Public Interest Disclosures Act 2022

# Template contract clauses for agency service contracts

[Note: s. 82 of the Public Interest Disclosures Act 2022 “applies to a contract or subcontract (an agency service contract) under which a person or body is engaged to provide services on behalf of an agency (the contracting agency), including an engagement to exercise a function mentioned in section 81(3)”.

Section 82(2) provides that “A contracting agency, person exercising the functions of a contracting agency or head contractor, as applicable, must not enter into an agency service contract on or after the day on which this section commences unless the terms of the contract require the engaged person or body to” do certain things specified in that section.

The PID Act commences on 1 October 2023 (Commencement Proclamation 2023 No. 11).

This sample clause may be included in agency service contracts to comply with the requirements of s. 82(2). The clause may need to be adapted to reflect the contract in question, including by changing defined terms where appropriate and updating the clause numbers.]

## *[Guide notes should be removed before issuing the contract.]*

1. Definitions and interpretation
   1. In this Agreement, unless the context otherwise requires:

…

**“PID Act”** means the Public Interest Disclosures Act 2022.

…

* 1. Except where the context otherwise requires:
     1. References to legislation. A reference to a statute, regulation, ordinance or by-law (“Law”) will be deemed to extend to include a reference to all statutes, regulations, ordinances or by-laws amending, consolidating or replacing that Law from time to time.

[Note: an Agreement should include an interpretive provision along the lines of (a) above to ensure that any amendments to the PID Act from time to time will be picked up.]

…

1. Public Interest Disclosures
   1. In this cl. [X] (Public Interest Disclosures), words and expressions:
      1. which are not defined in this Agreement, but which have a defined meaning in the PID Act, have the same meaning as in the PID Act; and
      2. which are defined in this Agreement but, by such a definition, are given a different meaning in other clauses of this Agreement to the meaning given in the PID Act, take the same meaning as in the PID Act in this clause.
   2. The [Contractor] must ensure that all individuals involved in providing services under this [Agreement] are made aware of the following:
      1. that those individuals are public officials for the purposes of the PID Act;
      2. how to make a voluntary public interest disclosure;
      3. the [Agency]’s public interest disclosure policy; and
      4. the fact that a person who is dissatisfied with the way in which a voluntary public interest disclosure has been dealt with may be entitled to take further action under the PID Act or another Act or law.

[Note: the above requirements will, practically speaking, require the Agency to provide copies of, or access to, the Agency’s public interest disclosure policy. If it is not dealt with elsewhere in the Agreement (eg, a general information sharing or cooperation clause), the Agency may wish to include a clause along the following lines. However, if the policy is publicly available on the Agency’s website pursuant to s. 47(1)(a) of the PID Act then it may not be necessary for the Agency to provide a copy of the policy to the Contractor but would be sufficient to provide information on how to access it on the Agency’s website. The following suggested draft clause could be adjusted accordingly:

“The [Agency] will provide the Contractor with a copy of, or access to, or information on where to access on the Agency’s website, the [Agency]’s public interest disclosure policy to assist the [Contractor] to comply with cl. [X.2] of this [Agreement].”]

* 1. The [Contractor] must notify the [Agency] of a voluntary public interest disclosure of which the [Contractor] becomes aware where either:
     1. the disclosure relates to the [Agency]; or
     2. the maker of the disclosure is known to be a public official associated with the [Agency].

[Note: s. 20 of the PID Act (Key terms – relationships) contains definitions of “relates to” and “associated with”. In addition to subcl. (1), the Agency may wish to include a note to this effect to draw the Contractor’s attention to these key terms.]

* 1. The [Contractor] must notify the [Agency] of serious wrongdoing committed, or alleged to be committed, by an individual providing services under this [Agreement].

[Note: s. 82(2) of the PID Act does not specify any procedural requirements in respect of notification under this provision. In its current form, this clause will likely pick up any other notification clauses in the Agreement generally (for example, which require notifications to be in writing and given to a specified person). An Agency may consider amending this clause, other general notification provisions, or the Agency’s relevant policies to ensure that notifications under this clause are received in an appropriate timeframe.]

* 1. The [Contractor] must use its best endeavours to assist in an investigation of serious wrongdoing if requested to do so by a person dealing with a voluntary public disclosure on behalf of the [Agency] or any other agency (as defined in the PID Act).
  2. The [Contractor] acknowledges that:
     1. the [Agency] has an obligation to take corrective action under s. 66 of the PID Act; and
     2. the [Agency] has a right to terminate the [Agreement] in response to a finding of serious wrongdoing or other misconduct involving the [Contractor] or an individual providing services under this [Agreement].

[Note 1: the Agency should also consider including a provision in the termination clause which specifically provides: “The Agency may terminate this Agreement in response to a finding of serious wrongdoing or other misconduct involving the Contractor or an individual providing services under this Agreement”. The termination procedures applying to other breaches under the Agreement may also apply to this right to terminate, and will depend on the Agreement.]

[Note 2: an Agency may wish to include a note to draw the Contractor’s attention to the potential for corrective actions that might affect a Contractor under PID Act s. 66, for example (but without limitation), under s. 66(4)(e) or 66(4)(f).]

[Note 3: noting that an Agency may take corrective action in the form of the payment of compensation to persons affected by serious wrongdoing or other misconduct under the PID Act s. 66(4)(f), an Agency may wish to include a provision in the indemnity clause of the Agreement which specifically provides that the Contractor will indemnify the Agency in relation to any payment of compensation by the Agency under s. 66 of the PID Act arising from or in connection with any serious wrongdoing or other misconduct involving the Contractor or an individual providing services under this Agreement. The specific wording for such a clause will depend on the drafting and structure of the Agreement’s indemnity clause.]

* 1. If the [Contractor] subcontracts the [Agreement] in whole or in part, the [Contractor] must ensure that the subcontract contains terms binding the person or body engaged under the subcontract that are equivalent to the terms binding the [Contractor] in this cl. [X] (Public Interest Disclosures).

[Note: this subclause may be deleted if the Agreement does not permit the Contractor to subcontract the Agreement or any part of the Agreement.]

* 1. The [Parties] acknowledge that the regulations made under the PID Act may make further provision about terms that must, or must not, be included in an agency service contract or a class of agency service contracts.

[Note: Agencies when using this PID clause should check the regulations made under the PID Act and seek to incorporate any requirements to include or not include a particular term in the Agreement at the time of Agreement preparation. Clause 2.8 may operate as both a prompt to the parties and/or as a ‘backstop’, so that the contract parties remain aware that PID Regulations might be made that are relevant.]