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31 August 2020

Danny Benjamin
Director, Commercial
Major Road Projects Victoria
Via email: danny.benjamin@roadprojects.vic.gov.au

Dear Danny,

Draft *Design Subcontract Key Commercial Principles* – Submission

I am writing on behalf of Consult Australia members about Major Roads Projects Victoria's (MRPV's) draft *Design Subcontract Key Commercial Principles,* which was drawn to our attention by several members late last week. We are disappointed that Consult Australia was not approached for comment, but we appreciate you confirming that you are happy to receive our submission. On behalf of our industry, we have significant concerns about how imbalanced and contractor centric the draft principles are.

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering. Our industry comprises some 48,000 businesses across Australia, ranging from sole practitioners through to some of Australia's top 500 companies, providing solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry is a job creator for the Australian economy, directly employing 240,000 people. The services we provide unlock many more jobs across the construction industry and the broader community.

Unfortunately, the draft principles demonstrate a significant misunderstanding of the value and offering provided by consultants. As we point out in our Model Client Policy a lot of unfair contract terms stem from failing to recognise the role of consultants as compared to the role of contractors. If we had been consulted from the outset, this could have been avoided. It is concerning that MRPV could develop these principles without having regard to the consultant voice. Consult Australia supports government clients having transparency of subcontracts in order to ensure fairness throughout the supply chain. Unfortunately, the draft principles do not ensure fairness, but instead provide contractors with the benefits of more rights while consultants suffer under more obligations. It exacerbates an imbalance of market power between the parties pushing greater liability onto the consultant, without regard for their ability to control or manage risk that may give rise to that liability. We believe that the draft principles go against much of the agreed Australian Standard for Consultants – AS4122. This Standard should have been the starting point for the principles.

Below we set out our particular concerns.

Payment principles

The key principle about payment a government client should be concerned about is ensuring that every party in the supply chain is paid and paid within a reasonable timeframe. Payment times are crucial for all businesses, but even more so now due to the economic impact of COVID-19.

Consult Australia is concerned that MRPV's draft principle seeks to control the basis for payment between a contractor and a consultant and also prioritises the commercial interests of contractors over everyone else. We do not support contractors having final say on 'chargeable rates'. Further, the payment arrangement may not be suitable to all delivery models.

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For example, a painshare/gainshare arrangement only works with collaborative contracting models (such as an alliance) – because a designer has limited ability to influence project outcomes in, for example a D&C arrangement. The payment principles do not seem to anticipate a lump sum contract. Payment between parties is a commercial matter and the salaries of an individual is commercially confidential to a consultant organisation. The payment principles also fail to take into account that a not insignificant proportion of consultant fees are at risk of legal disputation.

We recommend that the payment principles be re-cast to ensure fairness to all sub-contractors in respect of payment times. That is, any payment term contractors receive from government should be passed down the supply chain, i.e. if a contractor is paid within 30 days by the government client, the contractor must guarantee payment of subconsultants within 30 days.

Warranties

The key principle about warranties a government client should be concerned about is ensuring that warranties only apply to parties they are appropriate for.

Consult Australia notes that MRPV's draft principles on 'design warranties' fails to recognise the differences between the role of the consultant and role of the contractor:

- Consultants provide intangibles, professional services. Their promise is to deliver that service, not to guarantee the future or the outcome. Consultants cannot guarantee the final build as they do not have control of the construction. A consultant's obligation is to perform the services to the standard of skill, care and diligence as is generally exercised by competent members of the consultant's profession performing services of a similar nature at the time the services are provided.
- Contractors provide tangibles, the final build. Their promise is to deliver that final build. A contractor's obligation is to deliver that outcome and for it to be of satisfactory quality and fit for the intended purpose.

Therefore, there should be no fitness for purpose clause for professional services. The Australian Consumer Law makes clear that such fitness for purpose guarantees do not apply to professional services provided by an architect or engineer. AS4122 will be a useful guide here.

In respect of 'IP warranties' Consult Australia supports a licence for contractors, but the extent and application of the licence must be determined on a case-by-case basis depending on the particular project. In the majority of cases, the licence should be limited to use on the particular project only.

We recommend that the 'design warranties' principle be removed and replaced with a 'standard of care' principle focussed on the obligation to perform services to the standard of skill, care and diligence as is generally exercised by competent members of the consultant's profession performing services of a similar nature at the time the services are provided. Similarly, the principle on IP licensing should be dealt with under a more appropriate principle heading (not warranties). Government clients should ensure that all parties understand the distinction between roles and that warranties are not included in consultant subcontracts. AS4122 will be a useful guide here.

Risk and liability

The key principle a government client should be concerned about is ensuring a fair liability framework, by ensuring it:

- is based on an identification of potential losses and the likelihood of those losses
- includes a limit of liability that can be justified
- avoids linking liability to insurance
- only contains exclusions to liability and consequential losses that are necessary
- minimise indemnities.

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Consult Australia notes that MRPV's draft principles on 'risk and liability' fail in many respects:

- It includes a provision on cladding. We suggest flammable cladding has minimal to no application to roads projects and certainly is not so common that it justifies making it to a list of 11 key commercial principles.
- The indemnities are framed incorrectly. Indemnities cannot be 'back to back' as the role of the parties are different (as explained above) and should not be 'arising out of or in connection with' the performance of the design services. Instead indemnities must:
    - be fault based
    - be limited to events caused by the consultant
    - provide for contribution or reduction in liability for the fault of the contractor
    - require the contractor to mitigate loss.
- The liability cap is problematic:
    - The consultant's insurance policy is unnecessarily referred to.
    - It includes liability carve-outs that are unnecessary and have no basis in Australian law. For example, 'wilful neglect' and 'gross negligence' are not terms used in Australian law. The term 'wilful misconduct and negligence' is settled in Australian law and covers all aspects necessary.
    - It includes liability arising from the consultants 'abandoning' the contract. This seems to be an unnecessary carve-out to the liability cap as well as ensuring the contract is unbalanced in terms of termination rights (see discussion below).

We recommend:

- removing the cladding principle
- re-framing the indemnities to remove any reference to 'back to back' and to ensure the indemnities:
    - are fault based
    - are limited to events caused by the consultant
    - provide for contribution or reduction in liability for the fault of the contractor
    - require the contractor to mitigate loss.
- re-framing the liability cap principle by:
    - remove references to consultant insurance
    - removing 'wilful neglect' and 'gross negligence'
    - remove any reference to the consultant 'abandoning' the contract.

Insurance

The key principle a government client should be concerned about is driving behaviours that adequately identify and reduce risk in projects and reduce disputation by fostering a collaborative and cooperative approach, which in turn ensures a stable and attainable insurance market offering.

Consult Australia is confused by MRPV's draft principle on 'preservation of PI insurance' as it seems to be limited to cladding rectification (as per the yellow highlighted commentary) and also indemnities that are already covered above.

We recommend removal of the 'preservation of PI insurance' principle.

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Termination

The key principle a government client should be concerned about is ensuring fair and balanced contracting between their contractor and the subcontractors (and subconsultants).

Consult Australia notes that MRPV's draft principle on 'termination' is contractor centric. Contractors gain the benefit of a right to terminate for convenience, while consultants receive no benefit and as discussed above have a particular liability clause if they do wish to terminate a contract. If one party has the right to terminate for convenience, then in fairness so should the other. It should be noted that if a contractor terminates for convenience, the consultant will need to recover all development costs as well as fees for work performed. Drafting imbalances of this nature may not be enforceable in any event.

We recommend re-framing of the 'termination' principle to ensure both parties can terminate for convenience.

General subcontract requirements

Consult Australia is unable to comment on this principle as it requires compliance with clause 25.6 of the ITC Delivery Contract, which was not provided to our members. We re-iterate our concern that again it refers to the contractors right to terminate for convenience (as discussed above). It further points to a confusing approach to the drafting of these principles. We would assume that these principles would guide the development of contracts – rather than specify compliance with an existing one.

Conclusion

While MRPV has assured consultant businesses that they want consultant feedback and value their contribution – this is undermined by the way the consultation is being run and the actual content of the draft principles. MRPV did not publicly release the draft principles and those consultants who received the draft were given only three business days to respond. These consultants were not given any supporting or contextualising documents (such as delivery contract terms (even for the contractor)), limiting their ability to provide a useful response on the draft principles.

This is completely out of step with the positive engagement the Major Transport Infrastructure Authority and Consult Australia have had with each other, and fairness in contracting.

I note that we have a meeting scheduled this Thursday 3 September 2020, with senior leaders from the Consult Australia membership to discuss the draft principles. I look forward to the discussion.

Yours sincerely,

Kathy Uhlik
State Manager Victoria & Tasmania