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

9 May 2023

Angela Corbett
General Manager, Procurement Frameworks
Department of Finance
Government of Western Australia

By email to: PFDevelopment.Mailbox@finance.wa.gov.au
CC: Angela.Corbett@finance.wa.gov.au

Dear Angela,

RE: CUAWCS2023 Works Consultancy Services 2023 (Non-Residential Engineering and Related Services) - draft for comment

Thank you for providing Consult Australia with the opportunity to comment on the Department of Finance's draft Request for Works Consultancy Services. Overall, our members were satisfied to note that AS4122-2010 forms the basis of the panel contract, and I am pleased to be able to provide you the following additional feedback to further enhance the panel arrangements.

As you may be aware, 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. 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.

At the outset, as mentioned, it should be noted that Consult Australia supports use of AS4122-2010 as it represents a balanced contract that deals with risk well. It is worth reflecting that this Australian Standard was a negotiated outcome with key industry bodies including Consult Australia, as well as government representatives. Therefore, we appreciate where the Department of Finance relies on AS4122-2010 without amendment. When considering amendments our members are most concerned where there is a shift in the risk exposure.

With that in mind, our feedback on the proposed conditions draws on Consult Australia's keen interest and expertise in the interaction of contract clauses and professional indemnity (PI) insurance as it relates to consultants. As you may be aware, the current PI market, for consulting engineers in particular, is in crisis due to significant disputation in the Australian market. It is important for government to be aware of these pressures on supplier businesses and actively seek to alleviate what pressure they can. For some further context on the PI market, I attach Consult Australia's PI Market update.

In the table attached we set out the key concerns we have with the contract conditions proposed by the Department of Finance, as well as our solutions-focussed recommendations for improvement. It should be noted that the terms of concern we raise here are issues we consistently advocate on, including:

- PI insurance policy requirements
- standard of care
- set-off right
- unsatisfactory services

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I look forward to discussing the issues raised in this letter with the review team and securing improvements prior to implementation. I would be pleased to meet with you, along with senior member business representatives if that would assist, to explore these issues together and collaborate on mutually beneficial solutions.

Yours sincerely,

A handwritten signature in cursive script that reads "emma thunder".

Emma Thunder
Manager WA

Attachment: Professional Indemnity Insurance Market Update, February 2023

Consult Australia's consideration of Request Conditions and General Conditions of Contract

Focus area	Consult Australia's position
Professional indemnity policy requirements	<p>Recommendation: <i>Remove onerous insurance requirements</i></p> <p>Reference: Proposed clauses 26.1 – 26.9 of the General Conditions.</p> <p>Issues: Consult Australia holds that the existing provisions in AS4122-2010 regarding professional indemnity insurance (clauses 30.1 – 30.7) are sufficient to allow the client to be assured that the consultant holds relevant insurance but also doesn't unreasonably interfere with a consultant's insurance, which is a business tool for the business.</p> <p>A consultant's professional indemnity insurance policy is a business tool for that consultant to help meet any realised liabilities, it is not a consumer protection arrangement for clients (unless of course the client acquires insurance themselves for the project, such as project specific professional indemnity insurance).</p> <p>Our key concerns with the proposed clauses at 26.1 – 26.9 of the General Conditions is firstly that in practice consultants may not be able to meet the obligations (such as providing the client with a copy of the insurance policy). Secondly, the provisions allow an unreasonable amount of involvement for the client in commercial-in-confidence arrangements between consultants and their insurer. It is worth noting the following:</p> <ul style="list-style-type: none">• Insurers will not permit a consultant to provide copies of insurance policies to other parties because the policies are commercial-in-confidence between the consultant business and the insurance company.• The insurance policy held by a business covers all of its operations and can be drawn on for any relevant covered liability that arises. That is, the policy is not specific to the consultant's provision of services to Development WA.• It is not only unreasonable but would be practicably impossible for consultants to seek approval from any (or all) of its clients when renewing insurance. This is not only because the terms of the policy are confidential but also because the renewal phase does not permit time for such a process.• It is unreasonable to ask a consultant to notify the client of potential claims against the insurance policy. The threat of claim from other parties does not necessarily impact on the client or indicate anything (positive or negative) about the consultant. Further, it is highly likely that any claim will be in-confidence and the consultant would not be permitted to notify anyone other than their insurer and legal counsel. <p>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. PI insurance is a matter of internal business control and due</p>

	<p>diligence. Agencies that include onerous contract clauses on insurance will be creating barriers for businesses wanting to tender.</p> <p>Solution: Consult Australia recommends not including the proposed clauses 26.1 – 26.9 of the General Conditions. If the Department of Finance has issues it is trying to mitigate against, we would be keen to discuss those issues and identify an alternate solution.</p> <p>We also encourage you to talk with the Insurance Council of Australia about the points we've raised here and the context for them, or we can ask them to join us in a meeting with the Department.</p>
<p>Standard of care</p>	<p>Recommendation: <i>Rely on the standard of care in AS4122-2010</i></p> <p>Reference: Clause 3.5 of the General Conditions regarding services.</p> <p>Issues: Clause 3.5 of the General Conditions requires the consultant to supply the services in accordance with the specification, and where there is no specification, in accordance with the 'highest standards that usually apply'.</p> <p>It should be noted that clause 4 of AS4122-2010 General Conditions of Contract for Consultants already provides for the standard of care required of a consultant. Consult Australia supports the standard in AS4122-2010 as it is consistent with the normal, professional standard of care implied by common law.</p> <p>A heightened standard of care is likely to trigger an exclusion in a consultant's professional indemnity insurance policy because the liability of the consultant has been extended beyond the common law standard and is challenging to adjudicate. Consult Australia advocates for a standard of care in contract that matches the common law standard.</p> <p>In this instance it is unclear why clause 3.5 is needed if AS4122-2010 is being used.</p> <p>Solution: It is recommended that clause 3.5 of the General Conditions regarding Services be removed and instead clause 4 of AS4122-2010 is relied upon.</p> <p>Alternatively, if the Department needs to retain clause 3.5 of the General Conditions, it should read:</p> <p>Services</p> <ul style="list-style-type: none"> (a) The Consultant must supply the Services in accordance with the Specification. (b) If no standards for the Services are specified in the Specification, then the Consultant must supply the Services with 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 contracted services are provided.
<p>Set-off right</p>	<p>Recommendation: <i>Remove set off provision</i></p> <p>Reference: Clause 36.11 of the General Conditions.</p>

	<p>Issues: Consult Australia advocates against set-off provisions as they allow one party unfair rights to withhold money. Other provisions of the contract protect the client from paying for services that are not delivered and therefore set-off is unnecessary.</p> <p>Solution: Remove clause 36.11 of the General Conditions.</p>
<p>Unsatisfactory services</p>	<p>Recommendation: <i>Further discussion needed on this provision</i></p> <p>Reference: Clause 6.6 of the General Conditions.</p> <p>Issues: Clause 6.6 prescribes what is to happen if the customer finds that the services are 'defective'. This reads to be separate and addition to liability for loss suffered. Consult Australia would like to understand the reasoning behind the provision to explore if it is the right solution or if another approach would be better.</p> <p>Solution: Consult Australia and the Department of Finance to discuss this clause.</p>