



TRADITIONAL CONTRACTING REFORM

RESPONSE TO CONSULTATION PAPER

APRIL 2012

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INTRODUCTION

About Consult Australia

Consult Australia is the association for professional services firms within the built and natural environment; influencing policy, creating value and promoting excellence. As an association, our primary focus is on improving the commercial environment for our members and raising standards across the industry.

Our member firm services include, but are not limited to: design; architecture; technology; engineering; planning; landscape architecture; surveying; cost consulting (quantity surveyors); project management; environmental science; and management solutions. We represent some of the industry's biggest players in this space with our member firms collectively employing more than 50,000 staff.

Consult Australia is a member of the Australian National Engineering Taskforce (ANET), National Engineering Registration Board (NERB), Australian Chamber of Commerce and Industry (ACCI), the Australian Construction Industry Forum (ACIF), and the Australian Services Roundtable (ASR). Consult Australia is a host organisation for the annual Built Environment Meets Parliament (BEMP) summit.

Executive summary

Consulting firms in the built environment supply professional services to government on an extensive range of services and projects. Some 42 per cent of consulting engineers' income in 2009-10 was earned directly from Australian governments.¹ This does not include the very significant contribution that Consult Australia members make working as consultants to 'design and construct' contactors working on government contracts. Accordingly, the nature of contractual relationships between consultants and government is of the utmost importance to Consult Australia.

This submission summarises some of the major issues in contracting today, and proposes solutions that will lead to stronger contractual relationships and better outcomes for consultants and government.

The move to develop a national approach to contracting is welcomed, subject to the issues of concern being properly addressed in the new, national approach. On a number of issues canvassed in the discussion paper, preliminary recommendations call for guidelines to be established to ensure uniformity. The contents of those guidelines, and the input of industry into their development through a consultation process, are critical to ensuring their long-term success and widespread adoption.

Issues related to the allocation of risk, limits on liability, probity, procurement skills in government agencies, and the cost of tendering are all fundamental to creating better contractual relationships. These are addressed in this submission in response to the seven draft recommendations, as well as more broadly at the outset. Any attempts to move towards "best practice" contracting schemes around Australia have to satisfactorily address each of these concerns. To this end, we submit AS4122-2010 as a standard contract that is the result of extensive consultation and deals with these issues to the benefit of all parties involved.

Some of the issues in this submission have already been canvassed publicly in Consult Australia's submission to the Senate Inquiry into the *Shortage of Appropriate Engineering and Related Employment Skills in Australia*. As with that submission, we look forward to working with governments, in this and other forums, in all Australian jurisdictions to work towards these outcomes, and to achieve "best practice" procurement practices.

Part 1: Issues in Contracting Across Australia

Background

There is presently high demand for infrastructure development in Australia and globally, involving projects valued in the billions of dollars. Competition for the scarce pool of human resources and diminishing construction materials has placed a greater emphasis on good procurement practices. At the centre of good procurement processes at all levels of government is the need for best practice contracting that benefits both government and the consultants or other contractors engaging with them.

Australia's performance supporting the procurement and delivery of building and construction projects has been well documented in recent years in successive reports highlighting key areas of concern and identifying opportunities for improvement. In the context of this review into traditional contracting, these reports provide lessons learned with relevance for procurement of goods and services across government, not just in infrastructure construction:

Scope for Improvement

The three Scope for Improvement reports undertaken and published by Blake Dawson in 2006¹, 2008² and 2011³, provide a valuable cross-section of pressure points in the building and construction industry. Together the three reports represent a survey covering a cross-section of the industry representing \$80 billion worth of projects in Australia considering the perspectives of diverse stakeholders. The issues identified and recommendations included in each of the reports should be closely considered as part of the reform of contracting. Highlights are summarised below.

2006: A Survey of Pressure Points in Australian construction and infrastructure projects

This landmark report identifies 'five main issues [that] hamper Australian construction and infrastructure projects, leading to major pressure points at all stages of their life cycle:'

- A shortage of skilled resources;
- Inadequate scoping;
- Use of inappropriate delivery methods;
- Poor risk allocation;
- Unrealistic time and cost objectives.

These issues result in cost overruns, delays and increased disputation. Importantly for government, they lead not only to adverse financial outcomes, but significant reputational damage as manager of public finances. The critical role of skilled workers was highlighted in this report as presenting multiple options for

¹ Blake Dawson Waldron with the Australian Constructors Association. 2006. *Scope for Improvement: A survey of pressure points in Australian construction and infrastructure projects*. www.blakedawson.com

² Blake Dawson with the Australian Constructors Association and Infrastructure Partnerships Australia. 2008. *Scope for Improvement 2008: A report on scoping practices in Australian construction and infrastructure projects*. www.blakedawson.com

³ Blake Dawson with the Australian Constructors Association, Infrastructure Partnerships Australia and the energy Supply Association of Australia. 2011. *Scope for Improvement 2011: Project risk — Getting the right balance and outcomes*. www.blakedawson.com

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government and industry to respond proactively through better attraction and retention of skilled persons and more efficient use of existing resources.

2008: A report on scoping practices in Australian construction and infrastructure projects

Building on the 2006 key findings, the 2008 report examines current and increasing problems associated with scoping Australian construction and infrastructure projects. The report notes a high prevalence of deficient scoping in projects and estimates scoping inadequacies resulting in 26 per cent of the \$1 billion+ projects surveyed being more than \$200 million over budget.⁴

Six main factors are identified as leading to poor scoping:

- Lack of experienced and sufficiently competent personnel;
- Insufficient time to prepare scope documents;
- Inadequate definition of project objectives by the principal resulting in subsequent changes to the scope;
- Corrections to scope documents;
- Lack of consultation with end users; and
- Insufficient site information.

Key recommendations from the report to improve scoping include:

- Clearly identifying project objectives;
- Bringing together all relevant stakeholders and end users for the projects;
- Setting realistic timeframes and budgets;
- Interface the proposed project with related projects and existing infrastructure;
- Clearly describe the project objective and requirements
- Choose the right contract delivery model;
- Include site related information; and
- Resolve scoping issues and disputes under a contract.

2011: Project risk — Getting the right balance and outcomes

The most recent instalment in the Scope for Improvement series notes the importance highlighted in the first report of effective risk allocation to successful project delivery. Picking up many of the themes common to the 2006 and 2008 reports, the 2011 report identifies those approaches compromising project outcomes as they impact on effective risk allocation. These include:

- Inadequate scoping of project requirements;
- A lack of appropriately skilled and experienced personnel to examine risk at project outset;
- Pro forma risk allocation without consideration of project specific issues;
- Insufficient time and budget to appropriately identify and to allocate risk in contract documents;
- A failure to actively and adequately manage risk throughout the project; and
- Ineffective communication and relationships between project participants.

In response a range of options and tools to improve risk management are outlined. Of particular relevance in response to the Discussion Paper, the report notes the importance of:

⁴ Blake Dawson with the Australian Constructors Association and Infrastructure Partnerships Australia. 2008. *Scope for Improvement 2008*. Page 7

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- Fair, consistent and accurate contract documents;
- Availability of information; and
- Limitations on liability.

The range of issues highlighted through the Scope for Improvement reports demonstrates the complexity of interdependent issues impacting on successful project delivery. Importantly these issues also reflect the concerns and experience of our member firms doing business around Australia and providing services to the Commonwealth and various state governments, their departments and agencies.

In this context it is vital that a wide lens is cast on opportunities to improve contracting in Australia with a view to improving procurement skills, governance, risk management and contract conditions and management across the industry.

Part 2: Towards A National Approach

Question 1 - Do you agree that a national approach towards traditional contracting (incorporating the seven recommendations) would benefit the infrastructure industry?

A national approach to contracting would be of great benefit to the infrastructure industry, and the consulting firms that Consult Australia represents. Many of Consult Australia's member firms operate across Australian jurisdictions, and in some cases overseas as well. A uniform approach to contracting will reduce legal costs, streamline the negotiation process to provide simplicity and consistency, and will make it easier for consulting firms to do business with government.

In developing a national approach, there is a unique opportunity to move towards "best practice" in contracting. Indeed, the move to improved contracts is so important that a national approach will be wholly undermined if a national approach does not adopt "best practice" elements in its contracts. This approach has at its core a collaborative approach to contracting, working hand in hand with industry, to achieve better outcomes for all participants in the contracting process.

The development of standard contracts (such as *AS4122-2010: General Conditions of Contract for Consultants*) and support for a less adversarial approach to traditional contracting will be to the benefit of all parties.

Such an approach supports Consult Australia's key concerns in response to traditional contracting, namely that commercial terms are fair, risk is appropriately shared between the parties, liability is limited, proportionate liability is observed, and a less adversarial approach is adopted. These are outlined throughout this submission.

We would also like to emphasise the importance of working with industry, including holding a consultation processes, as contracts are developed. The consultation should be a true collaborative process that acts on concerns raised by industry, and does not just pay lip service to stakeholder issues. This will ensure all the benefits of better contracting – reduced disputation/ litigation, improvements in efficiency and reduced cost – are realised.

Risk Management

There is no more significant issue affecting the outcomes of procurement in relation to the built environment than the allocation of risk between parties. Liability in procurement must be managed equitably, with regard to good risk management and the limitations of professional indemnity insurance.

Current government procurement practices associated with professional services in the built environment either unnecessarily add to the cost of doing business, or run counter to government policy aimed at delivering best-practice procurement and facilitating insurance markets. For example, the lack of standardisation of fair and efficient contract terms, procurement guidelines and risk allocation across governments and agencies sees gross inefficiencies, increased costs and lost time to negotiation and disputation across all parties.

Consult Australia is opposed to requirements of excessive or unlimited liability contract clauses on the basis that these requirements promote the acceptance of risks which are beyond the control of any consulting

firm. Such practices threaten the sustainability of our industry, produce uncertainty and higher costs for clients and do not promote good risk management to the expectation of the community.

The imposition of clauses demanding unlimited liability of consulting firms, and the contracting out of proportional liability legislation in contracts with these firms, put at risk the affordability and availability of professional indemnity (PI) insurance covering services provided by professionals and providing protection to the consumers of those services.

Such practices ignore good risk management and see the parties responsible assume unknown risks where insurance is not available to cover the liabilities sought. Such behaviours distort the terms on which firms compete for work, and expose all parties to the possibility of project failure, unforeseen costs and poor value for money outcomes.

Despite the insurance crisis of the early 2000s and the consequent passage of Proportionate Liability (PL), and Professional Standards Legislation (PSL) by Australian governments, public sector procurement practices have yet to reflect the policy intent of these legislative reforms.

[In response to Draft Recommendation 4]

Unlimited Liability

Consulting firms accept that they have professional liability for the services they deliver however it is becoming common practice for many government departments and agencies to pass most or all of the risk for the entire project to the consulting firm through contractual conditions. This results in excessively high or unlimited liability to the extent that it is unmanageable in the event that a risk is realised.

By requiring consultants to sign up to contracts that contain unlimited liability clauses, or contracts which are silent on the question of limits on liability, government is demonstrating a lack of understanding about how insurance works. There are no insurance companies offering unlimited insurance policies in Australia. In practice, this means that in the event a consulting firm accepts an unlimited liability clause and a claim is brought against them, their insurance policy will be unlikely to respond to the full extent of the claim (if at all), leaving the balance of the liability with the balance sheet of the firm and ultimately, the client. In a practical worst case scenario, it means the consulting firm going out of business, and the client being left with the liability.

Consult Australia is aware that when faced with excessive or unlimited liability clauses in contracts, many consulting firms are reviewing their willingness to bid for work. The firms which are taking these decisions are often among the top performers, those which can and do deliver cost-effectively and at a high standard of quality. As a result, the pool of potential suppliers is decreased. Alternatively, the unreasonable expectations of liability may be built into the fee levies. Both of these outcomes reduce the potential for a competitive procurement model to deliver best outcomes.

Consult Australia has long lobbied for government departments and agencies to not impose unlimited liability clauses. The most common response we receive is that they understand the issues and concede that it is unfair and unreasonable to impose unlimited liability, but their hands are tied as they are bound to adhere to government policy.

Consult Australia would like to note that there are examples of government departments and agencies that have agreed to more reasonable and equitable liability clauses in contracts. Those agencies that fail to act

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on the risk and liability issues raised in this submission risk becoming less attractive for businesses in the building and construction industry. A list of government departments and agencies that have agreed to contractually limit liability is set out below:

- West Australian Department of Treasury and Finance (DTF) through its subset Building Management & Works;
- West Australian Department of Housing;
- West Australian Public Transport Authority;
- The Northern Territory Government Power & Water Corporation;
- Queensland Department of Public Works;
- Queensland Department of Main Roads;
- SA Water;
- Victorian Department of Primary Industries; and
- Commonwealth Department of Climate Change.

[In response to Draft Recommendation 4]

Commonwealth liability reform

Generally speaking, government procurement practice has been slow to recognise the legitimacy of limitation of liability for providers of goods and services to government. In relation to risk management, the Commonwealth Procurement Guidelines 2008 enunciates the general principle that "risks should be borne by the party best placed to manage them – that is, agencies should generally not accept risks which another party is better placed to manage". For the most part, this has been interpreted by government procurement agencies as meaning that risks should be borne by the provider of goods or services to government clients.

This tendency was reinforced by Regulation 10 of the Financial Management and Accountability Regulations 1997, which up until recently stated "If any of the expenditure under a spending proposal is expenditure for which an appropriation of money is not authorised by the provisions of an existing law or a proposed law that is before the Parliament, an approver must not approve the proposal unless the Finance Minister has given written authorisation for the approval.

This regulation was interpreted (in advice issued to agencies by the Australian Government Solicitor) as effectively meaning that any limitation of liability granted to a supplier of goods or services by a government agency would require approval by the Finance Minister. The reasoning was that limitation of a supplier's liability theoretically passes on to the agency the risk of bearing any loss not able to be recouped from the supplier over and above the limitation of liability granted, it being unlikely that money would have been appropriated to fund such potential losses. Not surprisingly, agencies were reluctant to seek written authorisation from the Finance Minister for limitations of liability and instead preferred to seek unlimited liability from suppliers, notwithstanding that in reality there is no such thing as "unlimited liability".

To the Government's credit, there have been positive developments in the procurement area in the past couple of years, including the following:

- The preparation of a Liability Risk Assessment Guide by the Department of Innovation, Industry, Science and Research to assist FMA agencies assess appropriate levels of liability (and in turn, PI insurance) to be required of service providers;

- The preparation by the Department of Finance and Deregulation of a model contract for Accounting and Related Professional Services aimed at simplifying and standardising government contracts for the provision of accounting services

- The introduction of new Regulation 10A of the Financial Management and Accountability Regulations 1997, effective from July 2012, to reduce the necessity for agencies to require approval from the Finance Minister whenever there is any risk of a contingent liability arising from the provision of goods or services.

Whilst these developments are welcome, further refinements are needed and it also remains to be seen how these changes are implemented. Whether the above changes result in practical improvements in processes will depend in part on cultural issues within the public sector and whether there is a fundamental change in the perception that the supplier is always the party best placed to manage risk (we would submit that in many situations it is the client that is best placed to manage the overall risks associated with a given project).

Proportionate Liability reform

An important recent development in managing liability reform has been the enactment of proportionate liability (PL) legislation to replace the doctrine of "joint and several" liability. Using PL in a contract allocates liability to the parties according to who is able to manage the risk, rather than who might be able to meet the liability. Consult Australia urges support for model proportionate liability provisions that will see the Commonwealth, states and territories introduce uniform legislation to create a clear and consistent scheme expressly prohibiting 'contracting out' of PL.

Consult Australia members support the harmonisation of proportionate liability PL legislation across Australia. Harmonisation of best practice PL legislation will:

- Provide clarity and certainty for clients and consultants alike;
- Reduce disputation; and
- Remove the need for costly and prolonged litigation.

Public and private sector clients around Australia continue to apply pressure to consulting firms to contract out of proportionate liability legislation. In addition, through the use of onerous contract terms, clients are seeking to make consulting firms liable for risks beyond those we would normally or reasonably expect to have within our responsibility, control or management.

The express ability to contract out of proportionate liability legislation in New South Wales, Western Australia and Tasmania has encouraged poor risk management by governments and industry groups, public and private sector clients working across the building and construction industry. Contracting out of PL encourages the allocation of unmanageable risks and liabilities upon consultants that would normally be acceptable to clients as a normal part of project development. The consequences of this behaviour are far reaching with implications across jurisdictions. Conversely, contracting out of proportionate liability is expressly prohibited in Queensland, and this is the position we would like to see uniformly endorsed around Australia.

In the experience of our members, where contracting out of proportionate liability is available, government agencies take up that option. This action undermines the intent of the proportionate liability regime as it was

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originally designed. Indeed, this move by individual agencies runs contrary to the intended policy outcomes of government as a whole.

Contracting out of PL not only threatens the sustainability of our industry, but also potentially exposes the community to uncertain and unmanageable risk and liability. The ability to contract out of PL is of national concern, where it leaves the market for professional indemnity (PI) insurance vulnerable to the same kind of market failure as occurred during the insurance crisis of 2001: with the creation of exposure to uninsurable risks beyond the control of policy holders. Ultimately the ability to contract out defeats the purpose of PL legislation, and those tort and liability reforms sensibly introduced in response to that crisis.

Consult Australia cautions any moves towards retrograde changes to PL legislation that attempt to balance the interests of plaintiffs and defendants at the expense of the original intent of proportionate liability reform. Such moves will result in ongoing uncertainty, increased risk and an operating environment that threatens the sustainability of the wider consulting industry and PI insurance markets.

[In response to Draft Recommendation 4]

Recommendation: Support and uphold proportionate liability

Consult Australia recommends that:

- All Australian governments support model proportionate liability provisions that will see the Commonwealth, states and territories introduce uniform legislation to create a clear and consistent scheme expressly prohibiting contracting out of PL across Australia.
- In the interim all governments adopt a policy immediately prohibiting the contracting out of proportionate liability legislation by their government departments and agencies.

More collaborative contracting

Consult Australia has long supported and promoted the use of relationship or collaborative contracting as a valuable tool to deliver projects that benefit all participants. We respect the principles on which relationship contracting has been built, and it has evolved to be an increasing component of our member firms' business over the last fifteen years.

The more common form of collaborative contracting is alliance contracting which has seen much success in Australia in recent years through more efficient project delivery, effective risk management and less disputation. Australia has increasingly demonstrated the strength of alliance contracting through projects such as:

- Roe Highway Stage 7 (Main Roads Western Australia);
- Tullamarine-Calder Interchange (VicRoads);
- Anthony's Cutting (VicRoads);
- South Morang Rail Extension (VicRoads, Metro Trains and Department of Transport);
- Northern Hume Alliance (NSW Roads and Traffic Authority);
- Lawrence Hargrave Drive (NSW Roads and Traffic Authority);

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- Inner Northern Busway (Queensland Department of Transport);
- Ipswich Motorway Project (Queensland Department of Main Roads); and
- SAFELink Alliance (Queensland Department of Main Roads).

The projects delivered above were successful because they adopted a collaborative process that promoted openness, trust, and risk- and responsibility-sharing through the alignment of interests between clients, designers and constructors. These principles should not be restricted to alliance contracts, and opportunities to reduce the adversarial nature of 'design and construct' contracting should also be considered.

Traditional design and construct contracting in Australia is often inherently adversarial and competitive with high levels of disputation and associated increased costs and delays. With increasing project complexity and the use of tools and systems such as Building Information Modelling (BIM) and Integrated Project Delivery (IPD), it is increasingly important to build collaborative arrangements between all parties to a project.

Emphasis should shift from defensive risk allocation, to strategies for fair risk allocation, and shared goals for mutual advantage. In part, collaboration and trust in traditional contracting can be built through fairer contract terms, but improved communication, early engagement and best-practice procurement generally all will support a less adversarial contracting environment.

Recommendation: More collaborative contracting

Governments pursue policies and strategies supporting more collaborative contracting and a less adversarial contracting environment through policies that support fair allocation of risk, shared goals, clear communication and early engagement of all involved parties.

Part 3: Better Contractual Relationships for a More Confident Private Sector

Question 2 – Are there additional topics or issues that should be considered in developing a national approach that might promote improvements in traditionally contracted infrastructure projects?

Question 3 – What other work should be done (outside the national approach) to improve outcomes for traditional contracting of infrastructure projects?

Any review of contracting relationships between government and the private sector needs to consider the nature of those relationships, and what actions can ensure that both parties benefit from future contracting. A key element of Consult Australia's response to this review is our submission that contracting must be made fair, transparent, efficient and offer better value. These changes will ensure that business and government both benefit from their contractual relationships. In addition to the broad principles of good risk management, limited liability, proportionate liability and a more collaborative approach to contracting, as outlined in Part 1, some of the further ways in which contracting around Australia can be improved, besides those covered by the seven recommendations in the Consultation Paper, are discussed below.

Allocation of risk and onerous contract terms

Procurement practices adopted by some government agencies are being used to drive consulting engineers to accept onerous contract terms that seek to shift the risk of the project outcome to the consultant regardless of whether the consultant has any control over those risks or is able to bear the risk.

A common practice in respect of risk in some jurisdictions is that it should be borne by the party best able to bear it. Consult Australia disagrees: risk management is not only about the party that can financially bear it, and risk should be borne by the party that has practical control of the risk and is in a position to manage the risk. It is Consult Australia's position that the contractual terms and procurement processes should reflect this.

A better procurement process—at all stages of project life—will give private companies the confidence to invest time, money and effort in the skills development of staff and use existing trained staff more efficiently. The following are areas for improvement to deliver real cultural change to the procurement process.

Government agencies are often not prepared to negotiate contract terms in a meaningful way. In these circumstances if a consultant does not agree with the contract contained in the tender document they are barred from further consideration in the tender process. Consult Australia members regularly report being told to 'take it or leave it'.

In some instances a government agency may require a consultant to withdraw their qualifications to a contract within 24 hours of submission of a tender, or the tender will be declared non-conforming and not considered further. Alternatively on being selected as the preferred tenderer, it will be made conditional on the withdrawal of the qualifications to the contract terms.

AS4122-2010 General Conditions of Contract for Consultants

Current contracting practices in the Australian building and construction industry are driving poor risk management behaviours that are exposing parties to the possibility of project failure and unforeseen costs. These practices also serve to establish adversarial relationships and behaviour rather than collaboration and communication. When these behaviours are brought into the project delivery, adverse outcomes ensue. The lack of standardisation of contractual terms across both the public and private sector has created a need for repeated negotiations of what should constitute core contractual terms, resulting in increased costs and lost time.

In recognising the need for an up to date, contemporary, and relevant standard agreement, Consult Australia made an application to Standards Australia for AS4122-2000 to be redrafted. Consult Australia along with Association of Consulting Architects Australia, Australasian Procurement and Construction Council, Australian Constructors Association, Australian Institute of Architects, and Master Builders Australia Ltd drafted AS4122 to meet the needs of the building and construction industry and governments through the fair and proportionate allocation of risk in line with current industry best practice.

Provided the standard contract is not amended beyond recognition, the use of AS4122-2010 will:

- Reduce the time and resources spent negotiating contractual terms and conditions of engagement;
- Reduce the need for external legal advice;
- Streamline the process for the engagement of consultants;
- Improve clarity and certainty of contractual terms and conditions between consultants and clients; and
- Reduce disputes between clients and consultants based on contractual terms.

Consult Australia endorses AS4122 and believes that the commercial terms are fair and reasonable and will be widely utilised by both private and public sectors.

It is important that AS4122 be used by both private and public sector industries for the benefits to be felt by the building and construction industry more broadly.

The Australian building and construction industry stands to benefit greatly through having greater access to a standard form of contract. Under AS4122, both purchasers and providers of services now have a contract that is both fair, reasonable and in line with current industry practice.

Consult Australia submits that there is merit in all Australian governments adopting greater consistency in the selection of general and special conditions of contracts. This allows for more time and energy to be spent on scoping and delivery of the project, rather than contract negotiation. It is equally important that the general and special conditions of contract be fair, clear and equitable for both government and consulting firms.

Consult Australia is of the view that the Commonwealth and state governments stand to benefit from the adoption of standard agreements with contractual terms that are:

- Aligned with the standard of care and duties of a professional consultant under common law;
- Consistent with government policy and the intent of relevant legislation;
- Consistent with sharing risk between client and consultant;
- Based on the principle that each party in a project remains responsible for its own actions;
- Consistent with the terms of professional indemnity insurance readily available in the marketplace;

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- Inclusive of a monetary limit on the liability of the consultant.

Consult Australia believes that the adoption of contractual terms that are based on the factors above would deliver benefits to government such as:

- A stronger focus on real risk management instead of illusory liability allocation;
- An overall reduction in adverse risk outcomes;
- Reduced dependency on insurance to treat project risk;
- Reduction in commercial loss claims against consultants;
- Reduction in the cost and amount of disputation between contractors and consultants;
- A positive impact of the availability of insurance cover;
- Broader field of consultants able to compete for government work;
- A more equitable basis for tender submission and evaluation by government;
- Better, more informed, project decision making;
- Increased transparency during the negotiation process;
- Encouraging the use of industry accepted tools and standards;
- Setting good practice benchmarks recognised by clients and industry;
- Limiting the negative impact of excessive or imprudent risk taking;
- Achieve a better project outcome for all parties.

AS4122-2010 is designed to deliver fair and proportionate allocation of risk in line with current industry best practice while also meeting government requirements.

Consult Australia acknowledges that AS4122-2010 will not be appropriate in every situation, but submits that it should be the standard agreement used by the Commonwealth and each State and Territory government when engaging consultants. A bespoke contract should only be used in situations where there are project specific special needs that necessitate it.

Recommendation: Standard General Conditions of Contract for Consultants

Commonwealth and all state governments endorse the use of AS4211-2010 General Conditions of Contract for Consultants for use by all departments and agencies.

Improving the efficiency of the tender process

What should be considered standard rules regarding probity and transparency are not always properly observed in all projects. It is not always clear that procurement officers in Government are supported or guided by established policies and procedures. For example our members report cases where procurement officers' responses to questions regarding the tender are not published for the information of all firms submitting; potentially creating unfair advantage across bids. Our members report that other 'standard' requirements are not implemented consistently across agencies, for example in relation to Workplace Health and Safety.

The costs of tendering are generally understood to governments who acknowledge the importance of minimising these costs to industry and support value for money outcomes for the taxpayer. While it is difficult to identify the precise costs of tendering,ⁱⁱ it is less difficult to identify opportunities to minimise those costs through greater efficiencies and quality procurement processes.

In the late nineties the Office of Building Asset and Building Policy in Victoria documented tender costs that are still relevant today in understanding how costs are accrued:

- For a \$320,000 public facility, one tender submission by an architectural consultant cost \$9,000 to prepare. 102 tenders were submitted. Potentially \$918,000 was spent on the preparation of submissions by tenderers and the total cost of tendering equated to almost 3 times the project value.
- For another public facility, the client found that tender bids were too high so made minor changes to the tender documents and re-tendered the projects. The client was effectively bid-shopping, but this required the tenderers to put in extra work.
- For a \$5-6 million project a consultant spent \$100,000 to prepare a bid, the successful bid was for \$180,000, meaning that the consultant only received \$80,000 for the project and the rest covered his tender costs. The unsuccessful tenderers did not recoup any costs.

As demonstrated through these examples, the costs associated with the deployment of skilled professionals, intellectual property, bid preparation and administration across all parties to a tender are substantial. In the interests of productivity, governments are obliged to seize all opportunities to deliver greater efficiency in the tender process.

Recommendation: Reducing tendering costs

Consult Australia recommends that government support the following proposals on how to reduce the costs associated with tendering:

- Greater focus on improving the quality, accuracy and timeliness of information provided in project briefs and scoping documents.
- More client education about best practice in tendering to improve purchasing skills;
- Greater use of electronic commerce by parties in the contractual chain to increase efficiency of the tendering process;
- Information about the required quantities of labour and materials being included in tender documents where appropriate;
- Pre-qualification of suppliers;
- Optimising the number of tenderers to achieve the right number and type;
- Sharing of tender costs where appropriate; and
- Intellectual property cost, which can be lost during the tender process to be alleviated through the development of procurement professionals who have very high ethical standards in confidentiality and sensible repercussions for those found to be in breach of those ethical standards.

Consult Australia recommends:

- Early engagement of consultant and contractor in complex projects to assist in the establishment of realistic budgets and time frames. This will give greater certainty regarding the accuracy of information that is passed to the public, when a project's costs and timeframe are announced.

Procurement Skills Shortage

One consequence of government outsourcing in recent decades has been an ongoing critical shortage of staff with skills in procurement at all levels of government. An erosion in governments' skills base in those aspects of engineering and construction critical to successful project management and procurement means that the standard of procurement and value for money outcomes are reduced. This is demonstrated in our members' ongoing concerns in relation to:

- Poor quality tender and project scope documentation;
- Poor risk management; and
- Poor quality contractual terms and conditions and undue reliance of external legal advice.

These are evident throughout government indicating a systemic procurement skills shortage at all levels. This issue is increasingly of concern to state and territory governments. For example, this is an issue being addressed as part of the current NSW Government Review of Procurement. However, a national response is necessary to support and catalyse action at a state and territory level.

The Australasian Procurement and Construction Council (APCC) as part of their guide, *Developing the Procurement Professional* acknowledge that:

"Until now, procurement professionalism in Australia has not been clearly recognised or defined. Public procurement too often is undertaken without professional support which results in sub-optimal value for money decisions and unnecessary high prices being paid for goods and services."

The APCC guide aims to raise the profile of procurement. It sets out the three main pathways to becoming a procurement professional and describes the characteristics of such a professional based on four levels of progression. Consult Australia believes that the guide is a useful tool in raising awareness about procurement in terms of it being a career within the public service

Recommendation: Procurement Skills Shortage

Consult Australia recommends that government support the following proposals on how to improve procurement skills in the public sector:

- An audit of procurement expertise, capability and skills across government agencies to scope the current state of play and opportunities for intervention.
- Formal training, support and continued professional development should be provided for any public servants who are moving into procurement and project management. This is particularly important when they are involved in high risk or high value projects.
- Governments should support the work of the Australasian Procurement Construction Council (APCC) and their "Building Government Procurement Capabilities" standard.

Office of the Commonwealth Procurement Coordinator

The benefits of expanding and better resourcing the office of the Commonwealth Procurement Coordinator are multiple. A centralised unit could take a stronger role in policy and standards development, build procurement skills through training and guidance material and facilitate better engagement both with industry and with state, territory and local governments. Ultimately, such a team could facilitate shared

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procurement expertise across jurisdictions. For example, expertise on complex alliance projects, or public private partnerships, often established within states in response to specific pipeline projects, could be brought together and shared with the support of a central federal government unit. A more centralised model would help overcome the procurement skills shortage often evident where agencies are required to deliver complex projects, through delivery models where there is little prior experience, or need to hold such experience in-house.

Recommendation: Office of the Commonwealth Procurement Coordinator

Expand and further resource the office of the Commonwealth Procurement Coordinator, establishing a centralised centre of procurement expertise with a mandate to develop policy, guidelines and standards for use across governments; build capacity in response to the procurement skills shortage; facilitate shared expertise in response to demand across jurisdictions; and encourage a stronger dialogue and a more collaborative relationship with industry.

Part 4: Responses to the 7 Preliminary Recommendations

Draft Recommendation 1: Prepare a National Infrastructure Guide on Good Practice and Commercial Principles as a basis for best practice and policy.

Consult Australia's members operate across jurisdictions and with every level of government. The wide variation in procurement expertise and skills, the variances in procurement policy, standards and guidelines is clearly demonstrated.

The Commonwealth Procurement Coordinator within the Australian Government Department of Finance and Deregulation plays a critical role in providing a centre of expertise on procurement, setting guidelines and standards across government. However with the devolution of procurement capability to government agencies in recent years, the benefits of a more centralised approach to build capability are less evident. To this end, the need for a National Infrastructure Guide on Good Practice and Commercial Principles is vital.

The contents should be the subject of extensive consultation with industry stakeholders, and must account for the issues raised in this submission. In addition, it is vital that the delivery of such guidance is supported by appropriate training capability building across government, supporting the professionalisation of public sector procurement.

Draft Recommendation 2: Encourage member jurisdictions to consider opportunities for promoting internal consistency in contractual terms and conditions; and for consistency in the application of those contractual terms and conditions.

Consult Australia is strongly of the view that consistency is vital in the contracts being used by each government in Australia, as well as between jurisdictions. The issues that this submission has raised above in response to Draft Recommendation 1 also apply in response to Draft Recommendation 2, namely that there needs to be centralised guidelines and standards across government for contracting and that there should be a strong office of procurement coordination to support training and delivery.

The use of standard contracts is a particular opportunity for government to meet the goal of consistency in contractual terms and conditions. There is a fundamental lack of consistency in the contracts being used by governments, rarely are two contracts the same, regardless of whether the project is of the same size and nature. This is adding significant costs to both the agencies involved, in obtaining the legal advice, and for the consultant who must continually seek its own legal advice in order to interpret the contract. This is a significant factor in a small consultant's decision on whether or not to bid for the work. It in fact penalises small consulting businesses.

Special mention must be made of the issue of proportionate liability, and the need for national consistency with how it is addressed. Not only is there a difference between how it is handled between states, but in those states where contracting out of proportionate liability is allowed, such a move creates a large and problematic discrepancy in how liability is handled. The subject of proportionate liability has already been dealt with in this submission, but we reiterate that Consult Australia is strongly opposed to contracting out of proportionate liability, and endorses a national approach, including within states, on this issue.

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AS4122-2010

Consult Australia particularly supports and endorses the use of standard contract AS4122-2010 for government agencies engaging with consultants. This contract has already received strong support by government /agencies, including the Queensland Department of Main Roads, and accounts for the concerns that our members frequently raise in contracting with government, which also form the basis of this submission.

Recommendation: AS4122-2010

Government agencies should act as model clients and utilise standard contracts such as AS4122: *General Conditions of Contract for Consultants*.

Draft Recommendation 3: Develop a framework of nationally available training courses and capability strengthening activities for public officials.

The broader question of liability management in contracts is dealt with elsewhere in this submission. However, liability and risk issues must also be considered in the context of ensuring procurement professionals are properly trained.

Consult Australia believes that professional liability management involves a review of contractual, project and service risks that results in an agreement between the contractual parties on the extent to which liability can be accepted for these risks. In the experience of our members there is a distinct lack of support and education for procurement officers to properly and effectively manage liabilities. This in turn leads to a risk-averse approach to liability management that sees the transfer of an unmanaged risk to consulting firms.

There is a clear need for robust liability and risk assessment guidelines to assist procurement officers when engaging the services of the private sector. These guidelines should provide information on the recommended standard agreements and the procedure for sign-off of any variation of the standard terms. Consult Australia believes that the standard should not be varied without a robust review procedure to confirm that this is necessary.

Consult Australia notes that the Federal Government, after identifying that there was a clear need to provide assistance to procurement officers in the liability stage of risk assessment, developed the "Liability Risk Assessment Guide for FMA Act Agencies". Consult Australia submits that other jurisdictions should develop similar guidance for their procurement officers, complimented by education and training to ensure proper liability management.

Consult Australia also endorses the Australasian Procurement Construction Council developed "Professional Indemnity Insurance Guidelines" and asks that the state governments also endorse these guidelines for use by procurement officers. The Guidelines acknowledge that the availability and affordability of Professional Indemnity Insurance to support project procurement is no longer guaranteed given the condition of insurance markets around the world. These Guidelines are intended to assist government clients (principals) to identify an appropriate level of insurance to be held by consultants.

An innovation that should be considered as part of this reform process is the development of joint training options for both public and private sector procurement officers. This will help representatives of government and non government organisations to understand the other's perspective, and close many of the disconnects that presently exist.

Recommendation: Develop and adopt best practice procurement policy and guidelines

Consult Australia makes the following recommendations as areas of reform:

- All Australian governments adopt a policy that allows the appropriate, fair and reasonable and equitable allocation of liability through proper risk assessment;
- Various state governments develop similar guidance as the Federal Government "Liability Risk Assessment Guide for FMA Act Agencies" for its procurement officers;
- State governments endorse the Australasian Procurement Construction Council "Professional Indemnity Insurance Guidelines".

Draft Recommendation 4: Develop a topic specific guideline on best practice project definition parameters for both the planning and procurement phases.

Project definition parameters for the planning and procurement phases of projects remain an important issue for Consult Australia. Many of our members have reported their efforts being frustrated by inadequate scoping of a project, and therefore not properly addressing the risks carried in that project. The development of a guideline that ensures best practice would greatly benefit all parties to those contracts that are subject to this review.

The quality of project briefs

It is important that the cost of tendering is minimised through the release of project briefs that are accurate and contain all information that is available and required by the tenderers. Consult Australia members have reported instances where project briefs have been released by Government agencies that appear not to have been reviewed for accuracy, that do not contain all relevant background information, and where additional information released has been difficult to access. More specifically, Consult Australia members report:

- The re-issue by agencies of entire project briefs, but without track changes, making it extremely difficult and time consuming for tenderers to ascertain where the changes have been made and the implications for a tender already underway;
- Project briefs that do not correctly refer to known industry standards;
- Project briefs in a 'state of flux' evolving throughout the tender period with additional information catering to changing client demands;
- Tender advertisements referring to published information that is not available online;
- Addenda being issued, sometimes the day before a tender deadline, with no time extension;
- References to parts of a project that are not actually relevant to the project being tendered;
- Project briefs that refer to construction phase services for projects where there is no need for such services; and

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- Increased demands for building information modeling (BIM) without associated increases in time to prepare such requirements.

In some circumstances where this is an issue, quality assurance has not been correctly administered and, in part, the costs of quality assurance have effectively been passed to the consultant where they choose to engage with the tender and raise issues of concern. Consult Australia endorses standard contract terms (through *AS4122-2010: General Conditions of Contract for Consultants*) supporting the provision of services against the project scope, but providing clear parameters to manage discrepancies, inconsistencies or omissions. The time and costs associated with this process can be substantial, and will either detract from resources spent on the preparation of the tender, or increase costs to the client and consultant alike following the commencement of the project. Ultimately however, of greater concern to the taxpayer are the ongoing unmanaged risks to the Government that arise in the absence of robust quality assurance.

Getting It Right: The First Time

Getting It Right: The First Time was published in 2005 by the Queensland Division of Engineers Australia. The report highlighted the declining standards in project design documentation within the Australian Building and Construction Industries. Consult Australia was pleased to participate in this study which was strongly supported by all areas of the building and construction industries and associated professional bodies as well as state and local government construction agencies. The conclusions from the study remain relevant today, in particular finding that:

- Poor documentation is contributing an additional 10-15% to project costs in Australia.
- The annual cost of poor documentation is estimated at \$12 billion per year across Australia.

The report finds increased safety risks where declining standards of documentation lead to inadequate structural design documentation being issued to contractors for use in construction. Declining standards are noted in the report, including:

- Inadequate project briefs based on unrealistic estimates of time and cost;
- Lack of integration along the supply chain linking the parties and between project phases;
- Devaluing of professional ethics and standards of business practice;
- Lowest cost bid selection strategy rather than best value for money;
- Poor understanding and skilling in risk assessment and (risk) management processes;
- Absence of an experienced client-appointed, overall Design Manager/Coordinator;
- Poor understanding of optimized and properly documented designs;
- Inadequate availability of, and recruitment of, skilled and experienced people;
- Inadequate/ineffective use of technology in design and documentation (e.g. poor application of CAD techniques: technical specifications drawn from an organisation's database but not tailored to the particular project); and
- Lack of appreciation of the benefits of effective communication.

Other key findings include:

- Poor documentation has led to:
 - An inefficient, non-competitive industry;
 - Cost overruns, rework, extensions of time;
 - High stress levels, loss of morale, reduced personal output;

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- Adversarial behavior, diminished reputations;
- 60% to 90% of all variations are due to poor project documentation;
- One price variation results from every three Requests For Information (RFI);
- Estimated Cost of Variations generated by poor documentation = 12% to 15.2% of project value (PV), based on actual cost of variation works, plus extra administration costs (1.1% of PV), extensions of time (2.1% of PV).

Draft Recommendation 5: Develop a topic specific guideline on best practice development of projects budgets, which would also allow for the benchmarking of outturn costs across projects and jurisdictions.

Consult Australia offers cautious support to developing guidelines for developing and benchmarking project budgets and outturn costs.

Whilst the existence of such a document would be of value as a guide, it must understand the nuances of consulting, and the different circumstances encountered on each different project. Consult Australia has also had a long-standing position that the selection of tenders should primarily consider factors other than cost. Lowest cost tenders do not always represent best value for money to the taxpayer, and might not result in the best delivery of the service contracted.

It is vital that if project costs are benchmarked, that industry is widely consulted, and Consult Australia believes that we could have significant input into that process. Over time, the development of expertise can be addressed by procurement professionals being able to effectively estimate budget and outturn costs, but there will always be nuances unique to individual projects, and it is important that these are considered in any benchmarking.

Consult Australia also supports moves to learn from previous experiences as part of a more unified procurement process across various jurisdictions nationwide.

Recommendation: Selection Criteria Based on Value Rather Than Cost

Consult Australia recommends that:

- Any move to develop benchmarks of project budgets need to focus on value for money, rather than simply cost.
- Any Benchmarks acknowledge the nuanced differences that exist between different projects that in turn lead to different cost outcomes, and are developed in wide consultation with industry.

Draft Recommendation 6: Develop a topic specific guideline on best practice governance and contract management including dispute resolution during the construction phase.

Governance and dispute resolution guidelines are an important aspect of developing best practice contracting procedures. The time and costs spent resolving issues that arise during construction can be substantial, and deter consultants from tendering for future similar work. Consult Australia endorses the move to best practice governance and contract management, including dispute resolution, and together with

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improvements in the quality of project briefs and better contractual terms, including the fairer and more appropriate allocation of risk, is a significant step towards better overall contract relationships.

An alternative practice that Consult Australia endorses is the use of dispute resolution boards. Under this practice, each party nominates an impartial representative, together with a jointly nominated representative who form the dispute resolution board prior to commencement of the project. Whenever an issue arises that threatens to turn into a dispute, it is referred to the board for their resolution. Evidence from overseas and elsewhere in Australia has shown that this method of dispute resolution is highly successful and saves all parties from the cost and time spent on litigation and disputesⁱⁱⁱ.

Together with the development of any guideline, there should be increased and improved training for procurement professionals, to ensure they have the requisite skills to undertake dispute resolution work. Any guidelines and training on dispute resolution should also focus on developing a more collaborative approach to contracting as outlined in Part 3 of this submission. As we have argued throughout this submission, guidelines and uniform approaches to issues in contracting are of limited value if they do not address the fundamental problems currently faced in contracting, and are not developed with extensive input from industry.

Draft Recommendation 7: Develop a framework for the application of a tenderer's past performance as a key tender selection criteria when awarding future contracts for capital works.

Past performance may be an important factor in a project's success. However, in the past non-price elements have too often been overlooked in favour of the lowest cost tender, or a project has been evaluated on the basis of cost rather than value.

We are of the view that rather than looking at whether past performance is a tender selection criterion, the focus of this question should be what aspects of past performance are relevant when future contracts are awarded. Such criteria may well vary from project to project. To ensure flexibility in identifying the best tenderer for a job, detailed consideration should be given to which aspects of past performance are relevant, rather than a generalised approach which may wish excluding candidates based on non-relevant criteria.

ⁱ Bills, G, 2011 *Outlook: An economic forecast for consulting firms in the built and natural environment*, Consult Australia (2011).

ⁱⁱ Dalrymple, J, Boxer, L, Staples, W. 2004. *Cost of Tendering: Adding Cost Without Value?*. Royal Melbourne Institute of Technology. Melbourne.

ⁱⁱⁱ Gerber, P and Ong, B (2011). *DAPs: When Will Australia Jump On Board?* Thomson Reuters, accessed online at www.drba.com.au