

Contracts and Commerce:

The Good, The Bad and the Ugly

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AECOM

The Good

Good contracts:

- are in writing



Written in Stone!
Sumerian contract of sale for a field
and a house

The Good

Good contracts:

- define the obligations of the parties
- have a balance of risk between the parties



"The purpose of this contract is to transfer all risk to consultant"

The Good

Good contracts:

- limit a consultant's liability
- provide for reasonable payment terms
- provide for variation to the services
- protect a Consultant's intellectual property
- define how disputes will be dealt with

The Good

ACENZ contracts are good contracts:

- CCCS



The Good

Other good contracts are:

The ACENZ/IPENZ Short Form

(available to Consultants and Clients)

And the ACENZ Short Form for Engagement of Subconsultants

(available to ACENZ members)

Also

The FIDIC contracts

NEC4 (but note that this requires more input from a client than CCCS)

But watch out for “special conditions” in good contracts , for example, ownership of intellectual property, reliance on information provided by the Client, payment only on completion of the Services.

The Bad and the Ugly

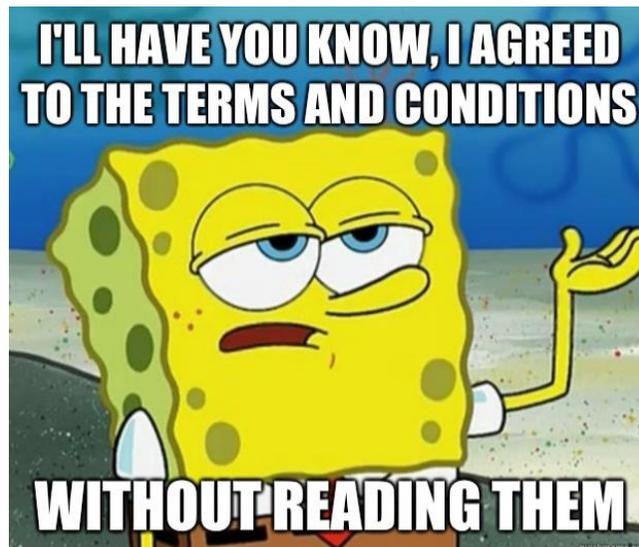
Bad and ugly contracts - generally all the things a good contract isn't

- Unreasonable risk allocation
- Unlimited liability*
- Consultant gives up its intellectual property
- Unreasonable payment terms
- Do not allow variations or extension of time

* Some government contracts have unlimited liability. You may want to make a commercial decision about these and bear in mind that in most overseas countries government contracts do not provide for a limitation of a consultant's liability.

The Golden Rule of Contracting

Read the Contract



Always make sure you read the contract. Other than legal requirements it may include reporting requirements, invoicing, onerous liability levels, insurances beyond the levels held by the Consultant etc.

The Bad and the Ugly

What to look out for – red flags:

- **Indemnity** – Look out for overly broad indemnities, e.g. “the Consultant shall indemnify the Client for all losses incurred either directly or indirectly or as a consequence of the actions or inactions of the Consultant”.
- Avoid offering indemnities. Check with your insurer.
- **Limit of liability** (or lack thereof) – a general rule of thumb is 5 times the fee with maximum of \$2 million.



The Bad and the Ugly

What to look out for:

- **Consequential losses** – always seek exclusion of consequential losses. These can sometimes be acceptable if in combination with a low limit of liability.
- **Duration of liability** – typically this should be 6 years or less. Where “building work” is involved, many clients will want to extend this to 10 years.
- **Liquidated damages** – these are generally unacceptable
- **Warranties** – to be avoided (except for the warranty of a duty of care).
- **Construction Risk** – why take on the risk if you are only monitoring the work of a contractor?

The Bad and the Ugly

What to look out for:

- **Levels of insurance** – ensure the levels of insurance are no greater than the insurances held by the company
- **Insurance certificates** – obtain approval from your Client to submit certificates of currency issued by brokers rather than insurance companies
- **Disclosure of policy terms**, e.g. deductibles (policy excesses) – Consultants consider the terms of their insurances as confidential and may be required by their insurers not to disclose them.
- **Third party reliance** – Where a third party is to be given your reports etc. and wishes to rely upon them, a Deed of Reliance should be signed by that third party limiting your liability.
- **Ownership of Intellectual Property** – you should always try to own the IP developed on a project, or at least to have joint ownership with the Client
- **Fit for Purpose** – unless the purpose is well defined this is unacceptable
- **Time of the essence** – not applicable for a professional services contract. Remove if possible

The Good

- The Fourth Edition of CCCS

The Third edition needed updating to ensure compliance with the:

Health and Safety at Work Act 2015

- The HSWA was introduced as a result of the Pike River accident. It updates health and safety requirements generally and imposes specific obligations on designers

Construction Contracts Act 2002

- Since 2015 the CCA applies to many of the services provided by consultants – design, engineering and surveying

The Good

- The Fourth Edition of CCCS
 - Review committee of 25 people
 - Make as few changes as necessary:

“When it is not necessary to change, it is necessary not to change”

Lucius Cary Falkland, 2nd Viscount, House of Commons, Nov 22, 1641

The Good

- The Fourth Edition of CCCS
 - Changes principally made:
 - a. Compliance with Client instructions
 - b. Health and Safety
 - c. "Early warning"
 - d. Payment
 - e. Variation
 - f. Intellectual Property
 - g. Right to suspend the Services
 - h. Right to use the adjudication process under the CCA where the Services come under the ambit of that Act

Compliance with Client Instructions



There is now a specific requirement for the Consultant to comply with a client's instructions (previously implied).

Health and Safety

The Health and Safety clauses now use the language of the HSWA and require the Consultant to consult, cooperate and coordinate activities with the client and other relevant parties.

There is a similar obligation on the client.

Where the Consultant is acting as a Designer (as defined in the HSWA), there are specific obligations (see the next slide).

Health and Safety

Duties of a "Designer"

"The designer must, so far as is reasonably practicable, ensure that the plant, substance, or structure is designed to be without risks to the health and safety of persons—

(a) who, at a workplace, use the plant, substance, or structure for a purpose for which it was designed; or

(b) who handle the substance at a workplace; or

(c) who store the plant or substance at a workplace; or

(d) who construct the structure at a workplace; or

(e) who carry out any reasonably foreseeable activity (such as inspection, cleaning, maintenance, or repair)..."

Early Warnings



The third edition of CCCS required the consultant to advise the client if the Consultant thought a Client direction was a Variation. However, that obligation has now been expanded to:

The Consultant must notify the Client in writing as soon as the Consultant becomes aware, or should reasonably have become aware, of any matter which could impact the provision of the Services. Within 15 Working Days of the notice date the Consultant shall provide the Client with details of the estimated impact of the matter on the cost of the Services, likely or estimated impact on the programme and completion date for the Services and make recommendations on how to proceed.

And there is a similar obligation on the client to advise the Consultant:

As soon as the Client becomes aware of anything that will materially affect the scope or timing of the Services, the Client must inform the Consultant in writing.

(But that was always in the third edition.)

The Good

Payment



This section of the document has been re-written to give the consultant the right to progress payments, and state when payments are due (20th Month following the month of issue of each invoice – previously time for payment was given in the Special Conditions (now the Special Conditions can over-ride the standard payment time.

Payment by the Client is now on account as does not constitute approval of any part of the Services.

Where the nature of the services is such that the Constructions Contract Act applies, the provisions of the Act apply when there is a disputed invoice, (see clause 22 of the Act)

Variations

A couple of changes have been made to this section. Now when a Consultant gives the Client an “early warning” of circumstances the Consultant believes constitutes a Variation, then the Client must respond in writing whether or not the client agrees with the Consultant. This is similar to the Third edition of CCCS. However, the Fourth Edition now adds that if the Consultant fails to give an early warning, then the Client is not bound to agree that the circumstances or direction should be treated as a variation.

The reason for this change is to give the client the opportunity to agree to a variation “up front” or decide not to proceed with it. The client group told us that there had cases where the consultant had proceeded to vary the Services when, if the Client had been aware of this, the client would have decided to do something different.

The other change to this section enables rates or prices included in Appendix B, Fees, Expenses and Payment, to be used to value a variation, similar to the process in the construction contract, NZS3910.

Intellectual Property



When we started our review, I thought this section was going to be quite contentious, and so it turned out to be. Views were expressed that the Consultant should own all new intellectual property developed on a project, or the client, who was paying, should own it. The good news is that in the end we arrived at a compromise and kept the status quo as in the third Edition, that is, New Intellectual Property is jointly owned by the consultant and the client.

However, a new clause has been added stating that the client's right in relation to the New Intellectual Property is conditional upon the Client having paid all amounts due to the consultant.

We have changed the clause stating that the Consultant does not warrant the use of New Intellectual Property for any purpose other than the Services, to state that the Consultant accepts no liability for use of the New Intellectual Property. There could have been an implication that the Consultant was warranting the suitability of the New Intellectual Property for the Services.

Right to Suspend the Services

It has often been an issue with Consultants that they must continue to provide the Services even if the Client is not paying.

The good news is that a new clause has been added to the Fourth Edition giving the Consultant the right to suspend performance of the Services if the client fails to make payment that is due and payable.

What next?

- Guidance notes will be prepared detailing the changes made to the third edition and how to interpret the document
- Special Conditions for Design & Construct Projects will be available
- The Short Form will be updated to be aligned with the Fourth Edition of CCCS
- Longer term, Special Conditions for Panel Agreements will be developed

Thank You

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