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CONSULT AUSTRALIA

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

7 June 2023

Australian Small Business and Family Enterprise Ombudsman
By email: inquiries@asbfeo.gov.au

Dear Ombudsman,

RE – Commonwealth Procurement Rules

Consult Australia welcomes the opportunity to contribute to the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) inquiry into Commonwealth procurement. We agree that for many small businesses, the processes involved in identifying and securing Commonwealth procurement contracts can be complex, costly, and time-consuming.

Consult Australia sees significant strengths in the Commonwealth Procurement Rules, particularly the following provisions relevant to risk and insurance:

> *8.4 As a general principle, risks should be borne by the party best placed to manage them; that is, relevant entities should generally not accept risk which another party is better placed to manage. Similarly, when a relevant entity is best placed to manage a particular risk, it should not seek to inappropriately transfer that risk to the supplier.*
>
> *a. Relevant entities should limit insurance requirements in contracts by reflecting the actual risk borne by suppliers in contractual liability caps.*
>
> *b. Suppliers should not be directed to take out insurance until a contract is to be awarded.*

Despite the above rules, we do continue to see risk being passed down the supply chain, unreasonable contract terms demanded by government clients, contracting out of proportionate liability and unrealistic insurance requirements (not just financial limits).

While Consult Australia supports the Australian Government's moves to improve procurement to attract more small business suppliers, more needs to be done with other levels of government. The federal government needs to leverage National Cabinet as well as its funding of state/territory projects.

Unreasonable contract terms

There is a range of unreasonable contract terms particularly where a client treats a consultant as a constructor, for example fitness for purpose: where fitness for purpose is primarily about the product, an outcome that consultant's do not have control over as it is dictated by the work of the constructor.

Other examples of unreasonable contract terms include standards of care that are higher than the common law, contractual warranties, and unrestricted indemnities. Consult Australia has more information on these "terms of concern" as it relates to consultant's professional indemnity insurance, available on request.

Contracting out of proportionate liability

Consult Australia has long been advocating for proportionate liability to be made mandatory for professional services contracts across Australia. We have been calling on the states and territories to amend civil liability laws in all jurisdictions to match Queensland, by explicitly prohibiting contracting out of proportionate liability for 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 professional indemnity insurance policy because it extends the liability of a consultant beyond their statutory obligation.

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The policy intent of civil liability reform and introducing proportionate liability was to bring balance back to the to the professional indemnity insurance market after the collapse of HIH in 2001. Therefore, contracting out of proportionate liability in professional services contracts undermines that original policy intent.

This reform will have a direct positive impact on the culture of the construction industry as more work will be invested to determine appropriate risk allocation when everyone knows that the consultant will not bare the liability of all.

Unrealistic insurance requirements

Consult Australia supports the Commonwealth Procurement Rules 8.4(b) that ensures suppliers can bid on tenders without an unreasonable insurance requirement (financial) barring them. This requirement should also apply on state and territory tenders given the significant proportion of small businesses that contract with state and territory government clients.

Consult Australia has observed a worrying trend of government clients (at all levels) inserting unrealistic insurance requirements (not financial) into standard contracts.

For example, government clients are requiring consulting businesses to:

- provide full policy documentation
- seek the client's approval of the insurance policy
- have the client named in the insurance policy.

All the above indicates a misunderstanding by government on the role of insurance policies including:

- insurance policy documents are commercial in confidence
- insurance policy documents are between an insurer and a consulting business only
- insurance policy documents generally do not name projects or clients
- clients are not a party to the insurance policy, even though the insurance policy may cover loss suffered by the client.

It appears that government clients are imposing these provisions to deal with the risk of a consultant not having appropriate insurance. However, as Consult Australia has stressed there are underlying issues such unreasonable contract terms and contracting out of proportionate liability that are impacting the affordability/accessibility of professional indemnity insurance. Therefore, government clients should be focussed on these issues rather than imposing even more unreasonable provisions in contracts.

We support ASBFEO's continuing work to uplift small businesses and welcome the opportunity to provide further information.

Yours sincerely,

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