Guide to Better Agreements for Services for Architects

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New Zealand Architects Co-operative Society

Contents

Introduction

There are many advantages for Members in ensuring that they have properly negotiated, well drafted written contracts of engagement with their Clients that are signed by both parties.

Written contracts are the good news; oral contracts are the bad news!

A good written contract can prevent disputes arising about the scope of the services that were agreed, the fees to be charged and the extent of the Member's liability in the event that a negligent mistake by the Member causes loss to the Client.

Many Members will have experienced disputes with clients about the agreed scope of services and the fees to be paid. At a more basic level, many will have had the experience of rendering an invoice only to be told by the party to whom it is addressed that another party was actually the Client and liable for the fees.

A good written contract with a limit of liability which has been drawn to the Client's attention and accepted by the Client can pre-empt expensive and prolonged litigation when the Member has made an error and is liable to the Client for negligence.

This guide deals with some of the basic elements of contract law with an emphasis on the elements that you need to pay attention to in order to avoid disputes with a Client.

A good contract is like the fence at the top of a cliff. Professional indemnity and other forms of liability insurance cover are like the ambulance at the bottom of a cliff.

Remember the Registered Architects Board code of Minimum Standards of Ethical Conduct for Registered Architects requires architects to have agreed terms of appointment:

Terms of Appointment

A Registered Architect must not undertake professional work when the Registered Architect and the Client have not agreed the terms of appointment, which may include but need not be limited to:

(a) Scope of Work

(b) Allocation of Responsibilities

(c) Any Limitation of Responsibilities

(d) Fee or method of calculating it, and Terms of trade

(e) Any provision for Termination

(f) Provision for Indemnity Insurance

Contract – an overview

A contract is a legally binding agreement that identifies the obligations of the parties to the agreement. This is a deceptively simple definition which is underpinned by hundreds of years of development of the law of contract through countless court decisions and many legislative interventions, from the Statute of Frauds, which is still law in New Zealand, to the Consumer Guarantees Act 1993.

A contract of engagement does not need to be in writing, but for all the reasons considered in this guide, the best policy is to have a written contract of engagement signed by the Member and the Client. An oral contract of engagement will be enforceable, but it can be open to disputes about precisely what was said and agreed.

The key elements of a contract are an offer; acceptance of the offer; a mutual exchange of values under the contract (which the law calls “consideration”); and an intention by the parties to create a legally binding contract. The law imposes a number of other requirements such as the legal competence of the parties to enter into the contract which need not concern us in this guide.

The legal requirements of consideration and an intention to create legal relations will rarely be in dispute between an Architect and a Client. That leaves the key elements of offer and acceptance which give rise to many of the disputes between architects and their Clients – what is it that both parties have agreed to do?

Offer

A Member’s offer to provide services will usually be made after discussions with the Client about the nature of the project, the scope of the services and the fee to be charged.

The Member's offer to provide services will then usually be contained in two parts of a written contract:

- The specific conditions of contract contained in a letter addressed to the Client and the basis upon which the fee is to be charged;
- The general conditions of contract in the form of standard conditions which are incorporated by reference to them in the letter to the Client.

The specific conditions, at their simplest, will often refer only to earlier discussions, briefly identify the services to be provided and confirm the fee to be charged. A properly drafted fee proposal letter should:

- Identify the nature of the Client's project;
- Record the scope of the services to be provided (usually design and/or observation) and for further clarification the services that will not be provided.
- The timing and/or duration of the various parts of the Service.
- The deliverables for each part of the services – e.g. plans, elevations, sections, perspectives etc.
- The Fee to be rendered for each part of the Service and if appropriate;
- The timing of the payment of the Fee.

Acceptance

If the Client's response to a fee proposal from a Member is to accept the offer, subject to some changes required by the Client, that is effectively a counter offer from the Client which in turn has to be accepted by the Member.

In practice, a fee proposal may lead to a fresh round of negotiations between Member and Client. If agreed changes are significant, the Member should prepare and forward a fresh fee proposal to the Client for acceptance. If the changes to the original proposal are relatively minor, the Member can and should record the changes in a further letter which confirms the contract in terms of the original fee proposal subject to the supplementary letter.

Client developed contracts

A Member may be obliged in some cases to accept a Client developed contract in order to secure the work. Any Client developed contract should obviously be read very carefully.

It is particularly important to ensure that the obligations a Member assumes under contract are no greater than the liability under common law and covered by the Member's insurance. In other words the contractual obligations are co extensive with the available insurance cover.

If you have any doubts about the implications of any of the terms of such a contract you should seek legal advice. The observations in this guide are no substitute for proper legal advice.

Contractual assumption of liability beyond common law and your insurance cover

The law of negligence requires design professionals to exercise reasonable skill, care and diligence. This is the standard imposed by the common law. *(The common law is the law that is created by cases decided by the Courts rather than by statutes enacted by Parliament.)* A negligent breach of the common law standard will create a tort liability to the parties affected by the negligence.

The law will imply a term into a contract of engagement that the Architect exercises reasonable skill, care and diligence in the absence of an express term to that effect. The NZIA AAS 2007 conditions, as an example, include an express term that the Architect must use reasonable skill, care and ability *(see Clause E1 a) 3).*

Contracts that have been prepared by Clients often require Architects to exercise a higher standard of professional competence than the common law standard of reasonable skill, care and diligence.

If a Member signs a contract requiring the exercise of a higher standard than the common law standard, the Member will almost certainly not be covered by professional liability insurance for this higher test. Professional indemnity insurance policies almost invariably exclude coverage of liabilities assumed under contract.

Members should be able to use this exclusion to persuade a Client who tries to insist on a higher contractual standard than the common law standard of care that such a clause is really not in the Client's interest since it will leave the Member uninsured for this additional exposure in the event that the Member is found to have breached the clause and caused loss to the Client.

Some terms in Client-developed contracts can potentially leave a Member without insurance at all. Members should be very wary of granting an indemnity in favour of the Client. An indemnity can inn favour of the Client can greatly extend a Member's liability beyond the liability the Member would have at common law in terms of:

What have to be paid, e.g. full solicitor – client legal costs rather than costs awarded by the Court.

1. When losses have to be paid. The Client may not have to show the consultant caused the loss in the same way as at common law.
2. What other parties contribute to the loss. If the Architect is liable to the Client under an indemnity, the Architect may not be able to join other parties who are to blame.

As a result of these additional risks, Insurers may decline to meet any part of the Client's claim against the Member.

Words and phrases to be wary of

The following table sets out some of the words and phrases that may appear in a Client developed contract and where those words result in the Member taking on obligations beyond those which exist at common law.

Adjectives	Word selection is an important issue in contract. The written contract is a record of the agreement. Architects should be cautious about the insertion of any extreme adjectives such as *"all", "every", "best", "highest"* or similar in any contract of engagement. For example, "the Member will provide its services to the highest possible standard". That is a standard higher than would apply at common law.
"Arising out of" or "arising from" or "in connection with"	Words to be avoided in the liability clauses of any contract of engagement if followed by the words *"the professional services"* or *"breach of the contract"* or similar. The reason is they change the common law test. The common law test requires the breach of contract to cause the loss. Words like *"arising out of"* require only a looser connection between breach and loss so extend Members' exposure. The preferable words in substitution would be "to the extent caused by". As an example: "Where the consultant breaches this agreement the consultant is liable to the Client for reasonably foreseeable damages to the extent caused by the breach."
Damages	Damages are the monetary award by a judge in a civil action. Reference in a contract of engagement to the Architect being liable to the client for *"claims, damages, liabilities, losses or expenses, proceedings, penalties, solicitor/client costs etc"* can extend what would be payable at common law and might therefore not be insured. Clauses requiring the Member to pay legal costs *"on a solicitor-client basis"* go much further than the common law which awards roughly 50% of actual costs. Such words can be deleted and replaced by "*any reasonably foreseeable claim, damage, liability, loss or expense"*, or as set out in the NZACS AAS 2007 document – Section E5.a.
Deed of Continuity	A Deed of Continuity may be requested where the Client as Principal requires an undertaking from an Architect or Sub-consultant to complete the services if a main consultancy agreement, or a design/build agreement is terminated. Members should ensure there are no terms in a deed of continuity that extend liability or the scope of work beyond the original contract of engagement. In particular, they should ensure there are no higher standards of care or warranties and the limitations within the original contract of engagement are carried over into the deed of continuity.

Duty of Care Deed	A Principal may require a Contractor under a design and build contract to procure such a deed from a sub-consultant for the benefit of the Principal. Alternatively, a Principal may require an Architect to agree that they owe duties to parties other than the principal, eg, financiers or future tenants. Members should ensure there are no terms in a duty of care deed that extend liability or the scope of work beyond the original contract of engagement. In particular, they should ensure there are no higher standards of care or warranties, and that the limitations within the original contract of engagement are carried over into the duty of care deed.
Ensure	*"To make certain"*. A word to be avoided in any contract of engagement as it may be synonymous with a performance guarantee. Replace with *"take all reasonable steps to ensure…"*
Indemnity	A contract by one party to keep the other harmless from loss. A broad form indemnity in a contract of engagement may require the Architect to cover the Client's costs even when the problem has been caused by the Client. This can create a contractual liability that is uninsurable. See section above (pages 6 and 7) for further details.
Guarantee	A binding promise to be answerable for the debt or obligation of another. To be avoided in any contract of engagement as it is likely to be uninsurable.
Limitation of Liability	An agreed monetary or time limit in a contract which places a limitation on the liability of a contracting party. Parties to commercial contracts (ie not domestic work) are free to agree to limit the Member's risk to a certain level or for certain time period. Monetary limits are often expressed as a multiple of the fees charged. Such terms, if agreed to by the Client, are binding. In terms of time for bringing claims, the Limitation Act 1950 provides for the limits in time in which a civil action may be commenced. In contract it is six years from the date of the act or omission. In tort it is six years from the date the damage is discovered or ought to reasonably have been discovered. The Building Act provides that no civil action may be commenced more than ten years after the date of the act or omission, referred to as a *"long stop".* Members should not accept any extension to the time limit beyond the 6 year duration required for contract claims. Any more may mean that claims arising in the extended period are uninsured.

Must	*"To be obliged to"* or *"to be certain to".* A word to be avoided in any contract of engagement as it may be synonymous with a performance guarantee and may be uninsured (unless the phrase is *"must use reasonable skill, care and diligence in performing…"*.
Novation	An assignment of a contract of engagement from one of the original parties to another. Typically from a Client to a contractor in conjunction with a design and build construction contract. Members should ensure there are no terms in a deed of novation that extend liability or the scope of work beyond the original contract of engagement. In particular, they should ensure there are no higher standards of care or warranties and that the limitations within the original contract of engagement are carried over into the deed of novation.
Reasonable Skill Care & Diligence	The established common law duty of care is to act with reasonable skill, care and diligence (sometimes just *"reasonable skill and care"*). Words in contracts of engagement that extend this liability to perform the services to *"the highest standard"* or *"the best"* or similar are to be avoided as they are uninsurable.
Commo Solicitor/Client Costs	The inclusion of these costs in the liability clauses of a contract of engagement should be strongly resisted. What it means is that Member would be funding the other parties' costs in suing the Member.
Warranty	An undertaking as to the title, quality or quantity of something being sold or that the subject of a contract is as it appears to be or as it has been represented. A word to avoid in any contract of engagement as it likely to be uninsurable.

NZIA AAS 2007 – Second Edition April 2007

Commentary

These standard conditions have been approved by the New Zealand Institute of Architects. Large Clients will often ask you to vary these terms or present alternative terms. You should compare these alternative terms to the AAS 2007 and reject any which increase your liability. The fact that we have not commented on any particular clause does not mean it can be safely deleted or altered. If in doubt, seek legal advice.

The following is a discussion of some of the important terms in the AAS 2007 Contract.

Section A: Confirmation of Agreement

The Agreement is the contract between the Architect and the Client. The documents forming the contract are listed in the Confirmation of Agreement for the engagement of the Architect.

A court trying to interpret the contract should only have to look at these specific documents. Note that the order of priority if there is any conflict amongst the documents making up the contract is as they appear in the Confirmation of Agreement in Section A.

Section B: Scope of Work

Be precise and remember that terms which are readily understood by architects may not be familiar to non-architects.

Section C: Scope of Services

Take special note of the reference to Core Services

Sections D: Scope of Fees & Costs

Section E: Mutual Responsibilities

E1) Architect's Responsibilities

a) The Architect is responsible to:

1) Act for or on behalf of the Client as set out in this Agreement.

2) Provide the Agreed Services as set out in this Agreement.

3) Exercise reasonable skill, care and diligence in the performance of the Agreed Services.

4) Perform the Agreed Services in accordance with the agreed time-line and, where circumstances may prevent this, advise the Client accordingly.

5) Advise the Client promptly of any matters that may affect the performance of the Agreed Services.

6) Notify the Client should any circumstance or instruction of the Client constitute a variation to the Agreed Services and any consequent adjustment to the Architect's Fee that may be required.

7) Advise the Client on matters relating to the proper conduct of the Construction Contract where appropriate.

8) Avoid and/or notify the Client of any potential conflict of interest that may arise.

9) Maintain confidentiality in relation to the Client's affairs and the Project and/or seek the Client's authority to vary this requirement.

10) In accordance with the Health and Safety in Employment Act 1992:

- Adopt and maintain a Health and Safety management plan in the Architect's offices.
- Respect obligations of the Contractor in relation to their execution of the Contract Works on the Client's site.

Amongst the responsibilities in providing the Agreed Services, the Architect must use reasonable skill, care and diligence as set out in Clause E1) a) 3).

This is the standard Members would be held to in any case. Members should not accept any higher standard.

b) The Architect is responsible to engage and pay the following Sub-Consultants, and also responsible to the Client for coordinating and integrating the services of those Sub-Consultants:

- Quantity Surveyor:
- Structural Engineer:
- Other:

In other words the Member remains responsible for performance of the Member's obligations under the contract even if the Member uses a sub consultant, but is not responsible for the sub consultant's tortious acts.

- Do not accept any greater responsibility for sub consultants
- Ensure that any sub consultants have the same liability towards the Member as the Member has to the Client
- Ensure that sub consultants have the same level of insurance the Member is required to hold.
- Also refer to NZIA Practice Note PN 7.102U and use the form of sub consultant for the engagement of the sub consultant

c) The Architect is responsible to coordinate with the following Separate Consultants engaged by the Client. The Architect is not responsible for the performance of the Separate Consultants.

- Project Manager:
- Other:

This reflects the common law position. Avoid any condition which makes a Member responsible for somebody else's acts or omissions.

E5) Architect's Liability

a) If the Architect breaches this Agreement the Architect will be liable to the Client for any reasonably foreseeable claim, damage, liability, loss or expense incurred by the Client caused directly by the breach.

This clause limits a Member's liability to losses which are:

- Reasonably foreseeable and
- Directly caused by the breach

It also avoids indemnifying the Client and simply states the position that a Member is liable for the breach. Agreeing to wider liability could leave the Member uninsured for the additional exposure or possibly the whole exposure. If the Member has granted the Client an indemnity, that may operate to prevent the Member from joining third parties who are liable for some or all of the loss. As insurers would be deprived of the ability to recover from these third parties, they could refuse to cover the claim at all.

b) The extent of the Architect's liability under this Agreement is reduced proportionately to the extent that the Client and/or any other person, including any third party (whether under the law of contract, tort [including negligence], statute under the common law or otherwise), has contributed to the claim, damage, liability, loss or expense.

This clause avoids the problem of joint and several liability, whereby a Member may have to pay 100% of a claim even though only (say) 10% at fault. Joint and several liability means that a plaintiff can choose the defendant to pursue. Although defendant 1 may be able to get judgment against defendant 2 who is partly to blame, if defendant 2 is unable to pay its share, that will not stop the plaintiff from being able to recover in full from defendant 1.

c) Neither the Architect or the Client shall be liable to the other for any loss or damage which has occurred as a result of any breach of this Agreement that is not notified in writing within 6 years of the date of this Agreement.

Stating an identifiable point from which time begins to run is useful as it brings certainty. In the absence of a contractual limitation two statutory time bars are relevant.

(a) The Limitation Act prevents actions in contract or tort being commenced more than six years after the cause of action accrues. The cause of action accrues in contract at the date of breach (which is usually easy to pinpoint) and in tort when damage has occurred and that damage has either been discovered or is reasonably discoverable. Damage may remain hidden for many years after you provide your services so without a clause such as this you can, for non-Building Act work, be potentially at risk indefinitely.

(b) Where the Services you provide are "Building Work" as defined in the Building Act, no action can be brought more than 10 years after the date of the act or omission on which the proceedings are based. This ten year period is known as a "long-stop" and applies even if the damage was not reasonably discoverable. It does not mean that the 6 year limitation period becomes 10 years but says that, if 10 years have passed since the act of negligence complained of, no claim can be brought in any circumstances.

Client contracts often try to extend the limitation period beyond the statutory limit. Be careful not to agree to a period longer than six years after the date the cause of action accrues.

d) In circumstances where the Core Services (as described and included in this Agreement) are reduced, limited or varied by later agreement or the Agreement is ended prior to the completion of the Agreed Services, the Architects liability is reduced accordingly and liability will attach only to those services actually performed and then only to the extent that the reduction of that part of the Core Services has not compromised or not denied the Architect the opportunity to correct the performed services or to otherwise mitigate the Client's loss.

The clause is designed to:

- Define the extent of the Architects liability in contract
- Encourage clients to purchase full or adequate service

e) The Architect is not liable for any claim, damage, liability, loss or expense incurred by the Client as a consequence of any change that the Client or any other person makes to the Architect's Documents, or of any variation of the Contract Works from the Architect's Documents or the Project resource consent or the Project building consent without prior written approval by the Architect.

Excludes liability for unauthorised changes

f) The Architect shall not be liable to any person other than the Client, and disclaims responsibility, in tort or otherwise, for any claim, damage, liability, loss or expense incurred by such person. In the event that the project to which the Architect's services relate is leased, transferred, sold, or otherwise disposed of in part or whole or by unit title to other persons, then the Client warrants that such persons shall be advised in writing that the architect accepts no responsibility in law to them. In the event of breach of this warranty, the Client, and the case of a company its directors, shall fully indemnify the Architect against any claim by such persons, whether such claim is in tort or otherwise.

This clause is intended to provide added protection for the Architect in circumstances whereby a project is disposed of by the original Client and to disclaim liability to subsequent parties. It is anticipated some Clients may object to this clause. It would not impinge upon insurance availability if it is deleted. It may have little relevance in circumstances where the Client owning the project is a Government Agency or Local Authority as such projects are not frequently disposed of to subsequent parties. However, it is recommended it be retained in the agreement for services where practicable.

g) The maximum amount payable by the Architect, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses arising from breaches of this Agreement is limited to $250,000 or five times the Architect's fee for the Agreed Service, whichever is the lesser.

This limits the Members liability in a monetary sense. It is important to have a cap on liability otherwise the potential risk exposure is unlimited and may lie beyond the limit of indemnity under the Member's insurance. Often Clients seek to increase this limit of liability to a level appropriate to the scale of the commission - $500,000 is not uncommon. This is a matter for negotiation; however whatever level is agreed must be backed up by a professional indemnity insurance of at least the same amount.

h) The limitations of the Architects liability as described above do not apply where any legislation prevents them.

It is a breach of the Consumers Guarantee Act 1993, with penalties lying under the Fair Trading Act 1986 to limit liability to a domestic consumer.

E6) Insurance

a) The Architect agrees to hold and maintain professional indemnity insurance for the duration of the Agreed Services and for a period of 6 years beyond completion of services for the indemnity amount of $250,000 (or whatever amount is agreed).

b) Should the Client require the Architect to obtain professional indemnity insurance for an amount greater than $250,000 the Architect will endeavour to obtain the required additional indemnity amount, which will be to the Client's expense.

c) Such increase in the indemnity will increase the Architects maximum liability to the Client to the new indemnity amount.

d) Should such insurance not become obtainable or if any material changes to the terms and conditions of cover occur, the Architect will accordingly advise the Client in writing.

e) The Client must provide to the Architect evidence of the Separate Consultants' professional indemnity insurance.

All policies contain exclusions so do not agree to obtain a policy covering all losses without exception or similar words.

Some contract may call for polices to be in the joint names of the Consultant and Client. While this may be possible for public liability policies a professional indemnity policy cannot be in the name of the Client. Check with your broker if the insurer wants to add an additional premium for adding the Client's name to the public liability cover. If it is excessive, negotiate with the Client about who should pay the additional premium, or the true need for the Client to be a party: Clients will often have their own public liability cover anyway.

F5) Resolving disputes, mediation and arbitration

a) Differences of opinion may occasionally occur. When a dispute between the Client and the Architect in relation to this Agreement arises and cannot be resolved by good faith negotiation, it shall be referred to mediation by means of a Dispute Notice given by one party to the other. The Dispute Notice must be in writing and dated, must set out the details of the dispute, and may name persons considered suitable to act as Mediator.

b) If the parties cannot agree upon a Mediator within 10 working days of the Dispute Notice, the party serving the Dispute Notice may apply for a Mediator to be appointed by the President of either the Arbitrator's and Mediator's Institute of NZ or of the NZ Institute of Architects. All discussions in mediation shall be without prejudice and confidential, and shall not be referred to in any later proceedings. Each party shall bear its own costs, and shall meet half the cost of the Mediator.

c) If the Client and the Architect agree, the Mediator may determine any matter arising out of the Dispute Notice. The Mediator's determination must be in writing and dated. It must specify the issues addressed and the decisions in respect of them. The determination shall be binding on the parties unless within 10 Working Days one of them gives written notice to the other rejecting it.

d) Matters not agreed within 60 days of the Dispute Notice, or within 10 days one party rejecting a determination given by a Mediator under the previous clause, may be referred to arbitration by either party serving an Arbitration Notice on the other. Such notice must be in writing and dated, and must specify the matters to be arbitrated.

e) If the parties cannot agree upon an Arbitrator within 10 Working Days of the Arbitration Notice, either party may apply for an Arbitrator to be appointed by the President of the Arbitrators' and Mediators' Institute of NZ. The arbitration shall be in accordance with the Arbitration Act 1996, and shall be final and binding on the parties.

f) Nothing in this Section shall preclude the Client or the Architect from pursuing debt collection (including court action if necessary) in respect of payments due under this Agreement.

g) The existence of a dispute does not give the Architect or the Client the right to suspend their obligations under the terms of this Agreement.

This is a prescribed process that needs to be followed in the absence of a good faith resolution.

F6) Ending this Agreement

a) The Client or the Architect may end this Agreement by writing to the other at their last known address. This Agreement will end 20 Working Days after the date the notice is sent.

Written notice to the Client gives evidence that you have stopped work on the project. Written notice from the Client gives the Member evidence that you are stopping work on the Clients instructions.

b) If the Client ends the Agreement for reasons other than the default of the Architect or if the Architect ends the Agreement because of a breach by the Client, the Client must then immediately pay the Architect :

1) All amounts owing under the Agreement (including proportional payment for services partially completed).

2) An amount equal to loss of profits which the Architect incurs because the Agreement was not completed, calculated in the manner set out in Sub-section E7) above.

3) Any expenses and costs that the Architect reasonably incurs relating to ending the Agreement.

c) If the Client ends the Agreement because the Client alleges the Architect has failed to properly perform the Agreed Services, then any disputed outstanding fees and reimbursable expenses must be paid by the Client into an independent interest bearing trust account, as identified in Sub-section E7) above, and held in that account until any disputes are resolved pursuant to Sub-section F5) above.

So a Member is entitled to be paid for their services up to the date of cancellation and to enforce any other rights under the contract.

d) If the Client ends this Agreement, other than through breach by the Architect, the Client must indemnify and hold harmless the Architect and the Architect's agents, employees and sub¬-consultants against all claims, damages, liabilities, losses and expenses (including legal expenses) that may be incurred by any of them in relation to the Project, except to the extent that they were incurred because of the negligence of, or breach of this Agreement by, the Architect or the Architect's agents, employees or Sub Consultants.

e) Early termination of this Agreement will not prejudice or affect the accrued rights of the Architect and the Client, or the liabilities of each to the other.

The Client is still entitled to sue the Member for breach of contract/negligence.

NZIA AAS – SF2007 – Third Edition

The Short Form Agreement for Architects Services is usually for smaller projects. Essentially it is a cut down version of AAS 2007 and most of the important items in this contract have been commented upon and dealt with in respect to AAS 2007.

Novation, Duty of Professional Care & Continuity Deeds

On some occasions Clients may request, in the addition to the agreement for consultancy services, that Members also agree to accept Deeds of Novation, Professional Care or Continuity.

- A Deed of Novation may be requested for situations whereby the contract for consultancy services is to be novated (i.e. assigned) from the Client as Principal to a Contractor for a design/build project
- A Deed of Professional Care may be requested whereby duties of care are sought and owed to parties other than the Client (i.e. the financiers of a project or the future tenants etc).
- A Deed of Continuity may be requested where the Client as Principal requires an undertaking from a Consultant or Sub-consultant to complete the services if a main consultancy agreement or a design/build agreement is terminated.

These separate deeds are sometimes combined under the one Client prepared document. Members should note that these types of arrangement increase the risk and place a Member in a situation of owing a duty of care contractually to more than one master.

Members should be wary of such deeds. If the consultancy agreement refers to one or more of them, the Member should require the Client to provide the full terms of the deed at the time of entering the consultancy agreement. The member should not agree to provide one of these deeds without knowing in advance what the terms will be.

The important issue is to make sure a deed does not impose higher standards of care than is the requirement under a normal consultancy agreement or impose indemnities or warranties in relation to professional obligations beyond common law.

There is also the issue of a potential extension of the scope of work beyond that which was required under the consultancy agreement (and perhaps without any additional fees being paid).

In summary, the various parties all should be required to agree that the Consultant's duty of care owed is no greater than the duty owed the Consultant to the original Client as Principal and that the Consultant shall be entitled to rely on all limitations of liability in the consulting agreement without any aggregation of liability in monetary terms.

Members should seek legal advice if in doubt.

Certification

Architects may be required to provide certificates. These may include Producer Statements, Certificates of Practical Completion and very often, for contracts with local bodies, certificates that the works comply with certain standards.

If the standard is performance based it is not possible to say that the standard has been complied with until the requisite time has passed. For example the Building Code requirement that a building last fifty years can only categorically be said to have been achieved after fifty years.

Certifying that works comply without any qualification or disclaimer may be interpreted as a guarantee.

NZACS recommends that for each and every such certificate issued under the NZIA Contract SSC 2007, Members insert the following paragraph to the wording of each certificate they issue.

"The Architect has used all reasonable care and skill in the preparation of this certificate and it is provided in accordance with, and subject to, the Architect's professional services agreement with the Principal. It is given solely for the benefit of the Principal (acting impartially between the Principal and the Contractor) and cannot be relied upon by any other party."

This wording makes it absolutely clear the certificate is solely for the use by the Principal alone.

The issue surrounding this additional wording is to do with the liability of the Architect in issuing these certificates in their role as agent of the client and acting impartially between the Principal and Contractor when engaged to administer the contract.

The intent of the wording is to avoid any connection that may suggest there is an implied contract or duty of care between the Contractor and the Architect when the Architect is acting in this role, for if there was, it would not have the protection of "limited liability in time and quantum" that is established by the contract between the Architect and the Client under AAS 2007 or AAS- SF2007.

As an example, should the Contractor suffer loss as a consequence of there being an error in the Architect's certificate the Contractor would seek damages under the construction contract with the Principal. The Principal would then seek redress from the Architect under the contract with the Architect with all of the limitations that exist under their contract, as opposed to the Contractor seeking direct redress from the Architect in tort, without that protection.

This recommended added clause is important as Members will also be aware that often banks and project managers, to name but two, often rely on signed off Practical Completion Certificates for the release of funds. It is quite possible that certificates, incorporating this recommended wording, could give rise to pressures being put on Architects to change the wording to make these parties beneficiaries.

Disclaimers

To provide as much protection as possible in this regard (no form of words will be capable of preventing liability in every case) third party disclaimers should include the following features aimed at qualifying the information provided:

(a) A statement of the purpose for which the document was prepared.

(b) Identification of the person for whom the document was prepared and that it was prepared on specific instructions.

(c) A statement of who may rely upon the report.

(d) A statement that the professional accepts no responsibility to persons other than those stated above and that the professional does not contemplate the use of the report by any other purpose.

The Clauses that follow are for example purposes only and an Architect wishing to insert a disclaimer should seek specific legal advice:

"This report has been prepared at the specific instruction of xyz in connection with xyz's proposed abc and only for the purposes of [ ].

Only xyz are entitled to rely on this report, and then only for the purposes stated above. Architect Limited and its directors and employees accept no responsibility to anyone other than xyz in any way in relation to this report and the content of it and any direct or indirect effect this report may have.

Architect Limited does not contemplate anyone else relying on this report or that it will be used for any other purpose.

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Checklist

To avoid the pitfalls discussed in this guide it is suggested the following items be checked before reaching any agreement with a Client.

Is the person to whom I am quoting the "Client"?	
If not does the person have authority to bind the Client?	
Who is responsible for my fee?	
Are the Services I am providing clearly set out?	
Has the Client signed the fee proposal/terms and conditions?	
Are there any conditions which increase my liability, such as:	
Indemnities	
Liability for sub-contractors, agents, employees	
More than reasonable care required	
Standard higher than common practice of reasonably competent professional	
Guarantees	
Liquidated damages, interest, costs	
Increased limitation period	
If I have subcontracted any of the services have I imposed the same conditions on the sub-contractors?	
Does New Zealand Law and Jurisdiction apply?	
Is my liability limit no higher than my insurance limit?	
Does my certification contain qualifying statements or disclaimers?	