

Government Briefing Note

Transparency during COVID-19

DATE: April 2020



PURPOSE

This briefing note has been developed for government agencies procuring for projects where the services of consultants are contracted via a constructor rather than directly. Transparency of the supply chain can assist government clients guard the public's interests, including the appropriate spending of public funds. This is especially important during the COVID-19 pandemic to ensure the stability of the economy.

SUMMARY

Even where consultancy services are contracted at arms-length from a government client, it is appropriate for government to have transparency of the contracting behaviours and terms. To effectively manage risk, the contract between consultant and constructor is just as important as the contract between the constructor and the client. Too often contracts fail to recognise the differences between the parties and their roles. This results in terms appropriate for constructors, but inappropriate for consultants, being replicated in consultancy contracts.

To gain transparency, government clients could require constructors to report on key aspects as set out in the checklist below. In the current environment transparency is essential to ensure that any beneficial arrangements introduced as a result of COVID-19 are passed down the chain (such as improved payment periods). Further, normal contractual issues are amplified by COVID-19 and it is vital that those issues are addressed.

CHECKLIST

Government clients should be alive to how the following matters are dealt with in consultancy contracts. This is not an exhaustive list but are the ones that pose the most risk at the current time, not only to the consultant but to the project and therefore to the client.

☐ **APPROPRIATE TERMS – contract terms should be appropriate to the party and its role**

There are various clauses that are often included, as a flow-down from constructor contracts, that are inappropriate for providers of professional services, including:

☐ **Security**

Security in construction projects is generally sought from contractors and may be required for example where a contractor seeks payment for goods or materials that have not yet been incorporated into the project works. A security requirement is generally not suitable for consultants as the risk of non-performance of contractual obligations is significantly different.

☐ **Fit for purpose**

A fitness for purpose requirement is not suitable for consultants, as supported by the Australian Consumer Law which has an exclusion for '*fitness for purpose of professional services provided by a qualified architect or engineer*'. This exclusion exists because the law recognises that the nature of the services are advice-based (intangible) – unlike contractors/builders that deliver a tangible product

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(e.g. a building, road etc). For the same reason, fitness for purpose clauses are not typically insurable under a consultant's professional indemnity (PI) insurance policy.

Conversely, there are provisions that are vital to consultants that are often ignored, including:

- **Proportionate liability**

Proportionate liability legislation was introduced to stabilise the PI insurance market, after professionals were particularly impacted by the collapse of the insurer HIH in 2001. Therefore, it is not suitable to contract out of proportionate liability in consultancy contracts. Contracting out allows other parties to inappropriately take advantage of a consultant's PI insurance. This can lead to the consultant facing higher premiums, higher deductibles, and restrictive cover.

- **RISK ALLOCATION – the party most able to control the risk should bear the risk**

A party's ability to cover liability (e.g. having sufficient assets or capital) for a risk that eventuates is driven by the extent to which it has control of the risk. Often an extensive range of potential losses (liabilities) associated with the project are passed to parties irrespective of their ability to control the risk. The inappropriate transfer of risk to consultants drives the cost and availability of PI insurance beyond the capacity of some consulting businesses to afford, obtain, and retain cover over the often long-life of the liability exposure. This is even more concerning in the current hardened insurance market coupled with the uncertainty of the COVID-19 pandemic.

- **INDEMNITY – should be limited to loss due to the other party's actions**

A contractual indemnity requires one party to take responsibility for any loss that might be suffered by another party that they are indemnifying, even if that loss was caused by that other party's own actions. This can be further exacerbated through third party indemnities. Generally, PI insurance will only cover consultants for loss resulting from their own acts or omissions. Broad indemnities, or those not relying on the fault of the insured party, are highly problematic because they often fail to align to actual risks or available insurance policies. During the COVID-19 pandemic, the range of loss could be significant.

- **LIABILITY CAP – a thorough risk assessment should underpin the cap on liability**

It is not appropriate for liability caps in head contracts to simply be reproduced in consultancy contracts and sub-contracts. The liability cap in each contract should be underpinned by a thorough risk assessment and genuinely negotiated with the consultant. A contractual limit on liability set with reference to a thorough risk assessment allows business to properly insure their work and provide certainty for themselves and their clients.

It is noted that some government clients provide constructors with a template consultancy contract to provide guidance on how matters should be appropriately managed. This approach is supported by Consult Australia as it would bring certainty to consultants and the market more generally.

This Briefing provides a summary only of the subject matter covered, without the assumption of duty of care by Consult Australia. The summary should not be relied on as a substitute for legal or other professional advice.