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CONSULT AUSTRALIA

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

Friday, 28 April 2023

Sanaz Mirzabegian
Executive Group Manager
Procurement ACT

By email to: Sanaz.Mirzabegian@act.gov.au
CC: Amaranth.King@act.gov.au; cshinkfield1@kpmg.com.au

Dear Sanaz,

RE: Procurement ACT - Procurement Reform Program

Consult Australia welcomes the opportunity to contribute to and be involved in the consultation by Procurement ACT on the Procurement Reform Program. Please find below part 2 of our submission.

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 reform program is focussed on three main commitments: increasing transparency, streamlining processes, and providing greater support.

We understand this to mean:

1. Transparency of the pipeline of projects.
2. Streamlining legislative and policy frameworks as well associated templates, commensurate with the scale, scope and risk of the procurement to ensure consistency and reduce complexity.
3. Providing greater support by enhancing training and tools to assist businesses to navigate the requirements to tender for work, including:
    - the development of a consultant portal and
    - a whole-of-government panel management policy.

Our submission is solutions-focussed and concentrates on opportunities to streamline processes (point two above) with a particular focus on contract templates and terms used in contracts. The terms of concern we raise are the issues we consistently advocate on, including:

- limitation of liability
- consequential loss
- proportionate liability
- variations
- fitness for purpose
- novation

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We understand the reform program is in a draft stage and we welcome the opportunity to co-design the reforms with you through further engagement prior to implementation. Additional items we would like to discuss with you and our members present include force majeure, thresholds, and pipeline timings.

Consult Australia looks forward to hearing from you to discuss this further and consider a workshop where we can collaborate on solutions.

Yours sincerely,

Alison Kirk
Manager NSW & ACT

Procurement Act – Procurement Reform Program	
Focus area	**Consult Australia's position**
Limitation of liability	**Recommendation:** *A limit of liability should be included in the contract (for example in line with the position in AS4122-2010)* **Issues:** A limitation of liability brings certainty for all parties to a contract as it sets out what the liability will be if a loss is incurred. A limit of liability is important to consultants who need to assess the risks of not only entering this contract but also how the risk of entering this contract fits with other risks on other projects. The limit of liability should be commensurate to the consultant's role in the project as well that the contract value for the consultant's services as well as 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. **Solution:** Consult Australia suggests Procurement ACT reform contract templates to include a limitation of liability as an express monetary value (in aggregate) with minimal to no carve outs, that reflects the level of financial risk retained by the consultant. Any question of insurance should remain separate to the limit of liability. We support the position in AS4122-2010 in respect of limitation of liability.
Consequential loss	**Recommendation:** *Insertion of a mutual and unqualified exclusion of liability for consequential or special losses* **Issues:** Consequential or special losses do not arise naturally from a breach or wrong and can open a party to unquantifiable and unreasonable liability. Consequential or special losses are extremely difficult to assess or manage and may not be an insurable risk. Therefore, for fairness, neither party should be liable for consequential or special losses of the other party. **Solution:** Consult Australia suggests Procurement ACT reform contract templates to provide a mutual and unqualified exclusion of liability for consequential or special losses. If Procurement ACT sees a need for a specific consequential loss to be covered, that can be discussed.

Proportionate liability	**Recommendation:** *Procurement ACT contracts should expressly guarantee proportionate liability* **Issues:** 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 professional indemnity insurance policy because it extends the liability of a consultant beyond their statutory obligation. The policy intent of civil liability reform and introducing proportionate liability was to bring balance back to the professional indemnity insurance market after the collapse of HIH in 2001. Therefore, contracting out of proportionate liability in professional services contracts in particular undermines that original policy intent. **Solutions:** Procurement ACT to insert into the indemnity clause that the consultant's liability will be reduced proportionally to the extent that ACT government, its employees, agents or clients acts or omissions contributed to any loss. Consult Australia welcomes the opportunity to engage with Procurement ACT further on how to expressly prohibit contracting out of proportionate liability for professional services contracts across all Procurement ACT templates, as well as through reforms to the *Civil Law (Wrongs) Act 2002* (ACT). Additionally, Consult Australia encourages that any Procurement ACT policy material make clear that Agencies should not contract out of proportionate liability in professional services contracts.
Variations	**Recommendation:** *Further clarification of variation clauses required* **Issues:** During a project there is often need for a variation to the services due to matters outside of the consultant's and the agency's control. Sufficient time should be allocated to enable variations where appropriate underpinned by a collaborative approach. **Solution:** Consult Australia welcomes the opportunity to work with Procurement ACT in clarifying the variation process, including discussion of a go slow to go fast approach to projects. Further, it would be good to understand how variations are to be assessed and the basis for them.

Fitness for purpose	**Recommendation:** *Replace any fitness for purpose obligation with an appropriate standard of care* **Issues:** 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. Therefore, fitness for purpose obligations are not suitable for consultants. 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 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. **Solution:** Procurement ACT should ensure that professional services contracts rely on holding consultants to an appropriate 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 this standard of care is within the professional's control and covered by PI insurance.
Novation	**Recommendation:** *Novation should be by consent of all parties* **Issues:** Consultants are concerned about novation of contracts because the risk profile of working with a public sector client is vastly different to the risk profile of working to a constructor. The disputation in the market is not driven by government claims against consultants, but by private sector constructors making unreasonable claims against consultants to access the consultant's professional indemnity insurance.

	For example, if a consultant accepts a government client, and the contract has a broad liability framework, the consultant business can conduct a risk assessment and note that the government client (like all government clients) is a model litigant. Therefore, the risk of an unreasonable claim against the consultant is low. However, if during the term of the contract, the consultant is novated to a private sector client, the risk of an unreasonable claim becomes high. This would bring the risk assessment of a consulting business to a position above usual levels of risk tolerance. If the consulting business is not able to consent to novation, they have no way to mitigate the risks resulting from the novation. **Solution:** Novation should be by consent of all parties. This would allow the consultant to try and manage its risks if novation occurs by negotiating terms with the private sector client, or to disagree with the novation.
Indemnities	**Recommendation:** *Removal of unqualified indemnities in contracts* **Issues:** Unqualified indemnities shift liability to consultants regardless of fault and expose consultants to liabilities for risks that consultants are not in a place to manage or control. This view also applies to the inclusion of warranties. The indemnity clause in the ACTGS Services Consultant Agreement is broad and shifts risk onto the consultant for liabilities outside the consultant's control. This relates to both clauses 10.2 and 10.3. **Solution:** Where indemnities are agreed to by both parties, they should be 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.
Professional indemnity insurance requirements	**Recommendation:** *Remove onerous insurance requirements* **Issues:** 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 or arrangement for clients (unless of course the client acquires insurance themselves for the project, such as project specific professional indemnity insurance).

	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 the specific project - should not needed 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. 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 diligence. Agencies that include onerous contract clauses on insurance will be creating barriers for businesses wanting to tender. Some businesses will have global insurance programs who have participants in their program who do not conduct business in Australia, but provide cover to the Australian market, and may be regulated by other reputable regulators, rather than APRA. Additionally, not all policies are underwritten on an annual basis. **Solution:** We suggest a rethink of the insurance requirements to ensure they are balanced. We are happy to meet with Procurement ACT to discuss the current insurance market and constraints, as well as to contextualise the need for care in setting insurance requirements in contracts. We also encourage you to talk with the Insurance Council of Australia, or we can ask them to join us in a meeting with Procurement ACT.