

Checklist: Issues to cover in a Sub-contract Agreement

Legal information for Specialist Homelessness Services in NSW

This checklist covers:

- before you start drafting or decide to enter into a sub-contract
- understanding and negotiating the sub-contract
- body of the agreement
- requirements that flow through to the sub-contractor
- completing Schedule 1, and
- executing the sub-contract.

If your organisation is entering into a sub-contracting arrangement, or if you are looking at re-contracting, it is important to think about the key terms of the sub-contract and how the arrangement will work in practice.

For the purpose of this checklist, a sub-contract is an agreement where an organisation (the Lead Contractor) is contracted by, and receives funding from Family and Community Services (FACS) for service delivery and by agreement, sub-contracts components of the service delivery to another organisation (the Sub-contractor).

This checklist provides some guidance about the kinds of issues to address or consider in your sub-contracts and some tips on tailoring a sub-contract to meet your needs.

The checklist is especially designed to be used alongside Not-for-profit Law's template Sub-contracting agreement, however it is also useful for those drafting their own agreements.

TIP

This checklist is designed to be used together with the Template Sub-contract Agreement for Specialist Homelessness Services (SHS) on the Information Hub at www.nfplaw.org.au/sub-contracts.

However, it is also useful to use alongside any sub-contract or other joint working arrangement to provide [homelessness] services. This checklist contains general information which is suitable for both Sub-contractors and Lead Contractors.



NOTE

The information contained in this checklist is intended as a guide only, and is not legal advice. There may be additional important issues that should be covered in your sub-contracting agreement depending on the nature of the sub-contract arrangement that you wish to enter into. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do.



Before you start drafting or decide to enter into a sub-contract

Issue	Explanation	<input checked="" type="checkbox"/>
Has consent been sought?	<p>Under the FACS Funding Deed the Lead Contractor must obtain prior written consent from FACS before sub-contracting any part of a Program Level Agreement.</p> <p>Parties should also check their constitutions or rules to see what approvals are required for entering into sub-contracts. Do you have approval from your board to enter into the arrangement? What delegations will you need in place from the board to be able to sign the agreement?</p>	<input type="checkbox"/>
Working together – culture and communication	<p>It is good to think about the nature of your organisation and the organisation you are entering into a sub-contracting arrangement with. Sub-contracting arrangements require good communication and collaborative working, so you are more likely to experience success if you have checked that the organisations that you want to work with will be compatible with yours. Undertake some due diligence and think practically about how your organisations will work together.</p> <ul style="list-style-type: none"> • What are the purposes of each organisation and do your purposes align? • If you are already working together in a sub-contracting or other arrangement, think about what has been working well and what can be improved. • Is the relationship between the parties reliant on certain individuals only or are there more robust communication practices and policies in place so that a good relationship between the organisations can continue even if personnel change? <p>There might be a general requirement in a sub-contract for parties to co-operate for the purposes of the project.</p> <p>The template sub-contract includes a clause on collaborative working to assist parties to collaborate, communicate and meet their respective obligations under the Sub-contract as well as a clause that the Sub-contractor provide all reasonable assistance and information to the Lead Contractor to enable it to meet its obligations under the Funding Deed and Program Level Agreements.</p> <p>TIP – you can always ask contacts in the sector about what it’s like to work with a particular organisation, search online for any information about the other organisation and conduct searches to check if there is any pending litigation against an organisation.</p>	<input type="checkbox"/>

Issue	Explanation	<input checked="" type="checkbox"/>
Negotiation	<p>It might be possible to negotiate terms of your sub-contract. If you are provided with a first draft of an agreement by the other party, make sure that you take time to read and understand the terms of the agreement, and think about whether they are reasonable and workable.</p> <p>You may want to seek advice from a lawyer about the meaning or consequences of clauses in the agreement. Lawyers can also draft alternative clauses that you can propose as part of negotiations.</p> <p>The Lead Contactor may not be willing or able to negotiate on some clauses if they are clauses that flow through from the arrangement they have with FACS.</p> <p>TIP – If your organisation is not able to negotiate and you can't meet one of the terms, you will need to decide whether to proceed (with an understanding of the risks) or walk away from the opportunity.</p>	<input type="checkbox"/>
Other agreements	<p>All parties to a sub-contract need to read and understand the FACS Funding Deed and relevant Program Level Agreements and keep in mind that many of the terms in these agreements also apply to Sub-contractor organisations. Some of the terms in the FACS Funding Deed are onerous. It is important to fully understand these terms.</p> <p>TIP – If you have not been provided with these other documents, you should ask for copies and review them. If you are unclear about anything in these agreements, ask the Lead Contractor for clarification or seek legal advice. Further information about the FACS Funding Deed is available on the 'Policies and guidelines for funded services' page of the FACS website.</p> <p>If there are other documents referred to or incorporated into the sub-contract, you should also have copies of, read and understand these documents.</p>	<input type="checkbox"/>

NOTE

This list is not exhaustive, and if in doubt, you should seek legal advice about any agreement your organisation intends to sign.



RELATED RESOURCES

Not-for-profit Law has developed a fact sheet that outlines the key terms of the FACS Funding Deed. You can download the fact sheet at www.nfplaw.org.au/govfunding.



Understanding and negotiating the sub-contract

This table is especially designed to use alongside Not-for-profit Law's Template Sub-contract Agreement for SHS providers. If you are using a different document as a starting point, not all of this checklist will be relevant and there may be extra considerations.

Body of the agreement

There are some terms, in particular, that the negotiating parties should consider carefully and understand before signing the sub-contract. Below are some of the terms to look out for and 'check off' that you understand. Tips are also provided to assist organisations work with the template sub-contract. We note that Schedule 2 of the template sub-contract flows through important terms from the FACS Funding Deed and is part of the sub-contract or 'body of the agreement'.

Issue	Explanation	<input checked="" type="checkbox"/>
Notification of breach	Is it important for a Sub-contractor to understand what can constitute a breach of a sub-contract because they must notify the Lead Contractor in writing if there is a breach or suspected breach of the agreement?	<input type="checkbox"/>
Conflict of interest	<p>Usually a sub-contract will have a clause to deal with actual or potential conflicts of interest which may arise for a sub-contractor. Many organisations are likely to have existing processes to manage conflicts of interest so this requirement should not be onerous.</p> <p>Under the template sub-contract, the Sub-contractor must warrant it has no conflicts of interest and if conflicts of interest arise, the Sub-contractor must notify the Lead Contractor and resolve the conflict.</p> <p>Examples of a conflict of interest might be:</p> <ul style="list-style-type: none"> • the CEO's family member is employed to deliver a funded service without the job being appropriately advertised or a formal selection process undertaken (actual); or • a board member's own business has applied for a contract to provide a service related to the funded program (potential). 	<input type="checkbox"/>
Dispute resolution	<p>A clear dispute resolution procedure can help guide resolution of disputes between parties. A good procedure will encourage open communication, involve senior staff early in a dispute and require mediation prior to parties taking court action.</p> <p>The template sub-contract provides for parties to attempt to negotiate a resolution between the parties then, if not successful, to refer the dispute to an independent mediator. Parties will need to try to agree on a mediator and share the costs associated with the mediation.</p>	<input type="checkbox"/>

Issue	Explanation	<input checked="" type="checkbox"/>
	<p>TIP – Negotiating or mediating a dispute is likely to be easier and more cost effective for all parties than litigation in court.</p>	
Liability, insurance and indemnities	<p>Usually there will be clauses in a sub-contract agreement to deal with insurance and indemnity. This includes:</p> <ul style="list-style-type: none"> • whether insurance is required and which party is required to take out appropriate insurances, and • whether one or both parties agrees to (wholly or partly) indemnify or protect the other party from any loss or liability associated with the activities. <p>The template sub-contract specifies the insurance policies that the sub-contractor must have. The indemnity clause in the template sub-contract outlines circumstances where both the Sub-contractor and Lead Contractor agree to indemnify the other party.</p> <p>TIP - It is important to understand your organisation’s obligations for obtaining insurance and indemnifying the other party. Think about:</p> <ul style="list-style-type: none"> • is the party bearing the risk, the party in the best position to prevent loss? • will you be able to obtain the required insurance within your budget? • does entering into the sub-contract affect your insurances? Have you notified your insurer? <p>If you are unsure about these obligations, seek legal advice or speak to your insurance broker.</p>	<input type="checkbox"/>
Warranties	<p>Usually a sub-contract will include a provision which sets out warranties and representations made by the parties. If a warranty or representation made by a party subsequently is untrue or inaccurate then that party may be in breach of the sub-contract.</p> <p>TIP – To comply with the warranties in the template sub-contract, the Sub-contractor will have to make sure (amongst other things) that it:</p> <ul style="list-style-type: none"> • is and remains incorporated as a separate legal entity (ensure appropriate compliance and reporting to relevant regulators); • complies with its constitution and its purpose when undertaking the services; and • has proper recruitment, screening and training so that all employees and volunteers are suitably skilled and qualified. 	<input type="checkbox"/>
Confidentiality	<p>It is likely that both parties will gain access to confidential information of the other. For this reason, you should agree and document how each party (and their employees, volunteers and contractors) may (or may not) deal with such confidential information, and make sure that confidentiality obligations are imposed to protect that information. Usually, confidentiality clauses will</p>	<input type="checkbox"/>

Issue	Explanation	<input checked="" type="checkbox"/>
	<p>prohibit parties from using, reproducing or disclosing confidential information without prior written consent.</p> <p>The template sub-contract requires each party to keep the other party's information confidential.</p> <p>TIP – When receiving information from other parties, consider whether it is confidential information and ensure you treat it according to your obligations under the sub-contract. When disclosing your own confidential information, consider marking it as such to ensure it is protected by the confidentiality provisions in the sub-contract.</p>	<input checked="" type="checkbox"/>
Privacy and information sharing	<p>Working with another organisation under a sub-contract agreement might involve sharing different types of information with the other party including personal, health and sensitive information.</p> <p>When sub-contracted to provide FACS-funded services, sub-contractors need to make certain information available to FACS through the Lead Contractor to comply with FACS' obligations under the <i>Government Information (Public Access) Act 2009 (NSW) (GIPA Act)</i>.</p> <p>Even if your organisation is not ordinarily required to comply with privacy laws, the template sub-contract requires compliance. The Sub-contractor must comply with privacy laws including by having appropriate privacy statements, collection notices and consents in place.</p> <p>Navigating compliance with privacy laws, while also disclosing information to FACS can be very tricky, and your organisation may want to seek advice on this point.</p> <p>TIP – For more information about privacy law and what your organisation needs to do to comply, see the Privacy page on Not-for-profit Law's Information Hub.</p> <p>If your organisation is unsure about its obligations around privacy and information-sharing, consider getting legal advice.</p>	<input type="checkbox"/>
Intellectual property	<p>Usually, sub-contract agreements will have a clause dealing with who owns the intellectual property (IP) created through a sub-contracted project or services. When reviewing an IP clause, it is important to think about:</p> <ul style="list-style-type: none"> • what IP will be created by the funded project? • who will be creating the IP (employees, volunteers, third parties (eg advertising agencies))? Have you agreed who will own it? • how will the IP be used? Who will need to be able to use it? <p>The template sub-contract states that the Sub-contractor owns the IP and gives an irrevocable, royalty-free licence or a right to use the IP to the Lead Contractor so that the Lead Contractor can meet their obligations to FACS. The Lead Contractor can request the Sub-contractor to sign a licence or</p>	<input type="checkbox"/>

Issue	Explanation	<input checked="" type="checkbox"/>
	<p>agreement in addition to the sub-contracting agreement to reflect this.</p> <p>TIP – For more information about IP rights and the law, see the IP page on Not-for-profit Law’s Information Hub.</p>	
Termination	<p>Usually sub-contracts can be terminated early if one party fails to fulfil its obligations and is not in a position to fix the breach.</p> <p>The template sub-contract also provides that if the FACS Funding Agreement (head contract) is terminated affecting the provision of all the services, then the sub-contract also terminates. However, where only part of the services are affected, the sub-contract contemplates that the parties will act in good faith to amend the sub-contract so it can continue to operate for remaining services.</p> <p>The Lead Contractor may also terminate the sub-contract where it is directed to do so by FACS.</p> <p>Where the FACS Funding Agreements are terminated by FACS because of a default (eg a breach of contract) by the Lead Contractor which is beyond the Sub-contractor’s control, under the template sub-contract the Lead Contractor may be required to pay the Sub-contractor costs incurred by the Sub-contractor. The template sub-contract includes examples of the types of costs that the Sub-contractor could seek from the Lead Contractor when the sub-contract is terminated in this way. This should be carefully considered and negotiated by the parties.</p> <p>TIP – You may want to negotiate around termination, as your organisation may want either party to be able to terminate the agreement for convenience (as a termination of convenience clause exists in the FACS Funding Deed) or by mutual agreement.</p> <p>You may decide that there are other circumstances in which you should be able to terminate the sub-contract.</p> <p>Consider what should be included as events of default by the other party (ie acts or events that will trigger rights to terminate under the contract).</p> <p>The parties will need to think about things such as payment of any outstanding amounts, confidential information, intellectual property and what is to happen to any remaining funding money (bearing in mind the Funding Deed or Program Level Agreement may require return of surplus).</p>	<input type="checkbox"/>

Requirements that flow through to sub-contractor

Often sub-contracts include obligations that ‘flow through’ from the contract between the funder and the lead contractor to the Sub-contractor.

The Sub-contractor should make sure that they thoroughly understand the sometimes onerous requirements of the FACS Funding Deed and Program Level Agreements, and any other agreements that flow through by reference to a sub-contracting agreement.

In the template sub-contract, some of the important obligations have been extracted into Schedule 2 of the sub-contract and are binding on the parties. The following table explains these clauses and provides some tips to comply.

CAUTION

Some sub-contractors are required to comply with the 'head' agreements but are not provided with a copy. Make sure you obtain copies of all the relevant agreements referred to in a sub-contract. If you are a lead contractor, make sure all sub-contractors are provided with the documents they are required to comply with.



Issue	Explanation	<input checked="" type="checkbox"/>
Accessibility of the services	The Sub-contractor must ensure it is complying with its obligations to make services reasonably accessible to all people. You should consider if you can comply with these requirements at the outset and understand who has to bear the costs. For example, if your premises are required to be wheelchair accessible but requires modifications before it complies, can you afford the required modifications?	<input type="checkbox"/>
When to provide notification in writing	There is a detailed section about this in the Not-for-profit Law fact sheet on the FACS Funding Deed on the Information Hub at www.nfplaw.org.au/govfunding .	<input type="checkbox"/>
Requirements for personnel	Obligations around personnel include that the Lead Contractor and/or FACS can request that a Sub-contractor not engage a particular person on a funded project, if they have engaged in misconduct for example. It is also a good idea for the Sub-contractor to communicate with the Lead Contractor about staff changes to help continued collaboration. TIP – Ensure that your organisation has appropriate recruitment, screening, training and supervision of all employees and volunteers.	<input type="checkbox"/>
Audits and access to records	There is a detailed section about these requirements in the Not-for-profit Law fact sheet on the FACS Funding Deed on the Information Hub at www.nfplaw.org.au/govfunding .	<input type="checkbox"/>
Performance measures	The Sub-contractor must understand and comply with the Performance Measures for Services which are specified in the relevant Program Level Agreement, including reporting on their performance and participating in the Performance Measurement Cycles for Services.	<input type="checkbox"/>
Financial reporting	There is a detailed section about this in the Not-for-profit Law fact sheet on the FACS Funding Deed on the Information Hub at	<input type="checkbox"/>

Issue	Explanation	<input checked="" type="checkbox"/>
requirements	www.nfplaw.org.au/govfunding . TIP – If the Lead Contractor must report to FACS using a particular template or program or in a particular way, it makes sense for the Sub-contractor to report in the same way and to be notified of this from the start. Keep a calendar and reminders of reporting dates.	<input checked="" type="checkbox"/>
Asset management and ownership	There is a detailed section about this requirement in the Not-for-profit Law fact sheet on the FACS Funding Deed on the Information Hub at www.nfplaw.org.au/govfunding .	<input type="checkbox"/>

Completing Schedule 1 of the template sub-contract

Schedule 1 in the template sub-contract contains the details that are specific to the parties and will need to be completed carefully and understood before signing the sub-contract. The table below provides some guidance on how to fill out this schedule.

Issue	Explanation	<input checked="" type="checkbox"/>
Parties	It is important that the sub-contract clearly names the correct contracting parties and ABN, the correct addresses and contact details. TIP – to check each organisations' correct name and ABN using the ABN Lookup tool .	<input type="checkbox"/>
Individual contacts	It is important to include the correct name and contact details for the nominated individuals from both parties to receive communication and notices under the sub-contract. The dispute resolution clause requires 'senior staff' to talk to each other so the name and contact of this individual should also be included. TIP – remember to let the other party know if any of these individuals change.	<input type="checkbox"/>
Services	Describing the Services that are to be delivered clearly and comprehensively is one of the most important parts of drafting a good sub-contract. Disputes most often arise about whether a party has delivered the Services as negotiated and documented in the agreement. It is critical to make sure that the description of the Services includes all the elements that have been agreed, as the agreement becomes the final record of your negotiations. This is about what you need to do to accurately document the 'who, what, when, where, how' of the agreement. It is also important to accurately describe the Services since this flows into your ability to comply with certain terms in the sub-contract. You are obliged under the sub-contract to provide the Services described. You are also giving a warranty that your organisation can perform the Services with a high degree of quality.	<input type="checkbox"/>

Term and start date	<p>It should be clear when the sub-contract starts and ends, and whether the commencement is conditional on any particular event occurring (such as commencement in the Funding Deed and Program Level Agreement). Include any options or extension provisions that parties have negotiated.</p> <p>TIP – Keep a calendar and reminders of dates. You may have an option to extend that can only be exercised in a certain time window.</p>	<input type="checkbox"/>
Fees and invoicing	<p>Set out the fees agreed to be paid to the Sub-contractor including:</p> <ul style="list-style-type: none"> • payment by the Lead Contractor in return for the delivery of services • any contribution to costs associated with meeting requirements such as accessibility under the FACS Funding Deed (if agreed between the parties) • make clear the circumstances where CPI will be applied, or where incremental changes to the Funds provided by FACS to the Lead Contractor will be passed through to the Sub-contractor, and • any invoicing requirements and payment timeframes (referred to as ‘Intervals’ in the template). 	<input type="checkbox"/>
Management Fee	<p>Include any fee the Sub-contractor must pay the Lead Contractor to cover its administration expenses such as a ‘management’ or ‘admin’ fee.</p> <p>Whether a management fee is retained by or paid to the Lead Contractor will depend on what has been negotiated and may depend on the level of services provided by the Lead Contractor to the Sub-contractor. For example, is the Lead Contractor providing administration, accounting services, client intake, referrals, resources, training, equipment, software, etc?</p> <p>TIP – Sub-contractors can seek an itemised breakdown of the anticipated administration and other costs for transparency around what the management fee relates to.</p>	<input type="checkbox"/>

Executing the sub-contract

Issue	Explanation	<input checked="" type="checkbox"/>
Execution	<p>Usually a sub-contract will contain execution clauses which both parties are required to sign in order to make it binding. Consider the following points when executing your agreement:</p> <ul style="list-style-type: none"> • If changes have been negotiated, make sure you're signing the correct, final version. If there are any last minute changes to the sub-contract, both parties must initial any changes. • If your sub-contract says it may be signed in 'counterparts', this means the parties can sign different copies of the contract. They need to sign a full copy, not just the signing page. • Make sure the correct names of the organisations are used. • Make sure the signature block properly identifies the person signing on behalf of that organisation. • Make sure the people signing have proper authority and delegations to sign the contract. Some organisations require two people to sign large contracts, and may even require a board member to sign. Your board may provide a formal delegation to execute the contract, or provide a power of attorney. Signature blocks should be drafted to reflect your organisation's requirements. • Make sure if using electronic signatures, to follow appropriate validity and security processes. NCOSS has an information sheet on Electronic Signatures – Keeping them secure. • Signatories should write the date on which they sign the sub-contract. It is not a problem if they sign on different dates (remember they don't need to sign the same copy). The contract should be dated the date that they final signatory signed. 	<input type="checkbox"/>

Resources

Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub (www.nfplaw.org.au) has further resources on the following topics:

- ✔ Government funding agreements – www.nfplaw.org.au/govfunding
- ✔ Working with other organisations – www.nfplaw.org.au/workingwithothers
- ✔ Intellectual property for community organisations – www.nfplaw.org.au/ip
- ✔ Tax – www.nfplaw.org.au/tax
- ✔ Insurance – www.nfplaw.org.au/riskinsurance
- ✔ Employees – www.nfplaw.org.au/employees
- ✔ Understanding contracts - www.nfplaw.org.au/contractsoverview

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