apply to professional and technical consultants or contractors engaged as part of an approved construction or maintenance project. For such arrangements, Central Services will conduct the approval to invite, the evaluation of, the selection of and the management of applicants in accordance with their approved procedures.

Background - Summary

Staff of the University will frequently seek the services of external parties to assist in the performance of their duties. Engaging such external parties will give rise to one of three possible relationships, each giving rise to different requirements and obligations. **It is critical that the nature of the relationship is determined before any appointment is made.**

The three possible relationships are:

1. **Consultancy**

A consultancy relationship arises where a party is engaged to provide services that are not normally provided by University staff and include the provision of a number of recommendations.

It is critical to determine where a consultancy relationship arises as:

- the terms and conditions of the consultancy agreement need to be clearly agreed in advance of any consultancy work commencing;
- consultants are required to demonstrate that they have appropriate insurance cover before they are commence work; and
- the Financial Management Standard 1997 requires the University's Annual Report to include "information about the agency's expenditure of each category of consultancies, including a description of the category" (s95).

2. **Contractor**

A contractor relationship arises where a party is engaged to provide services that are not normally provided by University staff and do not include the provision of a number of recommendations.

It is critical to determine where a contractor relationship arises as:

- the terms and conditions of the contractor's agreement need to be clearly agreed in advance of any work commencing; and
- contractors are required to demonstrate that they have appropriate insurance cover before they are commence work.

3. **Employee**

An employee relationship arises generally where a party is engaged to provide labour services normally associated with University business and subject to a close degree of control/supervision/direction by the University.

It is critical to determine where an employee relationship arises as:

- the terms and conditions of the employee's agreement need to be clearly agreed in advance of any work commencing; and
- appropriate Pay As You Go deductions, Superannuation contributions etc are made.

Further guidance as to the distinction between these three categories is located at Appendices 1 and 3.

Procedure

The following steps must be followed when a need for the labour services of external parties is identified. These steps are discussed in more detail in the following sections.

1. clearly determine the nature of the services that are required;
2. confirm that the services do not represent an outsourcing of core activities;
3. confirm that the services are not available within the University;
4. ascertain whether the nature of these services gives rise to an employee relationship:
 - where an employee relationship is identified, refer to the Human Resources Policies and Procedures
 - where the relationship is one of a consultant or a contractor (includes visiting academics, specialist presenters – refer Step 3 below), ensure compliance with the requirements of this Financial Procedure;
5. invite, and evaluate, quotes from the identified parties, in accordance with the Purchasing Policy and Procedures;
6. confirm the engagement, using the University's Letter of Acceptance and Standard Terms, amended as required; and

7. manage and evaluate the engagement.

Step 1: Clearly determine the nature of the services that are required

Staff must be fully aware of the exact duties that they require from the external party. **These requirements must be documented** - they will form the basis of the agreement between the University and the third party. Typical considerations include:

- description of services to be provided;
- timing of services to be provided;
- location of provision of services;
- degree of supervision provided / required by the University;
- whether any tools, equipment etc will be provided by the University to enable the services to be delivered;
- whether the University requires the services of a specific individual or whether the University requires services that can be provided by more than one organisation / entity; and
- degree of interaction with University personnel (whether the third party be required to supervise University staff, authorise University transactions etc).

Step 2: Confirm that the services do not represent an outsourcing of core activities

Refer to the Human Resources' Office for further details on this matter.

Step 3: Confirm that the services are not available within the University

A copy of the documented 'duty requirements' arising from Step 1 should be sent to the relevant Faculty Office or Division Office for confirmation that these services are not available from within the University.

Step 4: Ascertain whether the nature of these services gives rise to an employee relationship

It is critical to determine whether the nature of the services that are required are those that give rise to an employee relationship. Where, **at common law**, an employee relationship exists, the employer must withhold, and remit, the appropriate tax amounts, superannuation charges etc. Penalties will apply where this does not occur.

The employee relationship only needs to exist at common law: this means that it is the **nature** of the relationship that needs to be assessed, not how it is presented in the related documentation.

A common law employee relationship can only exist with an individual. Where the proposed contractor/consultant is a business (eg a company, a partnership or joint venture, but excluding a sole trader), no common law employee relationship can exist. Where the proposed contractor/consultant is a business, proceed to Step 5. Where the proposed contractor/consultant is an individual or sole trader, consideration must be given as to whether a common law employee relationship will arise.

It is not always obvious whether a particular relationship constitutes one of 'employment': the schedule attached as Appendix 1 can be used to assist with this process. Should this matter still

not be clear, staff should seek assistance from their Faculty/Division Office and, if required, from Human Resources or Financial and Business Services Office.

Engagements that are deemed to be of employee nature are not required to comply with the remainder of this Finance Procedure. For such agreements, refer the relevant Human Resources Policies and Procedures.

This Finance procedure only applies to appointments that are:

- not an outsourcing of core activities; or
- the appointment of a business; or
- the appointment of an individual where the relationship is not one of employment, at common law.

Examples

Generally, an individual who performs extended lecture activity, or performs other extended academic duties in courses leading to academic qualification, will be regarded as an employee of the University.

A distinction must be made between the provision of extended, routine academic duties and visiting academics / specialist presenters. Where a University staff member retains responsibility for the quality of the content for the course/subject, visiting academics / specialist presenters can be invited to present (a) session(s) and be paid as a contractor.

For industrial reasons, an academic employee of the University can not be paid for providing 'additional' academic services to the University. Academic employees of the University cannot be paid amounts additional to their contracted salary, either directly or indirectly, for the provision of academic services to the University (this does not apply to adjunct appointees). Contact the Human Resources Office for further information on industrial issues.

Sometimes the University will require the specialised services of a particular individual and the individual will work for a particular company/business. In such situations, the University can secure the services of the particular individual by entering in to a 'Contractor agreement' with the company/business and specifically stipulating the particular individual in the 'Key Personnel' section. All contractors / consultancies must provide evidence of having the appropriate insurances - refer Appendix 4.

Other Considerations

- Payment to deemed employees must be made via the Salaries system and can only be made to individuals, not to companies or business entities
- Payment to deemed contractors / consultants must be made via the Accounts Payable system on receipt of a (tax) invoice
- Only employees can be granted a University financial delegation : these delegations can not be granted to contractors/consultants
- All contractors / consultants must have appropriate insurances before they are permitted to commence their assignment (where a contractor is having difficulty in obtaining the

required insurances, he/she can be appointed as a casual / temporary employee) – refer Appendix 4.

Step 5: Invite, and evaluate, quotes from the identified parties, in accordance with the Purchasing Policy and Procedures

Once it has been determined that the relationship is one of a consultant / contractor, the terms of engagement need to be formalised. It is critical that the terms are comprehensive, unambiguous and clear. These terms will be used by potential consultants / contractors to determine whether they are suitably qualified / resourced to provide the supplies and will be a key document in the management and evaluation of the engagement.

The document that was produced in Step 1 above (“Clearly determine the nature of the services that are required”) should be used to assist with this purpose.

Once these terms have been finalised potential suppliers should be identified and invited to submit quotes in conjunction with the University’s Purchasing Policy and Procedures. The ‘invitation to quote’ should clearly state the selection criteria that will be used in assessing the responses.

The documentation should clearly provide details where competitive quotes are not sought.

Further details relating to the invitation and evaluation of quotes are attached as Appendix 2.

Step 6: Confirm the engagement, using the University’s Letter of Acceptance and Conditions, amended as required

Successful applicants must be effectively engaged and managed. The University’s Standard Conditions of a Consultancy Contract are central to this process (available at <http://www.jcu.edu.au/office/fabs/general/ConsultCont.pdf>).

These Standard Conditions should be used for engaging Contractors as well as for engaging Consultants, as their respective standard terms are very similar.

These Standard Conditions should be used as a ‘starting point’, and amended as appropriate.

All agreements require the proper documentation to be completed. As a minimum, this consists of a Letter of Acceptance and an official University Purchase Order (a standard Letter of Acceptance is available at <http://www.jcu.edu.au/office/fabs/general/LetterofAcc.doc>). Larger agreements also require the Standard Conditions to be included. These documents will form the basis of how the engagement is managed. Where no such terms exist and a dispute subsequently arises with the consultant / contractor, the position of the University is significantly weakened.

The engagement must be classified as being either for a Consultant or for a Contractor. Basically, the engagement will be a Consultancy where recommendations are made to the University. The engagement will normally be one of a Contractor where services are provided and no recommendations are made. Appendix 3 provides further guidance on this issue.

One of the more sensitive issues that generally arises with the engaging of a Consultant or a Contractor involves Insurance. Appendix 4 contains further information relating to Insurance. The Insurance requirements of the University must be satisfied.

The documentation must also ensure that the financial obligations of the University are 'capped' - for example, where a Consultant is to be paid a set rate per hour the contract must state what the maximum number of hours is and/or what is to be provided as an outcome for this payment to become payable (a report, some recommendations etc).

The fee that is paid to the Consultant may be deemed 'personal services income' in the hands of the Consultant. This has no implication on the University - the personal services income legislation affects the recipient of the fees.

All documentation relating to the appointment of a Consultant or a Contractor must be forwarded to the relevant Faculty/Divisional Executive Officer (or the relevant Pro Vice Chancellor, Deputy Vice Chancellor or Vice Chancellor) for approval prior to any offer of appointment being made.

Step 7: Manage the Engagement

The project officer needs to regularly communicate with the Consultant / Contractor to ensure that the required services are provided as intended (each agreement should include milestones and performance indicators). All communication is to be documented and kept on file.

Generally, advance payments should not be made to Consultants / Contractors. Payments should be linked in to milestones that are evaluated by the project officer prior to payment being made. Invoices received from the Consultant / Contractor must be approved by the project officer prior to a financial delegate authorising payment.

Payments should only be made to Consultants / Contractors where there is documentary evidence that the services have been provided satisfactorily. For larger agreements, this may require an Evaluation Report to be prepared. The financial delegate must be satisfied that all terms of the agreement have been complied with prior to authorising payment.

Appendix 1

Does an employee relationship exist?

The following criteria can be used to determine whether an employee relationship exists. Each case must be assessed based on its specific facts.

(adapted from ATO Tax Ruling TR 2000/14 - <http://law.ato.gov.au/atolaw/view.htm?docid=TXR/TR200014/NAT/ATO/00001>)

Features of Relationship	Employee - Contract of Service.	Consultant / contractor - Contract for Services.
1. Lawful authority to command	Under a contract of service, the payer usually has the right to direct the manner of performance. Of course, where the nature of the work involves the professional skill or judgment of the worker, the degree of control over the manner of performance is diminished. What is important is the lawful authority to command that rests with the payer.	The hallmark of a contract for services is said to be that the contract is one for a given result. The consultant / contractor works to achieve the result in terms of the contract. The consultant / contractor works on his/her own account.
2. How is the work performed?	Tasks are performed at the request of the employer. The worker is said to be working in the business of the payer.	A consultant / contractor enters into a contract for a specific task or series of tasks. The consultant / contractor maintains a high level of discretion and flexibility as to how the work is to be performed. However, the contract may contain precise terms as to materials used and methods of performance and still be one for services.
3. Risk	An employee bears little or no risk. An employee is not exposed to any commercial risk. This is borne by the employer. Further, the employer is generally responsible for any loss occasioned by poor workmanship or negligence of the employee.	A consultant / contractor stands to make a profit or loss on the task. They bear the commercial risk. The consultant / contractor bears the responsibility and liability for any poor workmanship or injury sustained in performance of the task. Generally, a consultant / contractor would be expected to carry their own insurance policy.
4. Place of performance	A worker under a contract of service will generally perform the tasks on the payer's premises using the payer's assets and equipment.	A consultant / contractor, on the other hand, generally provides all their own assets and equipment.
5. Hours of work	An employee generally works standard or set hours.	A consultant / contractor generally sets their own hours of work.
6. Leave entitlements	The contract generally provides for annual leave, long	Generally, a consultant / contractor does not contain

	service leave, sick leave and other benefits or allowances.	leave provisions.
7. Payment	An employee is generally paid an hourly rate, piece rates or award rates.	Payment to a consultant / contractor is based upon performance of the contract.
8. Expenses	An employee is generally reimbursed for expenses incurred in the course of employment.	Generally, a consultant / contractor incurs their own expenses.
9. Appointment	An employee is generally recruited through an advertisement by the employer.	A consultant / contractor is likely to advertise their services to the public at large.
10. Termination	An employer reserves the right to dismiss an employee at any time (subject to State or Federal legislation).	A consultant / contractor is contracted to complete a set task. The University may only terminate the contract without penalty where the worker has not fulfilled the conditions of the contract. The contract usually contains terms dealing with defaults made by either party.
11. Delegation	An employee has no inherent right to delegate tasks to another. However, there may be a power to delegate some duties to other employees.	A consultant / contractor may delegate all or some of the tasks to another person, and may employ other persons.

Appendix 2

Inviting and Evaluating Offers

The primary aim of the process is for the University to obtain the most appropriate skills and expertise at the best value for money while adhering to the relevant financial policies and procedures.

This does not simply mean selecting the cheapest offer. A number of factors will determine how many suppliers will be approached and in what manner they will be approached. These factors include:

- the nature and complexity of the required services;
- the availability of the services required;
- the significance of the services to the University;
- the associated processing costs;
- the application of Government priorities (eg local suppliers may be preferred);

- probity and accountability considerations; and
- the estimated contract value and the application of **Finance Procedure 711 - Purchase Requisitions and Orders, "Quotes"**.

When invitations are requested, potential respondents will often contact University staff to clarify issues. It is critical to provide consistent responses in writing and to ensure that all potential respondents are provided with the same information. Where a potential respondent is provided with additional information, even at the potential respondent's request, this information must be sent to all other potential respondents - no potential respondent can be given, or can be seen to be given, an unfair advantage.

Consultants / Contractors should be given adequate time to respond. Depending upon the complexity involved, three weeks should be used as a guideline.

When opening offers, two officers should be present who record details of each offer. Offers must be evaluated against the selection criteria. Where a panel has been involved in preparing a specification, the panel should be involved in the evaluation process.

The evaluation process must be documented and capable of withstanding scrutiny. Such documentation is open to audit review and Freedom of Information requests.

When a preferred Consultant / Contractor has been identified, referee checks should be obtained as appropriate.

The officer in charge of this process should complete a report on the recommended Consultant / Contractor, clearly stating the reasons for selection. An appropriate financial delegate must approve the recommendation.

Successful applicants must accept in writing. Unsuccessful applicants must be advised in writing and feedback provided as required, bearing in mind the possible confidentiality of the successful application. It is generally sufficient to advise unsuccessful applicants as to the identity of the successful applicant and the areas where the successful applicant demonstrated better ability to deliver, without providing details of, say, the successful applicant's price.

Appendix 3

Differentiating between a Consultant and a Contractor

Generally, a consultant is used to provide recommendations regarding a part of the University's business whereas a contractor performs work to deliver a known outcome.

- The key characteristics of a consultant include:
- generally a fixed term engagement for a fixed rate of payment;
- work is unsupervised;
- independent research/investigation is conducted; and

- written expert advice (with recommendations) or an intellectual product is provided.

The specific circumstances of each case must be reviewed when differentiating between a consultant and a contractor. Generally, the following do not satisfy the definition of a consultant and would be regarded as contractors:

- key note speakers, workshop facilitators, trainers, presenters;
- information technology programmers, analysts and system support staff;
- market researchers and providers of statistical data where no recommendations are made;
- persons performing asset valuations;
- persons providing legal advice where no recommendations are made;
- persons providing financial, legal and taxation services on day to day issues;
- persons providing audit services (including Workplace Health and Safety audits).

It is not for the service provider to declare whether he/she is engaged as a consultant - each case must be judged on its particular facts.

It is important to distinguish the difference between a consultant and a contractor as expenditure on consultants is included in the University's Annual Report whereas expenditure on contractors is not.

Expenditure on Consultants must be coded to one of the following Use Codes:

7730	Consultancy Fees - Management
7731	Consultancy Fees-Human Res Consultancies
7732	Consultancy Fees-Info Tech Consultancies
7733	Consultancy Fees - Communications
7734	Consultancy Fees-Finance/Accounting
7735	Consultancy Fees-Professional/Technical

Expenditure on contractors (non Buildings and Grounds) must be coded to Use Code 7750 (several Use Codes exist for Buildings and Grounds related contractors). Use Codes 7215 External Salaries and 8445 Display and Teaching must not be used for these purposes.

Appendix 4

Insurance

(Source: Queensland Purchasing, Guidelines for the completion of a Standard Conditions of a Consultancy Contract)

NOTE reference to “Consultant” applies equally to “Contractors”

A risk assessment will need to be carried out to enable insurance requirements to be determined and stated in Schedule 1 to the Standard Conditions.

Public Liability Insurance

Public liability insurance is intended to cover acts of a physical nature which may cause-

- damage to property of others; and
- injury to or death of others, caused by the Consultant in the course of carrying out the Consultant’s business.

The nature of the consultancy determines the risk to which the University is exposed for each of the above.

For example, where the Consultant is to perform work on University premises that has the potential to cause damage or injury, public liability insurance of not less than \$10M would normally be warranted (an example would be conducting a course involving physical activity on the part of participants). However, in a consultancy for provision of accountancy advice where the services are scheduled to be performed entirely at the Consultant’s premises, the risk would be low and the required level of public liability insurance would be lower.

The University must state in its Terms of Engagement the amount of public liability insurance that the Consultant is required to take out.

Professional Indemnity Insurance

Professional indemnity insurance protects professional persons (such as lawyers, doctors, accountants and surveyors) against claims for damages for negligence. A claim may arise in relation to the person giving negligent advice or negligently doing (or failing to do) something that causes loss or damage to the University.

The nature of the Consultancy determines the degree of risk to which the University is exposed. Professional indemnity insurance would not be necessary where the Consultant is engaged, for example, to prepare a report and not to give professional advice. Risk assessment should be based on the estimated value of the loss which may be incurred and the most probable time for the loss to become apparent.

The period during which the professional indemnity insurance policy is to be held after completion of the Consultancy Services or termination of the Contract must also be stated in the Terms of Engagement. In this regard, it is important to note that the policy of insurance must be current at

the time when the claim is made. Under the Limitation of Actions Act 1974, a claim in relation to giving negligent advice or negligently doing (or failing to do) something that causes loss or damage can be made for up to 6 years after the cause of action arose. Further extensions of time are allowed under that Act, for example, a minor has 6 years from the date of attaining 18 years of age to make such a claim.

WorkCover Insurance

If the Consultant will be performing the Consultancy Services through employees, the Consultant must have WorkCover insurance.

General

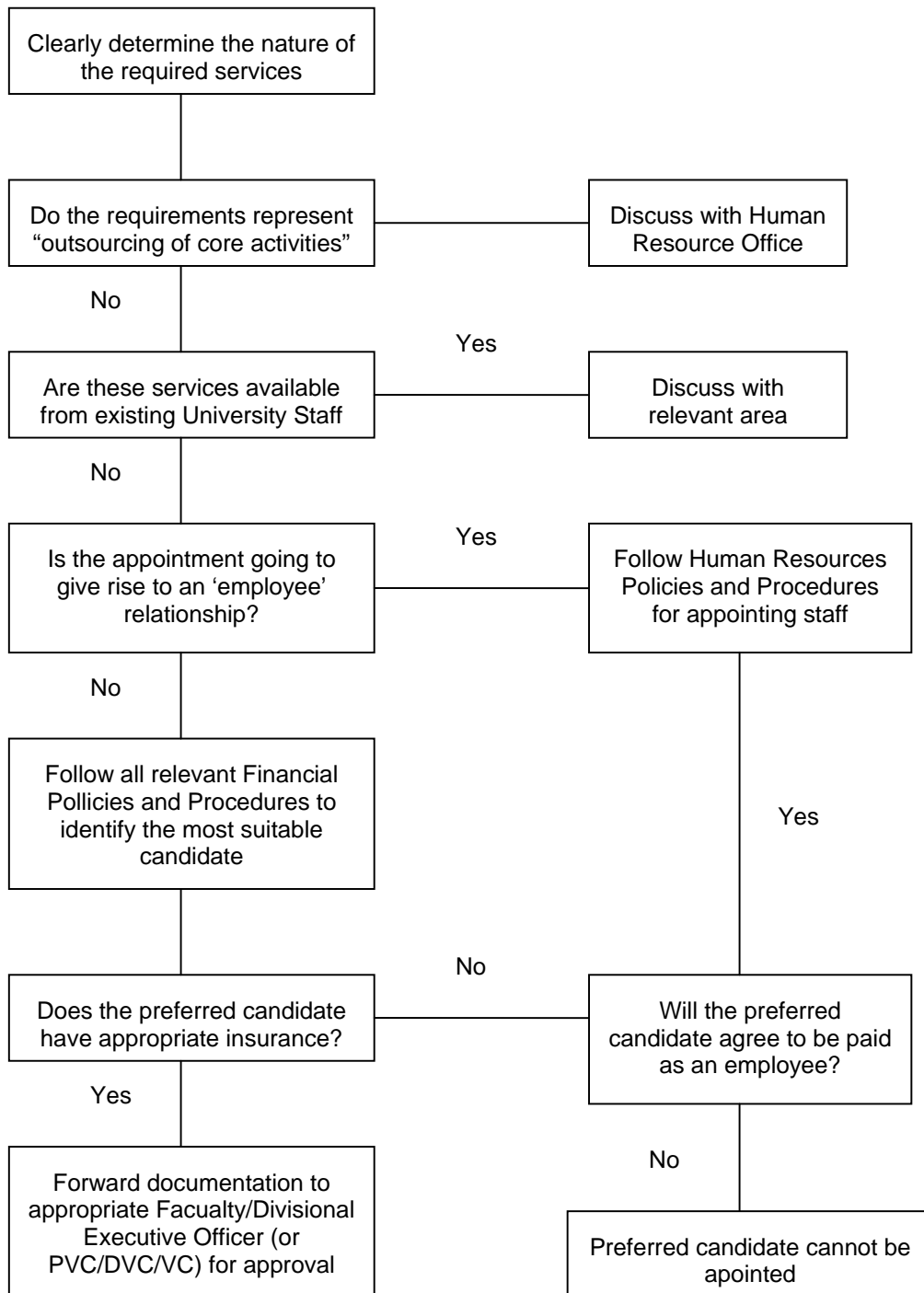
The Consultant is to arrange insurance cover for the amounts specified with an insurer of their choice who is approved by the University. The Consultant is responsible for payment of all premiums.

Clause 19 of the Standard Conditions specifies that the Consultant must produce evidence of the required insurances before starting work.

So that the interests of the University are protected and the Consultant is not required to affect and maintain any unnecessary and expensive insurance, insurance advice should be obtained before calling for expressions of interest if there is uncertainty as to the cover that should be required.

Appendix 5

Appointment of Consultant/Contractor: Summary of Key Process / Decisions



For enquiries in relation to this Finance Procedure please contact Danella.Stolza@jcu.edu.au

Approval Details

Policy sponsor:	CFO and Director, Financial and Business Services
Approval authority:	Procedures – CFO and Director
Version no:	03 - 1
Date for next review:	11/2008

Modification History

Version no.	Approval date	Implementation date	Details
03 - 1	11/2003	11/2003	