CHAPTER 18
ENFORCEMENT AND ADMINISTRATION OF CONTRACTS

18.1 BREACH OF CONTRACT

18.1.1 Breach of contract is when one of the parties to the agreement breaches a term thereof and does not comply thereto or indicates that it will not or be able to comply with the terms of the agreement.

18.1.2 Breach may be committed in several ways, i.e:

(a) A supplier may fail to perform on or before the date fixed for performance and the supplier would then be said to be *in mora* (in default) in respect of the obligation in question.

(b) Where no definite time for performance is agreed upon, the Department must demand performance within a specified time (must be reasonable in the circumstances) and if the Contractor or service provider has failed to perform in that time, he is regarded as being *in mora* (breach of time aspect).

(c) The supplier may render performance on time but deviate from the performance required by the agreement (e.g. use materials of inferior quality).

(d) The supplier may repudiate his/her obligation(s) in the sense that he/she may, before or after the due date for performance, make it plain by his/her words or actions that he/she does not intend to perform, or perform properly, in terms of his/her obligation(s). The test in each case is whether the supplier has acted in such a manner as to lead to a reasonable conclusion that he/she does not intend to fulfil the obligation(s). If a supplier repudiates his/her obligations after having breached these obligations in some other way, the Department could (if the situation is not amicably resolved) claim relief on the basis of either form of breach.

18.1.3 If a service provider repeatedly does not perform, or under-performs, and their actions cause the department serious inconvenience, loss, or embarrassment, corrective steps should be taken. All substantiated complaints regarding the performance of service providers must be recorded.

18.1.4 Where cancellation of a contract is considered as a remedy for breach, it is always advisable to obtain legal advice in order to minimise risk for the department. Cancellation should be regarded as the last resort. However, should this remedy be used it must be done in consultation with Legal Services.

18.1.5 Cancellation of a contract is usually prejudicial to the Department. Therefore, serious thought must be given to the grounds for considering cancellation. Clarity must be reached beforehand on the question of whether the contractor will have a claim against the Department or not, and if so, whether the cancellation may be justified. If a contract is cancelled, the matter must be fully documented, and the following be taken into account:

(a) The particular contract condition empowering the action;

(b) What further arrangements will be made for completing the contract and

(c) Whether additional costs will be recovered from the contractor

(d) If the additional costs cannot be accurately determined, a careful estimation thereof must be made;

(e) Any claim for the recovery of additional costs must be limited to the minimum actual amounts. Therefore, in such cases, the Department cannot summarily authorise purchasing to the best advantage, since this might prejudice the recovery of the additional costs from the original contractor. There may be other avenues of action that might result in lower additional costs. As an alternative, a new contract may be concluded through the normal bidding procedures. In this process, account must be taken of the time elapsed between the closing of bids and the cancellation of the contract and the effect of the cancellation on the Department's schedules.

18.2 REMEDIES FOR BREACH

The following remedies should be considered before the cancellation of a contract is contemplated:

18.2.1 **Specific Performance (Enforcement)**

(a) The most obvious remedy for breach of contract is an order for specific performance, i.e. an order compelling the defaulter to perform what he has undertaken to do or restraining him from what he has agreed not to do. The court always has the discretion to refuse an order for specific performance, for instance where it is impossible for the contractor or service provider to perform; it would produce an inequitable result or would be against public policy. If enforcement is denied it would be possible to claim damages from the contractor or service provider.

18.2.2 **Damages**

(a) An award for damages is an order to pay a sum of money for losses suffered. The primary rule being that the sufferer can claim so as to be put in the economic position he would have occupied if the contract had been properly performed. The aim is to compensate the innocent party for its real pecuniary (monetary) losses. The rules of Unjustified Enrichment must be applied. The onus of proof should as far as possible be placed on the contractor or service provider to make provision for situations where damages might be claimed.

(b) There is a duty on the innocent party (party who wants to claim damages) to mitigate its losses or damages. The sufferer cannot recover damages for losses that he could reasonably have avoided. Thus, the Department must, as far as possible, minimise (mitigate) damages, if and when it occurs.

(c) Where a party makes it clear, by their words or actions, that it will not perform its contractual obligations prior to the date for performance ("repudiation"), the

innocent party may ignore the repudiation and claim specific performance or damages in place of the performance when the due date arrives.

18.2.3 **Penalties**

(a) The parties may include in the contract a provision regulating the amount of damages to which the aggrieved party is entitled on breach. These penalties (also any forfeiture) are governed by the Conventional Penalties Act, 1962. In view thereof, if a contract contains a penalty clause or stipulation, damages may not be claimed in addition to the penalty, nor, unless the contract expressly provides otherwise, *in lieu* of it.

(b) Breach, no matter how serious it is, does not, cancel the agreement. This is so even if the agreement contains a provision that indicates that, on default occurring, the agreement will *ipso facto* (by the fact itself) become null and void. It is only where the aggrieved party cancels the agreement on account of the breach that it comes to an end. In the absence of cancellation, each party remains liable to carry out or complete their respective performance, although, if the aggrieved party chooses to claim damages in lieu of performance, the defaulter is *pro tanto* (to this extent) relieved of his/her duty to perform.

18.2.4 **Cancellation**

(a) Generally, cancellation operates retrospectively (*ab initio*). This means that the parties are put in the positions they would have been in, had the contract never been concluded. Each party is relieved of the duty to perform further and is obliged to restore to the other any performance(s) received in terms of the agreement (*restitutio integrem*). There are exceptions to this general rule.

(b) Because cancellation has legal consequences on the reciprocal rights and obligations of the parties, it is available only where the parties have incorporated a cancellation clause in the contract or where the breach is of a sufficiently serious nature. If the breach relates to time, the question is whether time could be said to be 'of the essence of the contract'.

(c) If the breach consists of a failure to perform according to the strict terms of the agreement, other tests would apply, i.e. is the breach sufficiently serious, does it go to the root of the contract?

(d) Breach, no matter how serious, does not automatically cancel the contract. This is so even if the contract contains a provision that indicates that, on breach occurring, the contract will automatically become void. It is only where the aggrieved party takes active steps to cancel the contract on account of the breach that the contract comes to an end. In the absence of cancellation, each party remains liable to carry out or complete their respective contractual obligations. However, if the aggrieved party chooses to claim damages in place of performance, the defaulter is, to that extent, relieved of their duty to perform.

(e) Generally, cancellation operates retrospectively. This means that the parties are put in the positions they would have been in, had the contract never been concluded. Each party is relieved of the duty to perform further and is obliged to restore to the other party any performance(s) received in terms of the agreement. There are, however, exceptions to this general rule.

(f) Where repudiation of the whole contract is concerned, it is usually regarded as sufficiently grave to justify cancellation. Cancellation clauses frequently contain a rider to the effect that the innocent party may only exercise his right to cancel on account of breach if he has given the defaulter notice of the breach and the latter has failed to remedy it within a certain period. A provision of this sort is binding and, in general, the innocent party must bring himself strictly within its wording if he wishes to enforce his right to cancel. However, a notice provision is not applicable where the defaulter has repudiated the agreement (unless the provision expressly says so).

(g) Cancellation should be regarded as the remedy of last resort. Cancellation of a contract is usually prejudicial to the department. Therefore, serious thought must be given to the grounds for considering cancellation. Clarity must be reached beforehand on the question of whether the service provider will have a legal claim against the department for unwarranted cancellation, and if so, whether the cancellation may be justified. If a contract is cancelled, the matter must be fully documented, and the following be taken into account:

(a) the particular contractual term empowering cancellation;

(b) what further arrangements will be made for completing the contract;

(c) whether additional costs incurred in completing the contract will be recovered from the service provider;

(d) if the additional costs cannot be accurately determined, a careful estimate thereof must be made; and

(e) any claim for the recovery of additional costs must be limited to the minimum actual amounts. The department cannot simply authorise new purchasing to the best advantage of the department, since this might prejudice the recovery of the additional costs from the original contractor. There may be other avenues of action that might result in lower additional costs. As an alternative, a fresh contract may be concluded through the normal bidding procedures. In this process, account must be taken of the time elapsed between the closing of bids and the cancellation of the contract and the effect of the cancellation on the department's schedules.

(f) If a contract is cancelled, the service provider must be requested to indicate to the department, within a given time limit, how goods in possession of the department must be disposed of and warned that if they do not react to the request, the goods will be returned to the service provider at their own cost.

(g) When a department has to buy out goods and services at the service provider's expense, the loss to the department must always be restricted to the minimum, since it is difficult to justify the recovery of unreasonable additional costs from the service provider.

18.3 ELECTION OF REMEDIES

18.3.1 When goods or services do not comply with the provisions or requirements of the contract, or problems are experienced in the execution of the contract, the matter must be brought to the attention of the contractor/service provider in writing.

18.3.2 When correspondence is addressed to the service provider, reference must be made to the bid or contract number, and to the item number and number and date of any relevant invoice, statement, or letter received from the service provider.

18.3.3 On breach, the innocent party has a choice of remedies. If cancellation is not permitted, he may claim specific performance or damages *in lieu* of performance. In either case, he/she may claim damages for any further losses resulting from the breach. If the contract contains a cancellation clause, or if the breach is sufficiently serious to warrant cancellation, the innocent party has the further alternative of cancellation and damages (including damages for further losses).

18.3.4 In general, the aggrieved party is not obliged to cancel where cancellation is permissible. He is entitled to keep the contract alive and seek an order for specific performance or an award of damages in lieu of specific performance. This is so, even where the defaulter repudiates the entire contract prior to the date for performance. The sufferer may ignore the repudiation and claim performance or damages in lieu of performance when the due date arrives.

18.3.5 Before action is taken (relating to breach), the Department must inform the contractor/service provider that action will be taken in accordance with the contract conditions unless he complies with the contract conditions and satisfactorily delivers goods or services within a specified reasonable time. If the contractor/service provider does not perform satisfactorily despite the warning, the Department may consider cancelling the contract concerned and/or enforcing other appropriate remedies.

18.3.6 When correspondence is addressed to the contractor/service provider, reference must be made to the bid or contract number, the item number and the number and date of any relevant invoice, statement or letter received from the contractor/service provider. Otherwise the number and date of the order, a short description of the goods or service and details of the destination if applicable, must be supplied.

18.3.7 Details of all cases where equipment, vehicles, implements, machinery, apparatus, etc. fail during the guarantee period and have to be replaced or repaired, or where the provision of spares or service is unsatisfactory, must be recorded, irrespective of whether the Department has satisfactorily finalised the matter with the contractor/service provider. The purpose of this requirement is for the Department to keep a record of unsatisfactory performance of services and defective goods/ products delivered.

18.3.8 If a contract is cancelled or rejected, the contractor/service provider must be requested to indicate to the Department, within a given time limit, how goods in possession of the Department must be disposed of and warned that if he does not react to the request,

the goods will be returned to him at his cost. If he ignores the request, the Department must act accordingly.

18.3.9 When the Department has to buy out goods and services at the contractor's/service provider's expense, the loss to the Department must always be restricted to the minimum since it is difficult to justify the recovery of unreasonable additional costs from the contractor/service provider.

18.3.10 If a contractor/service provider repeatedly fails to perform or there is non/mal-performance and these actions cause the Department serious inconvenience, loss or embarrassment, corrective steps should be taken. All substantiated complaints regarding the performance of contractors, including contracts concluded in terms of the delegated powers, must be recorded. A register must be maintained.

18.3.11 If the contractor/service provider does not deliver the goods or services within the contract period, the Department may after informing the contractor/service provider, at their own discretion, either deduct an amount as a percentage of the value of the contract amount as a penalty for each day that the delay continues, or instead of such a penalty, claim compensation for any actual damage or loss suffered, provided that where beneficial use of the completed portion is enjoyed, the penalty shall be applied to the value of the outstanding portion only.

18.4 NEGOTIATING A SETTLEMENT OR AMENDING THE CONTRACT

18.4.1 A settlement is an agreement whereby a dispute (usually but not exclusively regarding an uncertainty as to the terms of a legal relationship, or even whether or not such a relationship exists at all) is resolved by way of compromise or negotiation. The purpose thereof is to avoid extreme measures such as litigation. It is advisable that in this instance, the Department consults with Legal Services and where required obtains a legal opinion before making a decision of negotiating or amending a contract.

18.4.2 In the same way the parties to the contract (being the Department and the Contractor) may, by consensus/agreement, amend the contract or terms thereof. Once again, the Department must consult with Legal Services, and where required, obtain a legal opinion in this regard.

18.4.3 For the sake of protecting both parties to the agreement, the settlement or amendment must be in writing and signed by the parties involved or any authorised party representing those parties. These actions are subject to the provisions of the formal contractual requirements between the parties as well as the Common Law of Contract.

18.5 REMEDIES IN TERMS OF MISREPRESENTATION

18.5.1 Misrepresentation in this context means that a bidder/service provider/contractor provided certain information or put forward certain facts in his bid or additional documentation knowing that such facts are untrue or incorrect. The bidder would have intended to misrepresent the facts as such misrepresentation would not have been as a result of a *bona fide* mistake by the bidder. This section provides for remedies in the case of misrepresentation.

18.5.2 In order to implement these remedies, the Department has to be sure that the information provided was indeed incorrect. The misrepresentation has been proved factual and not merely an expressed opinion by the Department. The stated fact (misrepresentation) must be sufficiently material that a reasonable person would have regarded such 'fact' as important in deciding whether to enter into the contract or not. Furthermore, to be successful with a claim for misrepresentation, it will have to be shown that the particular fact (or misrepresentation) induced the Department to contract and had the Department known the misrepresented fact(s) it would not have contracted or would have contracted on different terms. If the Department would have contracted even though the facts have been misrepresented, it would not be entitled to the remedy of rescission. However, if the Department would have contracted on other terms if it had known that the facts had been misrepresented, the Department may be entitled to the remedy of damages.

18.5.3 Where the Department wishes to rescind the contract and obtain restitution (i.e. both parties return what is due to each other as if the contract had not been initiated), certain rules are applicable. First, on becoming aware of the fact that there has been a misrepresentation, the Department must not do anything, prior to rescission, which would lead the other party reasonably to believe that he intends to abide by the contract and not rescind it: it must not, for instance, exercise an act of ownership over an article purchased or service rendered etc. Secondly, the Department must communicate its decision to rescind to the supplier/contractor within a reasonable time of becoming aware of the misrepresentation. Failure to follow these rules could be construed as the Department having waived its right to rescind the contract. After rescission, restitution (restoration to the position one would have been in had the misrepresentation not take place) must take place.

18.6 **RECOVERING DAMAGES BY SET-OFF**

18.6.1 Set-off consists in the automatic extinction of debts by operation of law on grounds of policy, or a dispositive act whereby one party gives effect to the extinction of the debts by means of a unilateral legal act. This means that the Department may hold back monies due to the contractor/service provider in the event of cancellation by the Department as a result of non/mal-performance by the Contractor, or for any loss, damage or additional cost the Department incurred due to defective performance by the contractor/service provider. It enhances efficiency by promoting the speedy settlement of debts without the need for a costly and cumbersome duplication of performance. Thus, it may be interpreted to be a means of enforcing a claim indirectly.

18.6.2 In order to enforce this remedy the following considerations must be taken into account:

(a) The Department must have suffered damages or incurred a loss directly or consequentially.

(b) Set-off may also be used for damages such as additional cost the Department might have incurred in obtaining the service of a third party to remedy the defects which the current contractor failed to remedy within a reasonable time.

(c) This remedy may also be used to claim for latent defects in the product/service provided by the contractor or for any other defect resulting in the product/service not conforming to conditions / specifications of contract.

18.6.3 In order to use this remedy there are certain requirements that must be met, such as:

(a) The debt must be mutually owed.

(b) It must be *iusdem generis* (of the same kind). For example: a money debt cannot be set-off against a claim for delivery of property.

(c) The debt must be due, enforceable and payable. Set-off does not operate if the debt is subject to a suspended condition or only enforceable at a future date.

(d) The debt must be liquidated.

18.7 CANCELLATION AS A RESULT OF *FORCE MAJEURE / VIS MAJOR*

18.7.1 *Force majeure / Vis major* may be defined as an act of God, i.e. a natural disaster or some other circumstance beyond the control of the contractor/service provider. The *force majeure* clause is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, or an event described by the legal term *act of God* (such as hurricane, flooding, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract.

18.7.2 Cancellation of a contract entails the termination of the consequences of a valid contract, i.e. performance. This remedy is available only in exceptional circumstances.

18.7.3 Firstly, the party responsible for performance must give written notice within three (3) days (business days) of the date on which the *force majeure / vis major* occurred. Where reasonably possible, the party responsible for performance must do everything possible to deliver or comply with the terms of the contract. Dates and times allowed for the performance shall be agreed upon by both parties.

18.7.4 Failure to give notice of the *force majeure*, allows the aggrieved party to the contract the right to refuse amendment of the date and time on which performance was due and that the aggrieved party may exercise the remedies available for breach.

18.7.5 In practice, most *force majeure* clauses do not excuse a party's non-performance entirely, but only suspends it for the duration of the *force majeure* unless the party responsible for the performance (as opposed to the party first affected by the force majeure) agrees in writing to render such performance.

18.7.6 The Department may cancel the contract without prejudice to any other rights it might have if the *force majeure* persists after a period of 21 days or as soon as reasonably possible. If the department wishes to have these remedies at its disposal, it must ensure that the contract caters for these provisions.

18.8 INSOLVENCY

18.8.1 The Department has various rights, which it may exercise in the case of liquidation, sequestration or judicial management of contractors/service providers.

18.8.2 When the estate of a contractor/service provider is liquidated for whatever reason, the department may where necessary consult with Legal Services on whether to claim against the estate or not. The risk to the Department is the determining factor and the choice with the smallest degree of risk is preferred. All action must nevertheless be taken in accordance with the relevant National Treasury Regulations.

18.8.3 Where an estate is involved, all claimants accept responsibility for both assets and liabilities. Therefore, if a claim is registered against an estate, the claimant must accept his share of any costs that have to be defrayed.

18.8.4 There are three types of claims against an estate:

(a) "protected creditors", e.g. SARS;

(b) "preference claims", e.g. a bank having a secured claim over the assets; and

(c) "concurrent claims", which are all claims that do not fall into the categories of (a) and (b).

18.8.5 The first two categories of claims are paid out in full before the third category is considered, which places the third category in a weak position if a contractor/service provider is sequestrated, liquidated or placed under judicial management.

18.8.6 If a firm or person is liquidated /sequestrated, it is regarded in laymen's terms to something similar to a breach of contract. The liquidator or administrator is given the choice of carrying out the contract or not. In the majority of cases the liquidator or administrator will elect to cancel the contract and a provisional claim against the estate should be registered with the proviso that a final claim will not be submitted if the Department will have to make a financial contribution. The department may recover any of its property in the liquidated firm's / sequestrated person's possession.

18.8.7 A procuration could be signed in terms of which the liquidator may act on behalf of the Department. If the liquidator indicates that no dividend will be paid out to concurrent claimants, the Accounting Officer or delegated official may also decide that it would be more economical to write-off the relevant amount in terms of the relevant prescripts.

18.9 VARIATION AND WAIVER

18.9.1 Variation is an alteration to the legal consequences of the contract. This may take place only by mutual agreement of the parties and entails not merely changing the effect of a term, but also removing a term from the contract. On the other hand, waiver is a unilateral act meaning that one party to the contract decides on his own to abandon a right or remedy, which it may have without altering the terms of that contract.

18.9.2 It is of the utmost importance that such agreement to waive or vary the terms of the contract be in writing, for the sake of certainty and protection of both parties involved.

18.9.3 In exceptional cases, the Department may obtain a legal opinion from Legal Services before engaging in the variation or waiver of a contract to determine and investigate the legal implications of such action.

18.10 Assignment of Contracts

Clause 19 of the General Conditions of Contract (GCC) makes provision for assignment of contract. Clause 19 of the GCC provides that "a supplier (or service provider) shall not assign, in whole or in part, its obligations to perform under the contract, except with the purchaser's prior written consent".

18.11. CESSION OF CONTRACTS

18.11.1 Cession of a contract is the transfer of rights and obligations of a party to the contract to a party that was not an original contracting party. Cessions occur when the service provider might have merged with another service provider, or when a service provider may be in a position that it can no longer effectively render the service and may want to transfer it to another entity.

18.11.2 A cession is unlawful if it is prohibited by statute or by the common law, or if it is contrary to public policy or *boni mores* (i.e. good moral standards of society).

18.11.3 Prior to cession, the department should be mindful that the contract was originally awarded to a specific bidder for specific reasons, for example, because that bidder scored highest points and offered the lowest price. The identity of the contracting party is therefore of paramount importance to the department and care should be taken that the party to which the contract will be ceded complies as far as possible with the original requirements for the award of the contract, particularly if the contract is ceded in the early stages of the contract period.

18.11.4 Care should be taken if a request to cede a contract is received from a contractor within the first three months of conclusion of the contract. Firms are known to "front" for others, particularly on preferential procurement. It is recommended that approval to abandon, transfer, cede, delegate, assign or sublet contracts within three months after conclusion thereof shall only be granted in compelling circumstances, for example, in the event of death, sequestration, liquidation or merger.

18.11.5 If approval for cession is granted, the department must ensure that the necessary documentation is completed by the new service provider, so as to ensure that a complete understanding is reached and that the new service provider accepts the terms and conditions of the contract in writing.

18.11.6 The reasons for ceding the contract must be recorded and the new service provider's ability to carry out the contract must be established. The cession should not be approved if the department would suffer a loss as a result thereof or if there is an increased risk to the department.

18.11.7 The same conditions used for the award of the bids concerned must be made applicable to the cession of contracts. For example, if the original contract was subject to the provision of surety,

the same degree of surety, or better, must be provided by the cessionary. If this is not possible the reasons for it should be fully documented and placed on file for audit purposes.

18.12 SERVICE LEVEL AGREEMENT (SLA)

18.12.1 The Service Level Agreement will be more frequently used when a service is provided to the Department, as opposed to when a product is supplied to the Department.

18.12.2 Even though the agreement may be described as a standard agreement, the Department's rights and obligations in terms of the SLA will be dependent upon the specific service rendered, or product supplied to the Department. The terms and conditions will have to be adjusted to suit the circumstances of each contract.

18.12.3 Contents of clauses relating to the Provision of Services, Use of Services, Remuneration and Limitation of Liability will have to be negotiated for each contract.

18.12.4 When SLAs are drafted, they should adhere to the SLA template issued and vetted by Legal Services from time to time.

18.13 CONTRACT PRICE ADJUSTMENTS: FIRM AND NON-FIRM PRICES

18.13.1 Price adjustments, in any form, are incidental to the conclusion of any contract as a result of the period of the contract and the constant change in economic conditions. There are three (3) main circumstances for price adjustments:

(a) Price adjustments linked to inflationary and statutory adjustments;

(b) price adjustments as a result of rate of exchange variations; and

(c) price adjustments not provided for in a bid/contract. (Extra-contractual price adjustments.)

18.13.2 Firm prices are those prices subject only to adjustments of customs or excise duty or any other duty, levy, or tax which has a demonstrable effect on the price of the supplies for the duration of the contract. If firm prices are quoted, form WCBD 3.1 must be used.

18.13.4 Non-firm prices are those prices that are subject to all other variations, such as exchange rate fluctuations, inflation, price indexes and so on that have a demonstrable effect on the price of the supplies for the duration of the contract. If firm prices are quoted, form WCBD 3.2 must be used.

18.13.5 In the bid invitation, provision must be made for the bidder to indicate if their prices are subject to any escalation. The bidder by means of indices, Consumer Price Index (CPI), Production Price Index (PPI) or fixed period adjustments will indicate such price adjustments. Steel & Engineering Industry Federation of South Africa (SEIFSA), through Statistics South Africa receives the PPI's and CPI's for publication. The WCBD 3.2 pricing schedule must be utilised for all goods/services that would be subject to price escalations.

18.13.6 For the sake of efficiency, the Department should acquire a breakdown of the price at the conclusion of the contract. This is more convenient and allows the Department to determine which part of the price would be subject to such increases or adjustments.

18.13.7 In order for proper contract management to take place in respect of Contract Price Adjustments (CPA), the following questions need to be asked from the bidder in the bid documents:

(a) Is the price offered, firm for the duration of the contract?

(b) If not firm, indicate details as to non-firm price structures.

(c) Are prices linked to proven cost increases or formula-based adjustments? (formula-based price adjustments are Producer Price Index and Consumer Price indices together with the relevant Steel & Engineering Industry Federation of South Africa-SEIFSA).

(d) If formula-based, what indices will be utilised to measure such price adjustment claim during the contract period?

18.13.8 Should bidders indicate that price adjustment would be subject to the Producer Price Index (PPI), they must clearly and accurately indicate details as to what tables in the PPI will be utilised for such price adjustment.

18.13.9 This will form the basis for the entire contract period and if the company later submits a claim, the above will be used as the basis for such claim. It should be indicated to the company that the information is compulsory.

18.13.10 Once the contract is up and running, contractors are compensated for actual, proven additional expenses in connection with the aforesaid indices, provided that the relevant tables and base data of the PPI or CPI is used for the calculation of the bid price. PPI or CPI Tables that were indicated at the bid stage will be used to calculate the differences claimed.

18.13.11 The importance of requesting the bidder to stipulate whether his price is firm or not is amplified considering that should a bid be accepted, and the bidder did not indicate whether / not his prices are firm, such a bidder may after acceptance increase his price. Apart from the fact that the Department may not be able to afford such an increase, it may also lead to an unfair advantage to the bidder when taking into consideration that his price might now be higher than other bidders who competed against him.

18.13.12 It must however be noted that if a bidder gives a firm price, it does not mean that such a price will not be subject to change. A definition of a firm price is as follows:

"Firm prices means prices which are only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax which, in terms of a law or regulation is binding upon the contractor and demonstrably have an influence on the prices of any supplies, or the rendering costs of any services, for the execution of the contract."

18.13.13 Where a bidder does not offer a firm price, such bidder may stipulate the means by which the price will be adjusted. For example: Non-firm prices linked to proven adjustments, prices linked to fixed period adjustments, prices linked to escalation formula adjustments or prices subject to rate of exchange fluctuations.

18.13.14 Bidders may claim price adjustments on different methods and for different reasons. As a bidder's price consists of various factors/variables, they may wish to claim adjustments

on a combination of factors and methods. The Department may, in terms of a special condition, spell out the rules on how and on what basis prices will be adjusted. It is true that firm or non-firm prices may be offered, whilst there is provision for price adjustments by means of a formula.

18.13.15 Where a formula is allowed in the bid documents, the structure of the formula has to be agreed upon. The bidder's attention must be drawn to the requirement that the values of the variable factors in the formula must be specified in their bids. The relation between these factors must be reasonable.

18.13.16 Price adjustments, in accordance with the escalation formulae based on inflation indices, are allowed on no more than 85% of the price, unless good valid reasons to the contrary are provided. The risk attached to price increases in respect of the remaining 15% of the price must be accommodated in the supplier's price.

18.13.17 Where price adjustments based on escalation formulae are accepted and irrespective of stipulations to the contrary elsewhere in the bid documents, variations in the actual costs for whatever reason are for the account of the contractor. This implies that proven cost increases and formula-based adjustments cannot both be entertained at the same time.

18.14 EXTENSIONS AND EXPANSIONS AGAINST THE ORIGINAL CONTRACT

18.14.1 An Accounting Officer or delegated official may deem it necessary to expand or vary orders against the original contract. The Accounting Officer may: -

(a) expand a contract by increasing the scope of work; or

(b) vary a contract by changing the scope of work.

18.14.2 The PFMA SCM National Treasury Instruction on 03 of 2021/2022 on Enhancing Compliance Transparency and Accountability in SCM dated 31 March 2022 requires that any contract expansion/extension must be accordance with the thresholds set by the National Treasury which is 20% or R20 million in respect of construction related goods, works and/services and 15% or R15 million in respect of all other goods and services, whichever is the lower amount. All amounts are calculated inclusive of tax.

18.14.3 The Department must, in the format determined by the National Treasury, submit a monthly report, including the reasons for all expansions/extensions in excess of these thresholds mentioned in paragraph 18.14.2 to the Provincial Treasury and the Auditor-General. The Accounting Officer must record expansion and variations referred to in paragraph 18.14.2 above in the Annual Report of the Department in the format determined by National Treasury.

18.14.4 The Provincial Treasury will scrutinise such reports and only take appropriate action, where deemed necessary.

18.14.5 Such reports sent to the Provincial Treasury will be assessed on a case-by-case basis against policy and prescripts. The Provincial Treasury will only provide a written response if any findings of risk, non-compliance, and budgetary threat(s) are noted.

18.14.6 All Departments are required to submit cases of contract expansions and extensions to the Provincial Treasury which are required to address the minimum key criteria as reflected in **Addendum 9**.

18.14.7 Paragraph 18.14.2 is not applicable to transversal term contracts facilitated by the Provincial Treasury and specific term contracts as in such contracts, orders are placed as and when commodities are required and that at the time of awarding the contract, required quantities are not known.

18.14.8 In the case of fixed price contracts, the request for second and subsequent extensions should be permissible only if the request for extension provides for an appropriate adjustment mechanism of the quoted price to reflect changes of inputs for the contract over the period of extension, if necessary.

18.15 PLACING ORDERS NEAR THE END OF A CONTRACT

There should be no over-ordering at the end of an existing contract, due to be followed by a new contract. Orders should instead be placed with the new service provider. Over-ordering unduly benefits the existing service provider and unfairly deprives the future service provider.

18.16 PAYMENT

The department is required to pay creditors promptly. All amounts owing must be paid within 30 days of the receipt of a valid invoice, or date of settlement or court judgment. The period for payment of invoices may be negotiated, adjusted, and agreed in terms of the requirements of the contract. In the case of travel related goods and services, the invoices may only be due and payable upon confirmation of the official(s) having travelled and accommodation cost having been incurred. In this instance, the Department may receive invoices prior to the goods and service having been provided and/or confirmation having been received that the goods and services was rendered satisfactorily.