Updated standard consultancy agreements

New versions of two commonly used standard agreements for engaging consultants have been released, the:

- ACENZ / Engineering New Zealand (formerly IPENZ) Short Form Agreement for Consultant Engagement (**SFA**); and
- Conditions of Contract for Consultancy Services (**CCCS**).

This note outlines the more marked changes in each.

SFA

The SFA, as in the previous iteration, is a simple two-page document, with the specifics about the consultant's engagement on the front, and standard clauses on the back. These include, for example, a liability cap for the consultant, and a proportionate liability clause applying to both parties. Many of these clauses have not been changed, or given only minor update. However, we note the following.

New requirement to give 'early warning' (clause 6)

New clause 6 obliges both parties to inform the other in writing as soon as one "*becomes aware of anything that will materially affect the scope or timing of the Services*". This is in line with a trend in the construction industry towards early warning systems, and follows the addition of a similar 'Advance Notification' provision in the standard construction contract NZS 3910:2013 (which we have written about here).

Amended payment provisions (clauses 8 and 9)

Previously, the consultant was to be paid within 20 working days, and could otherwise claim interest and costs. Now payment is due on the 20th of the month (unless agreed otherwise) which aligns with CCCS. At the moment the rights to claim interest and debt recovery costs have been removed. However we understand that following further consultation these will be reintroduced in the next update.

In terms of payment (and suspension rights), the SFA is required to straddle two systems:

- Certain design, engineering and quantity surveying services will fall under the Construction Contracts Act 2002 (**CCA**), which provides for a payment claim / payment schedule regime and the statutory right of suspension;
- Otherwise the services will not fall under the CCA, so only the SFA itself applies to the engagement, rather than the statutory overlay as well. To cover off this possibility, new clause 9 requires the client to give reasons if it disputes all, or part of, an invoice (in effect the client must give a quasi payment schedule).

We have written about the changes to the CCA in September 2016 to encompass certain consultancy services here.

Rights of suspension (clauses 8 and 18)

As noted, a consultant using the SFA may also be covered by the CCA. If so, the consultant has a statutory right of suspension on 5 working days' notice[1] where:

- The client fails to give a payment schedule in time and does not pay a claimed amount;
- The client gives a payment schedule but then does not pay the scheduled amount; or
- The client fails to comply with an adjudicator's determination that the client must pay by a certain date.

The statutory right will trump anything to the contrary in the SFA.[2]

That said, the SFA also has to cover the possibility that the CCA does *not* apply to the services, so provides for a contractual right of suspension in two cases, for: non-payment (clause 8); and material default (clause 18). Further, the consultant may terminate if a suspension for material default has not been lifted after 2 months, and claim reasonable costs as a result of the suspension.

There is a potential inconsistency between *when* these two separate rights to suspend take effect. Clause 8 (non-payment) requires a payment default to continue for 14 days, at which point the consultant may suspend on a further 7 days' notice i.e. total 21 days. Clause 18 (material default) only requires 14 days' notice total. Thus if a default in payment is sufficiently sizable to be a "material default", the consultant may be able to suspend under the more favourable clause 18, but, if so, it should make that clear.

CCCS

CCCS is a long form of consultancy agreement. Most of its pages have been amended, with the changes ranging from minor updates to significant rewrites. As with the SFA, we comment on particular marked changes below.

New requirement to give 'early warning' (clauses 2.13 and 3.7)

The consultant must now notify the client in writing as soon as the consultant becomes aware (or should reasonably have become aware) of any client direction or circumstance, including a variation, which could impact the services. The consultant then has 15 working days to provide details such as the estimated impact on cost and completion date, and recommendations on how to proceed. This timeframe was added to strike some balance between client and consultant interests.

If the consultant fails to comply, any variation will be valued as if notification *had* been given within time, and might reasonably have resulted in the impact of the matter being avoided or reduced.

Conversely, the client is separately required to inform the consultant in writing as soon as it becomes aware of anything that will materially affect scope or timing.

Once again, these new clauses are in line with a trend in the construction industry towards early warning systems, and follow the addition of a similar 'Advance Notification' provision in the standard form construction contract NZS 3910:2013 (which we have written about here).

Health and Safety updates (clauses 1.1, 2.10, 3.8)

CCCS has been updated to align the parties' obligations with the Health and Safety at Work Act 2015 (**HSWA**). As part of the update, a new definition, "Designer", has been introduced, to cover the

[1] Section 24(A)(1) of the CCA.
[2] Section 12 of the CCA.

consultant undertaking design of plant, substances or structures; Designers have their own separate obligations under the HSWA such as to "*so far as reasonably practicable, ensure that the plant, substance, or structure is designed to be without risks to the health and safety of persons…who, at a workplace, use the plant, substance, or structure for a purpose for which it was designed.*"[3]

Amended payment provisions and right of suspension (clauses 5.4 and 11.5)

As noted in the foregoing section, the CCA may, or may not, apply to any given use of the CCCS, dependent on the particular services. If the CCA applies, the consultant will have statutory rights concerning payment and suspension on 5 working days' notice, which will trump anything in the contract. But if the CCA does not apply, the consultant is reliant solely on what is in the contract.

Accordingly, a new clause 5.4 covers off the possibility that the CCA's payment claim / payment schedule regime does not apply by in that event still requiring the client to give reasons if it disputes part, or all, of an invoice (i.e. give a quasi payment schedule).

Similarly, under clause 11.5, there is a contractual right of suspension for non-payment on 5 working days' notice, where the client has been in default for 10 working days (i.e. total 15 working days).

Limitations on liability (clause 6.1)

The limitations have been expanded so that now *both* parties (formerly only the consultant) are not liable to the other for indirect, consequential, special loss, or loss of profit. We understand this was a result of a request by the client group on the CCCS review committee.

Exclusion of warranties where Services acquired in trade (clause 12.3)

The previous edition of CCCS excluded the Consumer Guarantees Act 1993 where possible. Now, new clause 12.3 *also* excludes where possible, in relation to the unintentional conduct or representations of either party, the provisions of the Fair Trading Act 1986 prohibiting misleading conduct (section 9), unsubstantiated representations (section 12A) and false or misleading representations (section 13).

For more information on consultancy agreements, or to discuss any aspect of construction law, please contact:

Nick Gillies – nick.gillies@heskethhenry.co.nz or +64 9 375 8767

Christina Bryant – christina.bryant@heskethhenry.co.nz or +64 9 375 8789

Helen Macfarlane – helen.macfarlane@heskethhenry.co.nz or +64 9 375 8711

Sarah Holderness – sarah.holderness@heskethhenry.co.nz or +64 9 375 8778

[3] Section 39 of the HSWA.