

# A guide to sub-contracting for human services NGOs

Sub-contracting is when a service provider pays another individual or organisation to complete all or part of its contractual obligations. It is often used by government agencies to deliver a broad range of services and infrastructure, for example, agencies delivering human services (e.g. OOHHC) frequently subcontract a component of their service delivery human services to NGOs.

This guide provides information for NSW Government funded NGOs that are considering sub-contracting services to another service provider.

If your organisation is thinking about sub-contracting services, it is important to remember that you will be responsible for ensuring the sub-contracting organisation or individual meets your obligations under the contract you have with your funding agency.

## Can you sub-contract in NSW government contracts?

NSW Government's key objective is to deliver customer-centric human services that provide value for money to the people of NSW. To enable this, many NSW government agencies allow funded NGOs to sub-contract human services.

The contracting NGO remains responsible for its contractual obligations with the NSW Government. The availability of sub-contracting is often set out in the tender document or the contract, including the need and process for seeking approval. It is important to remember that there may be contracts for services where sub-contracting may not be permitted.

The **NSW Human Services Agreement** is the key contracting instrument for human services procured from NGOs in NSW. The default provisions state that sub-contracting involves an approval process and the adherence to certain conditions that may cease in compliance with the notice period.

If you are unsure, you need to discuss sub-contracting arrangements with the relevant government agency.

## Is sub-contracting suitable for my organisation?

You need to ask yourself the following questions:

- Why should I consider sub-contracting — does it have the potential to deliver better outcomes?
- Is sub-contracting worth the risk?
- What risks can be passed down to the sub-contractor?
- Can I ensure the quality of sub-the contractor's services?
- Can I accept responsibility for the sub-contractor's actions?
- Can I manage the sub-contractor's performance to ensure the contract requirements are met? How will I do this and how will these arrangements be documented and agreed?
- What governance arrangements are suitable?
- What is the subcontractor's track record? Can I do reference checks?
- Are there any other options available apart from sub-contracting?

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### Benefits of sub-contracting

- **You may deliver better outcomes** — collaboration between service providers can lead to more integrated pathways, better services and improved outcomes. Another organisation may have different resources, skills, or knowledge that can support the delivery of better outcomes.
- **Your service users may respond better** — many service users have complex needs and may respond better to individuals or organisations with a unique understanding of their situation (e.g. individuals or organisations who specialise in delivering services to Indigenous peoples). One service provider may not be able to provide all services or supports needed to assist service users to meet all their needs.
- **You can extend your expertise and take on larger contracts** — engaging expert knowledge to enhance your organisation's knowledge and skills.
- **More opportunities for smaller NGOs** — smaller NGOs can deliver parts of contracts that they couldn't secure by operating on their own.
- **It can build NGO capability** — NGOs can share knowledge and support each other's capability development.
- **You can focus on what your organisation does best** — specialists can save time and money because they are often quicker and more efficient in delivering specialist services than your organisation.

### Sub-contracting challenges

- **Greater risk** — larger projects come with higher risk. The risk increases the more work a sub-contractor performs.
- **You are responsible for the sub-contractor's performance** — sub-contracting does not relieve you from the contractual obligations you have with the government agency. You must ensure that the sub-contractor is aware and complies with all obligations in the funding contract. If the sub-contractor does not perform or breaches the contract, your organisation is liable.

- **Limited visibility with monitoring process** — your organisation and the sub-contractor may not have the same (or complementary) controls in place to ensure that timeframes are met, which can lead to potential enforcement and compliance issues. This can be managed through a contract (setting out regular performance reviews to identify and prompt deal with delays or underperformance) and by selecting a party that has a good track record.
- **Potentially expensive** — The hourly costs of professionals are high and they don't report directly to supervisors within your organisation.

### I'm interested in sub-contracting, what steps should I take?

- **Determine if sub-contracting is allowed** — check the contracting documents and with the funding agency to see if you can sub-contract all or part of the contract.
- **Get legal advice** — your organisation should seek legal advice to understand the legal implications of sub-contracting services to another provider or individual.
- **Find a suitable sub-contractor** — the expertise of the sub-contractors needs to benefit your organisation and match the needs of the project in order to justify sub-contracting. Check the market to be sure the sub-contractor rates are competitive.
- **Be prepared and set clear expectations in a written contract** — organise a sub-contracting relationship early and agree the parameters of the sub-contracting relationship with the relevant individual or organisation that will be undertaking the work. A written contract should be signed by the contractor and sub-contractor from the outset to establish the key personnel to complete the work, service quality, payment terms and basis of payment (i.e. daily fee or outcomes-based payment), timelines, reporting, key performance indicators, service, intellectual property, confidentiality, information sharing (i.e. preferred communication methods, knowledge transfer and process manual), dispute settlement etc. You should also consider if contractual risks can be passed through to the subcontractor.

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- **Establish the safety record** — look at what type of safety training programs are in place to ensure that they are compliant with Work Health & Safety legislation. Ensure that sub-contractors have completed required training prior to starting duties.
- **Seek references** — check online reviews and ask for references from other contractors, clients or suppliers to validate the sub-contractor's performance record. Focus on relevant experience only. Request for recent police checks and working with children checks if applicable.
- **Check sub-contractors have the necessary insurances and certifications** — you need to confirm sub-contractors have the appropriate insurances, certifications and accreditations to complete the work. Conduct relevant searches to confirm that they are or have not been declared bankrupt.
- **Indemnities and liability limitations** — understand your exposure under the subcontract and the extent to which the consequences of a breach of contract can be recovered from the subcontractor.
- **Budget for setbacks** — be prepared for the possibility that the work will run behind schedule which may generate additional costs. Establish in advance with the sub-contractor whether deadlines will be extended for revisions. Re-run forecast to understand breakeven point.
- **Prepare a contingency plan** — you should plan for a situation where you may need to replace the sub-contractor prior to signing the contract (i.e. ease for replacement, recruitment fees, time lag etc).

### Where do I find more information?

If your organisation is considering a sub-contracting arrangement, you should first discuss this with the funding agency.

The resources below provide general information:

- Not-for-profit Law Guide — **Working with Other Organisations: Summary of legal issues to consider when working with other not-for-profit organisations** (Justice Connect)
- **Checklist: Working with other organisations** (Justice Connect)
- **Checklist: Issues to cover in a sub-contract Agreement** (Justice Connect)
- **Template sub-contract Agreement** (Justice Connect)
- **Sub-contracting and Brokerage policy** (NSW Department of Family & Community Services)
- **Business structures and arrangements for community housing providers in a changing operating environment** (NSW Department of Family & Community Services, Housing NSW)
- Joint working arrangements — a supplement to the business structures report for community housing providers dated June 2014 (NSW Department of Family & Community Services, Housing NSW)
- **2016 Joint Working Agreement Guide for Homelessness Services** (NSW Department of Family & Community Services)
- Fact sheet: A guide to consortia for human services NGOs