



A GUIDE TO THE CHANGES MADE TO CONDITIONS OF CONTRACT FOR CONSULTANCY SERVICES (CCCS) IN THE 4TH EDITION

1 INTRODUCTION

1.1 Background

In 2000 ACENZ adopted a new set of Conditions of Contract for Consultancy Services, (CCCS). This document arose from a request from territorial authorities to update the then standard ACENZ/IPENZ Model Conditions ¹

Since that document's release there have been changes in legislation, in insurance policy and a growing dissatisfaction among territorial local authorities and other client groups, which led to the CCCS (2000) document being modified regularly for a consulting engagement, often to neither party's benefit.

As happened prior to release of CCCS (2000), consultants and their insurers spent much overhead time reviewing each new contract form.

In order to bring some consistency to contracts within the Auckland region, an Auckland Regional Contracts Group (ARCG) was set up, comprising representatives from each of the constituent city/district councils and the Auckland Regional Council. This group invited ACENZ representatives, as well as legal and insurance advisors, to discuss where improvements could be made to the document.

This review resulted in a modified contract entitled "Auckland Regional Conditions of Contract for Consultancy Services" ² published in 2004.

ACENZ subsequently circulated ARCCCS to the other three parties to the initial CCCS, for their approval. IPENZ, INGENIUM and Transit New Zealand all endorsed the new document, and agreed that there were substantial improvements to some sections, particularly the section on Intellectual Property.

A third edition was prepared in 2009³ as a result of experience from use of the second edition. It was developed by representatives of the ARCG, NZ Transport Agency and ACENZ and agreed by IPENZ (now Engineering NZ) and INGENIUM (now IPWEA NZ).

With the passing into law of the Construction Contracts Amendment Act 2015 (the "CCA") (which included design, engineering and quantity surveying as "Construction Work") and the Health and Safety at Work Act 2015 (HSWA), it was decided that the third edition needed updating to reflect revised legislative requirements. At the same time the entire document was reviewed to ensure it met current day needs of consultants and clients

¹ Model Conditions of Engagement (1997) published by IPENZ & ACENZ

² ARCCCS Ver 4, July 2004, ISBN 0-9583605-8-8

³ CCCS (third edition), August 2009, ISBN 978-0-9583605-0-0

1.2 Use of this Practice Note

This Practice Note has been prepared to outline the principal differences from the Third Edition and to provide guidance on some of the new or substantially amended clauses.

The CCCS has been developed as a result of considerable efforts by ACENZ to generate a plain English consultancy agreement which is acceptable to both clients and consultants. Some concessions were made in the latest review. Careful consideration should be given before accepting any terms which may be more onerous, and **consultants should argue strongly with clients who wish to make CCCS more onerous.**

Note that the Short Form agreement was updated in 2016 to reflect the requirements of the HSWA and again in 2017 to better align with the updated CCCS, including references to the CCA in terms of payments and disputes procedures.

An electronic version of CCCS (4th edition 2017) is available in a format which does not allow you to alter the document, other than the Form of Agreement and Special Conditions. This is deliberate to ensure long-term integrity of the document.

2 COMMENTARY ON CHANGES

2.1 Changes in the Fourth Edition

Changes made in the fourth edition are important in that they incorporate changes to health and safety and construction legislation and make the contract more acceptable to key client groups who have tended to make amendments particularly regarding the intellectual property, liability and variation clauses

2.2 Clause by Clause Changes

The following table shows the changes made to the third edition and, where significant changes have been made, guidance notes are included.

Clause No	Section / Clause Title	Explanation of Changes
General Conditions		
	Form of Agreement	The project to which the Services are to be provided is termed the "Client's Project". This term is used elsewhere in the document. "the" has been omitted from the definitions of Client and Consultant. The Agreement has been updated to include the "fourth" edition of CCCS.
1. 1.1	Definitions and Interpretation The following definitions have been added: CCA Client's Project Confidential Information	 This is the Construction Contract Act 2002. From 2015 this Act applied to many of the activities of design, engineering and quantity surveying undertaken by members of ACENZ This is as defined on the Form of Agreement This definition has been amended slightly such that all information as listed shall be considered as confidential unless noted otherwise.

	<p>Designer</p> <p>HSWA</p> <p>PCBU</p> <p>The following definitions have been amended: New Intellectual Property</p> <p>Interpretation</p>	<p>Previously the option of “unless otherwise noted” was not available.</p> <p>The definition of a Designer has been added because of their particular obligations under the Health and Safety at Work Act 2015, including a duty to design plant, substances or structures that, as far as reasonably practicable, are without risk to those who use, handle, store or construct them. [See also Clause 2.10]</p> <p>This is the Health and Safety at Work Act 2015. Those providing Services to a Client are obliged to comply with the requirements of the Act. [See also Clauses 2.10 and 3.8]</p> <p>A PCBU is a person conducting a business or undertaking. A “person” includes a company, practice or sole trader and also includes the Crown</p> <p>New Intellectual Property now includes models and software, prepared or created in any medium. New Intellectual Property only applies to things provided to the Client as deliverables, i.e. it does not include draft drawings or reports, internal correspondence or review comments etc. unless these are required as part of the Services.</p> <p>Where an Act or Regulation is referred to in the Agreement, it now means the latest amendment of the Act or Regulation.</p>
<p>2.</p> <p>2.1</p> <p>2.4</p> <p>2.10</p>	<p>Obligations of the Consultant</p> <p>The Services</p> <p>Subconsultants</p> <p>Health and Safety</p>	<p>The fifth obligation requiring the Consultant to notify the Client of circumstances that could result in a Variation to the Services has been deleted as the requirement is now covered in new Clause 2.13. The fifth obligation has been replaced with the requirement that the Consultant must comply with all reasonable instructions issued by the Client. This has been added as some clients believed they should have the power to instruct the Consultant, for example, to carry out additional work.</p> <p>Prior approval of the Client is now required before appointing a Subconsultant. The appointment can be at any time.</p> <p>This clause has been updated to comply with the Health and Safety at Work Act 2015. Of particular note is the requirement to comply with the obligations of a Designer under the Act, who must, as far as is reasonably practicable, ensure that the item or items being designed must be without risks to the health and safety of persons likely to build, use or maintain the item(s). Everybody providing Services to a client must consult, cooperate and coordinate activities with the Client and other relevant parties</p>

		and, where the Services include management in relation to the Works, to assist the Client to comply with its own obligations. SEE GUIDANCE NOTE
2.13	Consultant to give Early Warning	This is a new requirement. The Consultant must advise the Client of any matter which could impact the provision of the Services. Failure to provide an early warning could result in a Consultant not being paid for undertaking additional work. Note that there was and still is a similar requirement for the Client to warn the Consultant of anything that would affect the Services. [See Clause 3.7 – re-titled “Client to give Early Warning”.] SEE GUIDANCE NOTE
3. 3.1	Obligations of the Client Payment	This clause has been amended to refer to the terms and conditions set out in Section 5 which have been completely re-written. See below.
3.2	Provision of Information to the Consultant	This clause has been amended to require the Client to pay for any royalties or fees applying to ownership or proprietary rights in information held by other persons and which are needed for the Consultant to provide the Services.
3.7	Client to give Early Warning	The title of this clause has been changed from “Matters affecting the Services”. Other than that, no changes have been made to the clause. SEE GUIDANCE NOTE
3.8	Health and Safety	This clause has been updated to reflect the requirements of the Health and Safety at Work Act 2015. In particular the need for the Client to consult, cooperate and coordinate activities with other PCBU's and, where the Consultant is acting as a Designer, to participate in consultation undertaken by the Consultant. See also clause 2.10.
5.	Payment	This entire section has been amended and expanded to clarify that the Consultant is entitled to progress payments, when payments are due and that payment to the Consultant by the Client does not constitute approval of any part of the Services. Clause 5.4 recognises that where the Services are covered by the Construction Contracts Act 2002, the procedures in that Act for settling disputes may apply. SEE GUIDANCE NOTE
6. 6.5	Liability and Insurance Insurance	This clause now provides for additional insurances that may be required, such as motor vehicle insurance.
7. 7.1	Variations Variations to the Services	This clause is varied from the clause in the Third Edition reflecting the requirement for the Client to give an early warning of matters that could affect the Services or for the Consultant to give an early warning of any direction by the Client or any circumstance that could affect the provision of the Services. SEE

7.2	Agreement of Variations	<p>GUIDANCE NOTE</p> <p>A new paragraph has been added to assist in valuing Variations. Where rates or prices are included in Appendix B “Fees Expenses and Payment”, then those rates or prices may be used to value a Variation. While this might have been what happened in practice, the clause now makes it clear to both Parties that payment of Variations using rates or prices in Appendix B would be the likely method used.</p>
8. 8.1 and 8.2	Confidentiality Client and Consultant Obligations	<p>The first bullet points in Clauses 8.1 and 8.2 have been deleted. Neither the Client nor the Consultant need to identify Confidential Information as all information is deemed confidential unless noted otherwise.</p>
8.3	Exclusions	<p>A paragraph has been added to enable a Consultant’s or any Subconsultant’s personnel to disclose Confidential Information if required by their code of professional ethics.</p>
9	Intellectual Property	<p>This section has been re-named (was Copyright)</p>
9.3		<p>This clause has been added. The Client must have paid all amounts due to the Consultant in order to gain joint ownership of New Intellectual Property.</p>
9.5		<p>This clause, previously 9.4, has been amended to clarify that the Consultant does not accept liability for use of New or Existing IP other than that for which it was developed or provided, rather than not warranting the suitability of New or Pre-existing IP.</p>
9.8		<p>This new clause provides for geotechnical factual information collected in the course of providing the Services to be uploaded to the New Zealand Geotechnical Database, thereby adding to a national resource of geotechnical information.</p>
10. 10.3	Disputes	<p>The Arbitrators’ and Mediators’ Institute of New Zealand has been referenced in this amended clause as the nominating body for an arbitrator rather than the New Zealand Law Society as previously.</p>
10.5		<p>This clause has been added to note that the Consultant has rights under the Construction Contracts Act 2002 where the Services include design, engineering or quantity surveying.</p>
11. 11.1	Termination Termination of the Agreement	<p>This clause has been amended to require the return by the Consultant to the Client of certain data, information or property pertaining to the Services before the Agreement is terminated.</p>
11.2	Payment on Early Termination	<p>This clause now requires the Client to immediately pay the Consultant for Services performed to date where the Client terminates the Agreement for</p>

11.5	Right of Suspension for non-payment	reasons other than default by the Consultant. However, if the Client terminates the Agreement because the Consultant is in default, then the Client is not obliged to pay. This is a key new clause which provides for the Consultant to suspend the Services where the Client is not paying. SEE GUIDANCE NOTE
12. 12.2 and 12.3 12.16, 12.17 and 12.18	General Provisions Services Supplied to a Consumer and Services Acquired in Trade Entire Agreement Counterparts Amendments to the Agreement	These clauses replace the previous clause 12.2 Consumer Guarantees Act and expand upon when that Act and the Fair Trading Act do not apply to the provision of the Services. These three new clauses have been added to strengthen the agreement in terms of it superseding previous negotiations, allowing the signing in counterparts and rendering ineffective amendments that are not in writing and signed by both Parties.
Special Conditions – Part A		
5.1	Payment Timing	This has been deleted as this is now covered in the General Conditions.
6.5	Insurance	The ability to add other insurances, e.g. motor vehicle, has been added.

2.3 Guidance Notes

Clause 2.10 – Health and Safety

A Consultant has a number of responsibilities under the HSWA, the more significant ones are noted in this clause. Of particular importance to Consultants undertaking design are the requirements to ensure, as far as reasonably practicable, that the item being designed will be without risks to the health and safety to persons who will use, construct or maintain the item. Appendix 1 re-prints Clause 39 of the HSWA which more fully details these requirements.

Clause 2.13 – Consultant to give Early Warning

This is a new clause although a similar requirement was included as the fifth bullet point in Clause 2.1 of the Third Edition. The purpose of the clause is to bring to the Client's attention matters that may affect the cost, timing or quality of the Services whether or not due to a direction of the Client. This then enables the Client and Consultant to agree the best way forward, e.g. accept the additional cost or delay, omit to do certain work, or discuss an alternative course of action. The clause requires the Consultant to give the early warning as soon as the Consultant becomes aware, or should reasonably have become aware of the Client's direction or other circumstance that could affect the Services and then to provide details of the impact within 15 Working Days of the early warning. Failure to give an early warning could affect the Consultant's ability to obtain a Variation at a later date (see Clause 7.1).

Clause 3.7 – Client to give Early Warning

In the same way that the Consultant must give an early warning to the Client about anything that could affect the Services, the Client must likewise advise the Consultant. On receipt of such a warning the Consultant should enter into a conversation with the Client as to how best to proceed. While failure of the Client to give an early warning does not, in itself, affect the ability of the Consultant to subsequently claim a Variation for additional cost or time, the Consultant will be in a better position to make such a claim where an early warning has not been given.

Section 5 – Payment

Default provisions for the frequency of progress payments and when payment is due are included in this clause. If these default provisions are not to apply then alternative provisions must be set out in Appendix B.

If the Services are of a nature that they come within the ambit of the Construction Contracts Act 2002 (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. Refer Appendix 2.

Be aware when engaging Subconsultants that “pay when paid” and “pay if paid” provisions are now prohibited under the Construction Contracts Act 2002.

Clause 7.1 – Variations to the Services

Some clients of ACENZ members have expressed their concern that they are sometimes presented with a variation claim some time after a circumstance has arisen which the Consultant believes entitles it to a Variation. This was the reason why the requirement for the Consultant to give an Early Warning was strengthened and given a separate clause in the Fourth Edition. This clause enables the Parties to look back to when an early warning should have been given and the decision the Client would have made at the time, e.g.

- a. accepted that a Variation was valid, or
- b. would have directed the Consultant not to proceed with the additional work, or
- c. would have discussed alternative approaches that could be taken to minimise cost or time impact on the Services.

Note that there is still some risk that a Variation that the Consultant deems as valid may not be accepted if an early warning has not been given so it is important, indeed good project management, that early warnings are given even if they do not eventuate in additional work or delays.

The revised clause is similar in its effect to clauses in NEC4: Professional Service Contract and NZS3910: Conditions of contract for building and civil engineering construction.

11.5 - Right of Suspension for non-payment

This is an important new clause and of significant benefit to the Consultant when engaged by a Client who is not paying or is paying late. In order to take advantage of the ability to suspend the Services for non-payment the Consultant must follow the procedure detailed in the clause, i.e. wait for ten Working Days after the day on which payment is due then provide written notice to the Client requiring payment within 5 Working Days. Only then can the Consultant suspend the Services if payment is still not made.

2.3 Appendices

There are seven appendices to the CCCS and these are unchanged from the Third Edition except that Appendix B must state the frequency of progress payments to which the Consultant is entitled, and the date on which payments are due unless the default provisions of monthly progress payments and payment by 20th month following the month of issue of the GST invoice are to apply. Payment timing in the Third Edition was specified in the Special Conditions.

The appendices are completed on separate sheets as required and although the Appendices are largely unchanged from the Third Edition, except possibly for Appendix B as noted above, it is important that they are carefully prepared for each agreement.

Provided below is guidance on completing the appendices.

Appendix A Scope Purpose, Programme and Completion Date for the Services

Appendix A requires careful attention whether it is prepared by the Client or the Consultant.

The better and more detailed the description of the Services to be carried out; and the programme for the delivery of the services, the lower the probability there will be for future disputes. A good scope document should cover the following points:

- a) An accurate **description of the work** to be done by the Consultant;
- b) The **time scale** over which the services are expected to be carried out. Start and finish dates, and milestones should be identified. A good scoping document may well break the description of services into component parts, and should include, at least, a simple outline programme;
- c) An agreed series of points at which the **products** of the services (e.g. draft report, findings, design concepts etc.) will be presented to the Client for approval and agreement, prior to proceeding to the next stage of the commission;
- d) Clear **boundaries of work** extent, and coverage, beyond which any additional work required by the Client will be a Variation to the contract. This should include, if possible, the extent of alternative options that will be investigated;
- e) Specific reference to any area where there is **insufficient information** to accurately define the extent of the work required (e.g. inadequate geotechnical information to allow accurate prediction of the foundation design effort);
- f) Key information provided by the Client or third parties which the Consultant is **relying on** to perform the Services. Some Clients may wish to amend Clause 3.2 and not accept responsibility for the accuracy of information provided by them. In such cases it is particularly important that the Consultant identifies the key information the Consultant is relying on to perform the Services and agrees with the Client who will obtain this information. It is in neither Party's interest to proceed with the Services until this key information has been verified;
- g) Any key **assumptions** which are being made by the Consultant, or accepted as the basis for the project commissioned by the Client;
- h) A clear statement should be included in the Scope of Services as to who controls the workplace, where the Works are undertaken, even in the (usual) case of it not being the Consultant, and
- i) If appropriate, specific allocation of any **identifiable risks**, (e.g. the risk that a consent application may go to appeal, that the project may be extended, or altered by a landowner).

Additional information is available in the document "Guideline on the Briefing and Engagement for Consulting Engineering Services" 2004. ACENZ also encourages use of the industry-standard reference on "Construction Industry Council (CIC) Guidelines" (2016). Both documents are available from the ACENZ website.

Appendix B Fees, Expenses and Payments

This needs to contain a clear statement of the fees and basis of payment, including the type of contract (lump sum, hourly basis etc.), the rates and what disbursements and expenses are to be recovered. Everything the Consultant intends to claim, the method of calculation and the rate of payment, needs to be in this Appendix in a clear and unambiguous way. Additionally, unless the default provisions for frequency of progress payment claims and when payments are due, the appendix must state the frequency and time.

Appendix C Client's Representative

This Appendix may contain just a named person. Note that when seeking or receiving instructions or providing advice, ensure it is with the Client's Representative or person authorised by the Client. Often other parties associated to the Client will be corresponded with but who do not have the authority to give instructions or receive advice.

Appendix D Consultant's Key Personnel, Consultant's Representative, Other Key Personnel

This Appendix should contain a brief statement of the Key Personnel, including the nominated Consultant's Representative and other Key Personnel the Consultant intends to include in performing the Services.

Do not include here general resources you propose for the job as, under the contract, you will not be able to change them without client approval if they are designated Key Personnel.

Appendix E Subconsultants and Subconsultants' Key Personnel

List here any Subconsultants you propose, together with their Key Personnel.

Appendix F Other Consultants, Other Consultants' Insurances, Personnel, Equipment, Facilities and Information Supplied by the Client

Note that Appendix F includes Other Consultants and Other Consultants' insurance, as well as personnel, equipment, and facilities supplied by the Client. This is to register items which are generally dictated by the Client. Where the services provided by Other Consultants impacts on the Services provided by the Consultant, the Consultant should evaluate the risk of an Other Consultant having a level of insurance lower than the Consultant's level of insurance under its agreement with the Client. This is because if liability as between the Consultant and Other Consultant(s) is not clear cut the Client may go after the party with the "deepest pockets", i.e. the greater level of liability and insurance.

Appendix G Client's Risk Identification and Notification

Details to be provided of the risks identified by the Client in relation to the provision of the Services and the Client's Health and Safety Management

2.4 Special Conditions

Default conditions are included within this section with the opportunity for the conditions to be varied to suit the particular contract. Special care should be taken before modifying any General Conditions and advice sought if there is any doubt regarding the implications of proposed changes. ACENZ particularly cautions against accepting any conditions that raise the duty of care, as your PI insurance may not apply. It is recommended that, even when the default options are adopted, the blanks are filled in and appropriate alternative clauses struck out to avoid any doubt and to demonstrate a considered decision and agreement to the default option has been made

3. Acknowledgements

ACENZ acknowledges the valuable input of a number of people in preparing the Fourth Edition of CCCS, in particular clients of ACENZ members including Auckland Council, Auckland Transport, Christchurch City Council, Wellington City Council, Watercare, Wellington Water, NZ Transport Agency, KiwiRail, Ministry of Education, Department of Internal Affairs, Department of Conservation and MBIE, and also Civil Contractors New Zealand, Engineering NZ, IPWEA, the NZ Institute of Architects, Aon and CEAS.

Appendix 1 - Extract from the Health and Safety at Work Act 2015

39 Duty of PCBU who designs plant, substances, or structures

- (1) This section applies to a PCBU (a **designer**) who conducts a business or undertaking that designs—
 - (a) plant that is to be used, or could reasonably be expected to be used, as or at a workplace; or
 - (b) a substance that is to be used, or could reasonably be expected to be used, at a workplace; or
 - (c) a structure that is to be used, or could reasonably be expected to be used, as or at a workplace.
- (2) 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) at a workplace in relation to—
 - (i) the manufacture, assembly, or use of the plant for a purpose for which it was designed, or the proper storage, decommissioning, dismantling, or disposal of the plant; or
 - (ii) the manufacture or use of the substance for a purpose for which it was designed, or the proper handling, storage, or disposal of the substance; or
 - (iii) the manufacture, assembly, or use of the structure for a purpose for which it was designed, or the proper demolition or disposal of the structure; or
 - (f) who are at or in the vicinity of a workplace and who are exposed to the plant, substance, or structure at the workplace or whose health or safety may be affected by a use or an activity referred to in any of paragraphs (a) to (e).
- (3) The designer must carry out, or arrange the carrying out of, any calculations, analysis, testing, or examination that may be necessary for the performance of the duty imposed by subsection (2).
- (4) The designer must give to each person who is provided with the design for the purpose of giving effect to it adequate information concerning—
 - (a) each purpose for which the plant, substance, or structure was designed; and
 - (b) the results of any calculations, analysis, testing, or examination referred to in subsection (3), including, in relation to a substance, any hazardous properties of the substance identified by testing; and
 - (c) any conditions necessary to ensure that the plant, substance, or structure is without risks to health and safety when used for a purpose for which it was designed or when carrying out any activity referred to in subsection (2)(a) to (e).
- (5) The designer must, on request, make reasonable efforts to give current relevant information on the matters referred to in subsection (4) to a person who carries out, or is to carry out, any of the activities referred to in subsection (2)(a) to (e).

Appendix 2 – Extracts from Construction Contracts Act 2002 (please refer to the Act for complete provisions)

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the payment to which the payment claim relates if—

- (a) a payee serves a payment claim on a payer; and
- (b) the payer does not provide a payment schedule to the payee within—
 - (i) the time required by the relevant construction contract; or
 - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

23 Consequences of not paying claimed amount where no payment schedule provided

- (1) The consequences specified in subsection (2) apply if the payer—
 - (a) becomes liable to pay the claimed amount to the payee under [section 22](#) as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
 - (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the payment to which the payment claim relates.
- (2) The consequences are that the payee—
 - (a) may recover from the payer, as a debt due to the payee, in any court,—
 - (i) the unpaid portion of the claimed amount; and
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
 - (b) may serve notice on the payer of the payee’s intention to suspend the carrying out of construction work under the construction contract.

24 Consequences of not paying scheduled amount in manner indicated by payment schedule

- (1) The consequences specified in subsection (2) apply if—
 - (a) a payee serves a payment claim on a payer; and
 - (b) the payer provides a payment schedule to the payee within the time allowed by section 22(b); and
 - (c) the payment schedule indicates a scheduled amount that the payer proposes to pay to the payee; and
 - (d) the payer fails to pay the whole, or any part, of the scheduled amount on or before the due date for the payment to which the payment claim relates.
- (2) The consequences are that the payee—
 - (a) may recover from the payer, as a debt due to the payee, in any court,—
 - (i) the unpaid portion of the claimed amount; and
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
 - (b) may serve notice on the payer of the payee’s intention to suspend the carrying out of construction work under the construction contract.

See also clauses 20 and 21 for information on preparing payment claims and on payment schedules.