



A principal's guide to contracting to meet the Health and Safety in Employment Act 1992

▼ A GUIDE FOR WORKPLACES



Ministry of Business, Innovation & Employment

⇒ Ministry of Business, Innovation and Employment (MBIE) Hikina – Whakatutuki Lifting to make successful

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

MBIE combines the former Ministries of Economic Development, Science + Innovation, and the Departments of Labour, and Building and Housing.

⇒ More information

www.mbie.govt.nz

0800 20 90 20

Information, examples and answers to your questions about the topics covered here can be found on our website www.mbie.govt.nz or by calling us free on 0800 20 90 20.

Disclaimer

This document is a guide only. It should not be used as a substitute for legislation or legal advice. The Ministry of Business, Innovation and Employment is not responsible for the results of any actions taken on the basis of information in this document, or for any errors or omissions.

ISBN 978-0-478-40184-4 (online)

May 2010

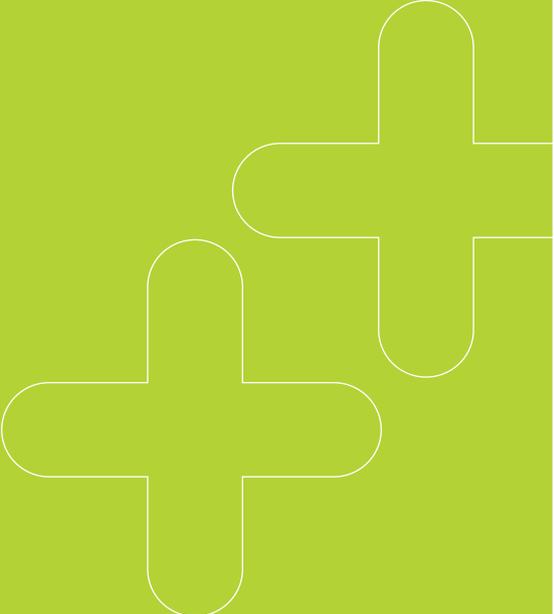
©Crown Copyright 2013

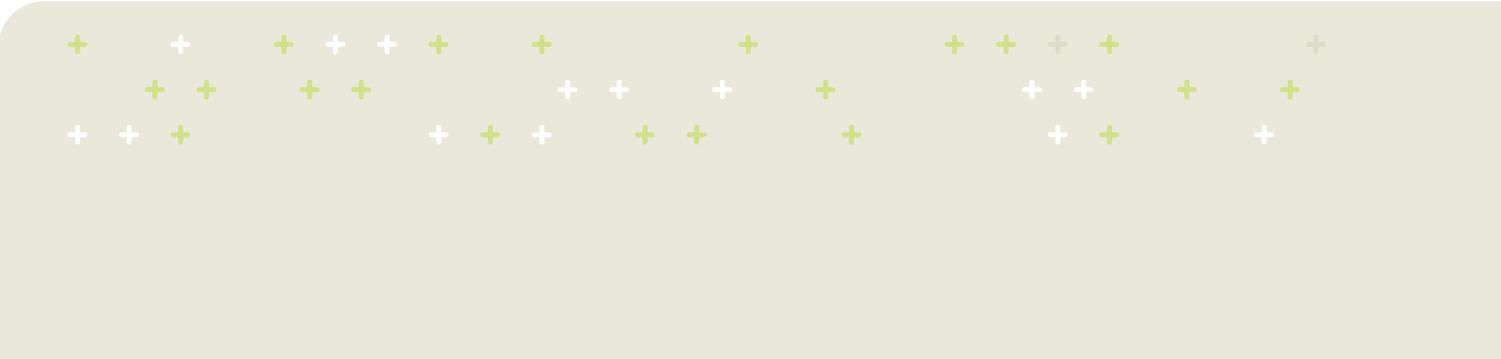
The material contained in this report is subject to Crown copyright protection unless otherwise indicated. The Crown copyright protected material may be reproduced free of charge in any format or media without requiring specific permission. This is subject to the material being reproduced accurately and not being used in a derogatory manner or in a misleading context. Where the material is being published or issued to others, the source and copyright status should be acknowledged. The permission to reproduce Crown copyright protected material does not extend to any material in this report that is identified as being the copyright of a third party. Authorisation to reproduce such material should be obtained from the copyright holders.



A principal's guide to contracting to meet the Health and Safety in Employment Act 1992

▼ A GUIDE FOR WORKPLACES





Foreword

Contractor safety is a significant issue for many workplaces.

Where once contracting for services was the exception in all but a handful of industries — such as construction, agriculture and forestry — it is now increasingly common across workplaces.

For individuals, this means that people often work in places that are controlled, at least in part, not by their employer, but by another business to which they are contracted.

Section 18 of the Health and Safety in Employment Act 1992 creates a duty for principals to contracts that applies to these situations, and this guidance has been prepared to help businesses meet that duty.

The courts have also found that health and safety obligations are fundamental to the relationship between principal and contractor. The guidance therefore provides plenty of examples from the case law. It also describes a “good practice” framework for principals to meet their duties for contractor safety.

There is an enormous range and diversity of contracted activities, and well-managed contracts benefit all. Such benefits include:

- reduced risk of accidents and ill health
- greater satisfaction for both contractors and clients
- fewer incidents, losses, problems, stoppages and delays
- less management time required to deal with problems
- continuous improvement in practices, and
- financial savings.

Businesses with effective health and safety systems are in turn more likely to deliver high quality goods and services to their customers.

The guidance sets out a broad process for building health and safety into contract management, which can then be adapted to specific contractual situations or industries. It was developed in response to submissions received by the 2007 Quality Regulation review. Public consultation was completed on draft guidance in late 2008 and the document has been revised in response.

A study was also commissioned to compare the draft version of the guidance with the practice of a recognised highly performing local authority, Manukau City Council. This case study is being published in support of the guidance.



In administering the Health and Safety in Employment Act, the Ministry of Business, Innovation and Employment is very aware of the significant influence the supply chain exerts on workplace health and safety, and encourages that influence to be positive wherever possible. This guidance is a significant step towards achieving that outcome, and the Manukau City Council case study confirmed the validity of the approach.

The Ministry also acknowledges the contribution of a broad range of other organisations in developing the draft guidance, and others that have contributed to the final version – particularly John Hughes of the Canterbury University School of Law.

In publishing guidance with such broad application, the Ministry accepts that the document is principles-based and not industry specific. We therefore encourage principals to contracts and sector groups to use it as a basis to draw up their own “best practice” approaches to managing health and safety in contracting.

Lesley Haines

Acting Deputy Secretary of Labour, Workplace



Contents

Introduction — the duty outlined.....	5
The application of the law to contracts in workplaces	5
What the duty requires.....	6
The extent of the duty.....	7
Who is a principal?.....	10
Agents and advisers	13
Situations where the contractor is better resourced than the principal	14
Selling, leasing or loaning goods and other equipment	14
Related duties during the progress of the contract.....	14
Overview of process	17
1. Scoping the work.....	20
1.1 A process for dealing with health and safety issues in tendering	22
1.2 Pre-tendering steps.....	23
2. Pre-qualifying the contractor	24
3. Contractor selection and negotiation of terms.....	30
3.1 Including project health and safety information in the tender.....	32
3.2 Tender review, evaluation and contractor selection.....	35
4. Awarding the contract.....	39
4.1 Documentation.....	39
4.2 Briefing the contractor	40
4.3 Information-sharing between principal and contractor.....	40
5. Monitoring the contract	48
6. Post-contract review	51
Case studies	52
Case study 1: Contract to build a small residential development.....	53
Case study 2: Harvesting a woodlot of plantation timber.....	55
Case study 3: Local authority lets a contract for a new link road	58
Case study 4: Motor vehicle insurer includes health and safety in its approved repairer processes.....	62
Case study 5: Government department lets a contract for the cleaning of a large office in a suburban shopping mall.....	64
Glossary.....	66

Introduction – the duty outlined



📖 Section 18 of the Health and Safety in Employment (HSE) Act 1992 – Duties of principals

- (1) Every principal shall take all practicable steps to ensure that –
 - (a) no employee of a contractor or subcontractor; and
 - (b) if an individual, no contractor or subcontractor, – is harmed while doing any work (other than residential work) that the contractor was engaged to do.
- (2) Subsection (1) of this section shall be read subject to section 2(2) of this Act.

📖 The application of the law to contracts in workplaces

Most work activities are covered by the Health and Safety in Employment (HSE) Act 1992. If people doing work for you are described as self-employed for tax or other purposes, you will almost certainly have duties as a principal under the Act.

In this guide, “contractor” refers to a person who works as a sole trader, corporate entity, or on some basis other than as an employee. **The emphasis is on contracts awarded by tender, but much of the process recommended is equally applicable to other contracting situations.**

It is important to remember too, that in some situations, alternatives to competitive tendering can better assist health and safety outcomes. These include:

- time and material (charge up) contracts



- collaborative working arrangements, and
- negotiated price contracts.

Where you have engaged a person or another business as a contractor, you will still have the duties of a “principal” to a contract in a workplace. If that is not the case, you may still have the duties of a person in control of a place of work. If a person is still legally considered an employee in terms of the Act, notwithstanding a different contractual label, then wider obligations will ensue.

The legal nature of the relationship between you and any person working for you or on your behalf should be clarified and included in the terms of the contract. Remember, though, that you cannot pass on a legal duty that falls on you as an employer, a person in control of a place of work, or a principal in terms of the Act. If you are considering any attempt to limit your responsibility for the health and safety of others, you should first read this guide carefully and, if necessary, seek legal advice.

It’s important to remember that putting work out to contract does not absolve a company or individual from their health and safety obligations and is not necessarily the “easy option”.

Refer also to the *Guide to the Health and Safety in Employment Act 1992*, available from the Ministry of Business, Innovation and Employment’s website, for further information on the duties mentioned above in relation to employers and persons in control of places of work.

What the duty requires

The object of the Health and Safety in Employment Act 1992 is the prevention of harm to people at work, or affected by work. To do this, the Act places a range of duties and responsibilities on different parties for health and safety management.

Section 18 of the Act creates a duty requiring principals to a contract to take “all practicable steps” to ensure contractors, subcontractors and their employees are not harmed while undertaking work under the contract.

Broadly, a “principal” is any person (either an individual, or a corporate entity) who engages another (other than as an employee) to do any work for gain or reward. The exception is engaging someone to do work on your own home. The legal definition of a principal is discussed on page 10.

A principal’s duty under the Act depends on what practicable steps they should take to ensure safety, such as planning, or site visits. There are situations where such duties might be shared by the principal and contractors. For example, a principal may have a limited duty in respect of intrinsic risks arising from everyday electrical work being done on a building project by an electrician as a subcontractor. However, the principal’s duty would be much more extensive with respect to scaffolding provided by them for the electrician to gain access to the work.

Again, it is important to note the principal cannot contract out of obligations owed under section 18 by purporting to pass the duties on to contractors or subcontractors. Contractual clauses that attempt to do this will not be accepted by the courts.



The courts have recognised that where the principal is a corporate entity, it can only discharge its obligations through employees or agents, and a failure by an employee or agent may then be attributed to the principal. Being “let down” by an employee or agent will be no defence.

Example

Munster Construction Ltd had procedures in place on a construction site, including an inspection checklist for the pre-pouring stage of concreting and requirements for inspection of relevant areas by a site engineer. Among other things, the checklist required the supervisor and site engineer to sign off an acknowledgement that proper bracing and supports were installed before pouring began. Employees of concrete placement contractor, **Smoothy Placements Ltd** were injured when an unsupported area of flooring collapsed during a concrete pour. In breach of Munster Construction Ltd’s procedures, no checklist had been completed and the site engineer had not inspected the area. Munster Construction Ltd was convicted under section 18(1)(a).

The extent of the duty

A principal has a duty to a contractor, a sub-contractor or their employees. The duty is to take “all practicable steps” to ensure none of these people are harmed while doing work they were engaged to do. As the legal requirement is that *all* practicable steps be taken, a failure to take only one practicable step is a breach of the Act, and may result in a conviction.

“All practicable steps”

This duty to take all practicable steps to prevent harm is defined in terms of taking all steps that are **reasonably** practicable. It involves consideration of:

- the nature and severity of any injury or harm that may occur
- the current state of knowledge about the likelihood of such injury or harm occurring
- the current state of knowledge about harm of that nature
- how much is known about the risk of potential harm and the ways of eliminating, isolating or minimising that risk, and
- the availability and cost of safeguards.

When dealing with any case, the question asked by the courts is: What would a reasonable principal do in the relevant circumstances?

The concept of “reasonableness” is based on the legal concept of a hypothetical “reasonable principal”, and the way they might behave in a particular situation.

There is a balancing exercise. For example, the degree of risk and the severity of potential injury or harm must be balanced against the cost and feasibility of the safeguard.



The cost of providing safeguards has to be measured against the consequences of failing to do so. It is not simply a measure of whether the person can afford to provide the necessary safeguards. Where there is a high risk of serious, or frequent injury or harm, greater expenditure on safeguards may be seen to be reasonable than where the risk is lower and the foreseeable injury less serious.

Any judgement of whether a safeguard is “reasonably practicable” should take into account the current state of knowledge within the industry. The “current state of knowledge” should not be confused with industry common practice. When asking what a reasonable principal would do, the courts look at best, not actual, practice.

Example

Tantalus Services Ltd operated a water treatment plant, and engaged **Arthur** as an electrical contractor to complete electrical maintenance work. The work was ongoing until one day when he was badly burned by an electrical flashover in an 11kv cable termination cubicle. Arthur had worked in the cubicle many times previously and had a key to access it. One day he entered to carry out his work without knowing that it had been energised that day.

Tantalus Services Ltd was convicted for a breach of section 18(1)(b).

The court found that, although Arthur breached a fundamental electrical industry rule by not ascertaining that the work area was safe before he entered it, Tantalus Services Ltd also failed to ensure his safety by not exercising sufficient control over access to the cubicle.

Nor should current knowledge be confused with a particular individual’s knowledge. A claim by an individual person that they did not know what to do about a hazard would not be successful if the hazard was foreseeable to others in the industry, or if they chose not to use the current body of knowledge about the hazard. The courts have referred to the current, “up-to-date” body of knowledge available to people. Failure to be familiar with this knowledge, or to apply it, is failing to take all practicable steps.

The overall test is: What would a reasonable and prudent person do in the circumstances? There is no single prescription, but one obvious source of knowledge is the various codes of practice approved under the HSE Act. Others include guidance produced by the Ministry of Business, Innovation and Employment, Standards and industry-developed guidance.

The question of what is reasonably practicable is always a matter of fact and degree in each situation. What this means in terms of any given contract depends on factors such as the:

- scale and nature of the contract
- type of work the contractor was engaged to do
- contractor’s and principal’s respective expertise in the work being undertaken
- current state of knowledge and “best practice” in the industry, and
- nature of hazards in the place of work.



Obviously, the steps expected of a principal to a photocopier service contract would be different to those expected of the principal to a contract for a major building alteration. The photocopier owner may only require a brief verbal exchange of relevant health and safety information. However, the “practicable steps” expected of the principal to a major building contract would be extensive.

The duties of employers and principals will often be interrelated

Frequently a contractor’s duties as an employer towards employees will require more practicable steps to be taken than may be expected of the principal to the contract.

The case law has shown, however, that when a step would be practicable for a principal to take, that step is required to be taken irrespective of what steps might be required of the contractor as an employer. For example, principals in the construction industry have been held liable under section 18 where employees of a sub-contractor were seen working in a dangerous way on a roof, rigging a crane without wearing safety gear, and using unsafe scaffolding. This was so even though the employer (and the employees) owed duties themselves.

Example

Associated Roofing Ltd had been contracted by a large construction and development company, **MegaSite Ltd**, for the supply and fixing of roofing to a major commercial building project. Associated Roofing then subcontracted the work to **Ray**, who employed **Jack** and **Jeff**. One day Jack and Jeff were fixing the roof, finishings and guttering when a health and safety inspector visited the site. They were working without a suitable working platform or any other safety device such as a harness to protect them from the risk of a fall of more than 10 metres. No protection had been provided by Ray or Associated Roofing.

Associated Roofing had provided the workers with a “cherry picker” which had been removed from the site because it was too small. Another cherry picker on the site had been used to lift the guttering into place. This machine, which did not have a current certificate of fitness, was sitting in mud, causing instability.

Access to the roof was by way of an extension ladder. This ladder was not secured in any way, and it did not extend above the working platform.

Questioned by the visiting health and safety inspector, Associated Roofing Ltd’s supervisor advised the inspector that he would pick up some safety harnesses. He confirmed that no hazard identification had been completed for the roofers. During the previous month the Ministry of Business, Innovation and Employment had conducted two seminars on the legal requirements for subcontractors on site.

Associated Roofing was convicted for breach of section 18 (1) (a).

A principal to a contract cannot distance themselves from what is occurring in a place of work simply because the employer is more directly related to, and responsible for, employees carrying out the work. Nor can the principal always satisfy their obligations under section 18



merely by retaining a competent contractor if, for example, it is reasonably practicable for the principal to stipulate safety standards in advance, or to take steps if unsafe practices are observed on site visits.

Again, there is no absolute standard. The steps required of a principal which, for example, has its head office in another city, may not be the same as the steps required of a principal which has a head contractor working on site.

Who is a principal?

You are a “principal” in terms of the Health and Safety in Employment Act 1992 if you are an individual or a corporate entity who engages any person (other than an employee) to do any work **for gain or reward**. This usually requires a contractual relationship in which the principal pays for the work of the person engaged. The duty under section 18 is then placed on the person able to ensure relevant obligations are performed through that contractual relationship.

The major exception to the definition of a “principal” is when a householder engages someone to do work on his or her home. As an example, if you hire a plumber to fix a blocked drain in your home, you are not liable under the Act for the safety and health of the plumber while the work is carried out.

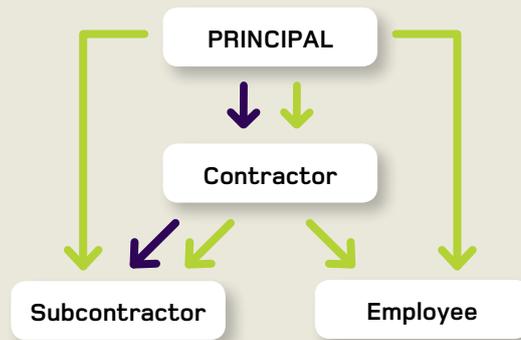
If, on the other hand, you contract with a builder to do a major alteration to your home and they subcontract a plumber, the builder is considered a “principal” in terms of section 18. A contractor is considered a “principal” with respect to subcontractors. This is an important point for businesses to consider. **The diagram opposite** illustrates a multi-party contractual situation for a small project. It shows that, although the client has responsibility as a principal, several parties can be principals at any one time and all key people have a duty to provide for the health and safety needs of their own areas of operation.

The contractual scope of section 18

Section 18 applies where there is a contractual relationship between principals and self-employed people or business units such as companies and partnerships; generally called “independent contractors”. The duties owed under section 18 extend to the employees of any such self-employed person, or business unit. As we have seen, the principal might have employees of its own, who will be owed separate duties arising from the employer/ employee relationship.

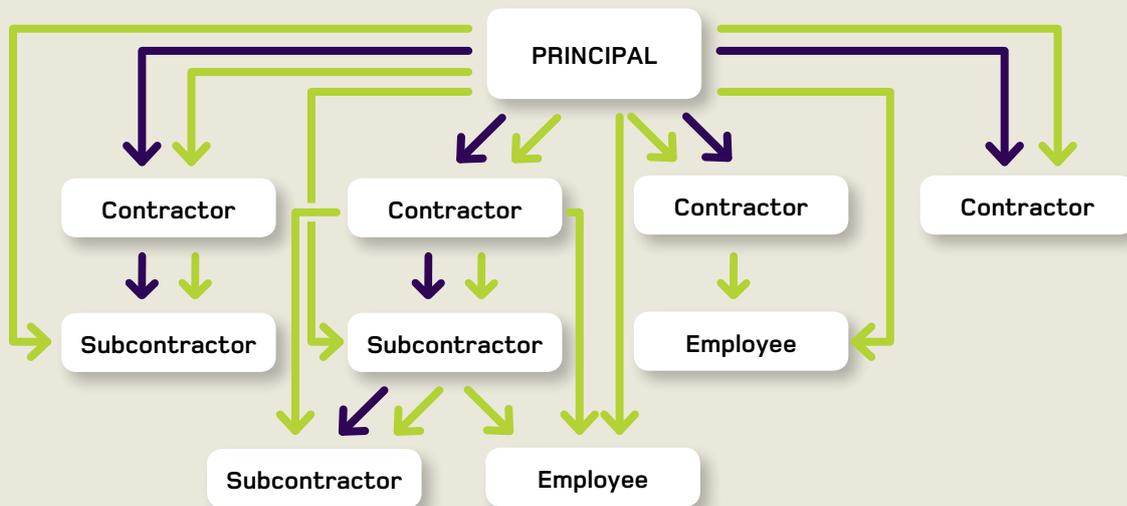
Where a company or other similar business unit is engaged to do work, there is a clear distinction between engaging such a business and hiring an employee. However, where an individual person is engaged, the distinction may be less clear. Questions might arise on whether the duty is owed as a principal under section 18, or as an employer under different provisions in the Act. Where there is a contract between a principal and a self-employed person, the duties of a principal under section 18 apply. Where there is an employer/ employee relationship in existence, then the duties of an employer/employee relationship apply (refer to part 2 of the *Guide to the Health and Safety in Employment Act 1992*).

Typical contractor/principal relationships (simple and for a typical small project)



KEY

- indicates principal/contractor relationship
- indicates employer/employee relationship
- indicates section 18 obligation





Deciding whether someone is an employee or a self-employed contractor

It may not always be clear whether a person is an employee or a self-employed contractor. Nor is it always of particular significance to the parties concerned, as long as their respective needs are being met. However, in the event of a dispute, or a prosecution after an accident, a court may have to determine the nature of the relationship. In making its determination, the court will place little importance on how the parties have described the arrangement. It will look at a number of other factors, including:

Indications of being an employee

The key question courts ask is whether the person performing the work is in business on their own account. This involves a variety of legal tests and the courts look to the reality of the working relationship, as opposed to the contractual “label” parties have attached to it.

A work relationship is likely to be an employment relationship between employer and employee if the:

- intention of the employer and the person performing the work is to form an employer/employee relationship, as shown in any written agreement or correspondence and/or by the behaviour of the parties to it
- employer or their agent controls the hours worked (how and when the job is done)
- payment is made by the hour, week, etc, as opposed to a lump sum
- employer or their agent has the power to hire and fire
- employer makes the profit or loss from the enterprise
- employer deducts ACC premiums and PAYE tax on behalf of the employee
- employer supplies materials for the work
- person performing the work cannot make a profit or loss from the way in which the work is carried out (for example, they are not paid on a “per job” basis)
- employer owns or leases the equipment needed
- person performing the work is bound to one employer at a time and is expected not to compete with or offer his or her skills to competitors of the employer.

Indications of being a self-employed contractor

It is more likely to be a contract where the person performing the work is classified as an independent contractor (with the duties of a self-employed person) if all or most of the following features are present in a work relationship:

- the intention of the parties to the contract is not to form an employer/employee relationship, and this is reflected in the contract and/or the behaviour of the parties
- payment is made in a lump sum at the end of the job, or in instalments as the job progresses



and the contractor:

- controls how and when the job is done
- can choose who does the job and hire other people without specific approval from the other party
- pays any tax, ACC or insurance themselves
- can make a profit, or suffer a loss directly
- supplies equipment and materials
- is free to accept similar work and materials from a number of sources at the same time.

“For gain or reward”

The contractor must be engaged “for gain or reward” in order for section 18 to apply. Case law has found the “gain or reward” must move directly from the principal to the person or company engaged through the contract.

The contract need not be written, and all terms do not need to be explicit, but there must be contract formation in the normal legal sense of an offer, an acceptance of the offer, and a mutual transfer of value (the “gain or reward”).

“Gain or reward” need not be financial. It could be payment in kind, an exchange of labour or services, or (as mentioned above) the benefit gained from a service or warranty agreement. The association between the principal and the contractor must be clear and direct.

Agents and advisers

Often a principal will act through an agent or adviser. This includes situations where a company uses expertise that it does not retain in-house to purchase specialist goods or services.

The use of an agent or a management facility by a principal does not mean the principal avoids their duty under section 18. For example, where a body corporate, as a building owner, asks a letting agency to organise a contractor to repair a roof, and the account is forwarded by the agent to the building owner, the owner still has the duties of a principal.

Example

Three property development companies undertook a joint venture to convert a warehouse to residential use, and hired **Hyperstructures Ltd** to act as their agent in co-ordinating contracts for the construction work. Hyperstructures Ltd accepted a tender for window installation from **Glassy Ltd** but made it clear that invoices were to be directed to the developers and not to Hyperstructures Ltd. Glassy Ltd in turn engaged subcontractor, **Joshua**, who was seriously injured when he fell through a skylight. Hyperstructures Ltd was held not to be a principal because there was no contractual connection between Hyperstructures Ltd and Glassy Ltd, or between Hyperstructures Ltd and Joshua.



Alternatively, if the agency commissions the work and pays the bill, it is a principal in relation to the contractor. An individual acting as an authorised agent of a corporate entity may also commit an offence under section 56 if they “direct, authorise, assent or acquiesce in” a breach of the Act by the corporate entity for whom they are acting.

None of these situations, however, negates other duties that might be owed under other provisions in the Act, such as those by a person in control of a place of work. In the case above, for example, the agent for the development companies had day-to-day control of the work site through one of its employees.

There are situations where a designer/adviser may effectively be engaged as a contractor to manage a project or as an agent and will enter into contractual arrangements of its own. In such a case, where the designer is responsible for engaging a contractor, they have the responsibilities of a principal also. To avoid unnecessary repetition, subsequent references to a “principal” include a designer/ adviser who is a principal in their own right.

Situations where the contractor is better resourced than the principal

Essentially, the legal duty is the same regardless of the relative size, resources or influence of the respective parties.

However, in practice, where the contractor has a high degree of expertise and resources in the area in which they are contracting to a less-well-resourced principal, there may be situations where there is a reduced expectation of steps required on the part of the principal. An example might be where a large and specialised telecommunications or waste management company is contracted to supply services to a smaller enterprise, such as a caterer, mechanical repairer, or panel beater.

Selling, leasing or loaning goods and other equipment

The Act does not generally apply to a contract for the sale of goods, although there are exceptions. One exception arises when a contract is for goods and services – for example, a company may have a contract for the purchase of an item of plant which includes a service agreement. In such a situation, if a service technician is required to visit the purchaser’s premises to repair the plant, the purchasing company has the duties of a principal.

The duty of principals should be read in conjunction with the duties of people selling or supplying plant for use in a place of work under section 18A, and the duties of designers, manufacturers and suppliers of plant in Regulations 66 and 67 of the Health and Safety in Employment Regulations 1995. These are discussed briefly under ‘related duties’ below. See also the *Guide to the Health and Safety in Employment Act 1992*.

Related duties during the progress of the contract

This guide focuses on the duties of a principal under section 18. There are three further provisions in the Health and Safety in Employment Act 1992 with particular relevance to



principals during the lifetime of a contract. In some circumstances, these provisions overlap with duties under section 18. They are also in addition to the duties the principal may have as an employer.

Person who controls a place of work

Under section 16 a person who controls a place of work (except for a home they occupy) must take all practicable steps to ensure no hazard in the place, or arising in it, harms people in the vicinity or people lawfully at work there. People lawfully at work include contractors, subcontractors and their employees. The contractual framework under section 18, discussed above, should deal with people lawfully at work in any event. People in the vicinity include, most obviously, bystanders or passersby. For example, in relation to pedestrians near a construction site, is the screening or covering of excavations adequate, has scaffolding been erected safely etc? In relation to tree-felling operations near a road, is there an approved temporary traffic management plan?

Example

Abe's Construction Ltd was building a new suburban house. One of its employees, **Ralph**, was using a powder-actuated fastening tool (a Ramset gun). Ralph did not hold a current certificate of competence authorising him to use the gun. The gun was loaded incorrectly and a nail from the gun sheared off and travelled across the street, breaking a window in a property opposite. Abe's Construction Ltd was convicted under section 16(1)(a) of failing to take all practicable steps to ensure that a hazard arising in a place of work did not harm people in the vicinity.

A principal becomes a person in control of a place of work when they:

- own it
- lease it
- sublease it
- occupy it, or
- are in possession of it.

This means, for example, a ship repairer is considered to be in control of a ship in dry-dock, a farmer to be in control of disused machinery on their property, and forestry contractors were held to control a forest in which tree-felling was being undertaken. Contractors have been held to have been in control of places such as a roof that was being sand-blasted and a section of roadway being constructed.

A right to control plant in the place of work also satisfies the definition, where it results from:

- ownership
- leasing



- subleasing, or
- bailment.

Again, this has been held to apply most obviously to machinery such as waste compactors, scaffolding, cranes and other vehicles.

Example

Isis Plant Ltd owned a 22-metre tower crane which was leased to **NewBuild Ltd**, a firm of building contractors. It was installed on the construction site of a six-storey building. One day while it was in use, the crane's load travelled out beneath the boom trolley to a point far enough away from the centre of the crane's base to overcome the counterweight. It collapsed and fell onto the adjacent roadway. Isis Plant Ltd was convicted under section 16, because the crane, as plant, was a "place of work". As the "person in control", Isis had not ensured that the crane was inspected and had a current certificate of inspection, had not tested the crane's limit devices after it had been assembled on site to ensure that they were correctly set, and had not ensured the crane's manual, which gave directions for safe use and daily maintenance, was available for those operating the crane.

Person who sells or supplies plant for use in a place of work

Section 18A places obligations on persons selling or supplying plant for use in a place of work. "Supplying" includes loaning, as for example the sharing of equipment between two contractors on a construction site, two neighbouring farmers, etc.

Once it is ascertained that plant is to be used in a place of work a person hiring, leasing or loaning it must take all practicable steps to ensure it is designed and made, and has been maintained, so it is safe for its intended use. For example, if a vehicle is leased or loaned, has it been adequately maintained, does it have necessary rollover protection, etc? If a machine is leased or loaned, is it adequately guarded, etc? The same duty applies if the person selling or supplying the plant agrees to install or arrange it.

Principal's duty to record and notify accidents and incidents in the place of work

Section 25 of the Act requires employers, self-employed persons and principals to maintain a register of accidents and serious harm in a prescribed form. Principals must record in it the details of every accident or incident that harmed, or might have harmed a self-employed person while at work and contracted to the principal, or as a result of any hazard to which the person was exposed while at work and contracted to the principal.

All incidents of serious harm to a self-employed person while at work and contracted to the principal must be notified and reported to the Ministry of Business, Innovation and Employment..



Overview of process

This guide describes a process for meeting the “all practicable steps” requirement for principals. The diagram overleaf outlines the usual features of a process for principals to manage and assist with the safety performance of contractors. It summarises the “best practice” process outlined in this guide.



Overview of process



1

Scoping the work

Health and safety issues

Determining what work needs to be contracted out, and considering the broad health and safety implications.

Tasks and documentation

Initial appraisal of significant hazards and overview of likely risks associated with different options.

Considering health and safety issues when selecting the best way to select a contractor and deciding price and other contractual terms.

Relevant tender and/or contract information developed by the principal.



2

Pre-qualifying the contractor

Health and safety issues

Assessing capability of potential contractors (i.e. for an "approved list").

Tasks and documentation

Pre-qualification questionnaire

Assessing health and safety management and, depending on the scale or significance of the hazards, a detailed appraisal of technical competence.



3

Contractor selection and negotiation of terms

Health and safety issues

Providing information to potential contractors on the health and safety, including the hazards of the particular contract.

Developing a draft health and safety plan for the project with scope for completion in discussion with the principal.

Assessing capability of tenderers (where pre-tender qualification hasn't been done).

Tasks and documentation

Tender contracts

Relevant information is given to tenderers by the principal through the information for tenderer document.

Draft health and safety plan

Tenderers complete a draft plan. Principal provides information and answers questions specific to the job, assists with completion of hazard assessment and method statements where appropriate.

Non-tendered contracts

Contract specific health and safety information is provided to pre-qualified contractor.

Contractor responds to information provided and depending on the size and nature of the contract provides either:

- *A draft health and safety plan; or*
- *Acknowledgement of receipt and acceptance of health and safety information, terms and conditions; or*
- *Other documentation as required*



4

Awarding the contract

Health and safety issues

For larger projects, developing a job-specific health and safety plan.

For smaller jobs, or ongoing work, maintaining agreed standards, systems and processes established by pre-qualification, and modifying them to suit the circumstances of the individual contract.

Tasks and documentation

The contract itself will often draw on the tender documents or other information provided to or by the contractor.

Job registration or permit-to-work systems may be used to inform risk assessments.

Completed health and safety plan

Principal provides information and answers questions specific to the job, assists with completion of hazard assessment and method statements where appropriate.

Incorporation of health and safety plan into contract.

Includes agreed detail of lines of communication, responsibilities, accountability, safe systems of work, method statements, use of client services, etc.



5

Monitoring the contract

Health and safety issues

Monitoring/checking throughout duration of contract.

Responding to information as received.

Keeping the contractor informed of the results of monitoring.

Checking and ensuring contractor performance meets the agreed standards.

Tasks and documentation

Ensuring permit to work or job registration systems, competency requirements, and other controls are in place and maintained.

Meeting as appropriate to plan for and resolve health and safety issues.

Principal's reporting, notification and hazard management documentation as required by the contract.



6

Post-contract review

Health and safety issues

Concluding review to determine success or otherwise of the contract.

Tasks and documentation

Helping principal and contractor learn from health and safety performance during the contract.

Post-contract evaluation form

1

2

3

4

5

6

1 | Scoping the work



Steps taken before work starts are often crucial. But thinking about health and safety from the beginning of a project and building considerations into design and planning is regularly overlooked.

Prosecution statistics suggest that principals are more likely to be found in breach of section 18 in relation to pre-site behaviour than afterwards. Case law has set a high standard for principals to include health and safety issues in the negotiation of contracts. A Court of Appeal judgment has stated:

“... in contract negotiations between principal and contractor or subcontractor – no matter how informal – safety is as critical factor as the contract price or duration. As between principal and employer who will supply and maintain safety equipment; who will bear any losses if that equipment fails or is unavailable, who will negotiate directly with the employees to ensure the safest working methods and conditions in the circumstances of the contract. If a principal lets a contract to an employer which does not incorporate and allocate responsibility for such features, the principal may well assume the burden of assuring that workers are not harmed. When negotiating any contract covered by the duty of section 18, the principal must turn their mind to the question of, and be satisfied that, the contractor is competent to perform the work being contracted for in a safe and healthy manner.” (Central Cranes Ltd v Department of Labour [1997] 3 NZLR 694).

In that case, the Court of Appeal also approved a statement made in the original judgment that a principal cannot relieve itself of responsibility for the safety of workers on site by being physically absent from the site, or lacking specialised knowledge. For example, in this case a principal was held to be liable under section 18 for a sub-contractor’s failure to observe safety precautions in the rigging of a tower crane, and was given general responsibility for supervising the site. The principal had a duty to ensure the contract terms

included clearly defined duties for providing safety equipment and generally supervising safe practices.

It needs to be reiterated that simply employing a competent contractor will not usually satisfy the principal's duties under section 18, although it is a practicable step that's required to be taken. The principal may decide the contractor is able to perform the work in a safe and healthy manner by determining:

- whether or not they are a well-established and competent firm or person with a good safety record
- that the contractor and/or its employees is qualified to do the work (e.g. is the holder of the appropriate certificate of competence, such as a registered electrician).

As part of this process, the principal should consider evaluations from earlier contracts, references provided by the contractor from previous clients, or other evaluative material as appropriate.

There may be some circumstances where it is practicable for the principal to prescribe safety requirements in advance without subsequent monitoring, but this is dependent on the particular facts of any case. Clearly, if the principal is aware of an intention to adopt questionable safety standards, it is reasonably practicable to ensure proper standards are observed.

Example

High and Dry Ltd was a well-established roofing company. Based in one region, it employed in another region a contracts manager, **Brian**, and conducted its business by employing subcontractors. It obtained a contract to supply and fix roofing and external cladding to an industrial building and subcontracted a roofing contractor, **Mike of Mike's Roofing Ltd**, to perform the work. There was verbal negotiation, and agreement was reached between Mike's Roofing Ltd and Brian on how the work would be done, including health and safety issues, and particularly with regard to the height of the operation. Mike required a scaffolding truck to be provided for the installation of wall cladding, guttering and wire netting on site.

High and Dry Ltd had a health and safety policy which required, among other things, the use of safety harnesses. However, there was no requirement for supervision, or that High and Dry Ltd provide the recommended safety equipment. Mike had indicated to Brian that he did not support the use of harnesses when installing the long-run roofing.

While standing on purlins and working with an employee laying building paper in preparation for the sheets of long-run roofing, Mike suffered a heart attack and fell through the wire netting to concrete 10 metres below. He died soon after from injuries suffered from the fall. High and Dry Ltd was convicted and fined under section 18 for failing as a principal to ensure the safety of a self-employed contractor.

A brief discussion of some of the issues to be considered at each stage of the tendering process follows.



📖 1.1 A process for dealing with health and safety issues in tendering

Contractor selection is particularly important in any tendering process. Principals and contractors need to share information and agree what has to be done, how it is to be done and who should do what.

Contract types include:

- projects, notably construction, installation or upgrade work (and sometimes within a segregated area for the duration of the contract)
- regular maintenance and repair activities (e.g. during off-season shutdown, painting contracts, or when contractors' and principal's employees may be working in the same area)
- routine service and/or cleaning contracts, where the contracted work is almost intrinsic to the work of the principal.

The nature of the contract (and the significance of the hazards) will affect procedures and precautions required. Some tasks involve little risk, while others could lead to serious, even fatal accidents or major health effects to either the contractors' or principal's employees, or others.

The broad health and safety implications will need to be considered by the principal as they assess work to be carried out. The principal is responsible for advising on appropriate safety standards to be observed. Depending on the work being undertaken, where a principal is required to take all practicable steps to avoid harm to contractors and their employees, this should involve an awareness of the required standards. For example, the degree of prescription expected is high in cases such as the operators of a major electrical substation, or an oil depot, engaging contractors to carry out service work. It would be lower, on the other hand, in the case of a self-employed potter engaging an electrical contractor to install a pottery kiln. But even in the latter case, the principal cannot avoid taking the practicable steps necessary to ensure health and safety standards are met.

Example

Graham was employed in the evenings as a cleaner by the **Perfect Cleaning Company**, which had a contract to clean an export meat works operated by **Exco**. The work involved cleaning of machinery as well as work areas, surfaces and amenities.

Exco installed a large new skinning machine, which was used to remove membrane from meat. Meat was fed into it through rollers, the machine would grip the meat and a fixed blade would remove the membrane. The new machine became part of the cleaning contract, and Graham's job came to include the thorough cleaning of the new machine.

Cleaning the machine involved hosing it down with hot water, then opening an in-feed guard to expose a toothed roller and blade while the machine was still running. One day, four weeks after the machine was installed, Graham was completing this

cleaning when his glove was caught by the machine – but he avoided injury. He told his supervisor, Jed. A week later, his hand was caught in the machine and he lost the tips of two fingers.

Exco, as the owner of the machine and principal to the cleaning contract, was convicted under section 18(1)(a) for failing to take all practicable steps to ensure the safety of a contractor's employee. It had not adequately informed the contractor of the nature of the hazards involved in the newly installed machinery.

The Perfect Cleaning Company was also convicted under section 13 for failing to train Graham.

1.2 Pre-tendering steps

1. At the pre-tender stage of a contract, principals should identify the work covered by the contract, and hazards likely to occur.
2. Development of the tender documentation begins with consideration given to how health and safety issues will be included in the tender documents.
3. At this early stage, any significant health and safety information available should also be provided to potential tenderers.

Where health and safety is determined to be a critical component of the tender and contract

4. Potential tenderers might be expected to submit a health and safety plan.
5. Principals may then ask potential tenderers questions to help assess their health and safety capability and competence for that work, and how they would manage health and safety.

Benefits of looking at the health and safety management of potential tenderers at the pre-tender stage are that it:

- emphasises from the beginning that health and safety is an important issue
- limits the number of tenderers, so that only contractors who have appropriate health and safety practices in place are invited to tender
- allows more time for assessing and negotiating the health and safety performance of tenderers.

2 | Pre-qualifying the contractor



Pre-qualification to establish a shortlist of tenderers need not be adopted in all cases, but where it is used there can be a number of benefits. Also, even where there is no pre-qualification process, the information will still need to be requested and examined during the following stages of the tender. A pre-qualification process is not only useful to contracting companies but the principles can also be applied to staffing agencies.

Pre-qualification is to determine competency

The sample pre-tender questionnaire at the end of this section contains a range of questions to help determine how well contractors manage health and safety. It asks the contractor to demonstrate an effective health and safety management system, as well as asking for information on the management of specific hazards.

Information required

Pre-qualification should look at the general ability and competence of the contractor for the work. Health and safety commitment and procedures should also be a part of the criteria. The level of detail required for pre-qualification should be appropriate for the type of project being undertaken and will depend on the project's size, type and complexity.

Broadly then, a pre-tender questionnaire will cover the following dimensions of health and safety:

- **documentation** e.g. health and safety plan for the type of activity concerned, existence of a health and safety policy, hazard assessments, method statements (and other procedures for ensuring the safety of the work) accident compensation, public liability, and other insurances
- **personnel** e.g. qualifications and training, demonstrating competence in the required areas

- **subcontractors** e.g. arrangements for assessing and appointing subcontractors
- **health and safety performance** e.g. employee participation systems, accidents, incidents, employee health monitoring, enforcement action, outcome of safety audits, etc.

Principals should be wary of pre-prepared or printed materials submitted at the pre-tendering or tendering stages and encourage specific answers to their questions.

Where the pre-tender questionnaire is asking about critical aspects of health and safety, e.g. essential accreditation of personnel, this should be indicated in the questionnaire itself.

Where contractors or subcontractors are needed quickly, a simplified form of capability assessment should have been completed beforehand. It is important for principals to have contingency plans and, where reasonably practicable, anticipate circumstances where contractors may be required at short notice. It is essential to remember commercial urgency will never be a defence to a flawed assessment.

Example

Highways Ltd had contracted to work on reconstruction of a realigned section of state highway. Part of the work involved felling a stand of trees adjacent to the site. One of Highways' managers, **Leslie**, engaged a fencing contractor, **Bruce**, at short notice to do the felling, even though neither Bruce nor his assistant had done this type of work on a paid basis before. Leslie gave instructions to the contractor and one of his own employees who was an experienced tree feller. Once the work started, the Highways employee warned the manager that the contractors were working in an unsafe manner and removed himself from the job. Soon afterwards the driver of a passing vehicle was hit by a falling tree when the contractors were signalled to continue, but made no independent check that the area was clear. The failure to make this check was contrary to established practice in tree-felling. Highways Ltd was convicted under section 18. Among other things, it had failed to employ competent tree-fellers, due to its lapse in organising the work at the last minute. It had also failed to recognise the hazard and provide proper co-ordination of the various tasks of clearing, signalling and felling.

Using the pre-tender information

Satisfactory completion of the initial assessment will usually allow contractors onto a principal's list of approved/ preferred tenderers or contractors. Approval may be restricted to certain key tasks or occasional activities, depending on the nature of the work.

It should be stressed again that pre-tendering is concerned with determining the general capability of potential tenderers, whereas their ability to manage a particular contract is determined in the tendering process itself. Examples of questions that are more specific to a contract are given in the information for tenderer document in section 3 of this guide. The information gained from that form may be recorded and, after the contract has been signed, used to develop and implement a health and safety plan. However, for some contracts it may be appropriate to gather the information at the pre-tender stage.



Benefits of pre-qualification for subsequent tenders/ contracts

As noted above, many organisations which regularly engage contractors use a pre-qualification procedure to help establish a shortlist of tenderers, or contractors, that they can use for contracts not requiring a tender process. This means any organisation which regularly contracts out work may be able to go directly to an already established shortlist of tenderers or pre-qualified contractors developed from past similar projects. This could result in considerable savings of time and expense during subsequent letting of contracts.

Pre-tender/ pre-qualifying questionnaire

The following three pages provide an example of some of the health and safety issues and questions that might be added to a questionnaire for pre-qualification of tenderers, with sample questions for completion by a tenderer. It is extensive and appropriate to a significant contract, but all or part of its contents may be used by principals as a basis to developing their own checklists. Checklists or questionnaires on health and safety may be integrated with other materials or may stand alone.

The health and safety information gained – along with that on financials, credit ratings, contract performance, technical and other subjects – can be used to develop a profile of potential contractors. In some situations it may not be appropriate to collect all the information, such as details on subcontractors, before tendering.

The purpose of the questionnaire is to help discover how effectively the contractor is managing health and safety. The information gained will be combined with project specific information and questions at the tender stage or when commissioning work that is not tendered.

It is important to remember that supporting documentation will also need to be provided with the checklist as evidence health and safety procedures are in place and are carried out.

Note: Where a pre-qualification checklist is not used at the pre-tender stage, the information will still need to be requested, and questions below considered during the full tendering stage.

Subject	Information required/expectations
Tender title	
Business information	<p>This category may include questions or invite respondents to provide information on:</p> <ul style="list-style-type: none"> • the numbers of employees • corporate structure • a summary of experience relevant to the work being tendered for, and references. <p>A principal should ask its contractors: "What do you expect from us as the client?"</p>
Key personnel	<p>Supply the name, qualifications and experience of the person proposed to be in control of the place of work for the project.</p> <p>Supply details of key employees on the project, and health and safety qualifications held.</p> <p>Name: _____ Qualification: _____</p>
Insurance and accident compensation	<p>Provide details of:</p> <ul style="list-style-type: none"> • public liability insurance held; and • accreditation in ACC injury prevention programmes.
Compliance with standards	<p>Where relevant, contractors may be required to provide evidence of their conforming with ISO 9000, AS/NZS, or other standards for health and safety compliance.</p>
Associations/memberships	<p>Provide details of the following memberships:</p> <ul style="list-style-type: none"> • trade or employers' association • health and safety organisation <p>Indicate the type and extent of health and safety information provided by the associations.</p>
Health and safety experience	<p>The principal must be made aware of the contractor's health and safety experience.</p> <p>Does the contractor have an employee participation system for dealing with health and safety issues?</p> <p>Which of the following safety records does the contractor maintain:</p> <ul style="list-style-type: none"> • an accident register as required by the HSE Act? • a hazard register? • hazard information, such as Safety Data Sheets? <p>Where necessary the contractor should supply records for the last five years of health and safety interventions, such as:</p> <ul style="list-style-type: none"> • fatalities • lost days from injury to workers • accidents resulting in environmental damage or pollution • notices, warnings or prosecutions by an enforcement authority such as the Ministry of Business, Innovation and Employment..



Subject	Information required/expectations
Health and safety management	
Policy	<ul style="list-style-type: none"> • Is there a written health and safety policy? (if yes, provide a copy) • Is the policy signed by the managing director? • How is the policy communicated to employees?
Subcontractors	<p><i>List subcontractors that will be used, and for which tasks.</i></p> <ul style="list-style-type: none"> • Has their competence been formally assessed? • Was health and safety considered in their selection? • Is there an induction/orientation programme for new subcontractors and their employees? • Are there procedures for controlling the safety performance of subcontractors?
Organisation	<p><i>Name the senior manager in charge of health and safety.</i></p> <p><i>Provide details of how the work is supervised, and who will be responsible for supervision.</i></p>
Arrangements	<p><i>An outline of the procedures in place to ensure a safe system of work.</i></p> <ul style="list-style-type: none"> • Are there documented working practices and safety instructions? • How often are these audited? • Are there procedures for maintaining plant, equipment and vehicles in a safe condition? • Are there procedures in place for employees to actively participate in the improvement of health and safety systems and procedures? • How is personal protective equipment supplied to all employees?
Information, training and supervision	<p><i>Summarise the health and safety training and information managers and supervisors receive to help ensure health and safety in the work they manage or supervise.</i></p> <p><i>Summarise the health and safety information, instruction, and training employees have received in relation to their work and the equipment they use.</i></p> <ul style="list-style-type: none"> • Is formal safety training given to employees? • Have the personnel who will undertake specific work received formal training in all relevant areas? • If so, what form does it take? • Is there an induction/orientation programme for new employees? • Are there health and safety representatives?
Emergency procedures	<p><i>Provide details of emergency procedures and planning.</i></p> <ul style="list-style-type: none"> • Does the emergency plan identify responsibilities and procedures to be followed? • Have all staff received training in emergency procedures? • Have emergency drills been carried out within the last 12 months?
Planning and setting performance standards	<p>More detail will be required for more complex or higher-hazard projects.</p>

Subject	Information required/expectations
Hazard assessment	<p>Are formal hazard assessments carried out and recorded? (The contractor may be asked to provide examples with related information e.g. method statements, explaining health and safety controls and other precautions.)</p> <ul style="list-style-type: none"> • Where hazards are identified, is there a system to identify and assess significant hazards? • Are accidents and incidents reviewed for the existence or otherwise of significant hazards • Is there a system for identifying new hazards? • Are there procedures for eliminating, isolating or minimising significant hazards?
Accident investigation	<ul style="list-style-type: none"> • Is the accident register maintained and reviewed for hazard assessment • Is there an investigation into any accident that results in harm, or could have resulted in harm? • Do investigations include remedial action plans to initiate future prevention? • Are the following advised of accidents: <ul style="list-style-type: none"> - The employees and health and safety representatives? - Where there is serious harm, the Ministry of Business, Innovation and Employment?? - The principal <p><i>Describe the responsibilities for notifying specified work, and reporting illness or injury</i></p>
Hazardous substances	<p>List the hazardous substances used.</p> <ul style="list-style-type: none"> • Are the key hazardous substances recorded? • Are there safety data sheets accessible for hazardous substances? • Are test certificates current for required sites? • Are there approved handlers for hazardous substances where required? • Are MOSHH assessments carried out and regularly reviewed?
Plant and equipment	<p><i>Are plant and equipment, lifting gear, etc. inspected, tested, examined and maintained, and proper records available?</i></p>
Health monitoring/surveillance	<p><i>Describe the monitoring/surveillance of employees and the workplace, particularly with regard to any specific hazards outlined by the principal.</i></p>
Measuring and improving health and safety	<p><i>Describe how performance is systematically assessed by inspection, audits etc.</i></p> <p>Are there:</p> <ul style="list-style-type: none"> • In-house safety meetings and/or safety committees? • Safety inspections or audits? • Other forms of employee participation?
Review	<p><i>Describe what happens to the results of checks, investigations and audits.</i></p> <p>How will the principal be involved in the review process?</p>
Completed by	<p>Name:</p> <p>Contact details:</p> <p>Date: Signed:</p>

3 | Contractor selection and negotiation of terms



Principals are required to give and receive information on hazards at the tendering stage, whether or not pre-qualification is used. This will normally take the form of the principal requiring tenderers to complete a health and safety questionnaire or checklist relating to the specific hazards of the contract, along with other tender documentation. This information is combined with any other gained from pre-qualification.

Where pre-qualification has *not* been used, the principal will also need to gather information that allows assessment of the general competence of the contractor to manage health and safety. A decision to accept a tender cannot be based on price if it is at the expense of adequate provision for health and safety. It is also worth remembering that a tenderer's health and safety record may well be indicative of its business efficiency and reliability as a contractor.

The principal has a responsibility for contributing to hazard management

The principal should identify and describe hazards related to the contract with the tender documents. They should also indicate, for example, whether work is to be done when its employees are absent, any areas that need to be demarcated and kept clear, and other similar information. For a suggested format for an "information for tenderer" document, see page 33. The principal should also stipulate safety standards in advance, where practicable.

Example

Pulpmakers Ltd owned and operated a wood pulp mill and contracted **Kakapo Engineering Ltd** to carry out mechanical maintenance and repair work. **Nick** was employed by Kakapo Engineering Ltd.

Because of the nature of the pulp making process, some of this work was conducted while plant operated. One day Nick was working to clear a pipe blockage when a

mixture of hot pulp and condensate burst out of the pipe, hitting him and resulting in severe burns to 30 percent of his body.

A similar incident had occurred some months earlier, resulting in a policy that full personal protective equipment (PPE) should be worn in such situations. However, as principals, Pulpmakers Ltd had failed to ensure that Mark was informed of the hazard and the need to wear full PPE to complete the work. Pulpmakers Ltd were therefore convicted under s18(1)(a).

Tender documents should outline arrangements to enable the contractor to work within the principal's health and safety management system (e.g. explaining and agreeing on appropriate points of contact and named individuals for reporting and monitoring progress).

The contractor will also be expected to describe their hazard management processes, and identify specific hazards which the principal may not be aware of.

Hazard assessment will include a competent examination of what could cause harm to people or other damage, in order to weigh up whether enough precautions have been taken, or if more should be done to prevent harm. Often the principal, contractor and any subcontractors will need to discuss jobs together to ensure the necessary information is available. Job registration provides a typical checklist for such discussions (see page 46). More formally, permit-to-work systems are often used in high-hazard situations. These are specific, formal procedures used to control hazardous work (e.g. entry into confined spaces, hot work, plant, electrical work, and pipeline breaking).

Example

Monrovia District Council contracted **Checkers Plumbing Ltd** to install piping for a sewage holding tank. Checkers Plumbing employed **Boris** to carry out the job. At one point Boris climbed into the tank to retrieve a dropped pipe, but was overcome by toxic gas. He lost consciousness and was trapped in the tank for an hour before he could be rescued. Boris was hospitalised and treated for hydrogen sulphide poisoning and asphyxia.

The Council was convicted for a breach of section 18(1)(a). The court found it had failed to ensure that Boris had been made aware of the hazards associated with confined space work and did not ensure that Checkers Plumbing was advised about their relevant health and safety policies.

In a controlled situation, permit-to-work systems may provide the most effective means of a principal managing exposure to significant hazards by contractors, employees and others. They are an essential feature of safe systems of work in many maintenance activities. For example, a principal was held liable when a contractor's employee was burned by an electrical flashover after exercising uncontrolled access to switchboard equipment that required controlled access and a permit-to-work.

Part 2 of *A Guide to the Health and Safety in Employment Act 1992* has more information on hazard management requirements.



📖 3.1 Including project health and safety information in the tender

This information describes known health and safety hazards and issues to be managed for a specific contract. It is generally issued with, or included in, the documents. It describes tenderers' minimum obligations with regard to health and safety, and enables allowances for health and safety to be factored into their tender.

The 'information for tenderer' document can be used as key material in the process of tender assessment, raising specific health and safety issues to which tenderers respond to in their tenders. These responses in turn need to be considered by the principal in making a judgement as to whether potential contractors have both adequate provision for health and safety, and are competent to carry it out.

Those preparing the project health and safety information (whether the principal, or an agent such as a consultant engineer or architect) will need to determine its most suitable format. The project health and safety information should be drawn up to require specific responses to issues. There is little advantage in only outlining hazards or risks. What is needed is the contractor's responses to how they will manage them during the work in terms of elimination (where practicable), isolation (again, where practicable) or minimisation (if elimination and isolation, respectively, are impracticable). The contractor's responses to the information for tenderer document will in turn form the basis of the health and safety plan for the project.

The main purposes of the information for tenderer document are to:

- provide a focus for bringing the project health and safety issues and the design to the attention of parties
- enable contractors submitting tenders to be fully aware of the project's health and safety requirements
- provide a benchmark against which the tender submissions can be measured, and
- provide a basis for the development of the contractor's health and safety plan for the project.

The information will mainly come from:

- the principal, who provides the contractor with information relevant to health and safety, such as existing drawings, surveys, a description of hazards known specifically to them, and their own health and safety requirements, and
- designers/advisers or agents of the principal, who provide information about the known hazards which will have to be managed by the contractor.

Subjects for inclusion in the 'information for tenderer' document

The degree of detail required, and the size and format of the information, will depend on a number of factors such as the nature of the work or project, types of foreseeable hazards, potential risks, and other requirements of the principal.

Obviously, some items listed below will not be relevant to all contracts. Work with minimal risk calls for simple, straightforward approaches. On the other hand, large projects involving significant risk will require more detail. The health and safety information provided should be specific and tailored to the contract, and the needs of those receiving the information.

Conveying the tender information

Health and safety information for tenderers can be included in tender documents in a number of ways, depending on what is appropriate. It can be included as part of the specifications for a project, as a totally separate document, or as a documented discussion with potential contractors on particularly small jobs. The key point is it needs to be appropriate to the project, so health and safety requirements are effectively built into tender documents and the project in some form - addressing health and safety from the beginning of the process, clearly defining and acknowledging the safety requirements in the tendering and award process.

Template for an 'information for tenderer' document

The template below will help the principal record job details and related hazards, as preliminary information for the contractor. The form may be completed by the principal either before, or with, tender documents. It provides an example only, and indicates the likely content and format of such documentation. Some of the information will be intrinsic to other tender documentation, but wherever possible it should be made clear as a matter of health and safety.

Subject	Information required/expectations
Tender title Ref no:	
Description of job/project	Describe the nature and extent of the project (location, type of work, timetable, performance standards, etc.) Outline the design of the project as required for the tenderer to be aware of all the health and safety issues involved. This may include information on the project beyond the scope of the work being tendered for.
Site/place of work	Describe the site/ place of work with regard to location and relevant issues, and including such factors as provision of services, existing or coinciding uses, adjacent premises, access and traffic systems and restriction, ground condition, atmospheric conditions, etc (e.g. underground services, drains, overhead lines or cranes, machinery or vehicles, work at heights, electrical or chemicals hazards, etc).
Materials/equipment to be used	The description need not repeat the tendering specifications, but should draw the tenderer's attention to any particular materials or equipment that presents health or safety issues. This includes materials, equipment or plant supplied, or specified by the principal and to be used/installed by the contractor (e.g. flammable, toxic, substances, heavy and/or bulky items).
Hazards relevant to the job	Detail the hazards likely to be associated with the job under tender. Hazards described may be proximate to and not necessarily part of the tender itself.



Subject	Information required/expectations
Work processes	This includes, for example, welding/hot work, electrical, confined/restricted spaces, working at height, proximity of overhead wires or cranes, excavation, or demolition.
Special requirements	<ul style="list-style-type: none"> • Is there provision for the health and safety plan to be incorporated into an existing health and safety plan for the site? • What other site-wide factors are there (for example: are there any special client needs such as access for school children, elderly or disabled persons in the vicinity; the positioning of the site access or exit points; location of unloading, or layout and storage areas; temporary site accommodation; traffic/pedestrian routes and so on)? <p>Detail any restrictions on working hours, vehicle access, difficult or restricted access to work area, permits to work, requirements for hazardous substances or work environments, emergency procedures, provision of barriers or signs, and any health surveillance/medical.</p>
Other information provided by the principal	
Design information or specification documents	Available? Yes <input type="checkbox"/> No <input type="checkbox"/> Provided? Yes <input type="checkbox"/> No <input type="checkbox"/> Detail the relevant information that is available to the tenderer.
Drawings	Available? Yes <input type="checkbox"/> No <input type="checkbox"/> Provided? Yes <input type="checkbox"/> No <input type="checkbox"/> Detail the drawings that have been prepared by the principal for the tender, and any pre-existing drawings, plans, specifications or other documents that are relevant. Provided with invitation to tender? Yes <input type="checkbox"/> No <input type="checkbox"/>
Principal's rules for contractors	<ul style="list-style-type: none"> • What site rules relating to the principal does the contractor need, such as emergency procedures, permit-to-work rules and so on, when work takes place at the principal's premises? • Will there be any overlap with the principal's own activities during the project, particularly where work is to take place at the principal's premises that might be occupied?
Emergency procedures	Describe the principal's emergency procedures for the site/ place of work. Detail the emergency procedures required of the tenderer to resolve any anomalies or points of conflict.
Contact and liaison	Describe a process for liaison and co-ordination for health and safety that is appropriate to the project. Include a delegate for multi-employer site meetings as appropriate. Include a procedure for dealing with design changes after the work has started. Detail the responsibilities for notifying work or reporting accidents or serious harm to the Ministry. Provide details of how the work methods are supervised, and who will be responsible for supervision. Name of tenderer's contact employee: Senior manager: Tel: Fax

Subject	Information required/expectations
Completed by	Name: Position: Contact details: Date: Signed:

3.2 Tender review, evaluation and contractor selection

Tender submissions (or pre-tender documents) should be received, evaluated and assessed by the principal to ensure potential contractors have complied with the tender documents, including the requirements relating to health and safety for the project, and are competent to carry out the contract.

3.2.1 Assessing health and safety competence

Assessment of the appropriate level of health and safety competence is an important element of contractor selection and appointment. To be consistent and fair, the principal needs to give full consideration to the information gained from tenderers at the pre-qualification and/or tender stages.

Where possible tenderers should be advised in advance of essential conditions required before they are considered competent to complete the contract.

The principal should evaluate the tenderer's ability to manage specific issues contained in the information for tenderer document or otherwise provided by tenderers. The level of detail required for a decision will depend on the nature of the project and risks involved.

Compliance with health and safety requirements must be a precondition to any tender being successful. Where there is any deviation from required standards, these should be addressed before acceptance of the tender.

Past performance in health and safety is a significant issue, but should not be the only consideration. Also competency assessment should not be limited to one deciding factor, particularly tender price. The courts have made it clear that safety is just as important as tender price when entering into a contract. Issues that focus on the health and safety requirements for the project need to be raised, and answers sought.

3.2.2 Capability

Principals to contracts will be expected to judge the capability (or competence) of contractors where this is critical to safety. In order to do this, they will judge the health and safety capabilities of short-listed contractors according to information about the:

- contractor's management systems and practice
- contractor's experience in the type and complexity of the work to be carried out



- contractor's resources in relation to the work being completed
- extent to which the risks of the contract will be minimised by suitable precautions.

This may be based on information gained through the pre-qualification process, but companies will often develop permit systems tailored to the particular tasks and hazards their contractors will encounter.

Accreditation under sector specific, ACC or other health and safety management programmes are a useful indicator of performance, but should not be the only measure of health and safety capability. Instead, assessment should be made with reference to particular hazards and processes.

However, principals themselves will need to have the appropriate training and competence at least to the level of being able to exercise good judgement.

Subcontractors will usually be expected to meet selection criteria which match those used for selecting the main contractor.

The competence of individuals will usually need to be assessed

Individual competence is judged according to a combination of training and experience.

The contractor's managers and supervisors will need to demonstrate they have received adequate health and safety training for managing the work, and have access to appropriate competent advice.

Health and safety certificates of competence or "passports", such as those issued by SiteSafe in the construction and retail sectors, provide another source of evidence regarding appropriate basic training and competence in a particular industry or setting. Health and safety representative training is a further important indicator of awareness and consistency in the contractor's workforce.

3.2.3 Key considerations in selecting contractors

In summary, notwithstanding the above considerations, in selecting a contractor the principal should consider the candidate's ability to manage, implement and monitor health and safety procedures, including:

- insurance and accident compensation ratings
- compliance with standards
- associations/accreditations
- health and safety experience
- policies and procedures
- subcontractor selection and management
- organisation and arrangements (including assignment of responsibility for health and safety issues, employee participation, etc.)

- information, training and supervision
- planning and setting performance standards
- hazard assessment
- accident reporting, recording and investigation methods
- performance monitoring processes
- review methods, and
- safety record.

3.2.4 Subcontractors

Principals are advised to also monitor the selection of subcontractors. In some situations health and safety requirements, such as a permit-to-work system or particular hazards, may mean the principal nominates particular subcontractors as a condition of the contract.

The selected head contractor will need to supply potential subcontractors with information about the project, the site, relevant parts of any existing health and safety plans, and any other relevant information. Much of this information will be relayed from the tendering or pre-tendering materials supplied by the principal, and includes:

- arrangements for the health and safety management of the project
- monitoring arrangements
- workplace/site rules and procedures (such as wearing personal protective equipment, training or competency requirements)
- processes for giving information and improving health and safety management in the workplace, and
- procedures for further subcontracting.

Requirements for health and safety need to be made clear at the pre-tender and tender stages. This means tendering contractors – who are in fact principals themselves in relation to subcontractors – have enough information to ensure site-specific provision for health and safety is included in their own tender submissions, demonstrating they are competent in health and safety matters relevant to the project.

It is a truism that in all tendering situations, price is only one factor and a low contract price does not necessarily lead to value or efficiency in the performance of the contract. The courts have made it clear cost savings or time reductions should never be sought at the expense of safety. Many section 18 prosecutions have concerned cases where unsafe practices arose from perceived commercial pressures.

Health and safety being overlooked can lead not only to accidents and injuries, but also delays, difficulties, and increased costs that may be borne by contractor and/or principal.



3.2.5 Evaluation

Principals need to ensure that:

- tenders are assessed by those with skills and knowledge relevant to the health and safety requirements of the project
- tender evaluation includes adequate consideration of health and safety requirements
- adequate time is allowed to assess the health and safety requirements of tenders
- the proposed schedule for the project would **not** adversely affect health and safety
- the health and safety performance of potential contractors and organisations tendering for the work has been adequately assessed, and
- all tenders are thoroughly reviewed, benchmarking the potential contractor's health and safety competence against tender requirements.

4 | Awarding the contract



Information-sharing between the principal and contractor should begin immediately. Depending on the type of contract, once the contractor is appointed a contract-specific health and safety plan should be developed by the contractor and provided to the principal.

Project health and safety will often be managed by the contractor, but the plan provides an important means for the principal (in conjunction with the contractor) to monitor the contractor's health and safety performance.

For a substantial contract, the principal may ask the successful tenderer to give a detailed presentation on their work activity plan. As discussed above, this would include providing an outline of the health and safety plan prepared for the project, and an opportunity to answer further questions on health and safety arrangements.

Where necessary, post-tender meetings should be held with potential contractors on a one-to-one basis to further assess their competence and aptitude for managing health and safety.

This could, of course, coincide with any discussions and clarification of other aspects of the tender. For example, principals monitor contractors constantly to ensure they are conforming to contractual specifications in other respects, and to monitor work quality. Health and safety should be no different.

📄 4.1 Documentation

Health and safety requirements should be documented and become part of the written contract wherever practicable. Usually this will involve reference to the management of the project's specific hazards, conformity with standards, co-ordination and reporting requirements and other project-specific information obtained in the tender documentation.



The health and safety plan may also form part of the contract documentation.

Principals will be expected to act on information in their possession at the relevant time. For example, the courts have found that when a principal learnt that a contractor allowed its employees to decide on the use of safety equipment, it had a duty to ensure the contract terms included clearly defined duties for the provision of appropriate safety equipment and supervision of work practices.

4.2 Briefing the contractor

Where appropriate, contractors and their employees should be given induction training regarding the workplace or site, and the opportunity to ask about hazards and risks. The nature of induction training will vary according to the types of hazards and associated risks. In some cases, basic induction training will be sufficient, where in others training will need to be more rigorous. The principal's conditions for contractors, whether general or for defined tasks, may be discussed, agreed and specified as part of 'job registration'.

To help identify risks and to plan the work safely, the principal may use job registration forms, or checklists specific to the project (see the sample job registration form in section 4.3.4 of this guide). This helps to assess the risks associated with the activity and define control measures and precautions required (e.g. safe systems of work, method statements, use of specific equipment). The number and type of questions will depend on the work complexity and hazards involved.

4.3 Information-sharing between principal and contractor

Information sharing between principals and contractors will be closely related to the monitoring of contractor performance. What is appropriate will vary according to the circumstances.

In a situation where the contractor is employed for their particular expertise and the principal has little effective control over the place of work, the principal might not be expected to take detailed operational steps in relation to the contractor's specialised functions. This may reduce the need for information sharing to a context of careful planning, selection and induction.

As an example, a principal that had subcontracted building work was held not to be liable for failing to ensure on-site supervision was provided. The principal was found to have taken all practicable steps in relation to contractor selection, providing safety information prior to work actually commencing that identified the specific hazard, and installing an adequate induction process. In another case, a principal who had carefully stipulated appropriate requirements for confined space entry in advance, made extensive contractual provision for health and safety, and checked its contractor's safety procedures, was held not to be liable when members of the contractor's specialised confined entry team were involved in an accident arising from defects they had noticed on site.

This is in contrast with a situation where the nature of the work may be well known to the principal, or where the principal may exercise a high degree of control over the place of work

— perhaps providing specialised plant or equipment for the use of the contractor — and there is associated information sharing.

Examples

The owner/ manager of a farm was held liable as a principal, when the employee of a contractor was killed after becoming entangled in a power take-off shaft attached to a tractor. The duty applied because the farmer was present on the farm and not “off- farm”, was involved in the overall operation, and had provided machinery with dangerous parts unguarded.

A building owner principal provided a “cherry picker” for a contractor and their employees to gain access to a roof. When the cherry picker broke down and wasn’t replaced or repaired in a timely way, the contractors’ employees began to gain access to the roof in an unsafe way. After an accident involving one of the contractor’s employees the principal was held to be responsible for maintaining the equipment and developing a procedure to follow if the equipment failed.

A building contractor engaged a subcontractor to provide scaffolding as part of their contract. They failed, as a principal, to tell the subcontractor that the scaffolding was to be used to support a free-standing wall. When the wall and scaffolding collapsed, they were held to have breached the Act.

Whatever the situation, effective information is critical and the principal and contractor should share and discuss information about the work and the area where it is to be carried out. Above all, the information needs to be effective. For example, simply providing information about the unsafe state of plant on a hazard board placed in a busy office was held to be insufficient, when the evidence indicated that it would have been practicable to attach information to the plant itself.

Example

ProPack Ltd, a chemical packaging company, regularly used **Valiant Labour Hire Ltd** to supply it with temporary workers.

One such worker, **Kelly**, was using a ribbon blender to mix and package chlorinated alkali powder. When the level of the chemical ran low she entered the blender tank to manually empty the remaining product. While inside it, Kelly’s chemically resistant overalls were ripped by the blender blade and her skin came into contact with the chemicals, resulting in a severe burn to her foot.

Proper practice had always been to clean the tank from outside, but the company had allowed the practice of cleaning it from the inside to develop. Propack Ltd was charged with a breach of section 18(1)(a) and the court found it had failed to accurately identify the hazard and should have imposed a strict policy prohibiting workers, including Valiant’s employees, from entering the tank.



4.3.1 Effective information sharing

Effective information should include the following details:

Nominated contact persons for both the principal and contractor

Representatives nominated should have the appropriate level of knowledge for the role, and be at a level of authority within the organisation that allows them to be effective. They should also be resourced and available to carry out the role effectively.

The planning and running of joint meetings

Meetings should be regular, and conducted in a format allowing a free and open exchange of information. It may be efficient to incorporate safety and health issues in other administrative meetings, but only where appropriate personnel and resources are available, and the forum allows sufficient coverage of the subject. The outcome of any meetings should be recorded in writing.

Procedures for reporting hazards

Although principals are required to take all practicable steps to monitor and manage hazards, there may be situations where they are reliant on the contractor to report hazards. Alternatively, there will often be situations where a contractor is dependent on the principal's control of hazards, or on their provision of hazard information. For effective hazard management, there needs to be efficient transfer of information between the parties. This can only be achieved with any certainty through clearly designated reporting lines.

Contractors or principals who are employers are required to follow the formal hazard management processes of sections 7-10 of the HSE Act. These are discussed in section 2.3 of the *Guide to the Health and Safety in Employment Act 1992*, covering hazard management responsibilities. Although these steps are not directly applied to the duties of principals under the Act, the courts have held they are relevant when considering the scope of the principal's duty to take "all practicable steps".

Responsibilities where work is notifiable to the the Ministry of Business, Innovation and Employment

The Health and Safety in Employment Regulations 1995 require employers to notify the Ministry of Business, Innovation and Employment of certain categories of work at least 24 hours before work begins. Much of this type of work, such as construction and forestry operations, is commonly performed by contractors. For a list, see the glossary at the back of this guide, under "notifiable work". The section 18 duty requires the principal to any contract involving such work to be aware of the notification requirements, and ensure the contractor complies.

Method for reporting accidents and incidents to the principal

As noted above, employers, the self-employed and principals all have responsibility for recording, investigating and reporting accidents in the workplace under section 25 of the HSE Act. The principal should ensure they are advised by contractors of all accidents and incidents, whether or not these arise from hazards or potential hazards over which the

contractors exercise control. This includes accidents that actually cause harm, or incidents or events which in different circumstances might have caused harm.

Involvement in employee participation

Where a principal or contractor maintains an employment participation system there may be scope for shared arrangements with meetings and processes for improving health and safety in the workplace.

4.3.2 Information to be given by the principal about the workplace or procedures

The section 18 duty also means there is a duty to inform of any foreseeable hazards, even when the principal is not an employer. Information to be given by the principal has been discussed in the previous section, but may be summarised as including the following categories:

- hazards that are known to exist in the place of work and may affect the contractor or their employees
- restricted areas
- any work permit procedures, e.g. hot-work permits
- any company rules that the contractor will be required to comply with during the contract
- emergency procedures that exist and first-aid facilities available, and
- specific job instructions and work methods.

The practicable steps are unlikely to include instruction on any specialised work for which the contractor has been employed. This means that, for example, having taken sufficient care to engage a competent diving contractor to inspect the piles of an estuary bridge, and that the work is notified to the Ministry of Business, Innovation and Employment, a principal would not usually be expected to provide instructions on diving practices or equipment. However, the principal would be expected to advise on such matters as traffic volumes over the bridge, the likelihood of flash flooding, or peculiarities in the method of construction that may create hazards for divers.

Example

Enda Ltd were plastics manufacturers who contracted **Acme Pressure Systems Ltd** to carry out maintenance on one of its phenolic kettles used to make resins. Acme Pressure Systems employed technician **Juan** to perform the work.

Juan performed this work in the plant, alongside Enda Ltd employees. One day he left the processing plant for a tea break, leaving by one door and returning soon after to resume work. He was working beside the kettle when two trainee technicians, who had observed him leave by one door but not return by the other, initiated the manufacture of a batch of phenolic resin. As a result, Juan was exposed to phenol vapour and had to be taken to hospital.



Juan was unable to work for a month and suffered lingering health effects for six months. Enda Ltd was convicted of a breach of section 18(1)(a). The court found that there were a number of practicable steps Enda should have taken to prevent the accident, including preventing access to the kettle floor when it was in use, having a system to warn workers when a cook was about to begin, and improving communication about work scheduling between technicians and others on site.

Where a principal is also an employer and is required to manage hazards in the workplace, it would be expected any information on hazards acquired in this process would be readily made available to contractors. See also section 2.3 of the *Guide to the Health and Safety in Employment Act 1992*, for a discussion of hazard management responsibilities.

4.3.3 Information to be given by contractor about the workplace or procedures

Information to be given by the contractor is described in the section above, and will be contained in the health and safety plan for the project. For any significant contract the contractor should submit a plan of how they intend to manage health and safety in relation to the proposed work, before the contract is formed. What is a significant contract will depend on the circumstances. For example, in the forestry industry a contract to fell and remove several trees from an isolated farm paddock would probably not require a formal plan. However, clearing a similar stand of trees from beside a busy highway or extracting a woodlot by a cable-logging operation would each require a detailed plan. Similarly, in the construction industry, the building of a single office partition might require elementary health and safety considerations, but for the refitting of an entire floor of an office building or the construction of a new building, the courts would likely require a detailed plan.

The health and safety plan will often have been based on the 'information for tenderer' document described in section 3.1, and may then be added to or improved as project planning proceeds. For any project, it should as a minimum contain the following details:

- hazards identified and control measures to be taken
- emergency procedures
- training, experience and qualifications of employees (including certificates of competency where required)
- procedures for reporting and recording of accidents/incidents, and
- means of involving employees in the improvement of health and safety.

The health and safety plan or policy needs to be adequate and appropriate to the hazards and circumstances of a particular contract. As mentioned above, this means a standard policy intended to apply to all contracts is unlikely to be appropriate. The plan should describe the lines of accountability and responsibilities for supervision.

The plan should contain the following information on hazard management, in addition to any other topics raised by the information for tenderer:

- information on hazards that the contractor is bringing onto or may be creating on site (e.g. hazardous substances, noise, dust, electrical hazards, etc)
- safety provisions for other people who may be affected by the work, including people in the vicinity and the public
- safety equipment that may be necessary, including means of access to an appropriate standard, and
- restricted areas, security and control of access to the work area.

The contractor will need to provide regular updates on progress with the health and safety plan.

Example

Cleaning contractors **Splendid Services Ltd** were engaged by meat processing company **Longhorn Meats Ltd** to clean the processing areas in its large meatworks.

Myles was one of several cleaners employed by Splendid Services Ltd for the Longhorn contract. One day Myles was cleaning an offal auger when he put his arm into the machine to clear a blockage. Myles had wrongly assumed that it had been turned off, and his arm was crushed.

Longhorn Meats was charged under section 18(1)(a) with having failed to take all practical steps to ensure that an employee of its contractor was not harmed. The court found that Longhorn should have isolated the hazard by ensuring that Myles could not access moving parts of the offal auger, or, if that was not a practicable step, established a documented procedure to ensure the auger was switched off before it was cleaned.

4.3.4 Using a job registration process

Job registration can be a useful communication tool between principal and contractor. It provides an opportunity for risk assessment and control by the principal.

The following questionnaire contains questions and relevant issues to be addressed following tender once the contract has been awarded. It is a means of the principal checking that the contractor is aware of specific health and safety issues, and may be used as a checklist with which to compare the content of the health and safety plan submitted by the contractor.

The plan will contain the detail of how the contractor proposes to deal with the specific hazards of the contract raised in the “information for tenderer” and any further safeguarding the contractor deems necessary.

Specific arrangements regarding hazards will need to be agreed to by both parties.



Sample job registration form

This sample questionnaire particularly relates to “high hazard” work (e.g. roofing, construction, excavation, or entry into confined spaces). Work will be carried out according to the principal’s conditions for contractors, which will also be described, discussed, and agreed as part of the “job registration” process. This form might also be adapted for less hazardous work.

Responsibilities		
i.e. the senior manager with responsibility for health and safety, and the names of those responsible for different aspects or areas of work activity, and the agreed lines of communication.		
Hazardous conditions		
<input type="checkbox"/> Roof work	<input type="checkbox"/> Overhead working	<input type="checkbox"/> Excavation/demolition
<input type="checkbox"/> Entry into ductwork	<input type="checkbox"/> Confined spaces/pits	<input type="checkbox"/> Electricity
<input type="checkbox"/> Noise	<input type="checkbox"/> Isolation of services	<input type="checkbox"/> Heavy/complex items to handle
<input type="checkbox"/> Falling objects	<input type="checkbox"/> Dangerous machinery	<input type="checkbox"/> Other (state)
Work equipment		
<input type="checkbox"/> Ladders/access equipment	<input type="checkbox"/> Lifting equipment	<input type="checkbox"/> Vehicles
<input type="checkbox"/> Welding/cutting equipment	<input type="checkbox"/> Grinding equipment	<input type="checkbox"/> Powder powered tools
<input type="checkbox"/> Lasers	<input type="checkbox"/> Portable electric equipment	<input type="checkbox"/> Pneumatic equipment
<input type="checkbox"/> Machinery	<input type="checkbox"/> Other (state)	
Materials/substances		
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Explosives	<input type="checkbox"/> Flammable substances
<input type="checkbox"/> Toxic substances	<input type="checkbox"/> Corrosives	<input type="checkbox"/> Solvents
<input type="checkbox"/> Adhesive/sealants	<input type="checkbox"/> Ionising radiation	<input type="checkbox"/> Irritant substances
<input type="checkbox"/> Compressed gases	<input type="checkbox"/> Epoxy materials	
<input type="checkbox"/> Other substances liable to give rise to fumes, vapours etc.		
Requests to use principal's services		
<input type="checkbox"/> Electricity	<input type="checkbox"/> Water	<input type="checkbox"/> Steam
<input type="checkbox"/> Compressed air/stream	<input type="checkbox"/> Waste disposal	<input type="checkbox"/> First aid
<input type="checkbox"/> Transport	<input type="checkbox"/> Forklift	<input type="checkbox"/> Scaffolding/access equipment
<input type="checkbox"/> Trucks	<input type="checkbox"/> Other equipment	<input type="checkbox"/> Principal's personnel or services

Any other special hazards?

- Yes (describe) No

Are permits to work required?

- Yes (describe) No

Site arrangements (to be explained and agreed)

- Hours of work Site boundaries Vehicle restrictions
 Emergency procedures First-aid facilities Accident/incident reporting
 Permits to work

Some of this information may be covered by the principal's general procedures for visitors and contractors. At this "job registration" stage, contractors will also be expected to provide evidence of:

- Relevant hazard assessments
 Health and safety plan(s)
 Agreed, safe systems of work/method statements (arising out of risk assessments)
 Competence of personnel involved (including details of relevant training)

5 | Monitoring the contract



The case law has established there will usually be a positive duty for principals to monitor contractors' and subcontractors' performance. This is not a duty to constantly check for hazards, but at least monitor workplace conditions and practices and to bring any unsafe practices or conditions to the contractor's attention and ensure they are dealt with.

Where subcontractors are engaged by the contractor, the practicable steps available to a principal will usually decrease the further the principal is removed from the subcontractor's engagement. However, a principal is still required to do what could reasonably be expected in the circumstances. The principal may not have directly engaged subcontractors but they still have a duty to ensure their safety at a level that could be reasonably expected, for example, providing an appropriate health and safety plan, a safe power supply, or access on a construction site.

Example

Best Booths Ltd was engaged by **Bay City Painters Ltd** to install a new LPG powered spray booth in their panel beating and spray painting workshop.

Best Booths in turn subcontracted **Alastair**, an electrician, to undertake the electrical installation work for the booth. While carrying out the installation, Alastair transposed two wires from the gas switch to the burner unit. The miswiring effectively bypassed the burner's safety mechanisms and resulted in a prolonged gas release prior to ignition.

When the burner unit ignited there was an explosion, blowing the burner directly into Alastair's face and resulting in him suffering multiple fractures and lacerations to his face, head and vertebrae. His error would almost certainly have been detected if Best

Booths had ensured that a qualified gas installer was on site for the initial firing of the booth.

Best Booths Ltd was convicted under s18(1)(b) for failing to take all practicable steps to ensure that Alastair was not harmed while doing work which he was contracted to do.

Nor will it be a defence to a particular incident that the principal did not know exactly what the relevant person was doing at the time. It is sufficient for liability that the principal ought to have known about a general process and relevant steps to be taken. So, for example, in a case where residential construction obviously required a building platform, the principal was held to be liable for a fall when the worker was operating simply from a deck and ladder.

As mentioned above, a head contractor is usually more able to influence general site safety, and less able to influence how subcontractors carry out specialist tasks for which the contractor has limited expertise, such as electrical, specialist machinery, or the use of hazardous substances.

Interrelationship with the contractor's duty as an employer

A principal is required to monitor a contractor's performance in relation to employees' exposure to hazards. This is in addition to the contractor's responsibilities in relation to their employees. What is practicable for the principal will often differ from that expected of the contractor/employer in the circumstances.

If there is a step that it is practicable for a principal to take, then there is a duty to take that step.

The principal cannot distance themselves from what is occurring in the workplace simply because the employer is more directly related to and responsible for the employees carrying out the work. It is a matter of fact and degree in each case. The positive duty certainly means, for example, that 'wilful blindness' is not acceptable. In one case, where the principal had taken substantial contractual steps to ensure properly trained workers were employed by subcontractors, including offering training, it was held to be liable because it failed to provide adequate supervision once alerted to the dangerous behaviour of a subcontractor's employee.

Supervision

The principal's managers or supervisors who are responsible for the contract should receive suitable health and safety training and must have the support of the principal where appropriate.

The principal will require contractors to report all accidents, dangerous occurrences (including significant near misses) and cases of ill health, in line with the principal's internal incident reporting system.

Steps required for monitoring

The following steps are therefore recommended to monitor contract work as it is being undertaken, and identify problems before accidents or incidents occur:



- effective management of the principal /contractor relationship, with all parties being aware of their roles and responsibilities through the contractual framework
- the principal having overall responsibility for the control and co-ordination of the contract
- regular meetings to review health and safety performance (including site-wide meetings as appropriate)
- regular inspections as appropriate
- raising issues that require attention by the contractor for any unsafe work practices observed
- investigating and responding to accidents and incidents
- the principal and contractor both meeting their obligations to report serious harm occurrences to the Ministry of Business, Innovation and Employment, and
- post-contract evaluation of performance (see section 6 of this guide).

There should be arrangements for principals to record progress in health and safety and regularly report on performance to the contractor. This should include recording positive features as well as any deficiencies, as the progress record can be useful in future contracting decisions. Conversely, any significant breach of the terms of the contract could lead to it being terminated and/or the contractor being removed from the principal's approved list.

Subcontractors

As noted above, contractors should seek approval from the principal before subcontracting any work other than that indicated in the tender (this will often be a standard condition of the contract). Subcontractors will usually be expected to meet selection criteria which match those used by the principal for selecting the main contractor.

6 | Post-contract review



The progress of the contract will be reviewed as part of ongoing supervision. However, when the work is complete (or at periodic intervals in a lengthy or ongoing contract), the principal and contractor will review the quality of the work against the job specification and the contractor's performance. This will consider, among other things:

- the effectiveness of the original choice of contractor
- how well the contractor fulfilled the health and safety plan and managed health and safety while completing the contract
- any improvements that could be made to equipment, work methods etc, and
- whether the contractor is suitable for further contracts.

This is an opportunity to put recommendations for improvements in writing, so the experience contributes to learning before the next contract.

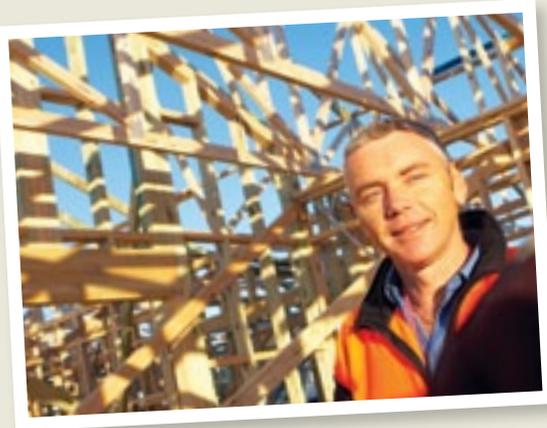
Case studies



- ✎ **Contract to build a small residential development**
- ✎ **Harvesting a woodlot of plantation timber**
- ✎ **Local authority lets a contract for a new link road**
- ✎ **Motor vehicle insurer includes health and safety in its approved repairer processes**
- ✎ **Government department lets a contract for the cleaning of a large office in a suburban shopping mall**

CASE STUDY 1: Contract to build a small residential development

PRINCIPAL: Quayside Developments Ltd, a small residential development company operated by Leon Hooper and his wife Glad, who together hold two-thirds of the shares, and with the balance owned by a financial backer not directly involved in the running of the business. Quayside Developments have developed a range of townhouse projects over the last 16 years, always employing some combination of the company's own capital and short-term financing through finance companies and banks.



CONTRACTORS: BB Builders Ltd, a four-employee construction company owned by builder Sid Moon, with a minority shareholding held by members of his immediate family.

PROJECT: Construction of four unit-titled townhouses on a subdivided urban section.

ORGANISATION: The developer, Quayside Developments, manages the project themselves, with BB Builders engaged to complete the structural work, and subcontractors engaged by Quayside completing ancillary work such as roofing, plumbing and electrical, and landscaping work.

PRE-TENDERING: BB Builders Ltd is one of several builders Quayside have used for different projects. Leon keeps pre-tender information in a brief register of suppliers, which is regularly maintained and reviewed after each contract. The register contains financial and legal information on businesses (their bankers, shareholders and legal structure, public liability and other insurances, employee qualifications, trade organisation membership and business alliances, and other relevant information). Much of this general information is relevant to health and safety performance, but some more specific health and safety information is obtained when appropriate. Some of this is also closely relevant to compliance with the Building Act, electricity and gas legislation.

TENDERING: Four builders tendered for the contract. Three had completed earlier contracts for Quayside, and one completed a brief pre-tender questionnaire that Leon has used. Tendering was based on working drawings and specifications prepared by the architects and engineers. Leon also included health and safety as an item in the agenda of his meetings with architect and engineer and discussed various issues with them. He also asked that the outlines of a health and safety plan be included in the tender documents.



Some issues were particular to the site. For example, it was on a busy road, so Leon ensured that the tender documents required a plan for parking and traffic management. A steep waterside site presented additional hazards, and the tender documents asked for additional information on how these would be managed with respect to scaffolding and access for vehicles and plant. This also had an impact on electricity cables.

As with other contracts, Leon found he needed to pay particular attention to areas where the work interacted with other contractors, neighbours, or the public.

TENDER REVIEW, EVALUATION, AND CONTRACTOR SELECTION: As always, tenders were reviewed on price, availability and other factors including past track record of the tenderers. Leon considered health and safety issues, and looked for evidence of health and safety being noted and thought through by the tenderers. Leon has found this to be an indicator of the quality of work generally. In two cases he asked for additional information on how tenderers would manage particular hazards.

Because Leon was organising subcontractors himself, he and the designers paid particular attention to clarifying roles and responsibilities between the principal contractor and subcontractors.

AWARDING THE CONTRACT AND INFORMATION-SHARING: All contracts were in writing and with reference to the tender documents. The health and safety plan is part of the contract documents and is maintained as the project progresses.

Notification of the work under the Health and Safety in Employment Regulations 1995 was the principal's responsibility.

MONITORING PERFORMANCE: Leon is on site and meets with the contractors and subcontractors at least daily. Where practical he arranges informal site meetings to discuss shared tasks and resolve or clarify any issues arising.

Leon's policy is to put any variation involving additional costs to writing, and to formalise any modifications to specification or plans and maintain a master copy agreed with the contractor/ sub-contractor. This is in addition to the documentation required by the Building Act and other legislation.

Leon finds this documentation is an essential aspect of managing the project.

The accurate information has financial and organisational benefits, but also contributes to health and safety by improving people's ability to monitor, plan and respond to situations.

POST CONTRACTUAL EVALUATION: Leon looks for continual improvement, and completes a systematic evaluation of each project. He records costs, efficiencies made and any holdups, accidents or significant breaches of contract or failures of the contractor and subcontractors progressively, and evaluates these after each project is completed. He also asks contractors for feedback on his own performance.

CASE STUDY 2: Harvesting a woodlot of plantation timber

PRINCIPAL: Radiata Investments (1978) Ltd

CONTRACTORS: Mac's Logging Ltd

PROJECT: Harvesting a 60-hectare farm-forestry woodlot comprising a plantation of 30-year-old pinus radiata trees on rolling arable land (with a yield of 500 cubic metres per hectare). The contract represented a minimum of three months work for a logging gang of 8-10, and two or more logging truck owner-operators.



ORGANISATION: The owner of the plantation, Radiata Investments, was a partnership between two neighbouring farmers, Gus and Luke, who planted and managed the woodlot.

Gus and Luke discussed the different ways Radiata Investments might go about realising their investment in the woodlot. They asked a forestry consultant, **J P Needleworth**, to complete an assessment of the standing volume of the woodlot, and advise on the best time and means of harvesting.

Together they decided to harvest the timber in the summer of year 30, to minimise damage to the land and to make the work easier and more efficient, and so that replanting could occur in the following winter.

The consultant then prepared a logging plan to allow the best recovery of the timber.

Gus and Luke decided to let a tender for logging and transport, and to sell the logs themselves, through a broker, **Wooden Agencies**. Depending on size or quality, the logs would be delivered to any of three destinations: the nearby port for export quality logs, a pulp mill for the lowest grade of logs, and a local sawmill for domestic grade saw logs.

This way of operating was chosen as an alternative to selling the woodlot to a forestry contractor as a "standing crop". If that had been done, the contractor would then have taken full responsibility for harvesting the timber and made a profit or loss by selling the logs, reducing Radiata Investments' involvement, and their legal obligations.

PRE-TENDERING: Radiata Investments used their forestry consultant, JP Needleworth, to help with the tendering process.

From the logging plan the consultant could develop a short list of suitable contractors. An advertisement was also placed in the local newspaper asking logging contractors to register their interest.

The consultant maintained, and regularly updated, pre-tendering information on three logging operators who said they were interested in tendering. Two further contractors



responded to the advertisements and they were sent a pre-tendering questionnaire for them to complete before being supplied with tender documents. In addition to financial, operational and other questions, the pre-tender questionnaire sought specific information on health and safety management and performance.

TENDERING: Tenders were based on the logging plan and other documentation provided by the logging consultant.

The logging plan provided guidance on:

- skills and equipment needed to complete the work
- a detailed site plan and roading plan with suggestions for access from the road, a skid site and other transport requirements
- a proposed plan for directional felling
- estimated yields of particular grades of log
- an outline of delivery destinations/ purchasers' expectations (including dates), and transport requirements
- a standard for quality control
- specified cost components that were to be provided by the tenderer, and
- reporting expectations and communications.

Each of these aspects of the contract has an impact on health and safety, and Gus, Luke and the consultant agreed it was important to provide timely information and describe expectations as clearly as possible.

In addition, tender documents allocated responsibilities between contractor and principal wherever practical. Reporting requirements – on production and quality and incident and hazard reporting were included in the tender documents.

This included responsibilities for interaction with the health and safety inspectorate, regional council and territorial authority as appropriate.

Tenderers were asked specifically for information on their ACC standing, and any workplace injuries over the last two years. They were also asked to indicate any variation from the tender document and negotiate alternatives where appropriate - in advance of submitting their tender.

TENDER REVIEW, EVALUATION, AND CONTRACTOR SELECTION: Four tenders were received. Gus, Luke and the consultant evaluated them together. They reviewed the tenders for price and for completeness against the specification. Two of the tenderers included a company profile showing their equipment, personnel and experience in performing different logging contracts. Gus and Luke found this profile very useful to their decision and in communication with the successful contractor.

Mac's Logging Limited was chosen for various aspects of their tender, not only price. Their provision of information on health and safety management proved to be a good indicator the quality of tender.

AWARDING THE CONTRACT AND INFORMATION-SHARING: After Mac's Logging was chosen as the successful tenderer, the consultant produced a written contract based on

the tender documents and information received. The parties met to sign the contract and discuss the steps towards Radiata Investments concluding the sale of the logs and completing other steps before Mac's Logging could begin the contract. The work meant that Gus and Luke required some additional fencing to remove gates and allow trucks better access. There was also some minor additional roadwork, and they reorganised scheduled farm work to fit in with the work on the woodlot.

Notification of the work under the Health and Safety in Employment Regulations 1995 was the contractor's responsibility.

MONITORING PERFORMANCE OF THE CONTRACT: Harvesting the woodlot could be described as a medium-sized operation. A total of about 10 fellers, skid workers and machine operators were employed at any one time. The work was organised from one skid site set up according to the logging plan. Log haulage was carried out by up to four trucks coming and going from the site, in addition to the skidders, bulldozers and other machinery.

Regular meetings and site visits formed the basis of the monitoring of the contract.

In addition there were production reports from the contractor, and sales returns from the log purchasers. Gus and Luke checked these for consistency with the logging plan. They also passed the information on to the contractor to do the same.

Once work began there were weekly on-site meetings. These were to discuss progress, and health and safety was on each meeting's agenda. At each weekly meeting the contractor reported on the work completed, and described the work planned for the week ahead, including what and where machinery and personnel would be working and any other information Gus and Luke would need.

Because access was through farmland, Mac's Logging also advised of any additional contractors, such as earthmovers, coming on site, and undertook to report any incidents or significant hazards arising from the work. If Gus or Luke couldn't be present for a site meeting they rescheduled, or at least made contact by phone.

The flow of information from principal meant the contractor could better plan the work, making it more efficient and profitable, and safer for employees and subcontractors. Gus and Luke were in the best position to provide the contractor with information, even in addition to that contained in the logging plan, and it was important to maintain the flow of information.

POST-CONTRACTUAL EVALUATION: The contract was completed on time within four months, and at the specified rate, and all log sales contracts were met on satisfactory terms.

Radiata Investments completed a formal evaluation of the investment and the contract to harvest the woodlot was part of that. The evaluation report formed the basis of their discussions about further investment in forestry and the use of specific areas of the land after the woodlot was harvested.

The consultant contributed to an evaluation of the contract and used the information to amend their information on logging contractors for future reference.



CASE STUDY 3: Local authority lets a contract for a new link road

PRINCIPAL: Blue Moon Bay District Council

CONTRACTORS: Clearway Civil Contracting (CCC) Ltd

PROJECT: A contract to form and seal a 1.6 kilometre two-lane road through rural land to link the ends of two existing roads.

ORGANISATION: The council engaged civil engineering and project management consultancy, **MacAdam, Camber and Partners (MCP)** to design and oversee the construction of the new road, including culverts, drainage and related work.

The council selected MCP on the basis of their track record in the design and project management of similar work for the council and other clients. In choosing MCP for the role, the council made specific reference to, and asked MCP to describe their awareness and management of health and safety. This included the health and safety performance of other design work and contracts they had administered.

In addition, in selecting MCP for their role, the council asked for evidence of the consultancy's ability to:

- engage personnel with appropriate qualifications and experience for the role
- maintain an appropriate level of site supervision
- provide and maintain a risk and hazard register - updated at each stage of the contract.

MCP advised that the work was best organised through a principal contractor, who would use their own arrangements for subcontractors to carry out work, including:

- earthmoving and haulage
- surveying
- amenities
- asphalt
- road marking
- signage
- suppliers.



Before beginning the tendering process, the council had provided information and instructions to MCP including:

- authority to act as its agent on its behalf
- a point of contact within the council and a process for requiring information or authorisations
- requiring a transparent tendering process, with adequate time for tenderers to review and implement the information provided.

PRE-TENDERING: MCP maintained a list of approved tenderers meeting the council's health and safety, financial, and other requirements. By agreement with the district council, MCP required tenderers to be accredited under either of two health and safety management systems maintained by different sector organisations – "Operate Safe" or "Oest".

MCP also placed invitation to tender notices in trade journals and newspapers seeking registration of interest. Any respondents not on MCP's list of approved tenderers completed a questionnaire, including information on safety and health, and were assessed for entry to the list.

MCP supplied the council with a list of businesses meeting its requirements that would receive tender documents.

TENDERING: MCP maintained a procurement regime to suit the risk profile, type and size of the project. It was based on price and non-price attributes, including health and safety performance.

This meant that, where practical, selection criteria that were not price dependent were identified in the tender documents – this included several critical safety components, including traffic control. Although, MCP maintained the ability to further negotiate pricing in those areas. Where there was a "reward" component to non-price criteria, this was specified in the tender documents.

Tenderers were required to document certain safety standards including machinery, traffic control processes, maintenance, and personnel requirements. They were also required to provide a draft health and safety plan for the project.

TENDER REVIEW, EVALUATION, AND CONTRACTOR SELECTION: Four complete tenders were received, two from national companies, one from a regional contractor, and one from a smaller local firm.

Clearway Civil Contracting Ltd, the regional firm, was selected on the basis of a range of criteria (including the specified non-price elements), as well as their track record, available resources, and their ability to complete the work on time. They also provided details of critical subcontractors they would be using to complete the project.

The contents of the draft health and safety plan were reviewed during the evaluation, although some details were to be completed after the contract was awarded.



CCC Ltd was able to demonstrate its health and safety performance through membership of the ACC's WSMP programme, and completion of the Operate Safe accreditation process, including being able to report on its performance against national benchmarking (key performance indicators).

AWARDING THE CONTRACT AND INFORMATION-SHARING: Although the council acted through MCP as its agents, the contract itself was signed at the appropriate level of delegation within the council.

Awarding the contract always involves the passing of documentation. In relation to health and safety this meant MCP transferring to Clearway Civil Contracting Ltd:

- all appropriate permissions and approvals for the work
- design documents
- risk assessment documentation completed during the design and tender stages
- a summary of reporting requirements
- details of contact personnel.

CCC Ltd transferred to MCP:

- the completed health and safety plan for the project
- documentation of personnel qualifications as required
- information on reporting
- contacts for project reporting.

MONITORING PERFORMANCE OF THE CONTRACT: The work was scheduled to take place over a total of 30 weeks.

CCC Ltd provided written reports to MCP monthly. MCP reviewed these reports against tender performance criteria and discussed any points of variance in a report to the council.

Every week there was a site meeting, convened by CCC Ltd's project manager and engineer as appropriate. The council's contracts manager, engineer or other personnel would also attend when required. An agenda and minutes were kept for each meeting. Health and safety was an agenda item, although frequently other agenda items concerned matters that had an impact on health and safety.

All incidents and accidents on site were reported to the principal via MCP.

Operate Safe formed the basis of CCC Ltd's health and safety management programme. It has the following components:

- Key performance indicators - to allow companies to ensure they meet or exceed the average industry performance - and a requirement for Improvement Plans where performance falls short.

- Systems and Training - internal systems to meet the audit requirements of ACC WSMP programme and training (evidence based) to exceed the HSE Act requirements for Induction training, through a hierarchy of cards for operatives, based on national education qualifications (unit standards and National Certificates).
- Auditing - evidence based internal (including maintaining the hazard register) and to meet ACC WSMP accreditation.

BEST PRACTICE: For training - through mandatory Operate Safe courses.

For auditing - through an industry best practice guide (based on a current and sector specific ranked risk and hazard analysis) for WSMP secondary accreditation.

Operate Safe requires agents and principals to review their own performance on site - including ensuring that, at least, records show there is appropriate task analysis, necessary training, and that suitably qualified subcontractors and personnel are being utilised by the contractor.

POST-CONTRACTUAL EVALUATION: MCP completed a full review of the contract and contractor performance. It used this to monitor its own performance, update its pre-tendering register, and to provide a report to the council. The council's contract manager used the information to plan further work and for planning maintenance and other subsequent work in relation to the new road.

Performance indicator data was forwarded to the national KPIs database held by the Centre for Advanced Engineering (University of Canterbury).

CCC Ltd reviewed its own performance against the key performance indicators.



CASE STUDY 4: Motor vehicle insurer includes health and safety in its approved repairer processes

PRINCIPAL: Combined Vehicle Insurers (CVI) acting on behalf of its policyholders

CONTRACTORS: Up to 150 motor vehicle repairers nationwide

NATURE OF THE WORK: CVI is a significant motor vehicle insurer with a national network of offices. It offers insurance to businesses as well as private insurers. As part of its business it receives several thousand motor vehicle claims each year.



Health and safety issues are significant in the motor vehicle repair industry. There are mechanical hazards, and considerable occupational health hazards, particularly from dusts and the use of solvents and isocyanate-based paints. For a smaller business these can require considerable investment in the appropriate controls, including spray booths and respiratory protective equipment.

For repair firms, these investments are often linked to improvements in quality and productivity. Insurance companies play a significant role by requiring and maintaining standards that encourage the firms they contract to invest in appropriate equipment and healthy and safe systems of work.

ORGANISATION: In responding to motor vehicle claims, CVI allows its customers a choice of which repairer they use from an extensive list of approved repairers. To gain CVI “approval” repairers need to meet a range of requirements, including health and safety.

The approved repairer programme is organised nationally, and the company uses its network of loss assessors/adjustors to not only assess damage and approve individual claims, but also to monitor the ongoing performance of repairers. CVI also requires annual review of each “approval”.

PRE-TENDERING: The approved repairer programme is in effect a form of pre-tendering. CVI collect a range of information concerning staffing and other factors to indicate the repairer’s ability to provide repairs of suitable quality and timeliness. There is also some emphasis on the quality of client access, reception areas and the provision of other services to CVI’s policyholders as they use the approved repairer. A customer survey is included in the process.

Health and safety, along with quality assurance, is a significant component of the approval process. Repairers’ premises are assessed for the quality of equipment and

work methods. This places emphasis on electrical and mechanical plant safety, the application of hazardous substances (HSNO) controls and codes of practice for painting operations and dust control, including spray booth design and maintenance.

As part of evaluating the quality and safety of the work environment, approved repairers provide evidence of their staff induction and training provision, hazard management processes and emergency procedures in place.

Although repairers may provide evidence of membership to or accreditation by an industry association, this is additional to the assessment carried out by

CVI's assessors, who complete the approval of individual repairers. Assessors are all recruited to their role on the basis of their industry experience, and this involves awareness of the health and safety issues associated with motor vehicle repair work.

Approval takes the form of an initial questionnaire/proposal completed by the repair firm. CVI's assessors then evaluate this and either follow up with further questions, or assess aspects of the individual workplace as appropriate.

The approval is reviewable by CVI annually.

TENDERING: Repairs are quoted and negotiated between assessor, client and repairer on an individual basis.

The approved repairer process means issues of quality, timeliness and price are able to be dealt with against a background of agreed standards, including those for health and safety. It also gives assurance to repairers that their pricing will not be in competition with businesses that do not meet health and safety and other standards, and so is an incentive against corner cutting.

AWARDING THE CONTRACT AND MONITORING PERFORMANCE: The payment for any repairs to the policyholder's car is made by CVI to the repairer. Legally, this makes CVI a "principal" – being a person who or that engages any person (other than as an employee) to do any work for gain or reward.

Individual contracts for repairs tend to be of a predetermined nature and for short duration, meaning CVI does not usually monitor contractor performance, other than to deal with variations in the agreed work (contract).

CONTRACTOR REVIEW AND EVALUATION: All significant repairs are inspected on completion.

CVI reviews the performance of individual contracts for quality, timeliness and other aspects of the contractor's performance.

Assessors' knowledge and experience can mean they can note and respond to health and safety issues as they visit and deal with repairers. This informs the annual review.



Case study 5: Government department lets a contract for the cleaning of a large office in a suburban shopping mall

PRINCIPAL: Department of Wellbeing

CONTRACTORS: Immaculate Services Ltd

PROJECT: A contract to clean a large office for 200 staff, and including some public spaces, in a regional shopping centre.

ORGANISATION: The Department of Wellbeing's policy is to review all extended contracts for services at three-yearly intervals. If a right of renewal isn't exercised, the department carries out a full tendering process for a new contract.



The department has standardised contracting processes, including for health and safety. However these are able to be adapted to suit local circumstances.

The department is also bound to follow the *Principles for the Property Services Industry*, a government statement recognising that the interests of all participants in the industry are served by low turnover in cleaning staff, high levels of training and low levels of occupational illness and injury.

PRE-TENDERING: Before the tendering process began, the department evaluated the existing contractor's performance. This included the facilities manager talking with different work groups and key users within the office, and led to refinements of how the work is organised and the terms of the contract. These had an effect on conditions for contractor staff and on health and safety. A Request for Tender document was prepared after the review.

The contract was placed on the Government Electronic Tender Service and advertised in the local newspaper. When businesses expressed an interest in tendering they were asked to supply some basic information on their capability and experience to prequalify for tendering.

TENDERING: The Request for Tenders document was sent to four selected businesses.

The process was led by the department's facilities manager, who acted as the contact point for tenderers. He emphasised that the department encouraged variations or improvements on the RFT document where appropriate.

Detailed information was expected on, among other things:

- equipment and personnel being used to complete the work
- any subcontracting included
- referees on performance
- a health and safety plan.

This encouraged tenderers to provide information on quality management, health and safety management and security systems. The request for tenders included a summary of the evaluation criteria that the department would use to select the successful tender. It also included a comprehensive set of safety and security instructions for contractors to the Department of Wellbeing.

TENDER REVIEW, EVALUATION, AND CONTRACTOR SELECTION: Tenderers were assessed against the criteria included in the RFT, with specific reference to satisfactory health and safety performance being a requirement.

AWARDING THE CONTRACT AND INFORMATION-SHARING: The contract contained specific references to health and safety management. It set out the obligations of the principal and the contractor.

The Department of Wellbeing said it would:

- provide the contractor with all relevant policies and procedures, including emergency procedures, and with information on hazards in the workplace
- ensure access to and maintain the building and equipment in good working order
- take all reasonable steps to ensure a safe working environment.

Immaculate Services Ltd said it would:

- comply with the department's health and safety policies and procedures
- notify the department of any hazards identified in the premises by its employees
- provide evidence, on request, of all induction and training procedures, working processes and procedures demonstrating its compliance with its obligations under the HSE Act
- reserve the right, without penalty, to refuse to carry out work under conditions it considers dangerous to its employees, the department's employees, or the public on or near the department's premises.

The contract also contained provisions concerning security, limitations on subcontracting, and mutual undertakings to meet a range of statutory requirements. Immaculate were expected to provide a health and safety management plan.

The contract also required monthly meetings between the department's facilities manager and the contractor.

REGULAR MEETINGS: A brief monthly meeting covers performance and quality standards, any changes to access or facilities and encourage exchange of information between the office workers and the contractor. The contractor uses the meeting to advise of staff changes and security related issues and any incidents or areas for improvement. Meetings are regular and at the same time and place where practical. The facilities manager sends a note to the contractor in advance of any agenda items beyond usual reporting issues. Brief minutes are also kept of the meeting, of any reporting requirements and any decisions made at the meeting.

MONITORING PERFORMANCE OF THE CONTRACT: The monthly meetings are an important part of the principal's monitoring of the contract. In addition an annual review is completed and the results are discussed with the contractor.

Glossary

The following key terms are defined in section 2 of the Health and Safety in Employment Act 1992, or where indicated, in the Health and Safety in Employment Regulations 1995. The definitions are reproduced here, sometimes in paraphrase, with commentary in italics where applicable.

Accident means an event that

- a) causes any person to be harmed, or
- b) in different circumstances, might have caused any person to be harmed.

The Act prescribes investigation, hazard management and reporting duties after an accident. It should be noted the definition in terms of the Act is broader than in common usage and includes "near misses" as well as events causing injury or illness.

All practicable steps: in relation to achieving any result in any circumstances, means all steps to achieve the result it is reasonably practicable to take in the circumstances, having regard to the:

- a) nature and severity of the harm that may be suffered if the result is not achieved
- b) current state of knowledge about the likelihood that such harm of that nature and severity will be suffered if the result is not achieved
- c) current state of knowledge about the harm of that nature
- d) current state of knowledge about the means available to achieve the result, and about the likely efficacy of each
- e) availability and cost of each of those means.

A person required to take all practicable steps under the Act is required to take those steps only in respect of circumstances that the person knows, or ought reasonably to know, about.

This important term is discussed on page 7, The extent of the duty.

At work: in relation to any person, means present, for gain or reward, in the person's place of work.

The definition depends on that for "place of work". It also raises the question of timing as to when a person is in their place of work, but not necessarily for gain or reward. Is for example an employee "at work" during their unpaid lunch break? The courts are likely to say yes if the purpose of their coming to work was for gain or reward, and their shift is continuing after the break. On the other hand a visit to a place of work for private purposes, and after the hours of work, is less likely to be construed as "at work".

Construction work is defined by Regulation 2 as:

- (a) any work in connection with the alteration, cleaning, construction, demolition, dismantling, erection, installation, maintenance, painting, removal, renewal, or repair, of -
 - (i) any building, chimney, edifice, erection, fence, structure, or wall, whether constructed wholly above or below, or partly above and partly below, ground level
 - (ii) any aerodrome, cableway, canal, harbour works, motorway, railway, road, or tramway
 - (iii) any thing having the purpose of drainage, flood control, irrigation, or river control
 - (iv) any distribution system or network having the purpose of carrying electricity, gas, telecommunications, or water
 - (v) any aqueduct, bridge, culvert, dam, earthwork, pipeline, reclamation, reservoir, or viaduct
 - (vi) any scaffolding, and
- (b) includes any work in connection with any excavation, preparatory work, or site preparation carried out for the purposes of any work referred to in paragraph (a) of this definition; and
- (c) includes any work referred to in paragraph (a) or paragraph (b) of this definition carried out underwater, including work on buoys, obstructions to navigation, rafts, ships, and wrecks; and
- (d) includes the use of any materials or plant for the purposes of any work referred to in any of paragraphs (a) to (c) of this definition, and
- (e) includes any inspection or other work carried out for the purposes of ascertaining whether any work referred to in any of paragraphs (a) to (c) of this definition should be carried out; but
- (f) does not include any work in any mine, quarry, or tunnel.

Contractor: a person engaged by any person (otherwise than as an employee) to do any work for gain or reward.

Employee: primarily a person employed by any other person to do any work (other than residential work) for hire or reward; and, in relation to any employer, means an employee of the employer.

There are some exceptions where, for example, volunteers, persons involved in job training or work experience, or loaned employees, are deemed to be employees for purposes of the Act.

Employer: primarily someone who or that employs any other person to do any work for hire or reward; and in relation to any employee, means an employer of the employee.



Again, there are some exceptions where, for example, volunteers, persons involved in job training or work experience, or loaned employees, are deemed to be employees for purposes of the Act.

Facility: includes amenity and equipment.

This definition is particularly relevant to the application of regulations made under the Act concerning the provision of facilities.

Fail: includes refuse; “failure” includes refusal.

Harm: illness, injury, or both and includes physical or mental harm caused by work-related stress; “to harm”, “harmed” and “unharmed” have corresponding meanings.

See also, “serious harm”, below.

Hazard: an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm; and includes

- (i) a situation where a person’s behaviour may be an actual or potential cause or source of harm to the person or another person and
- (ii) without limitation, a situation where a person’s behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition that affects a person’s behaviour.

“Hazardous” has a corresponding meaning.

Home: means a place occupied as a dwelling house; and includes any garden, yard, garage, outhouse, or other appurtenance, of a home.

Machinery: means an engine, motor, or other appliance that provides mechanical energy derived from compressed air, the combustion of fuel, electricity, gas, gaseous products, steam, water, wind, or any other source; and includes -

- a) any plant by or to which the motion of any machinery is transmitted
- b) a lifting machine, a lifting vehicle, a machine whose motive power is wholly or partly generated by the human body, and a tractor.

This definition is particularly relevant to the application of regulations made under the Act and concerning machinery.

Notifiable work: is defined by Regulation 2 of the Health and Safety in Employment Regulations 1995 as:

- (a) any restricted work, as that term is defined in Regulation 2 (1) of the Asbestos Regulations 1999
- (b) any logging operation or tree-felling operation, being an operation that is undertaken for commercial purposes

(c) any construction work of one or more of the following kinds:

- (i) work in which a risk arises that any person may fall 5 metres or more, other than
 - work in connection with a residential building up to and including 2 full storeys
 - work on overhead telecommunications lines and overhead electric power lines
 - work carried out from a ladder only
 - maintenance and repair work of a minor or routine nature;
- (ii) the erection or dismantling of scaffolding from which any person may fall 5 metres or more
- (iii) work using a lifting appliance where the appliance has to lift a mass of 500 kilograms or more a vertical distance of 5 metres or more, other than work using an excavator, a fork-lift, or a self-propelled mobile crane
- (iv) work in any pit, shaft, trench, or other excavation in which any person is required to work in a space more than 1.5 metres deep and having a depth greater than the horizontal width at the top
- (v) work in any drive, excavation, or heading in which any person is required to work with a ground cover overhead
- (vi) work in any excavation in which any face has a vertical height of more than 5 metres and an average slope steeper than a ratio of 1 horizontal to 2 vertical
- (vii) work in which any explosive is used or in which any explosive is kept on the site for the purpose of being used
- (viii) work in which any person breathes air that is or has been compressed or a respiratory medium other than air.

Notification of hazardous work is defined by Regulation 26 of the Health and Safety in Employment Regulations 1995, which requires that:

- (a) Every employer who intends to commence any notifiable work (or work that will at any time include notifiable work) shall take all practicable steps to lodge notice of that intention.
- (b) A notice required to be lodged under this regulation must
 - be lodged at an office that deals with occupational safety and health matters, being the nearest such office of the Ministry of Business, Innovation and Employment to the place where the work is to be carried out
 - be in writing
 - be given at least 24 hours before the time at which the employer intends to commence the work and



- contain the following particulars:
 - (i) the nature and location of the work
 - (ii) the name, address, and contact details of the employer
 - (iii) the intended date of commencement of the work
 - (iv) the estimated duration of the work.

(c) It is not necessary for any employer to lodge notice before commencing any construction work or tree felling operation necessary to deal with an emergency arising from:

- damage caused by any earthquake, explosion, fire, flood, lightning, ram, slip, storm, or washout; or
- the blockage or breakdown of any drain or sewer
- the blockage or breakdown of any distribution system or network for electricity, gas, telecommunications, or water.

The duty to notify extends to “employers”, but “employer” is then broadly defined as any person who controls a place of work and so includes principals who control places of work.

Person: includes the Crown.

Person who controls a place of work: in relation to a place of work, means a person who is the:

- a) owner, lessee, sublessee, occupier, or person in possession, of the place or any part of it
- b) owner, lessee, sublessee, or bailee, of any plant in the place.

Place of work: a place (whether or not within or forming part of a building, structure, or vehicle) where a person is to work, is working, for the time being works, or customarily works, for gain or reward; and

In relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee), -

- a) Where the employee comes or may come to eat, rest, or get first-aid or pay; or
- b) Where the employee comes or may come as part of the employee’s duties to report in or out, get instructions, or deliver goods or vehicles; or
- c) Through which the employee may or must pass to reach a place of work.

Further, a person is defined as being in a place of work whenever and wherever the person performs work, including in a place that the person moves through or a place that itself moves.

It is clear from the definition of a place of work that it is not confined to fixed sites where people work but extends also to places where employees are “on the move” while working

(for example, trucks and boats) or places through which employees must pass for work-related purposes (for example, bridges, passages, and other access points).

Plant: includes -

- a) an appliance, equipment, fitting, furniture, implement, machine, machinery, tool, and vehicle
- b) part of any plant, the controls of any plant, and any thing connected to any plant.

Because it begins with the word "includes", this definition supplements the everyday meaning of the word 'plant', and does not limit its terms.

Principal: a person who or that engages any person (otherwise than as an employee) to do any work for gain or reward.

This describes a contract for services under which the person performing the work is self-employed.

Residential work: in relation to the occupier of a home, means -

- a) domestic work done or to be done in the home
- b) work done or to be done in respect of the home,
 - by a person employed or engaged by the occupier solely to do work of one or both of those kinds in relation to the home.

Safe:

- a) in relation to a person, means not exposed to any hazards
- b) in every other case, means free from hazards; - and "unsafe" and "safety" have corresponding meanings.

Serious harm: death, or harm of a kind or description set out in the Schedule 1 of the Act, or declared by regulation to be "serious" for the purposes of this Act; "seriously harmed" has a corresponding meaning.

No regulations for this purpose have been passed to date and Schedule 1 applies.

Significant hazard: hazard that is an actual or potential cause or source of -

- a) serious harm
- b) harm (being harm that is more than trivial) the severity of whose effects on any person depend (entirely or among other things) on the extent or frequency of the person's exposure to the hazard
- c) harm that does not usually occur, or usually is not easily detectable, until a significant time after exposure to the hazard.



“Significant hazard” is an important definition for determining the responses required by employers managing hazards under the duties of sections 7-10 of the Act. It is important to note the definition is considerably wider than just a cause of “serious harm”. This has the effect of placing employers on notice that they need to identify and manage hazards with the potential for any harm that is not trivial. The harm might only occur after a long time. Likewise, the potential harm may vary in degree according to the intensity or duration of exposure to the hazard.

Subcontractor: a person engaged (otherwise than as an employee) by any contractor or subcontractor to do for gain or reward any work the contractor or subcontractor has been engaged (as contractor or subcontractor) to do.

The Act imposes the same duties on a subcontractor as a “contractor”.



FOR FURTHER INFORMATION ON HEALTH AND SAFETY VISIT WWW.DOL.GOV.T.NZ OR PHONE 0800 20 90 20

