



NON STANDARD TERMS OF CONSULTANT AGREEMENTS

For those members with long memories many may remember the singing trio of Peter, Paul and Mary. They had a song which finished “*when will they ever learn, when will they ever learn.*”

Well these are the words your claims directors are muttering, not so musically however, regarding some members who don’t appear to have understood the perils of signing up to non-standard conditions of engagement.

Architects presented with non-standard conditions of engagement should carry out a careful review to ascertain whether there are any nasty words or terms which significantly increase liability. The decision then must be made whether they require to be removed, or whether specific actions are required in order to manage the associated risk.

It is often difficult to identify what is “non-standard” in terms of the content of client or project management generated conditions of engagement. A few words slipped in here and there can make a significant difference to the liability you take on.

The best way of identifying “alerts” is to compare clauses with the equivalent ones in AAS 2008, or ask yourself the question:

“Does this clause require me to contract for a service, risk or liability beyond those in AAS 2008?”

Seemingly Innocent Words

“The architect shall perform the services to the “best” or the “highest” standards of professional performance.” “The Architect will “ensure” that the Contractor...” “The Architect will carry out “detailed inspections” of the work ...” “The Architect will “supervise” the work”.

Best or Highest implies that there is no better standard. At Common Law you are only required to perform your services with reasonable care, skill and diligence.

Ensure (assure) means that you will make certain that This is an express performance warranty or guarantee that may not be in your power or authority to achieve.

Detailed Inspections (and just Inspections) means that you are contracting to provide a detailed examination of some aspect of the building that you are not normally paid to do or perhaps don’t have the necessary skill or knowledge to perform to the extent that is expressed or implied.

Use the term Observation and then only to the extent that you may describe – refer to AAS 2008.

Supervise implies that you will stand over and direct the Contractor in the performance of the construction contract.

Superlatives

Adjectives are dangerous! Check your own descriptions of the scope and extent of service that you will be providing, and remove adjectives unless they are essential to describe the actual tasks you will carry out. Remove all of those which imply a performance standard in excess of what you are required to deliver. This is not a time for advertising hype.

You will then have a more definitive description of what it is you will do. You will be less likely to extend your liability, or to be bound to something for which you are not paid.

Avoid statements like preparing “complete drawings”; achieving a “most economical” result; producing something of the “highest quality”; “guarantee” or “warrant” an outcome and so on.

Indemnities

Be very careful of indemnities. Avoid accepting conditions that require you to indemnify, defend and hold harmless your client (for anything that may happen in this world and the next) under your contract.

These are very dangerous and onerous obligations that can extend your contractual liability far beyond your normal duty of care at Common Law.

The inclusion of an indemnity or “hold harmless” clause has substantive and procedural implications for the conduct of the legal defence of any claim made against you.

The substantive implications are that your liability may be extended beyond the scope of an Architect’s liability at Common Law in contract or tort.

The procedural implications are that your client may be entitled to apply for summary judgment on liability or even perhaps quantum that confers on the client an enormous bargaining advantage. Such an advantage a client would not normally have when faced with normal court proceedings.

There are occasions when your client may insist on such clauses. Where unavoidable, you need to make sure that the indemnity you give relates to the service or part of the service of which you are in full control.

You need to make sure that the words in the clauses that follow on from any indemnity are, as far as is practicable, coextensive with your common law liability. This requires appropriate legal advice.

For example, you may be required to defend your client and even pay for the client’s legal expenses if the loss arises from your negligence or failure to perform. This can include, in some extreme cases, even paying for the solicitor/client costs in suing you!

A not too uncommon clause, as an example, of what not to agree to is:

“The Architect will indemnify and hold harmless the Client from all claims arising from the architect’s performance or service on the project.”

Such a wording is a definite attempt at defeating your normal legal defences against any claim for damages resulting from professional negligence.

The dangerous words here are:

“indemnify and hold harmless”

“arising from”

There are also words omitted that are needed to align such a clause with your Common Law liability.

A wording that preferably should appear would be:

“The Architect shall be liable to the Client for any reasonably foreseeable claims to the extent caused by any negligent act error or omission in the performance of the services by the Architect”.

When asked to accept unacceptable clauses, counter your agreement by linking the clause to the limitation of your responsibilities and liability as listed in AAS 2008.

By this means you are at least limiting your exposure to liability in specific aspects of your service and the possible outcomes from it.

Warranties & Guarantees

Your Professional Indemnity Insurance does not extend to include coverage for the granting of performance guarantees or warranties to Clients or other parties that would not have otherwise applied to you at Common Law.

Many non-standard agreements contain Deeds of Covenant and Deeds of Warranty appended to the contract for services.

Be very wary of such Deeds as they often do not limit your duty of care or your liability. They should at least be coexistent with the terms and conditions of your original commission.

It is often a good argument to remind the client that such Clauses may, if incorporated in the agreement for service, remove the very financial protection of the insurance the Client is seeking from you (in other words you may compromise the very insurance protection your Client has asked you to provide).

Remember a “warranty” or a “guarantee” when incorporated in such a Deed links you directly with the Client or perhaps with other parties.

This is in respect of your obligation to perform a specific service and shifts home the liability to you if the performance or non-performance of the service results in any loss or harm to the Client.

The wording of such Deeds has to be carefully tailored to reflect the nature of the professional service you are providing, and to incorporate some suitable limitations to your liability.

Seek Advice

In all cases seek the advice of your lawyer when faced with conditions of engagement that you consider may represent a potential threat to you in the performance of your contract.

Your Client will likely respect your professionalism for the caution you display.

