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Driving business success for consulting firms in the built and natural environment

7 April 2021

Chris Lamont
NSW Small Business Commissioner

Via email: cx.team@smallbusiness.nsw.gov.au

Dear Commissioner,

Submission – Selling goods and services to NSW Government

Consult Australia welcomes the opportunity to assist the NSW government understand the pain points our members face when attempting to supply to government, all of which we believe can be solved with real engagement and collaboration between industry and government.

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering. Our industry comprises some 55,000 businesses across Australia, around 97% of which are small businesses (less than 20 employees) and in fact over half of all consulting businesses in Australia are sole practitioners. Our members, no matter their size, provide 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.

We support moves to ensure that small businesses can participate fully in the economic activity in NSW and we support the *NSW Government Small and Medium Enterprise and Regional Procurement Policy*. It is noted that the Policy applies to all new government goods and services procurement activity excluding construction. Advisory and design is a key element prior to construction, as nothing cannot be built without first being designed. We hope this Policy will apply to these professional services (if it doesn't already) even if it cannot apply to the work of contractors. From Consult Australia's perspective there is nothing in the Policy that should exclude SMEs involved in the construction industry, especially when contracting direct to government.

The focus on digital solutions and improved payment times in the Policy is great to see as well as the availability of an anonymous feedback mechanism for SMEs having undertaken government procurement processes. Unfortunately, the NSW government may not get this feedback where the barriers are such that SMEs don't even undertake procurement. For example, access to pre-qualified supplier panels can be limited, or unachievable, because of barriers including insurance limits and the requirement to have proven work history with government.

While the intentions of the Policy are commendable, we know that the Policy is not always applied on the ground, in particular in respect of contracts and insurance.

The use of standardised contracts is limited

Many government agencies in NSW will use the same contract form to engage SMEs on small lower risk projects as they do for engaging large businesses on high-risk projects. These contracts are rarely the same, concise, or in plain English. The terms of the contract by using warranties and indemnities that shift liability to the SME, regardless of fault, are tantamount to unfair contract terms because of the significant imbalance in market power between the government agency and SME. Most SMEs do not employ in-house counsel and cannot afford to engage external legal counsel on every procurement to comprehend these contracts and the implications for their business.

Under the devolved model of government procurement, government agencies often use external counsel to draft these contracts, which means that in-house procurement officers are usually less comfortable discussing contract terms with industry members.

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Non-lawyer SMEs representatives, if they attempt to negotiate, often find they are doing so with external lawyers who have little knowledge of the role of the SME or their services and so are given very little scope to achieve balanced amendments to the contract.

Further, when industry associations such as Consult Australia try to engage with government agencies to find solutions and increase productivity for both industry and government the concerns we raise are dismissed as being concerns by 'sore losers' who didn't win the job. This is very far from the truth, as Consult Australia never acts on the voice of only one business. The issues we raise are industry-wide concerns.

Case Study

A small business providing flood plain advisory services successfully bid on a small fee advisory tender for a government water agency. The business was provided with over 100 pages of contracting materials and when seeking clarity on terms was advised to have the business' in-house counsel (which it doesn't have) contact the external legal counsel that had drafted the contract. This same contract has been used to engage large businesses on complex projects.

Unreasonable insurance requirements

Tendering and contracting requirements are rarely modified and do not seem to relate to the particular risks of the project, the consultant's fee, the scope of services, or the state of the insurance market.

Consult Australia member businesses are facing a worsening professional indemnity insurance market, this combined with the economic downturn caused by COVID-19, is significantly impacting the ongoing sustainability of our industry. Many small businesses and sole traders face forced business closures and early retirement based solely on the fact they can no longer get insurance (often at any price let alone affordable insurance).

We have been talking about the hardening market over the last 18 months, [AON's Global Insurance Market Conditions Q2 2020 Report](#) states that the hardening in the market is here to stay for now and that in Australia:

Australian insurers are focused on cost over-runs, loss mitigation, warranties and cross liability, with related exclusions and sub-limits commonplace. As the Australian government tries to kick start the economy with infrastructure investments, capacity may become an issue.

In talking with our members, capacity is already an issue across businesses of all sizes. Australia's building and construction sector is now considered one of the highest risk industries in the world for PI insurance – which impacts all our members whether they work on designing the most complex infrastructure projects or the local school. Our SME members advise that PI insurance premiums are their largest business expense and year on year premiums are increasing while coverage amounts decrease – irrespective of claim history. The number of underwriters providing any sort of coverage has become extremely limited. Small companies providing specialise design, advisory, or engineering services will struggle to survive unless action is taken.

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Case Study

A sole trading structural engineer has been forced into early retirement because he cannot secure PI insurance. This is despite having a long-term client of over 20 years, a steady stream of work and income as well as no claims in over 15 years. Without PI Insurance, this sole trader cannot operate, even as a verifier of other's work.

Further, he is unable to secure run-off insurance, to cover any claims that may arise during his retirement for past work. Essentially, this engineer is self-insuring, putting at risk his savings and property holding. The cover required by this engineer to continue working with their long-time client is only \$2-3 million. In past years, the premium for the PI insurance was \$6,500 this increased to \$22,000 last year.

Multiple brokers specialising in engineering and professional services cover have advised this member that there is no cover '*from any insurers, underwriters, or other markets (at any price)*'. This is an untenable position for this engineering consultant who has a long and successful career and could still contribute to Australian economy, but for the hardening of the PI market.

With the current state of the professional indemnity (PI) market, all consultants are under increasing pressure from their insurers to ensure they do not sign up to arrangements that unnecessarily exposes their insurance. The lack of willingness to use standardised and fair contracts combined with unreasonable insurance limits, make contracting with NSW Government unattractive and often too risky a prospect for SME consultants.

The solutions

The above issues can be resolved with real engagement and collaboration between industry and government. In fact, these issues are addressed in our [Model Client Policy](#) which suggests that all government agencies have a responsibility to acknowledge and address the inherent imbalance in market power between government clients and the private sector.

The lost productivity and costs associated with the devolved model of government procurement should also be measured, as we believe that this would support this case for greater standardisation of appropriate and balanced contract terms across NSW government.

In terms of standardised contracts for consultants, Consult Australia supports AS4122-2010 General Conditions of Contract for Consultants, FIDIC Consultants Model Services Agreement and NEC4. These contracts avoid the onerous and/or inappropriate terms our members see in NSW government contracts.

If NSW government (or an agency of NSW government) seeks to develop a bespoke standardised contract, it is vital that industry associations are consulted on the terms prior to their release, to avoid the terms of concern which are often borne out of a failure to understand and acknowledge the difference between consultants and contractors. It is also essential that procurement officers are educated and empowered to discuss contract terms with industry (both individual businesses and industry associations).

Below is a list of typical terms of concern that appear in contracts prepared by NSW government agencies:

- **Fitness for purpose obligations are not appropriate for consultants.** Too often fitness for purpose obligations, which are suitable for contractors that can guarantee the final build, are imposed on consultants who should instead be held to the reasonable standard of care for professional services. For more information I attach our [Client Briefing on Fitness for Purpose](#).

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- **Contracting out of proportionate liability should not occur in consultancy contracts.** Proportionate liability was introduced into the civil liability framework around the country to alleviate the Professional Indemnity Insurance market issues caused by the collapse of the insurer HIH.

However, that policy intent is undermined, and consultant's insurance is subject to too much exposure because government contracts require parties to waive their statutory right and contract out of proportionate liability. For consultancy contracts, proportionate liability must be preserved. For more information I attach our *Client Briefing on Proportionate Liability*.

- **Capped liability must be the default without a reliance on insurance proceeds.** Capped liability ensures certainty for all parties if things go wrong. In a few bespoke contracts around the country, we have seen sensible liability caps undermined by excluding insurance proceeds. In certain instances, liability frameworks can refer to insurance, but when a single cap is set, that cap should be independent of insurance. For more information I attach our *Client Briefing on Liability Frameworks and Insurance*.
- **Contractual warranties must be avoided in consultancy contracts.** Contractual warranties are common in contractor contracts, as contractors (builders/constructors) can guarantee outcomes, however the professional indemnity insurance of consultants will rarely cover contractual warranties. The obligations suitable for consultants can be contained within the contract as obligations, but if they are drafted as warranties insurers can deny cover. For more information I attach our *Client Briefing on Warranties*.

In respect of insurance requirements, once again educated and empowered procurement officers are key to ensuring that minimum insurance requirements are reasonable. Consult Australia is currently drafting a guide to insurance for procurement officers, which we'd be pleased to share with the NSW Small Business Commissioner when complete.

I would appreciate the opportunity meet with you (virtually) to discuss this further. I invite your office to contact me at kristy@consultaaustralia.com.au or on 0499 878 839.

Yours sincerely,

A handwritten signature in black ink that reads "K. Eulenstein".

Kristy Eulenstein

State Manager for NSW and Policy Lead (Procurement and Practice)

Attachments:

- *Client Briefing on Fitness for Purpose*
- *Client Briefing on Proportionate Liability*
- *Client Briefing on Liability Frameworks and Insurance*
- *Client Briefing on Warranties*