

Australian Standard[®]

**Consultants agreement—Design and
construct**



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 - Australian Chamber of Commerce and Industry
 - Australian Constructors Association
 - Australian Industry Group
 - Australian Procurement and Construction Council
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Australian Standard[®]

Consultants agreement—Design and construct

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Preface

This Standard was prepared by the Standards Australia Committee MB-010, General Conditions of Contract and by Committee OB-003, General Conditions of Contract.

This Standard incorporates Amendment No. 1 (January 2010). The changes required by the Amendment are indicated in the text by a marginal bar and amendment number against the clause, note, table, figure or part thereof affected.

AS 4904—2009 *Consultants agreement—Design and construct* is a supplementary document to the suite of conditions of contract based on AS 4000—1997 *General conditions of contract*.

This Standard is intended to be used as contract conditions forming part of a contract between:

- (a) a Consultant and a Principal for the development of preliminary design to form part of the Principal's Project Requirements under AS 4902—2000 *General conditions of contract for design and construct*.
- (b) a Consultant and a Contractor where AS 4902—2000 *General conditions of contract for design and construct* are the contract conditions, in conjunction with the following project procurement methods:
 - (i) design and construct;
 - (ii) design development and construct; or
 - (iii) design, novate and construct.
- (c) a Consultant and a Subcontractor where AS 4903—2000 *Subcontract conditions for design and construct* are the subcontract conditions, in conjunction with the following project procurement methods:
 - (i) design and construct;
 - (ii) design development and construct; or
 - (iii) design, novate and construct.

If either (b) or (c) above applies, and the project procurement method chosen is:

- (a) **design and construct**—the Consultant will be responsible for design to a Contractor engaged in an AS 4902—2000 Contract or to a Subcontractor engaged in an AS 4903—2000 Subcontract (as the case requires).
- (b) **design development and construct**—the Consultant will be responsible for the development of the detailed design from a preliminary design provided by the Principal in an AS 4902—2000 Contract or by the Main Contractor in an AS 4903—2000 Subcontract (as the case requires).

- (c) **design, novate and construct**—the Consultant will be responsible for the development of a preliminary design to the Principal in an AS 4902—2000 Contract or to the Main Contractor in an AS 4903—2000 Subcontract (as the case requires). Subsequent to novation, the Consultant will be responsible for the detailed design to the Contractor in an AS 4902—2000 Contract or to the Subcontractor in an AS 4903—2000 Subcontract (as the case requires).

Clauses prefixed by * may be omitted in the Contract, where necessary, but consequential amendments may be necessary. Such omission should be clearly shown on the face of the document by striking out these clauses and indicating clearly in Annexure Part E or elsewhere that they are *not to apply*. See paragraph (i) of clause 1 on page 3 for the effect of stating changes in Annexure Part E.

Users of this Standard are advised of the importance of completing the Annexures, as in some cases completion of the *Item* is necessary for the operation of the corresponding clause.

Warnings

- (1) Users of this Australian Standard are warned that clause 9, Damage to persons or property other than the Services, does not limit the liability of parties for special, indirect or consequential losses, notwithstanding any limitations or exclusions permitted under insurance clauses 10, (Professional indemnity insurance), and 11, (Public liability insurance).
- (2) The Consultant's warranties in subclause 2.2 may impose liability on the Consultant regardless of the Consultant's exercise of due skill, care and diligence. Consultants should seek insurance advice and legal advice before accepting these warranties.
- (3) A Client should ensure that its specific requirements are fully and completely incorporated in its project requirements obtaining specialist advice if necessary. Where a Consultant provides a proposed design as part of its offer, the parties should consider whether that design should form part of the project requirements.
- (4) The risk allocation, drafting, interpretation and construction of this Standard are interrelated. Users who alter the Standard do so at their own risk and should obtain specialist advice as to whether it is suitable for the particular project.
- (5) Legislation has come into force in some jurisdictions dealing with security of payments which may affect Clause 23. Parties intending to use this Standard should seek expert advice as to their rights and obligations under such legislation.

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1 Interpretation and construction of Contract

In the *Contract*, except where the context otherwise requires:

Item means an *Item* in Annexure Part A;

Client means the person stated in *Item 1*;

Client's project requirements means the *Client's* written requirements for *the Services* described in the documents stated in *Item 9* which:

- (a) shall include the stated purpose for *the Services*;
- (b) may include the *Client's* design, timing and cost objectives; and
- (c) where stated in *Item 10*, shall include a *preliminary design*;

compensable cause means:

- (a) any act, default or omission of the *Client* or its consultants, agents or other contractors (not being employed by the *Consultant*); or
- (b) those listed in *Item 22*;

completion means completion of *the Services*;

Consultant means the person bound to carry out and complete *the Services*;

Consultant's design obligations means all those tasks necessary to design and specify that part of the project the subject of *the Services* and, if the documents stated in *Item 9* as describing the *Client's project requirements* include a *preliminary design*, developing the *preliminary design*;

Contract has the meaning in clause 3;

date of acceptance of tender means the date which appears on the written notice of acceptance of the offer;

date for completion means the date in *Item 5*, or that resulting from an *EOT*;

design documents means the drawings, specifications and other information, samples, models, patterns and the like required by the *Contract* and created (and including where the context so requires, those to be created by the *Consultant*) as part of *the Services*;

direction includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;

dispute has the meaning in clause 28;

EOT (from 'extension of time') has the meaning in subclause 21.2;

fee means that fee calculated in accordance with Annexure Part C;

fee adjustment means a sum assessed by the *Client* to be added to or deducted from the *fee*;

final certificate has the meaning in subclause 23.2;

final payment claim means the final payment claim referred to in subclause 23.2;

intellectual property right means any patent, registered design, trademark or name, copyright or other protected right;

key personnel means those personnel stated in *Item 6*;

legislative requirements includes:

- (a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where *the Services*, or the particular part thereof, are being carried out;
- (b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of *the Services*; and
- (c) fees and charges payable in connection with the foregoing;

preliminary design means the documents stated in *Item 10*;

prescribed notice has the meaning in subclause 27.1;

program has the meaning in clause 19;

public liability policy has the meaning in clause 11;

qualifying cause of delay means:

- (a) any act, default or omission of the *Client* or its consultants, agents or other contractors (not being employed by the *Consultant*); or
- (b) other than:
 - (i) a breach of omission by the *Consultant*; and
 - (ii) stated in *Item 21*;

selected subconsultant has the meaning in subclause 6.3;

the Services means the services in Annexure Part B which the *Consultant* is or may be required to carry out and complete as part of the project in accordance with the *Contract*, including *variations*;

variation has the meaning in clause 22;

and like words have a corresponding meaning.

In the *Contract*:

- (a) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or unincorporate;
- (b) time for doing any act or thing under the *Contract* shall, if it ends on a Saturday, Sunday or Statutory or Public Holiday, be deemed to end on the day next following which is not a Saturday, Sunday or Statutory or Public Holiday;
- (c) clause headings and subclause headings shall not form part of, nor be used in the interpretation of, the *Contract*;
- (d) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender;
- (e) communications between the *Client* and the *Consultant* shall be in the English language;
- (f) measurements of physical quantities shall be in legal units of measurements of the jurisdiction in *Item 7*;
- (g) unless otherwise provided, prices are in the currency in *Item 8(a)* and payments shall be made in that currency at the place in *Item 8(b)*;

- (h) the law governing the *Contract*, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in *Item 7*; and
- (i) the changes in Annexure Part E shall be deemed to be part of these General Conditions.

2 Nature of Contract

2.1 Performance and payment

The *Consultant* shall carry out and complete *the Services* in accordance with the *Contract* and *directions* authorised by the *Contract*.

The *Client* shall pay the *Consultant* the *fee* as adjusted in accordance with the *Contract*.

2.2 Consultant's warranties

Without limiting the generality of subclause 2.1, the *Consultant* warrants that:

- (a) the *Consultant*:
 - (i) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in carrying out and completing *the Services*; and
 - * (ii) has examined the *Client's project requirements* and exercising the due skill, care and diligence referred to in subclause 2.2(a)(i), that *the Services* are suitable, appropriate and adequate for the purposes stated in the *Client's project requirements*;
- * (b) to the extent that the *Consultant's design obligations*, exercising the due skill, care and diligence referred to in subclause 2.2(a)(i) are within the discretion and control of the *Consultant*, the *Consultant's design obligations*, when carried out, shall meet the *Client's project requirements*; and
- (c) subject to clause 6, the subconsultants identified in the *Consultant's* offer and *key personnel* are suitably qualified and experienced.

*NOTE: See Preface on page (iv).

2.3 Warranties unaffected

The warranties remain unaffected notwithstanding:

- (a) that the *Consultant* has entered into a deed of novation pursuant to subclause 6.4 in respect to *the Services*;
- (b) any receipt or review of, or comment or *direction* on, the *design documents* by the *Client*; or
- (c) any *variation*.

2.4 * Accuracy of Information

The *Client* warrants:

- (a) the accuracy of all information the *Client* gives to the *Consultant*; and
- (b) it has supplied all information in its possession which affects the carrying out of *the Services*.

*NOTE: See Preface on page (iv).

3 Evidence of Contract

Until a formal instrument of agreement is executed by the parties, documents evidencing the parties' consensus shall constitute the *Contract*. If such *Contract* requires a formal instrument of agreement, the *Client* shall, within 28 days of the *date of acceptance of tender*, send it in duplicate for execution by the *Consultant*. Within 14 days after receiving them, the *Consultant* shall (if they are correct) properly execute both copies and return them.

Within 14 days after receiving them, the *Client* shall execute both copies, have them stamped as necessary and send one copy to the *Consultant*.

4 Service of notices

A notice (and other documents) shall be deemed to have been given and received:

- (a) if addressed or delivered to the relevant address in the *Contract* or last communicated in writing to the person giving the notice; and
- (b) on the earliest date of:
 - (i) actual receipt;
 - (ii) confirmation of correct transmission of fax; or
 - (iii) 3 days after posting.

5 Documents and information

5.1 Discrepancies

Figured shall prevail over scaled dimensions in a discrepancy. Otherwise, if either party discovers any inconsistency, ambiguity or discrepancy in any document prepared for the purpose of carrying out *the Services*, that party shall give the other written notice of it. The *Client*, thereupon, and upon otherwise becoming aware, shall direct the *Consultant* as to the interpretation and construction to be followed.

The *Consultant* shall bear the cost of compliance with a *direction* under this subclause to the extent that any inconsistency, ambiguity or discrepancy in the *design documents* or between the *design documents* and the *Client's project requirements*, and which is in breach of any warranty given in subclause 2.2, necessitates the *direction*.

If compliance with any other *direction* under this subclause causes the *Consultant* to incur more or less cost than otherwise would have been incurred had the *direction* not been given, the difference shall be a *fee adjustment*.

5.2 Information

The *Client* shall as and when reasonably necessary:

- (a) promptly answer any reasonable enquiries made by the *Consultant* in connection with *the Services*;
- (b) direct others to liaise, co-operate and confer with the *Consultant*; and
- (c) give the *Consultant* all relevant *directions* and information in the control of the *Client*.

The *Consultant* shall use reasonable endeavours to:

- (a) liaise, co-operate and confer with others as directed by the *Client*;
- (b) inform itself of the *Client's* requirements; and
- (c) consult regularly with the *Client*.

5.3 Client-supplied documents

The *Client* shall supply to the *Consultant* the documents and number of copies thereof, both stated in *Item 11*.

They shall:

- (a) remain the *Client's* property and be returned to the *Client* on written demand, except that the *Consultant* shall be permitted to retain a copy of documents with the consent of the *Client*, which consent shall not be unreasonably withheld; and
- (b) not be used, copied nor reproduced for any purpose other than *the Services*.

5.4 Consultant-supplied documents

The *Consultant* shall supply to the *Client* the documents and number of copies at the times or stages both stated in *Item 12*.

If the *Consultant* submits a document to the *Client*, then except where the *Contract* otherwise provides:

- (a) the *Client* shall not be required to check that document for errors, omissions, inconsistencies, ambiguities, discrepancies or compliance with the *Contract*;
- (b) notwithstanding subclause 2.1, any *Client's* acknowledgment or approval shall not prejudice the *Consultant's* obligations; and

- (c) if the *Contract* requires the *Consultant* to obtain the *Client's direction* about that document, the *Client* shall give, within the time stated in *Item 13*, the appropriate *direction*, including reasons if the document is not suitable.

A *direction* by the *Client* to vary anything in the *design documents* shall be a *variation* to *the Services* only to the extent that the *design documents* before such *variation* complied, or would have complied, with the *Client's project requirements*.

Copies of documents supplied by the *Consultant* shall be the *Client's* property but shall not be used nor copied otherwise than for the use, repair, maintenance or alteration of the project.

5.5 Availability

The *Consultant* shall keep available to the *Client* one complete set of documents affecting *the Services* and supplied by a party.

5.6 Confidential information

The parties shall ensure that there are kept confidential such documents, samples, models, patterns and other information as are supplied and clearly identified as confidential.

If required in writing by a party, the other party shall enter into a separate agreement not to disclose to anyone else any confidential matter even after *completion* or earlier termination of the *Contract*.

5.7 * Media

The *Consultant* shall not disclose any information concerning the project for distribution through any communications media without the *Client's* prior written approval (which shall not be unreasonably withheld). The *Consultant* shall refer to the *Client* any enquiries from any media concerning the project.

*NOTE: See Preface on page (iv).

6 Assignment and subcontracting

6.1 Assignment

Neither party shall, without the other's prior written approval (including terms) assign the *Contract* or any payment or any other right, benefit or interest thereunder.

6.2 Subcontracting generally

The *Consultant* shall engage the subconsultants identified in the *Consultant's* offer and may terminate their engagement only with the *Client's* written approval which shall not be unreasonably withheld.

The *Consultant* shall not without the *Client's* prior written approval (which shall not be unreasonably withheld):

- (a) subcontract or allow a subconsultant to subcontract any of *the Services* described in *Item 14*; or

- (b) allow a subconsultant to assign a subcontract or any payment or any other right, benefit or interest thereunder.

With a request for approval, the *Consultant* shall give the *Client* written particulars of *the Services* to be subcontracted and the name and address of the proposed subconsultant. The *Consultant* shall give the *Client* other information which the *Client* reasonably requests.

Within 14 days of the *Consultant*'s request for approval, the *Client* shall give the *Consultant* written notice of approval or of the reasons why approval is not given.

Approval may be conditional upon the subcontract including:

- (a) provision that the subconsultant shall not assign nor subcontract without the *Consultant*'s written consent;
- (b) provisions which may be reasonably necessary to enable the *Consultant* to fulfil the *Consultant*'s obligations to the *Client*; and
- (c) provision that the subconsultant shall effect and maintain professional indemnity insurance on the same terms as are required in *Items* 18(c) and 18(d).

6.3 Selected subconsultants

If the *Client* has included in the invitation to tender a list of one or more *selected subconsultants* for a particular part of *the Services*, the *Consultant* shall subcontract that particular part of *the Services* to a *selected subconsultant* and thereupon give the *Client* written notice of that *selected subconsultant*'s name.

If no subconsultant on the *Client*'s list will subcontract to carry out that particular part of *the Services*, the *Consultant* shall provide a list for the written approval of the *Client*.

6.4 Novation

When directed by the *Client*, the *Consultant*, without being entitled to compensation, shall promptly execute a deed of novation in the appropriate form of Annexure Part D, such deed being between the *Client*, the *Consultant* and the incoming client stated in *Item* 15 for the particular part of *the Services*.

6.5 Consultant's responsibility

Except where the *Contract* otherwise provides, the *Consultant* shall be liable to the *Client* for the acts, defaults and omissions of subconsultants (including *selected subconsultants*) and employees and agents of subconsultants as if they were those of the *Consultant*.

Approval to subcontract shall not relieve the *Consultant* from any liability or obligation under the *Contract*.

7 Intellectual property rights

7.1 Warranties and indemnities

The *Client* warrants that, unless otherwise provided in the *Contract*, the *Client's project requirements*, design, materials, documents and methods of working, each specified in the *Contract* or provided or directed by the *Client*, shall not infringe any *intellectual property right*.

The *Consultant* warrants that any other design, materials, documents and methods of working, each provided by the *Consultant*, shall not infringe any *intellectual property right*.

Each party shall indemnify the other against such respective infringements.

7.2 Intellectual property rights granted to Client

The Alternative in *Item 16* applies.

Alternative 1

The *Consultant* grants to the *Client* an irrevocable licence to use the *design documents* for the project. Such licence shall also include any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the project and the copying of the documents for such purposes.

Alternative 2

Copyright and property in the *design documents* hereby vest in the *Client*, and the *Client* grants to the *Consultant* an irrevocable licence to use the *design documents* for the *Services*. Such vesting shall not extend to components of the design which have been developed by the *Consultant* for general use in the *Consultant's work* and which have not been specially developed for incorporation in the *design documents*.

The *Consultant* shall do everything necessary to perfect such vesting.

The *Consultant* shall ensure that the *design documents* are copied, supplied and used only for the purpose of the *Services*.

8 Legislative requirements

8.1 Compliance

The *Consultant* shall satisfy all *legislative requirements* necessary to carry out the *Services* except those in *Item 17* or directed by the *Client* to be satisfied by or on behalf of the *Client*.

The *Consultant*, upon finding that a *legislative requirement* is at variance with the *Contract* or the *Client's project requirements*, shall promptly give the *Client* written notice thereof.

8.2 Changes

If a *legislative requirement*:

- (a) necessitates a change:
 - (i) to the *Client's project requirements*;
 - (ii) to that part of the project the subject of *the Services*;
 - (iii) being the provision of services by a municipal, public or other statutory authority in connection with *the Services*; or
 - (iv) in a fee or charge or payment of a new fee or charge;
- (b) comes into effect after the 14th day before the closing of tenders but could not reasonably then have been anticipated by a competent consultant; and
- (c) causes the *Consultant* to incur more or less cost than otherwise would have been incurred,

the difference shall be a *fee adjustment*.

9 Damage to persons and property

9.1 Indemnity by Consultant

To the extent permitted by law, the *Consultant* shall indemnify the *Client* against:

- (a) loss of or damage to the *Client's* property; and
- (b) claims in respect of personal injury or death or loss of, or damage to, any other property,

arising out of or as a consequence of a breach of any warranty given in subclause 2.2 in the carrying out of *the Services*, but the indemnity shall be reduced proportionally to the extent that the act or omission of the *Client* or its other consultants, agents or contractors (not being employed by the *Consultant*) may have contributed to the injury, death, loss or damage.

This subclause shall not apply to:

- (a) the extent that the *Consultant's* liability is limited by another provision of the *Contract*;
- (b) exclude any other right of the *Client* to be indemnified by the *Consultant*;
- (c) damage which is the unavoidable result of the carrying out of *the Services* in accordance with the *Contract*; and
- (d) claims in respect of the *Client's* right to have *the Services* carried out.

9.2 Indemnity by Client

To the extent permitted by law the *Client* shall indemnify the *Consultant* in respect of damage referred to in paragraph (c) of subclause 9.1 and claims referred to in paragraph (d) of subclause 9.1.

10 Professional indemnity insurance

Before commencing *the Services*, the *Consultant* shall effect and maintain professional indemnity insurance with levels of cover not less than stated in *Item 18(a)*.

The insurance shall be maintained until the *final certificate* is issued and thereafter for the period as stated in *Item 18(b)*.

The *Consultant* shall ensure that every subconsultant, if within a category stated in *Item 18(c)*, shall effect and maintain professional indemnity insurance with levels of cover not less than stated in *Item 18(c)* applicable to that category.

Each such subconsultant's professional indemnity insurance shall be maintained until the *final certificate* is issued and thereafter for the period stated in *Item 18(d)*.

The obligation to effect and maintain professional indemnity insurance shall be subject only to the availability of such a policy in the market, without having regard to premium cost or to the refusal of insurers to provide such a policy because of matters which are personal to the *Consultant*, and this qualification shall apply to a subconsultant.

11 Public liability insurance

The Alternative in *Item 19(a)* applies.

Alternative 1: Consultant to insure

Before commencing *the Services*, the *Consultant* shall effect and maintain for the duration of the *Contract*, a *public liability policy*.

The policy shall:

- (a) name the *Consultant* and (subject to subclause (f)) every subconsultant as an insured;
- (b) cover the:
 - (i) respective rights and interests; and
 - (ii) liabilities to third parties,of the *Consultant* and, if included as insured, subconsultants, from time to time, whenever engaged in *the Services*;
- (c) cover the insured's liability to the *Client* and to third parties for loss or damage to property and the death of or injury to any person (other than liability which the law requires to be covered under a worker's compensation insurance policy);
- (d) provide insurance cover for an amount in respect of any one occurrence of not less than the sum in *Item 19(b)*; and
- (e) be with an insurer and otherwise in terms both approved in writing by the *Client* (which approvals shall not be unreasonably withheld).