Australian Institute of Architects TAS

ABN 72 000 023 012
The Royal Australian Institute of Architects
trading as Australian Institute of Architects

1/19a Hunter Street
nipaluna/Hobart, Tasmania 7000

P: (03) 6214 1500
tas@architecture.com.au
architecture.com.au

18 December 2024

Infrastructure Tasmania
Department of State Growth
2 Salamanca Square
Hobart TAS 7000

By email to: itas@stategrowth.tas.gov.au

Re: Review of Tasmanian Government Contract Documents

Dear Infrastructure Tasmania and the Office of the Crown Solicitor,

The Tasmanian Chapter of the Australian Institute of Architects (the Institute) would like to thank you for the opportunity to review and provide feedback on Infrastructure Tasmania's procurement contracts.

About our organisation
The Australian Institute of Architects (the Institute), has been the peak body for the architectural profession in Australia for more than ninety years. It is an independent, national member organisation, with more than 14,500 members across Australia and overseas and 340 members in Tasmania.

- The Institute's vision is: Everyone benefits from good architecture.
- The Institute's purpose is: To demonstrate the value of architecture and support the profession.

At the time of this submission the NSW Chapter President is Daniel Lane RAIA and the Tasmanian Executive Director is Jennifer Nichols.

Our feedback
Our Chapter, together with our Institute's Policy and Advocacy Unit, has reviewed the following documents:

- **Document:** CONTRACT FOR SUPPLY OF CONSULTANT SERVICES RELATED TO CONSTRUCTION
  Document Ref: PR Docs-BC Consultant Services (BC) Contract
  Date: 2023-01

- **Document:** AS4000 MAJOR WORKS CONSTRUCT ONLY CONTRACT Amended from Australian Standard General conditions of contract
  Document Ref: Complex Projects Version
  Date: 2024-01

- **Document:** Amended AS4000 - 1997
  Document Ref: Business as usual version
  Date: July 2024
- **Document:** Amended AS4902 – Business As Usual
  Document Ref: Annexure Part X Deed of Novation (Subcontractors from Contractor to Principal)
  Date: 2024-01

- **Document:** Amended AS4902 – Business As Usual
  Document Ref: Annexure Part Y Deed of Novation (Consultant from Principal to Contractor)
  Date: 2024-01
- **Document:** Amended AS4902 – Complex Projects
  Document Ref: Annexure Part DD Deed of Novation (Subcontractors from Contractor to Principal)
  Date: 2024-01
- **Document:** Amended AS4902 – Complex Projects
  Document Ref: Annexure Part EE Deed of Novation (Consultant from Principal to Contractor)
  Date: 2024-01

The feedback provided by the Institute is limited to the perspective of impacts on the rights/obligations of the architect, and the architect acting as the superintendent. Feedback has been provided in consultation with members and our insurance subsidiary, IBL, who trade as Planned Cover through a contract review service called “Informed by Planned Cover”. Feedback on the consulting agreement and deeds of novation is the advice provided to us by Informed and focussed on insurance risk and insurability of the architect.

Common themes

Our feedback response across the contracts includes some common themes:

- Ensure clauses – which demand a higher standard of performance than that required at law, as registration competence and skill requirements of a profession.
- Frequent use of “warranties” – pose insurability risks for professionals.
- Indemnities – particularly in relation to the Novation Deed, pose insurability risks for professionals.
- Within the Novation Deed, specific imposed obligations of superintendents reporting on Contractor’s breaches of the Works Contract – which is an unachievable obligation, where the architect is not the superintendent, nor a supervisor of the Works, and as such has limited access to the site, the parties and complete contract.

Code of Novation

The Institute, based on extensive consultation, published the Code of Novation[1], which is an industry-wide framework, defining standards of conduct that promote good design, safety and quality standards throughout the entire procurement process, thereby mitigating project risk and resulting in significant benefits to the built environment and broader community. The Code is intended to be a guideline document covering many matters including the level of completeness of documentation at the novation point, input into the Principal's Project Requirements (PPR), head contractor selection, timely access to cost plans and construction program for consultants, protocols for product substitution, and transparency of the scope of service for all consultants. It discusses communications protocols, value management, client relationships and the independence of the superintendent role during the construction phase.

We recommend a review of this Code against some of the obligations of the Deeds of Novation, in particular in regard to communication protocols, which may assist in setting better protections for the Principal and more insurable obligations on the architect/superintendent.

[1] Located: https://www.architecture.com.au/archives/policy_campaigns/procurement

Document: CONTRACT FOR SUPPLY OF CONSULTANT SERVICES RELATED TO CONSTRUCTION

Document Ref: PR Docs-BC Consultant Services (BC) Contract

Date: 2023-01

No.	Clause Ref.	Comment
1.	2.3(a)(i)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to delete the superlative adjective "high" from the first line of the clause
2.	2.5(b)(ii)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *replace "ensure" with "take reasonable steps to".*
3.	3.1	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *Consider whether to replace "warrants" with "acknowledges and agrees".*
4.	3.3	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *replace "ensure" with "take reasonable steps to"*
5.	3.5(a)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *Consider whether to replace "warrants" with "acknowledges and agrees".*
6.	6.2	This creates an insurance issue in respect of a waiver of rights exclusion. Our subsidiary's advice of a general nature is as follows: *Either delete clause 6.2 or narrow the definition of "Relief" on page 10 by deleting sub-clauses (c) and (d) so that it only applies to extensions of time and professional fees.*
7.	10.3(c)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *Consider whether to replace "warrants" with "acknowledges and agrees"*

8.	10.5	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *Consider whether to replace "warrants" with "acknowledges and agrees"*
9.	10.6	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *Consider whether to replace "warrants" with "acknowledges and agrees"*
10.	12.1(a)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *replace "ensure" with "take reasonable steps to"*
11.	12.2(a)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *replace "ensure" with "take reasonable steps to".*
12.	14.1	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: "*delete this clause*"
13.	15.3	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is that if the Deed of Novation is not made available to the consultant, then a specific right is provided to negotiate the terms of the Deed of Novation.
14.	15.4	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is that if the Deed of Novation is not made available to the consultant, then a specific right is provided to negotiate the terms of the Deed of Novation.
15.	15.4(c)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to *amend clause 15.4(c) by adding "upon terms to be agreed between the parties" (and not "in a form and substance satisfactory to the Principal").*
16.	15.4(d)(iii)&(v)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature to *delete*

		clauses 15.4(d)(iii) and (v) which are matters for negotiation at the time the novation deed is drafted, and upon which consultants may wish to seek legal advice, particularly the release in clause 15.4(d)(iii).
17.	19(b)	This creates an insurance issue in respect of a waiver of rights exclusion. Delete this clause or rewrite to ensure that any scheme that does not exist at the time of entering the contract does not have retrospective application if a scheme protecting architects were approved in future, and in the unlikely event that a scheme was established it had retrospective application.
18.	23.6(a)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *replace "ensure" with "take reasonable steps to".*
19.	23.17	This creates an insurance issue in respect of a waiver of rights is exclusion. Our subsidiary's advice of a general nature is to either delete the clause or give it limit it to the consultant's professional fees only.
20.	23.20	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *Delete this clause and replace it with a new clause similar to the following: "The parties agree that nothing within the Contract is intended to exclude the operation of any legislative proportionate liability regime."*
21.	23.22	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is as follows: *Consider whether to replace "warrants" with "acknowledges and agrees"*

Document: AS4000 MAJOR WORKS CONSTRUCT ONLY CONTRACT Amended from Australian Standard General conditions of contract

Document Ref: Complex Projects Version

Date: 2024-01

No.	Clause Ref.	Comment
1.	34A.	The definition of 'Conditional Certificate of Practical Completion' is not described adequately
2.	1.1 Definitions	Is it intended that the 'Contract Sum' be adjustable rather than static as per the original contract.
3.	2C 3 Responsibility	Suggest this clause is unfair to expect a Contractor to 'warrant' that Base Works are suitable to support The Works. Clause 2E 3.
4.	2E 3	Suggest this clause is unfair to expect a Contractor to 'warrant' that Third Party Early Works are suitable to support The Works Under Contract
5.	8B.2	Clause Discrepancy in the Contract Documents; advises the contractor is to advise of discrepancies in documents 'as soon as practicable'. Would prefer a time limit for this to happen given the looseness in the term 'as soon as practicable'.
6.	9.2	Subcontracting generally; It would have been good if this clause has some provision for the contractor to request recompense if the Superintendent rejects a proposed subcontractor and an alternative sub contractor has a higher price.
7.	11A.4	Existing utilities; notes the party nominated in Item 71 shall bear the costs of rectifying damage to existing utilities, if the Contractor is nominated then it is unreasonable they should be responsible for something that was potentially unknown.
8.	11A.5	Headworks; If the Contractor is nominated as the party under Item 73 the cost of Headworks may not be known at the time of establishing the contract Sum so how can they allow for these works.
9.	11D.2	Compliance with the Contractors Management plans; Feel there could be a conflict here with the Superintendent role where there is a requirement for the Superintendent to act as opposed to Clause 8D.3 where the superintendent could not act.

10.	20A.3	Time and cost consequences; The contractor is expected to provide information as to time and 'anticipated' cost consequences as a result of a direction given by the Superintendent, the 3 day time limit for Contactor's response whilst tight is good, however it is noted the Contractor is not entitled to any payment in excess of the 'anticipated advice'. If this is the case why is the 'amount' not exact.
11.	20A.4	Clause Time for compliance with Directions; Is there a conflict with time limits in this clause as opposed to 20A.3.
12.	20C.2(b)	The request; If the RFI is submitted under the Contractors management system there could be a conflict with the engagement terms of the Superintendent using their own management systems.
13.	20C.3	The response: 1. Need consistency between terminology with the indefinite article– "a" RFI (as in previous clause), and "an" RFI here. 2. This clause does not allow the Contractor to claim a delay in WUC because of a delay in responding to an RFI. This is unreasonable if the request affects the critical path of the WUC and the Contractor is relying on the information. Far better to give a time for response.
14.	21 & 22	Superintendents Representative and Clause 22 Contractor's Representative; Clause 21 only allows for one Superintendents representative but Clause 22 allows for any number of Contractors representatives, would prefer Clause 22 aligns with Clause 21 and has only one Contractors representative.
15.	24.2	Access for Principal and others; Would like to see a note added here that those nominated people here have the relevant construction induction card before access is granted to avoid conflict with State Legislation.
16.	24.3	Minerals, fossils and relics; Would like to specific reference in this clause to Aboriginal relics and as well as the Contractor

		giving notice to the Superintendent, to stop the WUC in the vicinity of the element to prevent damage and seek further advice from the Superintendent.
17.	26.1	Setting out; Would prefer it be mandatory a licensed surveyor sets out all projects.
18.	32.3	(c); Is there conflict in the wording of this clause denying the Contractor the right for an EoT claim for delay caused by the Principal not taking notice of the program for items they may be supplying to the Contractor for incorporation into the WUC.
19.	34.6 (a) (ii)	How can a Contractor 'certify' there are no defects, would have thought this was impossible.
20.	35	Defects Liability; This clause requires the Contractor to 'rectify all defects existing at the Date of Practical Completion', how can there be any Clause 34.6 (a) (ii) requires the Contractor to certify there isn't any defect at this point of time.
21.	36.5	Variations after the Date for Practical Completion; Addition of this clause is welcomed but there should be some discussion about the limits on size and extent of variation particularly if it were to prevent the Contractor from performing other projects they have committed to.

Document: Amended AS4000 - 1997

Document Ref: Business as usual version

Date: July 2024

No.	Clause Ref.	Comment
1.	1.1 Practical completion (d)	Remove (d). This is too broad, particularly given the definition of "Contractor's Activities" expressly excludes the carrying out of WUC and the completion of The Works. Delete clause
2.	1.2 (m) & (n)	Remove (m) & (n). the Contractor would request the removal of these paragraphs which it does not consider appropriate in a construction contract given there are a range of complex interactions between the

		parties. The parties each need to act reasonably to achieve the intended outcomes of the Contract. Delete clauses
3.	1.3	Remove this clause, which we consider an unnecessary and unreasonable attempt to derisk the Project, particularly in the context of construct-only procurement. This would require the Contractor to assume risks which neither it nor the principal could foresee in relation to the delivery of the Project, and in respect of which the Contractor is unable to reasonably price. Delete clause.
4.	2B	Remove early warning procedure. The way this clause is structured is completely unmanageable and the bars are completely unreasonable in the favour of the principal. Delete clause.
5.	5.2	Recourse Deletion is unreasonable. Reinstate obligation to provide 5 days' notice if a party intends to have recourse to security.
6.	8A.2	Discrepancies in the Contract Documents It is not reasonable for errors and omissions to be included within this clause, particularly for a construct only contract. Delete all references to errors and omissions.
7.	8B.6	Non reliance the Contractor is not agreeable to this provision, which seeks to exclude the principal's liability in relation to "Principal's Material", particularly as to the extent that it may concern Site Conditions and design. the Contractor should reasonably be entitled to rely on this information, as it plays a significant part in the overall assessment of risk, and hence, pricing and programming considerations. Delete clause
8.	8B.7	Relied upon information. It is not reasonable for errors and omissions to be included within this clause, particularly for a construct only contract. Delete all references to errors and omissions.
9.	10.5	Extent of licence the Contractor does not agree to the principal having the right to commercially exploit the Contractor's Background IP. Use of this licence should be limited to purposes directly associated with

		the Works, including repairs, maintenance or servicing, and additions or alterations. Delete clause 15.5 (f).
10.	20.1 (b)	General The superintendent must act reasonably at all times. The list of certifying functions is very limited and would need to be expanded significantly if this clause is to remain.
11.	20.5	limits of authority 20.5 requires the Contractor to accept that the Superintendent, when performing its functions under the contract, may be required by internal delegations or policies of the principal or by reason of the nature of the principal, to obtain the consent of, or act under the direction of, personnel of the principal or to give effect to particular policies or internal Directions of the Principal, and we would not have any Claim against the Principal by reason of this. Such matters of authority in relation to the Contract ought to be regularised in advance of the Contract being executed, instead of the Contractor – who has no control over such matters – having to assume the burden of additional risk. Delete clause
12.	20A.3	Time and cost consequences The structure of this clause is completely unreasonable and practically will not function. 3 days to respond to a direction with anticipated time and cost, then bar any claim in addition to the anticipated amounts. We would need to take such a conservative approach to time and cost that it would defeat the point of the clause. Delete - 3 day time bar to respond. Delete - The Contractor will not be entitled to a payment in excess of the anticipated amount nominated in the notice or an extension of time in excess of the period set out in the notice or any relief in addition to or greater than the relief described in the notice. Delete - “If the Contractor does not give such notice to the Superintendent within the required time, the Contractor shall not have any Claim in respect of the direction and, the Contractor must, after the

		expiration of the time of the giving of the notice by the Contractor prescribed in this Clause, comply with the direction."
13.	20C.3	The response The clause is completely unreasonable and often creates significant delays to projects. Not acceptable in its current form. A delayed RFI must entitle the Contractor to an EoT claim, should it affect the critical path. Delete entire clause and replace with The Superintendent will facilitate a response to an RFI with 10 business days.
14.	30.1B	Testing authority There are numerous site-based tests specified in the contract documents, with the majority completed by tradespeople on site. The clause seems to have unintended consequences. Review clause, remove or clarify which tests it relates to.
15.	34.3B	Programmed Working days This clause is completely unreasonable, unmanageable and just doesn't make sense. Delete clause.
16.	34.6 (a)(ii)	Having no defects in the work as a precondition to practical complete is unreasonable and unmanageable. Minor defects and omission are acceptable in all construction contracts. Delete clause
17.	34.6 (a)(iii) &(b)	Linking practical completion to the finalisation of all claims under the contract is not reasonable or practically possible. These items are completely separate Delete clause
18.	36.6 (b)	Negative variations. Not reasonable, must be by agreement. Include wording to the affect – by agreement with the contractor
19.	37.1A (b)	Payment claim warranties This clause is inappropriate. Claims are specifically dealt with under separate clauses Delete clause
20.	37.4 (f)(ii)	Final Payment Claim and certificate Extending the entire DLP period for minor defects is unreasonable. Delete clause or isolate the DLP extension to the defect item alone

21.	39.2	Contractors Default The standard clause has been amended so that a substantial breach by the Contractor will be taken to have been committed afresh on each day following the breach, until the substantial breach has ceased and the consequences of the substantial breach for the principal have been neutralised. We require the removal of the underlined words, because a breach should end when it has been remedied by the Contractor, not when its consequences to the principal have ended. Delete and the consequences of the substantial breach for the principal have been neutralised.
22.	40A(b)	Termination for convenience The Contractor does not agree to having the amount payable to be assessed as if the termination of the Contract had occurred pursuant to GC 39.4(b). This subclause relates to a termination for the Contractor's substantial breach. A termination for convenience is one without fault. The Contractor would require payments to be made to it on the same terms as set out in GC 40(b) (Frustration), which is also the standard wording parties generally adopt with termination for convenience clauses in AS contracts.
23.	Amended clause 40A(b)	23 Item 74 – Insurance policy The Contractor reserved the right to review the principal insurance policies once in place, given the contract sum will exceed the standard $30m policy. Additional costs may apply if the terms are unfavourable. Note only

Document: Amended AS4902 – Business As Usual

Document Ref: Annexure Part X Deed of Novation (Subcontractors from Contractor to Principal)

Date: 2024-01

No.	Clause Ref.	Comment
1.	3.5(e)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to "Delete the words "to ensure" from both clauses. Guarantes are excluded

		from cover under professional indemnity insurance. In this case, the architect should not be expected to guarantee contractual outcomes resulting from contracts drafted by the Principal's solicitors."
2.	3.8	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to "Replace "warrants" with "acknowledges and agrees". Warranties are commonly mentioned in the "assumed liability" exclusion in professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a warranty provides potential grounds for insurers to deny cover for claims that otherwise may have been insured."
3.	5.6(e)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to "Delete the words "to ensure" from both clauses. Guarantes are excluded from cover under professional indemnity insurance. In this case, the architect should not be expected to guarantee contractual outcomes resulting from contracts drafted by the Principal's solicitors."
4.	5.7	This creates an insurance issue in respect of a waiver of rights exclusion. Our subsidiary's advice of a general nature is "Add a new sentence providing that the Subcontractor releases the Principal from Obligations and Claims only to the extent that the Final Novatee has assumed liability for those Obligations and Claims pursuant to this Deed. Otherwise clause 5.7 releases the Principal from a greater range of liabilities ("Obligations and Claims under or in connection with the New Contract … before or after the Novation Time") than are being assumed by the Final Novatee under clause 5.6(b) ("Rights and Obligations … the Principal had under the New Contract … on or after the Novation Time")."
5.	5.9	This creates an insurance issue in respect of an assumed liability exclusion and novation extension. Our subsidiary's advice of a general nature is to "Replace "warrants to the Principal and the Final Novatee" with "acknowledges and agrees with the Final Novatee". Also add a clause releasing the Subcontractor from

		liability to the Principal both before and after the Novation Time – the release should be as broad as the Principal's release in clause 5.7 minus the reference to paying "any amount due and payable". The risk of warranties is explained under clause 3.8 above. In addition, professional indemnity insurance will not cover the assumption of duplicated and additional liabilities to multiple parties during novation"

Document: Amended AS4902 – Business As Usual

Document Ref: Annexure Part Y Deed of Novation (Consultant from Principal to Contractor)

Date: 2024-01

No.	Clause Ref.	Comment
1.	3.3	This creates an insurance issue in respect of a waiver of rights exclusion. Our subsidiary's advice of a general nature is "Add a new sentence providing that the Consultant releases the Principal from Obligations and Claims only to the extent that the Contractor has assumed liability for those Obligations and Claims pursuant to this Deed. Otherwise clause 3.3 releases the Principal from a greater range of liabilities ("Obligations and Claims under or in connection with the Consultancy Agreement") than are being assumed by the Contractor under clause 3.2(b) ("Rights and Obligations … the Principal had under the Consultancy Agreement … on or after the Novation Time").
2.	3.4	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is, "Replace "warrants to the Principal and the Contractor" with "acknowledges and agrees with the Contractor". Also add a clause releasing the Consultant from liability to the Principal – the release should be as broad as the Principal's release in clause 3.3 minus the reference to "Amount Due". Warranties are commonly mentioned in the "assumed liability" exclusion in professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a

		warranty provides potential grounds for insurers to deny cover for claims that otherwise may have been insured."
3.	4.7	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is, "Replace "warrants to the Novatee and the Principal" with "acknowledges and agrees with the Novatee". Also add a clause releasing the Consultant from liability to the Principal – the release should be broad and apply to liability both before and after the Novation Time. Warranties are commonly mentioned in the "assumed liability" exclusion in professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a warranty provides potential grounds for insurers to deny cover for claims that otherwise may have been insured."
4.	5.7	This creates an insurance issue in respect of a waiver of rights exclusion. Our subsidiary's advice of a general nature is, "Add a new sentence providing that the Consultant releases the Novatee from Obligations and Claims only to the extent that the Final Novatee has assumed liability for those Obligations and Claims pursuant to this Deed. Otherwise clause 5.7 releases the Novatee from a greater range of liabilities ("Obligations and Claims under or in connection with the New Consultancy Agreement") than are being assumed by the Final Novatee under clause 5.6(b) ("Rights and Obligations … the Novatee had under the Novated Consultancy Agreement … on or after the Novation Time")."
5.	5.8	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is, "Replace "warrants to the Final Novatee and the Principal" with "acknowledges and agrees with the Final Novatee". Also add a clause releasing the Consultant from liability to the Novatee – the release should be as broad as the Novatee's release in clause 5.7 minus the reference to "any amount due and payable. Warranties are commonly mentioned in the "assumed liability" exclusion in professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a warranty provides

		potential grounds for insurers to deny cover for claims that otherwise may have been insured."
6.	7	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to, "Delete this clause. Alternatively, amend clause 7(f) to provide that the Principal and Novatee also must not make any claims against the Consultant arising out of or in connection with its obligations under clause 7. In most scenarios contemplated by this deed, the Principal will not be the architect's contracted client. The architect's professional indemnity insurance generally will not cover the architect for assuming direct contractual liabilities to a third parties. This clause is very high risk because it renders the architect liable for breaches of the Works contract by the Contractor unless the architect reports to the Principal every last breach of which it is aware."

Document: Amended AS4902 – Complex Projects

Document Ref: Annexure Part DD Deed of Novation (Subcontractors from Contractor to Principal)

Date: 2024-01

No.	Clause Ref.	Comment
1.	3.5(e)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to "Delete the words "to ensure" from both clauses. Guarantes are excluded from cover under professional indemnity insurance. In this case, the architect should not be expected to guarantee contractual outcomes resulting from contracts drafted by the Principal's solicitors."
2.	3.8	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to "Replace "warrants" with "acknowledges and agrees". Warranties are commonly mentioned in the "assumed liability" exclusion in

		professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a warranty provides potential grounds for insurers to deny cover for claims that otherwise may have been insured."
3.	5.6(e)	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to "Delete the words "to ensure" from both clauses. Guarantes are excluded from cover under professional indemnity insurance. In this case, the architect should not be expected to guarantee contractual outcomes resulting from contracts drafted by the Principal's solicitors."
4.	5.7	This creates an insurance issue in respect of a waiver of rights exclusion. Our subsidiary's advice of a general nature is "Add a new sentence providing that the Subcontractor releases the Principal from Obligations and Claims only to the extent that the Final Novatee has assumed liability for those Obligations and Claims pursuant to this Deed. Otherwise clause 5.7 releases the Principal from a greater range of liabilities ("Obligations and Claims under or in connection with the New Contract … before or after the Novation Time") than are being assumed by the Final Novatee under clause 5.6(b) ("Rights and Obligations … the Principal had under the New Contract … on or after the Novation Time")."
5.	5.9	This creates an insurance issue in respect of an assumed liability exclusion and novation extension. Our subsidiary's advice of a general nature is to "Replace "warrants to the Principal and the Final Novatee" with "acknowledges and agrees with the Final Novatee". Also add a clause releasing the Subcontractor from liability to the Principal both before and after the Novation Time – the release should be as broad as the Principal's release in clause 5.7 minus the reference to paying "any amount due and payable". The risk of warranties is explained under clause 3.8 above. In addition, professional indemnity insurance will not cover the assumption of duplicated and additional liabilities to multiple parties during novation"

Document: Amended AS4902 – Complex Projects

Document Ref: Annexure Part EE Deed of Novation (Consultant from Principal to Contractor)

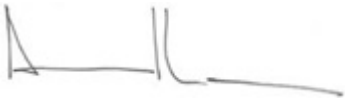
Date: 2024-01

No.	Clause Ref.	Comment
1.	3.3	This creates an insurance issue in respect of a waiver of rights exclusion. Our subsidiary's advice of a general nature is "Add a new sentence providing that the Consultant releases the Principal from Obligations and Claims only to the extent that the Contractor has assumed liability for those Obligations and Claims pursuant to this Deed. Otherwise clause 3.3 releases the Principal from a greater range of liabilities ("Obligations and Claims under or in connection with the Consultancy Agreement") than are being assumed by the Contractor under clause 3.2(b) ("Rights and Obligations … the Principal had under the Consultancy Agreement … on or after the Novation Time").
2.	3.4	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is, "Replace "warrants to the Principal and the Contractor" with "acknowledges and agrees with the Contractor". Also add a clause releasing the Consultant from liability to the Principal – the release should be as broad as the Principal's release in clause 3.3 minus the reference to "Amount Due". Warranties are commonly mentioned in the "assumed liability" exclusion in professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a warranty provides potential grounds for insurers to deny cover for claims that otherwise may have been insured."
3.	4.7	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is, "Replace "warrants to the Novatee and the Principal" with "acknowledges and agrees with the Novatee". Also add a clause releasing the Consultant from liability to the Principal – the release should be broad and apply to liability both before and after the Novation Time. Warranties are commonly mentioned in the "assumed liability"

		exclusion in professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a warranty provides potential grounds for insurers to deny cover for claims that otherwise may have been insured."
4.	5.7	This creates an insurance issue in respect of a waiver of rights exclusion. Our subsidiary's advice of a general nature is, "Add a new sentence providing that the Consultant releases the Novatee from Obligations and Claims only to the extent that the Final Novatee has assumed liability for those Obligations and Claims pursuant to this Deed. Otherwise clause 5.7 releases the Novatee from a greater range of liabilities ("Obligations and Claims under or in connection with the New Consultancy Agreement") than are being assumed by the Final Novatee under clause 5.6(b) ("Rights and Obligations … the Novatee had under the Novated Consultancy Agreement … on or after the Novation Time")."
5.	5.8	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is, "Replace "warrants to the Final Novatee and the Principal" with "acknowledges and agrees with the Final Novatee". Also add a clause releasing the Consultant from liability to the Novatee – the release should be as broad as the Novatee's release in clause 5.7 minus the reference to "any amount due and payable. Warranties are commonly mentioned in the "assumed liability" exclusion in professional indemnity insurance policies as being an excluded from insurance cover. Expressing this clause as a warranty provides potential grounds for insurers to deny cover for claims that otherwise may have been insured."
6.	7	This creates an insurance issue in respect of an assumed liability exclusion. Our subsidiary's advice of a general nature is to, "Delete this clause. Alternatively, amend clause 7(f) to provide that the Principal and Novatee also must not make any claims against the Consultant arising out of or in connection with its obligations under clause 7. In most scenarios contemplated by this deed, the Principal will not be the architect's contracted client. The architect's professional indemnity insurance generally will not cover the

		architect for assuming direct contractual liabilities to a third parties. This clause is very high risk because it renders the architect liable for breaches of the Works contract by the Contractor unless the architect reports to the Principal every last breach of which it is aware."

Kind regards,



Daniel Lane
President, Tasmanian Chapter
Australian Institute of Architects

Jennifer Nichols
Executive Director, Tasmanian Chapter
Australian Institute of Architects