NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

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

Friday, 26 August 2022

Melissa Brooks
Director
Infrastructure & Structured Finance Unit
Commercial & Procurement Group
NSW Government Treasury

By email to: Infrastructure-Advisory@treasury.nsw.gov.au; melissa.brooks@treasury.nsw.gov.au

Dear Melissa,

RE: Submission to Infrastructure Advisory – Standardised Terms and Conditions Term Sheet

Consult Australia welcomes the opportunity to contribute to and be involved in the consultation by the NSW Government Treasury on the Infrastructure Advisory Standardised Terms & Conditions Terms Sheet.

As you know, Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia's top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

We note that the consultation will form the basis of new template contracts (and guidance) for NSW Government buyers of infrastructure advisory services under the following whole of government schemes (the Schemes):

- SCM1191 Consultants in Construction up to $9 million Scheme
- SCM10611 Consultants in Construction above $9 million Scheme
- SCM0005 Performance and Management Services (PMS) Scheme (engagement type 15)
- SCM0801 Government's Architect's Strategy and Design Scheme.

Our submission is solutions-focussed and focusses on the top industry concerns and issues that we consistently advocate on, including:

- fitness for purpose
- indemnities
- proportionate liability
- novation
- set-off.

NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

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

You will see that we have articulated how these issues impact on the availability of professional indemnity insurance coverage for our members. We believe that a targeted workshop with a select group of our members and the NSW Treasury team to explore the issues in depth, with real-life case studies will lead to better mutual understanding and true co-design of the term sheet. Effective consultation needs to be truly collaborative with demonstrated mutual respect.

Consult Australia looks forward to hearing from you and the Infrastructure Advisory team to set up a workshop. I can also be contacted at alison@consultaustralia.com.au or on 0438 339 083.

Yours sincerely,

Alison Kirk
Manager NSW

NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

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

Infrastructure Advisory Services: Terms & Conditions Term Sheet Feedback Template

***Organisation:**	Consult Australia
ABN:	
***Contact person (name and position):**	Alison Kirk
Contact Details:	alison@consultaustralia.com.au

***Mandatory fields

#	Focus Area	Feedback
A3	**Fitness for Purpose**	**Consult Australia suggests removal of the fitness for purpose obligation, parties to instead rely on a suitable standard of care obligation on consultants.** ***Issue:*** Consult Australia holds that fitness for purpose obligations are not suitable for consultants. A fitness for purpose obligation is an unqualified outcome promise. An engineer/designer cannot guarantee the final build because there are too many factors beyond the consultant's control. Even if the fitness for purpose guarantee is limited to the provision of services rather than the resulting building or facility, it can still be problematic because it is almost impossible to define the purpose of a professional service with the same certainty as the purpose of a finished build. It should be noted that while the Australian Consumer Law (ACL) includes a general fitness for purpose guarantee for consumers of products and services, it expressly does not apply to the '*supply of services of a professional nature by a qualified architect or engineer*' (see section 61). Consultants hold professional indemnity (PI) insurance to cover liability for claims about their services. Generally, PI policies do not cover assumed liabilities or contractual warranties - this includes contractual provisions that impose fitness for purpose obligations. This is even where the insurance policy does not expressly exclude fitness for purpose. Therefore, if a consultant agrees to a contract with fitness for purpose provisions it may well be uninsured risk due to the lack of cover options for fitness for purpose available in the global professional services insurance market.

NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

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

		Solution: Consultants are subject to a common law standard of care, where the professional must '*exercise due care, skill and diligence as a reasonably competent professional*.' Unlike a fitness for purpose guarantee, breach of the common law standard of care is within the professional's control and covered by PI insurance. Consult Australia holds that any relevant loss linked to a consultant's service should be able to be linked to this standard of care.
D2	**Intellectual Property Rights in Contract material**	**Consult Australia recommends that the consultant retains intellectual property rights.** ***Issue:*** In the interest of economic productivity and uptake of digital innovation, it is important that the consultant retains intellectual property (IP) rights so that their work may be used in other settings. Additionally, it is generally the consultant that pays for IP development, not the Agency. A more flexible approach to IP and data rights would allow more innovation and faster development of digital solutions. Further, Consult Australia does not support the inclusion of warranties and indemnities regarding IP (e.g. in Part D). ***Solution:*** Consult Australia suggests the following alternative provision: *Service Provider retains Intellectual Property (IP) rights in Deliverables and grants a licence (including right to sub-licence) to the Agency to use, reproduce or modify the Deliverables.*
D7	**Moral Rights**	No comment at this stage.
E1	**Reliance and information documents**	**Consult Australia agrees with the principle that reliance and information documents should be provided by the Agency to the service provider and that the template contract should facilitate the parties agreeing a balanced risk allocation for 'rely-upon information' or 'information only' material, which best reflects the specific circumstances of the project.** Communication and agreement between the parties should alleviate issues seen in other contracts where consultants cannot rely on information supplied by clients. If consultants cannot rely on supplied information, they need to undertake work (vastly like the work already undertaken to produce the supplied information).
F3	**Third party reliance**	**Consult Australia supports the principle of limited third party reliance but recommends changes to the provision to address issues of concern.**

		Issue: In general Consult Australia advocates against broad third party reliance provisions as it exposes clients to too much risk. An acceptable reliance provision is one that allows a third party contracted to the Agency in the future to rely on supplied data for the next phase of the same project. That is, the extent to which a third party can rely on the consultant's report could be set out in a Reliance Letter (for example, usually data only, and not interpretation of that data, or completeness of it). Therefore, any Reliance Letter provided to a third party should be clear and discrete. This includes specifying the duration the reliance can stand, and the particulars of the analysis or information provided with clarity as to what is not included. Consult Australia does not support the consultant indemnifying the Agency in relation to any reliance by a third party (including the Authority) on the Deliverables. A consultant should not be required to indemnify for third party reliance as the third party may include parties that the consultant has not envisaged and therefore the consultant's liability can become unfair and unreasonable. ***Solution:*** Consult Australia suggests the removal of part b of the third-party reliance focus area clause where the indemnity is raised, and any other amendments to achieve the reasonable outcome in terms of reliance.
G1	**Indemnities**	**Consult Australia suggests removal of unqualified indemnities.** ***Issue:*** Consult Australia does not support the imposition of unqualified indemnities as they shift liability to consultants regardless of fault and expose consultants to liabilities for risks that are not in a place to manage or control. This view also applies to the inclusion of warranties and indemnities referenced in Part D regarding Intellectual Property. ***Solution:*** The parties should agree to limited and specific indemnities linked to the consultant's service and account for a reduction in liability to the extent the client contributed to the loss.
G2	**Limitation on Liability**	**Consult Australia supports a limitation of liability but does not support the limitation on liability reflecting the level of financial risk retained by the Agency. Consult Australia advocates that a limitation on liability should**

NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

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

		reflect the level of financial risk retained by the consultant. ***Issue:*** Consult Australia advocates for a limitation on liability commensurate to the consultant's role in the project, a genuine assessment of the risks likely to arise as a direct result of the consultant's services, and the consultant's ability to manage those risks. Consult Australia agrees that the assessment of an appropriate liability cap should have regard to the contract value, nature of the consultant's services, and risks to be covered. ***Solution:*** Consult Australia suggests amendment to the limitation of liability to be an express monetary value (in aggregate) with minimal to no carve outs, that reflects the level of financial risk retained by the consultant.
G3	**Exclusions for Limitation on Liability**	**Consult Australia supports some of the proposed exclusions from the limitation on liability but suggests removing others to account for the role of the consultant and to ensure an appropriate risk allocation between the parties.** ***Issue:*** Consult Australia does not support the following exclusions from the limitation on liability: - insurance proceeds that are or would have been recoverable - abandonment of obligations - intellectual property indemnity and warranty. *Insurance proceeds* Excluding insurance proceeds that are or would have been recoverable from the limitation of liability unnecessarily exposes the consultant's full PI insurance policy. The liability question and insurance question should always remain separate. A consultant's insurance policy is a business tool for that consultant to help it meet any realised liabilities, it is not a consumer protection or arrangement for clients (unless of course the client acquires insurance themselves for the project, such as project specific professional indemnity insurance). The parties should reach an agreement of the liability cap first, based on the services to be provided. Then and only then should the Agency seek assurance that the consultant holds insurance. AS4122-2010 shows how these two questions can and should be separated in a contract. *Abandonment of obligations*

NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

		Excluding abandonment of obligations from the limitation of liability is problematic. This seems to be an unnecessary carve-out to the liability cap and also makes the contract unbalanced in terms of termination rights. *Intellectual property indemnity and warranty* Consult Australia does not see the justification for excluding intellectual property right breaches From the liability cap. ***Solution:*** Consult Australia suggests above exclusions be removed.
G4	**Consequential loss**	**Consult Australia supports that neither party should be liable for consequential or special losses of the other party. However, we remain concerned about the exclusions from the limitation of liability (as discussed above).**
G5	**Proportionate liability**	**Consult Australia does not support the principle that an Agency may contract out of proportionate liability (Part 4 of the *Civil Liability Act (NSW) 2002*) for professional services. We cannot see when this would be justified when contracting with a consultant.** ***Issue:*** Consult Australia does not support the contracting out of proportionate liability under any circumstance or project type when it comes to professional services contracts. Proportionate liability allows liability to be attributed to each party based on their degree of responsibility and therefore allows for appropriate risk allocation and encourages fair contractual dealings. Contracting out of proportionate liability is likely to trigger an exclusion in a consultant's PI insurance policy because it extends the liability of a consultant beyond their statutory obligation. The policy intent of proportionate liability reform was to bring balance back to the PI insurance market after the collapse of HIH in 2001. Therefore, contracting out of it in professional services contracts undermines that original policy intent. ***Solution:*** Consult Australia suggests the following amendment to the provision: *Agency not to contract out of Part 4 of the Civil Liability Act (NSW) 2022.*
H1	**Professional indemnity insurance**	**Consult Australia does not support the onerous insurance requirements.**

NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

		Issue: A consultant's PI insurance policy is a business tool for that consultant to help it meet any realised liabilities, it is not a consumer protection or arrangement for clients (unless of course the client acquires insurance themselves for the project, such as project specific professional indemnity insurance). Consult Australia remains steadfast on our advocacy that onerous clauses relevant to PI insurance should not be included in consultant contracts. A consultant: - cannot provide copies of insurance policies because they are commercial-in-confidence between the consultant business and the insurance company, instead a certificate of currency is reasonable and appropriate to satisfy a client - cannot give clients any right to approve specific insurance policy terms as the terms are confidential and apply to the whole business, very rarely to project specifically - should not need to notify a client of claims under a consultant's policy, as it does not relate to the client and could be in-confidence where the claim is alive/disputed. It is recommended that the NSW Government talk to the Insurance Council of Australia to confirm the above. If a party wants to ensure the other has appropriate and sufficient insurance to cover the contractual liabilities, that can be managed outside of the contract conditions. This is a matter of internal business controls and due diligence. Agencies that include onerous contract clauses on insurance will be creating barriers for businesses wanting to tender. ***Solution:*** Address all the issues we have raised in this table, as well as remove contract clauses that impose onerous insurance requirements.
H2	**Public Liability insurance**	No comment at this stage.
H3	**Set-off**	**Consult Australia does not support the inclusion of a set-off clause within the contract.** ***Issue:*** Set-off clauses not only introduce an adversarial nature to the relationship between parties but are unnecessary. Payment terms should reflect the monies owed to the consultant for the services provided. It is more appropriate to deal with other debts and claims through other mechanisms provided

NATIONAL OFFICE
Level 6, 50 Clarence Street
Sydney NSW 2000
GPO Box 56
Sydney NSW 2001

T. 02 8252 6700
E. info@consultaustralia.com.au
W. www.consultaustralia.com.au
ABN. 25 064 052 615

CONSULT AUSTRALIA

		for in the contract. In the unfortunate event that a claim arises between the parties, there are appropriate avenues for redress and set-off is not necessary to enable these avenues. ***Solution:*** Remove the set-off clause. Introduce a clause as follows: *'The Service Provider may claim payment in accordance with the times set out in Annexure A, or if no time is set out, monthly in arrears, and upon termination of the Agreement. The Agency must pay to the Service Provider, without set-off or deduction, the amount payable (including GST) under this Agreement for the Service Provider's Services provided during the relevant period, within the times set out, or if no time is set out, within 14 days of receiving a valid tax invoice.'*
J1	**Novation to third party**	**Consult Australia suggests that novation as a standard clause is problematic, and a preferred approach is a limited novation clause that is only added by exception where necessary for the project.** ***Issue:*** Consult Australia remains concerned about novation to a third party, especially as a standard clause because novation can expose a consultant to risks its insurers and project risk committees might not be able to accept that were not anticipated when the consultant was engaged directly to the Agency. This is especially so when the Agency is a Model Litigant. ***Solution*:** The novation clause should only be used by exception, not as standard. If it is standard, businesses will need to assess the project based on a novation to a third party happening. Therefore, a decision should be made to include it and that reasoning should be justified by the project and made clear to tenderers. Further, any novation clause should ensure that both parties agree to the novation at the time of the novation.