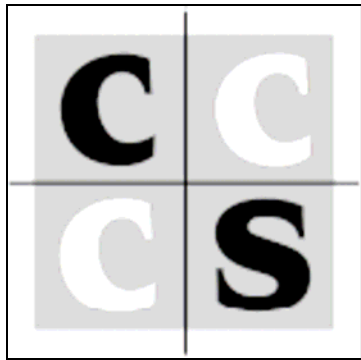


A Guidance Note to Conditions of Contract for Consultancy Services (2005)



This Guidance Note is based on a document prepared by the Auckland Region Contract Group,
and verified by ACENZ, in February 2005.

This Guidance Note issued by
The Association of Consulting Engineers New Zealand Inc.
June 2005



A GUIDANCE NOTE TO CCCS (2005)

INTRODUCTION

The Conditions of Contract for Consultancy Services were developed jointly by the Auckland Region Contract Group (ARCG, see below) and The Association of Consulting Engineers New Zealand Inc. They have been ratified by INGENIUM, Institution of Professional Engineers and Transit NZ and were issued as a second edition (2005).

The Conditions of Contract for Consultancy Services (CCCS)¹ 2005 are recommended for general use for contracts for the purpose of procuring and providing consulting services. They have been developed to apply to a wide range of consulting services and for most types of projects. This document is for use where the Services are being procured for the purposes of a business.

The General Conditions of Contract are can be amplified or adapted when required to suit particular engagements by use of the Special Conditions.

This Guidance Note has been prepared to provide clarification in the use and interpretation of the CCCS (2005) Conditions of Contract for Consultancy Services. They are not intended to form a part of any Contract Agreement.

This Guidance Note reflects the combined opinions of both ARCG and ACENZ, based on their own current contract documents and experience with them. The ARCG is made up of both providers and users of consulting services.

As a perceived “best practice” guide, the Guidance Note may, from time to time, be used by mediators, arbitrators and adjudicators in determining what may be current practice and therefore intent, in the event of ambiguity in, or dispute over, the wording of a particular contract.

This guide has been prepared to provide assistance to Consultants and Clients in the preparation and interpretation of CCCS 2005. While every effort has been made to provide relevant examples and guidance, it can not be relied on as legal or professional advise on the subject. ACENZ or the individuals involved in the preparation of this Guide accept no responsibility for the information contained in this document or for its use and interpretation.

Auckland Regional Contract Group comprises:

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Manukau City Council
North Shore City Council
Rodney District Council
Papakura District Council
Waitakere City Council
Franklin District Council
Auckland Regional Council

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¹ For contracts in the Auckland region, also read ARCCCS (July 2004)

DISCUSSION

Clause numbers used in this section refer to the corresponding clause in the body of the CCCS (2005).

1.1 Definitions:

A clear understanding, and correct use, of defined terms in any contract agreement is imperative if ambiguity and argument are to be avoided.

“Confidential Information”: Information can be confidential to either the Client or the Consultant. The definition is quite broad and not confined to information specifically labelled as “Confidential”.

There is a new definition for **Intellectual Property** in this section of the document. This has particular application under section 9, which deals with Copyright and shared right to use new Intellectual Property, while protecting copyright in pre-existing intellectual property.

Equally, care in the use of the terms **“Services”** and **“Works”**, or **“Consultant”**, **“Subconsultant”** and **“Other Consultant”** is required to ensure clarity of intent is maintained.

In professional services contracts, the term **“Principal”** is not used. **“Client”** is the defined term and should be used to avoid any confusion with the Client’s role as “Principal to other “Works” contacts. Similarly, the term “Contractor” should only be used as defined, and is not synonymous with the term “Consultant”.

2.3 Duty of Independent Judgement

Where the Scope of Services requires the Consultant to act as Engineer or Architect to a contract under NZS3910, NZIA-SCC1, FIDIC or other similar forms of contract, there will be times when the Consultant must fairly and impartially exercise professional judgement and make decisions which will be binding on both parties (Principal and Contractor).

Users of the CCCS are referred to the Guidelines to NZS3910: 2003, section G6.2 for a discussion of what has often been described as the “semi-judicial” role and duty of the Engineer to the contract.

This requirement has occasionally created problems, particularly for Local Authorities, when Clients find themselves contractually bound by a decision (or action) of a consultant and are faced with a choice between declaring a dispute, breaching a contract or making a payment that they have not authorised. This is further complicated by the provisions of the Local Government Act with respect to financial contract delegations and the authority to commit expenditure of public funds.

Effective and timely communication between the Consultant and the Client is critical to the proper management of those situations where the Consultant is obliged to make a judgement which may result in an outcome at variance with the Client’s views or wishes.

Where problems have occurred in the past, these have almost invariably been in relation to the instruction of variations, acceptance of contractor claims, or issue of completion certificates where the Client has not agreed with the decision, the instruction or determination of the Consultant. If not properly managed, the actions of the Consultant may leave the Client with an un-budgeted and hence un-funded obligation to pay.

Refer comments under clause 2.9 below.

2.4 Other Consultants

If the Consultant is required by the Scope of Services to direct, or otherwise co-ordinate, the work of Other Consultants (see definition clause 1.1), this would not normally include the authority to vary the scope of services of the Other Consultant.

The drafting of the Scope or Brief for each such consultancy contract will need to accurately reflect the duties and responsibilities of the other – one to instruct, the other to act upon instruction – while clearly defining the boundaries with regard to variations to Scope of Work.

Appendix A – Scope and Purpose of Services, is the appropriate place to define the respective roles and responsibilities in this regard.

2.9 Instructions to Contractors

Consultants should appreciate the constraints under which public bodies operate. Consultants do not have authority to commit public funds and should not expect to be permitted to act unilaterally when considering the issue of variations to a contract.

When defining the extent to which a consultant, when acting as Engineer or Architect to a contract, may instruct variations to a physical works contracts, care should be taken to ensure that the Consultancy Services Contract does not result in the Consultant being unable to act impartially as required under the terms of the Works contract, without breaching the Consultancy Agreement.

Where a high level of control by the Client / Principal is considered desirable, the Works contract agreement should make it clear to the Contractor that the Engineer (or Architect) cannot be relied upon to act as would normally be expected. In which case, consideration should, perhaps, be given to using NZS3915 – “Conditions of contract for building and civil engineering construction (where no person is appointed to act as engineer to the contract)”.

Each local authority will wish to manage this issue in a way that best reflects their own internal operational procedures, and hence Appendix A – Scope and Purpose of Services is the appropriate place to define the respective roles and responsibilities in this regard.

It is important that the Consultant’s authorisation in relation to instruction or variations to Contractors is made clear. For example, what is the maximum variation that the Consultant can instruct without prior approval of the Client and under what circumstances?

2.10 Health & Safety

A fundamental principle of the Health & Safety in Employment Act (HSEA) is that all parties have responsibility for their own actions and ensuring that their actions or failure to act do not endanger themselves or others. Equally, no party may contract out of their obligations by assigning, or attempting to assign, that responsibility to others either by contract or other mechanism.

This clause therefore reinforces these principles by stating clearly that:

- Consultants are responsible for their own health and safety, and that of their employees

and Subconsultants, in the execution of their obligations within the Scope of Work. Further there is an obligation to provide and implement properly considered management plans which address specific hazards relating to the work to be carried out;

- Others may have a responsibility in respect of particular sites or operations, and there is an obligation on the Client to provide relevant management plans specific to those sites and/or operations. Equally there is an obligation on the Consultant to seek to obtain these and to ensure compliance with such management plans;

An example of where this might be applicable is where the Scope of Services requires the Consultant to access an existing building or facility, which is owned by the Client. In this case the Client has an obligation to provide to the Consultant any safety management plans for the facility and to establish a hierarchy or precedence of safety management plans for the Services.

This is even more relevant where the Consultant is to act as Engineer or Architect to the Contract in respect of alterations to an existing building or facility, which is to remain operational during the Works, and where the construction contractors will be required to have a safety plan for the Works.

- Consultants must accept that, when the Scope of Services requires that they act as Engineer or Architect to Contract or otherwise to administer a separate construction contract, they have responsibilities under the HSEA to take all practicable step in the interests of safety of others as well as their own staff and must act accordingly. This does not in any way relieve the Client as Principal, of their responsibilities under the Act – it simply reinforces the Consultant’s responsibilities.
- Clients and Principals equally must recognise that, although they may have engaged the Consultant to administer a construction contract, they remain responsible under the HSEA and must act to address identified hazards or dangerous practices, and to take reasonable steps to satisfy themselves that the works are being carried out safely.

It is important that the Consultant’s role in relation to Health and Safety in Employment Act 1992 is defined in the Scope of Services where the services include site visits and construction phase services. A clear statement should be included in the Scope of Services as to who controls the place of work, where the works are undertaken, even in the (usual) case of it not being the Consultant.

Clause 2.10 should be read in conjunction with clause 3.8.

3.2 Provision of Information to the Consultant

This clause acknowledges the principle that in providing information to the Consultant, the Client is responsible for the accuracy or reliability of that information, or to notify the Consultant that it may be deficient or unreliable. This includes information which may have been prepared for the Client by another consultant or party.

It is not reasonable to provide information to Consultants and attempt to shift the liability for determining its accuracy onto the Consultant. Court and arbitration precedent exists that has determined that clauses which attempt to transfer this risk are not reasonable.

The wording of this clause places an onus of responsibility on the Consultant when receiving information from the Client to review it for obvious or “manifest” errors before relying upon it. The more critical that the supplied information is to the Services, the more important it is that the Consultant undertakes a check of the information rather than rely upon it as provided.

3.5 Other Consultants

This clause provides further clarity of the role of an Other Consultant. The particular points about the level of insurance required and Conditions of Contract is to ensure the Managing Consultant feels empowered to manage the Other Consultant. Also in the event of a serious problem with the services, the claim will more likely fall on the negligent party rather than the one with the higher insurance requirements under contract. This is to encourage equity rather than the “deep pocket principle” of claims against the more substantial insurance policy/party rather than the most liable. This principle is important in most cases when there is a serious issue, since there can be allegations in a number of directions.

3.6 Instructions to Others

The principle that when the Scope of Services requires the Consultant to instruct Other Consultants or to administer a construction contract under, say NZS3910, the Client does not also instruct these Third Parties and as a result confuse the responsibilities between the parties.

3.9 Approvals

The intention of this clause is to reinforce the principle that the Consultant is deemed the specialist and the Client should reasonably be able to rely upon the work performed. In accepting or approving work as being satisfactorily completed, the Client does not assume liability for its correctness.

The exception is stated because there may be instances where to accept a lesser outcome or solution may be in the interests of the Client even though that option may carry some risk. In this case, the Consultant would be expected to detail the implications or risks associated with the lesser option, and the Client would then be in a position to make an informed decision based on an understanding of those risks. In this case, it may be reasonable for Consultants to limit their liability in respect of the Client’s decision to adopt a lesser solution or outcome.

It behoves Consultants to use this provision reasonably. It would not, for instance, be reasonable to promote a more expensive solution when a lesser cost one would meet the requirements of the Brief, and then attempt to withdraw from responsibility if the lesser value, but equally adequate, solution is chosen. The “risks” referred to in the clause relate to the performance of the completed works and desired outcomes envisaged by the Brief.

4.3 Key Personnel

This clause is based upon the principle that the Consultant has an obligation to deploy on the project those people and resources offered in the proposal. Where, for whatever reason, it is no longer possible for the nominated key personnel to be assigned to the work, the Client has a right to expect people of equivalent skill and knowledge to be made available at no additional cost.

6.0 Liability and Insurance

The two main types of insurance relevant to consultancy contracts are Professional Indemnity (PI) and Public Liability. The former provides cover in the event of negligent design or deficiencies in the work undertaken by the Consultant; the latter covers injury or damage to property and/or third parties arising directly out of the actions or failure to act on the part of the Consultant in carrying out works under the contract.

From an insurance and risk perspective, the two are addressed in different ways.

Professional Indemnity insurance, in most cases, is an annual “claims made” policy which covers only those claims made during the year of the policy cover. It does not cover services provided in that year unless the Consultant claims during that year. It does not cover negligence in services provided in prior years providing the circumstances of the claim were not known in a prior year.

To quote from the Guidelines to NSZ3910:2003 [G8.4]:

“Frequently [PI] insurance will be in the form of an annual policy which covers a number of other projects and does not provide for reinstatement of cover so that coverage may be lost if there is [a significant claim] on any of the projects covered by the policy. As a result, in some special cases it may be appropriate to request a separate policy with cover exclusively for this contract.”

The professional indemnity insurance sum required and the limit of liability value should be the same dollar value to avoid confusion of differing contract interpretations.

It should be noted that professional indemnity insurance is not “event triggered” in the same manner as public liability insurance. The case for negligence must be established first and in most cases PI insurance will not respond until negligence is proven. There is a lack of certainty for the Client with claims made against PI insurance cover that may see a client paying an additional fee to cover risk transferred through the Consultant’s contract as well as paying the cost associated with any remedy.

The potential cost of rectifying an error made by a Consultant can be many times greater than the value of the fees paid. For this reason, the industry norm limit of liability determined by “five times the fee” bears no relevance to the level of risk and should not be used. For this reason, this option has been modified in the Special Conditions to the CCCS to set a default minimum limit of liability at \$500,000 and a normal maximum limit of \$2,000,000.

Some clients have, in the past, sought to transfer the entire risk of potential losses arising from negligent errors onto consultants by requiring very high or even “unlimited” liability. This is not seen as a cost-effective way of managing such risk – especially as an “unlimited liability” is not insurable.

Where unreasonably high liability and insurance limits are set, consultants will be obliged to manage their exposure to such risk by either declining to undertake commissions or operating within companies lacking in financial substance and/or risking their businesses with liabilities greater than their insurance cover.

A considered assessment of the risks needs to be undertaken before determining the limit of liability required. This then, by application of a “multiplier” or other methodology, will define the minimum limit of liability and corresponding level of PI insurance cover required in the contract.

It should be noted that there will be situations where the level of risk is so low as to make the default minimum limit of liability (\$500,000) unnecessary, disproportionate to the value of the fee, or unreasonably onerous to the smaller consultants. It should, however, be understood that a decision to reduce the limit of liability is effectively a decision to “self-insure” and should be based on a sound understanding of the risks and liabilities involved.

Prudent consultants will ensure that their PI insurance policies provide a level of cover in excess of the sum of the limit of liabilities on a number of their more significant projects, and this by a reasonable margin.

Duration of Liability:

The Duration of Liability provisions (clause 6.4) have been inserted to set an end-date to the liability of the Consultant. The default value of six years from completion of the service is a reflection of the timeframe established under the Limitation Act 1950 although it applies from a completion of the services rather than when any defect is discovered. Under the Building Act the comparable period is ten years and in some other situations may be longer. In some cases, therefore, it may be reasonable to set the term of the liability period longer than six years. This is a decision for each client organisation to make based on a considered assessment of the risks and policies regarding “self-insuring”.

In the event that a Consultant ceases to trade, the expectation is that “run-out” cover would be obtained to insure a reasonable level of liability for a period of six years.

In view of the fact that PI cover is effectively reduced by any claims, it is imperative that Consultants notify their Clients of events which would result in the level of cover being less than required to adequately cover the limit of liability set by the contract.

Public Liability insurance is an annual cut-off policy, but is relatively cheap for even quite high levels of cover. Unlike PI cover, Public Liability insurance would normally provide for automatic reinstatement of cover after a claim.

As with PI liability and insurance, the required level of cover should be determined having due regard to the potential risks associated with the nature of the works. Furthermore, variations to the scope of services should include a review of the risks associated with any additional services to be provided and the level of insurance adjusted accordingly.

Where the nature of the Services is such as to require the Consultant to perform a component of the work using a motor vehicle (eg traffic surveys, site inspections) it will be necessary for the Consultant to carry a Motor Vehicle Insurance Policy which provides an appropriate level of Third Party / Public Liability cover.

Evaluating Level and Nature of Risks:

It is recommended that a considered approach be applied to the determination of the potential risks to either the Client or third parties, prior to setting the level of cover required under any particular consultancy contract. Each client organisation will respond to identified risks differently on a range between the “risk averse” and an “acceptance of managed risk” response.

However transferring risk that cannot be managed and insured by a consultant who has little appetite for risk because of low capital and low margins, may not be avoiding Client risk. Other approaches, such as joint management of risk may be a better approach.

Some local authorities are formalising risk assessment procedures with the end goal of defining a level of consistency or “best practice”.

7 Variations

The management by both the Consultant and the Client of variations including their prompt processing is of key importance to the success of any contract for the provision of consultancy services. Both parties should pay particular attention to these clauses.

Note under Clause 7.2 there is a reference to Clause 2.1 and the clauses need to be read together.

9 Copyright of Documents

This series of clauses is a development of previous clauses in standard professional services contracts. The clauses recognise that both parties may enter a contract with pre-existing intellectual property and that further intellectual property is likely to be developed as part of the Services. Both the Client and the Consultant have the need to use that intellectual property after the completion of the Services.

It is important for clients, in the long run, that consultants do retain ownership of the intellectual property they develop, otherwise there will be a disincentive for consultants to develop innovative approaches and solutions as part of their research and development. Such innovation can be used to the advantage of their clients on subsequent engagements.

The client also needs access to the intellectual property for the ongoing operation and modification of their asset. A good balance between the needs of both parties has been achieved with these clauses.

Clause 9.4 notes that if the client wishes to reuse the intellectual property developed on one project for another, they will be doing that at their own risk and they cannot hold the Consultant responsible for its adequacy in the second application. This is because it requires professional judgement to know when an idea or concept can be used, even if the set of circumstances appears similar. If the Client wishes a standard design to be developed for application on a widespread basis it should be clearly stated in the Scope of Services and Brief, and this clause would not apply.

11 Termination

It should be noted that the Client may terminate the agreement at any time whereas the Consultant may terminate the agreement only in the case of material breach by the Client.

12.14 Client's Regulatory Functions

This clause has application where the Client is a Territorial Local Authority, or similar organisation, which has various regulatory, asset management, network utility operator, and compliance certification responsibilities while, as Client to any particular contract, it may be deemed to be one organisation or legal entity. This clause has been inserted to ensure that the Client's ability to function in its other responsibilities, is not fettered in any way by virtue of it being the Client under the contract.

Thus, no variation would arise from delays arising from the proper execution by the Client, of its responsibilities under (say) the Resource Management Act, Building Act, Hazardous Substances and New Organisms Act or when (for instance) issuing approvals as a Network Utility Operator, Road Controlling Authority or the like.

Clients to whom this clause applies, must ensure that at all times they act reasonably and equitably in carrying out their other functions and not seek to deliberately manipulate the contract through application of this clause.

Appendix A – Scope and Purpose of Services

The Scope of Services is the foundation for the successful completion of any professional services contract. It is important from both the Client and Consultants point of view. The Client's objectives should be stated in clear performance terms and it is preferable that solutions are not provided as that can lead to misunderstanding as to what is fixed and what may be changed to achieve the overall objective of the Client.

If the Client has difficulty establishing a clear brief for the Scope of Service, it may be beneficial for there to be an initial phase to the services during which the brief and scope is worked out jointly and in an interactive manner. The initial phase could be on a time and disbursements basis and its objective could be to achieve clarity on the scope and extent of services and, determined by negotiation, a lump sum fee for completing the full Scope of Services.

The Scope and Purpose of Services should include the start and completion dates of the contract and include performance measures and milestones for the services that are specified.

Appendix B – Fees Expenses and Payments

It is important to detail the payment terms as an hourly rate or lump sum and specify whether it is inclusive or exclusive of GST.

Consideration needs to be given to the appropriateness of linking milestones to payments.

Special Conditions Part B

Should any changes to the General Conditions be required they are to be detailed in the Special Conditions.

The parties are encouraged to minimise amendments to the General Conditions except for particular circumstances of a project where requirements should be additional rather than modifications.

In particular, Clients should avoid making the conditions more onerous in such a way that raises the duty of care. If that is done, normal PI insurance may not respond or the Consultant may find the risks are out of proportion with the potential reward and accordingly not bid, or the risks carried by the Consultant cannot be managed by the Consultant. In such situations the services have a high chance of not meeting the Client's needs and the Client will not have, in reality, the additional comfort they seek.

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