

A Guide to the ACE New Zealand/Engineering New Zealand Short Form Agreement for Consultant Engagement

The Short Form Agreement (SFA) had been updated in 2016 to reflect the requirements of the Health & Safety at Work Act 2015 and again in 2017 to include references to the Construction Contracts Act 2002.

However, in 2017 we adopted the fourth edition of “Conditions of Contract for Consultancy Services” (CCCS) and changes incorporated in the fourth edition meant that there were differences in wording and intent between CCCS and the SFA. To address these differences, the SFA was amended, and an updated version was published in February 2019.

This guide has been prepared to assist users of the February 2019 edition of the SFA in preparing agreements with their clients.

| Front Page – Agreement Particulars | |
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| Item | Guidance |
| (Client) | Enter the full legal name of the Client. You may also include the company number for added certainty of the legal entity with which you are contracting, some companies have a number of different, but similar, names. |
| (Consultant) | Enter the full legal name of your organisation |
| Project | Enter the name of the Client’s project |
| Scope & nature of the Services | Provide as much information as you can about what you will be doing. Refer to and attach your proposal if appropriate or the Client’s request for proposal (RfP) plus any subsequent correspondence. Exclusions and assumptions can be noted for clarification. |
| Programme for the Services | Provide a programme appropriate for the scope of Services, e.g. a simple spreadsheet for a simple project, or a Gantt chart for a more complex project. Include any items that require input from the Client, i.e. provision of information, approvals etc. |
| Fees & timing of payments | Include the fee arrangements, e.g. time and expenses, lump sum, milestone, and when payment is due if other than the default (refer clause 8 overleaf). |
| Information or services to be provided by the Client | List here the information and/or services the Client needs to provide in order that you can perform the Services, e.g. “information” may include a plan and legal description of the site, results of a geotechnical investigation, “services” may include the work of another consultant. |
| Variations to the Short Form Model Conditions of Engagement | List here any amendments to the Short Form Model Conditions of Engagement (overleaf) that have been agreed with the Client, e.g. this may include a requirement to comply with a Client’s policies, or specific health & safety procedures. Some clients will want to solely own New Intellectual Property (refer clause 16 overleaf, which provides for the default option of joint ownership). This should be resisted as intellectual property is what a consultant has to offer and “giving it away” could hinder its ability to use such intellectual property in future work. However, each case should be considered on its merits. |

Back Page – Model Conditions of Engagement

| Clause | Guidance |
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| 1 | Ensure you attach all relevant information, e.g. your proposal, correspondence with the Client, etc. Attached documents should be initialled by both Client and Consultant on each page. |
| 2 | <p>Where you are providing Services to the client for their personal, domestic or household use, the Consumer Guarantees Act 1993 (CGA) applies- which provides that:</p> <ul style="list-style-type: none"> • you will not be able to limit your liability • your services must be reasonably “fit for purpose” • the Services must be completed within a reasonable time (unless a specific time is stated in this agreement) and, • unless a fixed or “not to exceed” fee is included in the agreement, the fee must also be “reasonable”. <p>This clause seeks to clarify that such provisions do not apply when the Consultant’s services are provided for the purposes of a business. Typically, the CGA applies where you are working on a private residence but may also include projects undertaken for private individuals.</p> |
| 4 | The Consultant is required to ensure that information provided by the Client is not used for any purposes unrelated to the Services. The Client must advise the Consultant if any of the information provided to the Consultant is copyright and/or the intellectual property of a third party. |
| 5 | This clause confirms the good practice requirement to advise the Client without delay if you believe that an instruction from the Client constitutes a variation or if you become aware of a circumstance which could impact the Services. For example, results of geotechnical testing which show that ground conditions are different to what were expected, or there has been a change in a code of practice or statutory requirement. This is similar to the “early warning” requirement in CCCS. |
| 6 | Whether the Client has ordered a variation or has requested the Consultant to submit a proposal for a variation, the cost of the variation and the time required to provide the additional services should be agreed prior to any work being done on the variation. Failure to agree these at the time could result in a disagreement or dispute later. |
| 7 | The amount and frequency of payments to be made by the Client are set out in the <i>Agreement Particulars</i> . Where you are engaged by an agent on behalf of the Client, e.g. an independent project manager, then the agent is also liable for payment in the event that the Client is unable or unwilling to pay for the Services. |
| 8 | The default payment terms are 20 th month following the month of issue of each GST invoice. If alternative terms are agreed, they must be included in the “ <i>Fees & timing of payments</i> ” or “ <i>Variation to the Short Form Model Conditions of Engagement</i> ” sections in the <i>Agreement Particulars</i> . Note that the Services can be suspended following notice by the Consultant for continued non-payment by the Client, but the Services must be resumed when payment is made. Interest is payable where payment is made after the due date and costs incurred in recovering the fees owed may also be charged. |
| 9 | <p>If the Services are of a nature that they come within the ambit of the Construction Contracts Act 2002 (e.g. design, engineering and quantity surveying) and the Consultant follows the procedure set out in the Act for claiming payment, then the provisions of the Act regarding payment may be invoked.</p> <p>Be aware when engaging Subconsultants that “pay when paid” and “pay if paid” provisions are prohibited under the Construction Contracts Act 2002 and apply in all cases.</p> |
| 10 | The Consultant should seek to obtain the Client’s approval prior to purchasing incidental goods and always when purchasing services. The Client may have preferred suppliers and, in the case of services, may believe those services form part of the Services the Consultant was undertaking. In such cases, early consultation between the parties will avoid a dispute later. |

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| 11 & 12 | <p>Where the Consultant breaches the Agreement, e.g. is negligent in performing the Services, the Consultant is liable for the Client's losses caused directly by the breach.</p> <p>However, these clauses also:</p> <ul style="list-style-type: none"> • limit the Consultant's liability to five times the fee with a minimum cap of \$100k and a maximum cap of \$500k. The minimum cap has been introduced in recognition that the Consultant, as a consultancy professional, is expected to have a fair and reasonable level of responsibility even for minor engagements. Note that this minimum does not mean that the least the Consultant could have to pay would be \$100,000. The Client would have to justify the amount of its loss, which could be less than \$100,000. • exclude the Consultant's liability for the Client's indirect or consequential loss. |
| 13 & 14 | <p>The Consultant's liability in connection with the Agreement extends for a period of six years from the date of completion of the Services. The Consultant must use all reasonable endeavours to maintain professional indemnity insurance for at least this period. While the Consultant is in business, this should be the case anyway. If you are closing your business and/or retiring, you can purchase "run-off" insurance to cover this period of liability. Talk to your broker about this.</p> |
| 15 | <p>New Zealand does not have proportionate liability legislation - so that if other parties, in addition to the Consultant, that have contributed to the Client's losses, the Consultant could still be held liable for the entire losses (e.g. if other contributing parties are no longer around or insolvent). However, this clause seeks to amend this by providing the Consultant is only liable to the proportional extent of its own contribution.</p> |
| 16 | <p>New Intellectual property now only applies to intellectual property created in carrying out the Services and provided to the Client as a deliverable, i.e. it should not include calculations (unless these are specified as a deliverable), internal workings, draft concepts etc. New Intellectual property is jointly owned by the Consultant and Client, but only after the Client has paid for it.</p> <p>Some clients will want to own New Intellectual Property exclusively, i.e. you could be deprived of using it on future projects for other clients. However, consultants should typically resist this because such intellectual property is likely to be of commercial value and is one of the reasons clients engage consultants. However, each case should be considered on its merits.</p> |
| 17 | <p>The Health and Safety at Work Act 2015 requires the Consultant and the Client to be responsible for their own health and safety obligations under the Act, i.e. they cannot be delegated to others. Consultants must ensure they are familiar with and comply with such obligations in performing the Services. Of particular importance to Consultants undertaking design is the requirement to ensure, as far as reasonably practicable, that the item being designed will be without risks to the health and safety of persons who will use, construct, operate or maintain the item</p> |
| 18 | <p>Either the Client or the Consultant can suspend the Services if the other party is in "material default". A material default is a breach of the contract which is significant in consequence and more than minor. The circumstances of the breach will determine whether a material default or a non-material/minor default has occurred. Repeated or continuing "minor defaults" can amount to "material default" when viewed collectively and not remedied within a reasonable period.</p> |
| 19 | <p>The first step in resolving a dispute is for the parties to meet and try and reach agreement themselves. If this is unsuccessful, then the dispute may be resolved by mediation, a confidential and consensual dispute resolution process in which an independent and impartial mediator facilitates negotiation between the parties to assist them to resolve their dispute. The mediator is not a decision-maker, and the process is based on achieving co-operation between the parties.</p> |
| 20 | <p>The Short Form Agreement is subject to the laws and courts of New Zealand. If the Services are to be provided for an overseas client, it remains preferable for that New Zealand law applies.</p> |