Infrastructure Advisory Services: Terms & Conditions

Term Sheet Feedback Template

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***Mandatory fields**

#	Focus Area	Feedback
A1	**General Obligations**	In (c) add "reasonable and lawful" before "directions". Service Provider needs a clear right to resist unlawful directions - for example if, after novation, the builder directs the Service Provider to make a design change that causes non-compliance with a legislative requirement. In (e) replace "ensuring" with "procuring". Service Provider cannot guarantee time and cost outcomes of third-party contracts. **In (f) replace "meet" with "be capable of meeting".** Design documents don't dictate placement of every last nail, but instead leave some details to the builder's judgment, where appropriate. Without this essential layer of expertise contributed by builders and manufacturers, a building built in accordance with the design will *not* meet requirements.
A3	**Fitness for Purpose**	**In (b) replace "should" with "must".** **Add a new (d): "Contract must provide a clear process for provision by the Agency, or subsequent development, of a brief which realistically defines the Agency's purposes for the project"** "Fit for purpose" obligations must be tied to due care and skill, otherwise they are uninsurable for Service Providers. A good briefing process is essential to articulate Agency's purposes and allow Service Provider to meet them. Unclear project objectives lead to service providers adding a price premium, not bidding or submitting a non-confirming bid (Consult Australia, Model Client Policy 2018, Principle 8)
A5	**Work, health and safety**	Replace "ensuring" with "ensuring, so far as is reasonably practicable," in the second and third bullets. The above language is verbatim from s22 Work Health and Safety Act. Service Providers cannot "ensure" safety as they only design, or enter for very limited

		purposes, a site that is managed and controlled by others.
A6	**Agency Obligations**	**Add a new row providing: "Agency must provide Service Provider with directions, approvals, information and site access as reasonably required in connection with the Services"** Project success is dependent on an Agency fulfilling a minimum of contractual obligations. Service Provider cannot perform its services without these things.
B1	**Approved Personnel**	In (b) replace "at its discretion" with "acting reasonably" In (c) replace "should" with "must". In (g) add "acting reasonably" before "require" Service Provider has no choice but to replace Key Personnel in some cases - illness, resignation etc. Reasonable right to replace is required where tender process requires commitment of senior staff months in advance of work. Providing timesheets is an administrative burden that should only be required with good reason, and not when the fee is a lump sum.
B3	**Records**	Add (c) "Agency may only require Service Provider to provide company financial records, audit results or similar if Agency has reasonable grounds to believe Service Provider is likely to become insolvent." Providing these highly confidential records is a heavy administrative burden that is very rarely justified.
C3	**Media and publications**	Add (d) "Agency must not unreasonably withhold its consent to Service Provider photographing completed work or referring to the project for reasonable publicity purposes." Reference to past work, supported by photographs, is critical to promoting architectural services and creates minimal risk to Agency.
D1	**Warranty**	Add (c) "Agency to provide reciprocal warranty for IP and moral rights in any material provided by Agency including pre-existing work of others which is to be incorporated in the Services." Service Provider needs a minimum of rights in order to adapt others' work. In many cases only Agency can obtain these (e.g. altering an existing building owned by Agency, or completing the design of an earlier service provider engaged by Agency).
D2	**Intellectual Property Rights in Contract material**	Add to the end of (b) "for the Project". Reverse (a) and (b) so that default position is Licence. A broad licence enables Agency to do everything it needs to. Use of Service Provider's IP should be restricted to the subject project and site, as the design may be non-compliant and wholly unsuitable if used on other sites.

D5	**Indemnity**	Add to the end of current text "caused by Service Provider's breach of IP requirements in the Contract". Service Provider cannot indemnify for breaches caused by others – e.g. Agency failing to secure IP licences from any previous designers whose work is being adapted.
D6	**Moral Rights**	Add to existing text "Agency must attribute Service Provider as author where reasonably practicable and must cease attributing Service Provider upon reasonable request." Only the moral right against derogatory treatment needs to be waived for Agency to use the work unconstrained. It is not onerous for Agency to agree to reasonable attribution, and to the right to withdraw attribution if the work is substantially altered. NSW Government should uphold this legally-enshrined right where it can do so without detriment.
E1	**Reliance and information documents**	**In (a) replace "is encouraged to" with ", except in exceptional circumstances, must".** It is rarely possible for Service Provider to verify information, especially during a tender process. Service Provider cannot re-survey the Site, or verify soil conditions, or check the presence of asbestos in old buildings. It is inefficient for Agency to pay Service Provider to reperform this work, which can amount to over $40,000 per firm, per bid (Consult Australia, Model Client Policy 2018, Principle 8).
E2	**Discrepancies/errors**	In (a) replace "error" with "error it discovers" Service Provider cannot guarantee to detect all errors in documents provided by others if those errors are beyond Service Provider's ability or expertise to detect.
F3	**Third party reliance**	**Delete this row completely.** Reliance letters are akin to collateral warranties. They impose on Service Provider liability to third parties, which is likely to trigger the "assumed liability" exclusion commonly found in professional indemnity policies. In other words, there is likely to be no insurance cover for claims arising out of reliance letters. These letters have not been required of architects in the past and will create serious uninsured gaps if they become a requirement.
G1	**Indemnities**	**In (b) delete "consultants, agents and contractors".** **In (c) replace "which covers" with "to the extent caused by".** **Delete (c)(i) and (ii).** This indemnity must be limited to the extent caused by Service Provider's fault, and must not extend to unidentified "consultants" or other third-party

		beneficiaries. Otherwise it exceeds the cover provided by most service providers' professional indemnity insurance (Consult Australia, Model Client Policy 2018, Principle 4) and conflicts with item G5 (proportionate liability). No-fault indemnity obligations for property damage and personal injury are wholly inappropriate for Service Providers who merely visit a construction site controlled by others.
G2	**Limitation on Liability**	**Add (d) "When setting a liability cap, Agency should take into account Service Provider's fee and role, available insurance cover, and the ability of a typical Service Provider's balance sheet to bear uninsured risk. Liability cap should not generally exceed 20% of Service Provider's fee (noting that the carve-outs in G3 require Service Provider to pay the liability cap amount *in addition to* amounts recovered under insurance)."** Many NSW Government projects have a project value greatly exceeding the professional indemnity insurance held by architects (which is $1m - $20m per claim for most Australian practices). Architects lack the resources to pay large claims that exceed their insurance. If an architect becomes insolvent due to a large claim, their insurance lapses, meaning there will be no insurance cover for future claims arising out of any current or past projects. A realistic liability cap, set at something like insured amounts plus 20% of the fee, is in the best interests of the project.
G3	**Exclusions for Limitation on Liability**	Delete the second bullet. For Service Providers who merely visit a site that is controlled by others, there is no reason to treat personal injury differently.
G4	**Consequential Loss**	Delete (b). Carving out the broad list of items in G3 comes close to nullifying the protective value of this clause for Service Provider.
G5	**Proportionate liability**	**Delete "unless justified on a project specific basis, as determined by the Agency". Alternatively, add to the end of existing text "in exceptional circumstances".** Proportionate liability is a vital and appropriate protection for architects. As generalist consultants with a broad project role, they are often minor contributors to claims primarily caused by the errors of others, and are often targeted as perceived "deep pocket" defendants. The result is increasing cost, and decreasing availability, of professional indemnity insurance for consultants (see Attachment A, Insurance Council of Australia submission on D&BP Act, 2021). This is

		exactly what Part 4 of the Civil Liability Act was enacted to prevent.
H1	**Professional indemnity insurance**	In (b) consider replacing "$10 million" with "$5 million", depending on profile of projects on which the long form Contract will be used. Some medium sized architects would otherwise be excluded from tendering as they might only have $5 million professional indemnity insurance.
H2	**Public Liability insurance**	Public Liability Insurance must be reflective of the nature of the projects and the role of the consultant.
I1	**Fees**	**Add (d) "Service Provider entitled to fee increase for substantial changes to brief, changes to scope of services, unforeseeable changes in law, prolongation of the services, or substantial amendment of approved Deliverables, except to the extent caused by Service Provider's negligence or breach."** Add (e) "Service Provider entitled to negotiate adjustment to any agreed and accepted rates in accordance with market changes if Contract term exceeds 2 years." Add (f) "Service Provider entitled to charge interest at market rates on overdue payments" Service Provider cannot price for unforeseeable circumstances, so they need to be claimable as variations. Service Provider cannot resource the services if rates are frozen indefinitely at unsustainable levels – especially for long-term panel agreements. The set-off right in I3 heightens the importance of interest.
I3	**Set off**	**Delete this row entirely.** Set-off rights are all too easily misused to withhold fees without proof of fault, indefinitely. The risk is heightened when architects are novated to a builder, who may withhold fees simply to improve its own cashflow. Setting off also fails to trigger professional indemnity insurance cover, meaning the architect's balance sheet bears the loss. If Agency instead pays the fees then makes a claim for damages, the insurer pays the claim.
J1	**Novation to third party**	**Replace "consent" with "not unreasonably withhold its consent" and renumber existing text as (a).** **Add (b) "Novation deed not to impose unreasonable or duplicated liabilities on Service Provider and to provide an express right of communication between Service Provider and Agency after novation"** **Add (c) "Unless Contract confirms from outset the project stage at which novation will definitely take**

		place, Service Provider may negotiate a reasonable fee adjustment if novation is implemented. Service Provider may negotiate a reasonable fee adjustment if any changes to scope or Contract occur at novation" With the number of builder insolvencies in the last two years, architects need a right to refuse novation if there are reasonable grounds. Novation also creates additional work that must be priced for – such as redocumenting in trade packages, investigating builder requests for substitutions, and redocumenting work to suit builder's preferences. We would welcome a discussion with NSW Government about putting in place protocols to achieve better outcomes on novated projects. A survey of our members has revealed serious concerns about novation, including excessive design changes by builders that diminish project quality; inability to conduct proper inspections of construction work; and isolation of architects from key decisions and from collaboration with other consultants.
K1	**Force majeure**	**Add to (c) "epidemic or pandemic"** COVID-19 demonstrated the serious effect of pandemic-generated lockdowns on business continuity.
K2	**Suspension**	In (b)(iii) replace "directions" with "reasonable directions". In (b)(iv) replace "necessary" with "reasonable" Replace (c) with "Agency must provide reasonable notice to allow Service Provider to remobilise after suspension" Service Provider cannot keep staff idle for an indefinite time during suspension (and Agency would not want to incur this cost). A reasonable remobilisation period allows Service Provider to reallocate resources elsewhere on a temporary basis.
L3	**Termination by Service Provider**	**Renumber existing text as (a).** **Add (b) "Service Provider may suspend performance as an alternative to termination"** Suspension is best for project. The alternative is the much greater cost and delay of engaging a replacement service provider after termination.
L4	**Payment on Termination (no default)**	Add to (a) "plus a reasonable percentage of the fee applicable to unperformed services". Service Provider will incur substantial loss of profit and wasted time which is difficult to quantify. Paying (say) 5% of the remaining fee to reflect this loss is not unreasonable.

L6	**Dispute Resolution**	Add “Non-binding” to the start of the text and delete “at the option if the Agency”. Arbitration and expert determination are often poor forums for construction disputes due to inability to join other at-fault parties. Agreeing to mandatory binding ADR may breach the terms of architects’ insurances. Dispute resolution procedure needs to be clear and not “optional”.
M1	**Relationship of parties**	Replace text in brackets with “(except that the Agency will provide authorisation to bind the Agency where appropriate, including where Service Provider’s services involve administering other Agency contracts)” Architects cannot act as superintendent of the construction contract unless they have power to act as Agency’s agent.
Other comments		