



## Levelling the Playing Field in FM Contracting



We need a better approach to contracting in our sector,  
one that will benefit both client and service provider

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**The stakes could not be higher. Your clients and investors have arrived, the media is setting up. It's the day you have been waiting for, your new Head Office building is opening. Except there's a problem. The AC isn't working, and people are starting to feel it. The lights are on but flickering. And worst of all, the AV equipment for your launch presentation won't turn on. This may seem dramatic, but the FM industry is littered with war stories like this. And when the dust settles, the failures can often be traced back to the lack of a strong contract underpinning delivery.**

Yet the current approach to contracting in Australian facilities management remains surprisingly mixed. There is very little consistency in the structure and breadth of contracts covering projects in the industry, a situation which is in stark contrast

to markets in Europe and the UK. The Australian industry needs to move away from retro-fitting standard form construction contracts. Instead, we need to create bespoke, customized contracts which suit the services we are delivering and ensure facilities work how they should, when they should.

This lack of a rigorous, comprehensive, and standardised approach to contracting is especially prevalent in the smaller end of the sector. For contracts close to or below the \$3 million mark, there are a huge range of varying contract types in place, including the use of inappropriate construction contracts, while instances of works starting without any formal contract in place are not uncommon. This status quo suits no one. From a client point of view, ambiguity around contracting leaves little space for recourse if your contractor or a sub-contractor fails to deliver against an informal Statement of Work (SoW). Equally, from a service provider perspective, a lack of rigor at the contracting stage means that you, as the contractor, are taking on a significant risk by starting work without a contract in place that's fit for purpose.

The other significant problem this situation creates is one of asymmetry. Without a rigorous, standardised contracting approach as a foundation, it is often simply not a fair playing field when two parties begin negotiations. While one party may be a large corporate with an experienced in-house legal team, the other party may be a relatively small company who is relying on the project manager to oversee the contract negotiations. This inevitably leads to situations where contracts are unfairly swayed in one party's favour. A good example of this asymmetry is liability caps, for a small FM service provider or a client, being able to calibrate what is a sufficient share of liability is a complex issue which needs to be carefully agreed with both parties. Uncapped or excessive liability caps on contractors – liability positions which far outweigh the reward they may achieve under the contract – can result in bankruptcy for those who accept those positions. Fair and balanced contracts can help resolve this, ensuring that competition within the industry remains strong. So what should companies sourcing FM services do to ensure they have a sound contractual foundation for any commissioned works?


First, undertake a rigorous procurement process and identify a contractor who has a clear and transparent contracting approach, and establish early on that they are indeed willing to agree to a formal contract prior to any works being started.

Second, ensure that the SoW within the contract is comprehensive. At present, there is often too much ambiguity on what is and what isn't covered through

a service agreement. When contracting, make sure all the services you are commissioning are fully itemised and included within the SoW in the contract. Third, if at all possible, engage a contractor who is directly delivering the services in question rather than subcontracting to multiple parties. From a services provision perspective, the advantages of this approach are obvious. But legally, it also makes the process of contracting a lot easier and, crucially, should an issue arise during the project it means

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that investigatory powers lie with one contractor. If an engineer has not turned up on site, if an installation is faulty or dangerous, there is one party culpable not a chain of sub-contractors.

But while these precautions will help mitigate risk, the reality is that the sector itself needs an improved contracting approach to reduce the burden on the contracting parties. Such an approach also has the additional advantage of changing the project dynamic. With a clear, rigorous, and comprehensive contract in place, both parties are assured of the parameters of the agreement and have a collective stake in the project's success. From our experience at EQUANS, where no works are started unless a such an approach is taken, it means that projects are delivered collaboratively, and the focus can remain on delivery rather than periodically addressing issues linked to liability, provision, or cost. It's time the industry follows suit. Everyone stands to gain. 

**If you would like more information or to chat further to Adrienne about this article, you can contact her at [Adrienne.Gubbay@engie.com](mailto:Adrienne.Gubbay@engie.com)**