**Consultancy Agreement  
related to construction  
(Long form)**

**Model clauses**

[***These model clauses may be inserted into the Consultancy Agreement (Long Form) (June 2023) only. Clause cross references have been drafted for this agreement only.***

***Either clause may be used separately, or both clauses may be used.***

[***Guidance Notes (located throughout this document) and items that you need to complete are shown in yellow shading. Ensure you remove guidance notes before releasing this document.]***

Model clauses have been developed for the Victorian Public Construction Contracts to address commercial situations that arise infrequently or respond to unusual project circumstances. The clauses have been approved by the Secretary to the Department of Treasury and Finance (DTF) for use with the applicable Victorian Public Construction Contract.

These model clauses either replace existing clauses, amend existing clauses or are additional clauses depending on the specific issue being addressed. Use of these model clauses by delivery agencies is optional and does not require the approval of DTF.

Using model clauses from the Clause Bank provides a common Victorian public sector position on each matter, consistent with the use of standard form construction contracts.

Although use of these model clauses will take them into the public domain, they should only be adopted by Agencies in particular situations, rather than becoming the Agency’s standard position.

**Revision history for this agreement is listed on the cover page of the terms and conditions for the Agreement.**

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***The following optional clause may be inserted into the Consultancy Agreement (Long Form) (December 2022) only. Clause cross references are drafted for this agreement only.***

***Refer to Contracting Practice Note Limitation / Exclusion of Liability for issues to consider when using this clause. This Practice Note is available on request from*** [***Construction Policy Unit***](mailto:construction.procurement@dtf.vic.gov.au)***. Note that while this Contracting Practice Note has been drafted for AS4300-1992 with VPS Special Conditions, the issues raised should be considered to the extent they apply to professional services.***

***If you use this clause, you must also insert the definition and use the applicable item in the Agreement Particulars.***

***After you have inserted the definition, clause and the item in the Agreement Particulars, update the table of contents.***

***Insert the following definition between “Schedule’ and ‘Services’.***

1. **Scheme** has the meaning given in clause 18.4(b)(i).

***At the heading 18.4, remove the words ‘Not used’. Insert this clause at the heading 18.4.***

## 18.4 Limitation of liability

### This clause 18.4 only applies if Item 49 states that it applies.

### Subject to clause 18.4(c), the Consultant’s total aggregate liability to the Principal under the Agreement, howsoever caused or arising, whether in Agreement, tort (including by negligence), equity, statute, by way of indemnity, contribution, unjust enrichment, warranty or guarantee or otherwise at law is limited:

#### where a scheme approved under the *Professional Standards Act 2003* (Vic) (**Scheme**) applies, in accordance with the Scheme; or

#### where a Scheme does not apply, to the amount set out in Item 49.

### Clause 18.4(a) does not apply to any liability of the Consultant arising from or in connection with:

#### Claims by any person against the Principal in respect of personal injury, death, loss or damage to any property or any other third party liability (including the liability of the Consultant under the indemnity set out in Clause 18.1);

#### a failure by the Consultant to effect and maintain the insurances required to be effected and maintained by the Consultant under the Agreement;

#### events or circumstances in respect of which insurance proceeds are available or would have been available under insurance required by the Agreement in relation to those events or circumstances but for:

##### a failure of the Consultant to obtain or maintain the insurances (for which it is responsible) in accordance with clause 6;

##### a failure by the Consultant to claim under the relevant insurances (or comply with the claim procedures under the relevant insurances); or

##### the Consultant not complying with any provision, obligation or duty owed under the relevant insurance policy (including the Consultant’s duty to disclose);

#### a breach of the Consultant’s obligations under clause 9;

#### a breach of the Consultant’s obligations under, or the liability of the Consultant under the indemnities set out in, clauses 8 or 18.2;

#### the wilful misconduct, wilful default, wilful neglect, gross negligence, fraud or criminal acts or omissions of the Consultant or the employees or agents of the Consultant, or any act or omission of the Consultant or the employees or agents of the Consultant which gives rise to a statutory penalty or fine;

#### any amount which the Consultant recovers, or would have recovered but for an act or omission of the Consultant, from a third party in connection with a Claim;

#### any liability that cannot be excluded at law; or

#### the Consultant’s abandonment of its obligations under the Agreement.

***At item 49 in the Agreement Particulars, remove the words ‘Not used’ where appearing. Insert this text at item 49.***

|  |  |  |
| --- | --- | --- |
| 49 | Consultant's limitation of liability - Does clause 18.4 apply?  (clause 18.4) | Yes  No  *If nothing stated, 'No' applies.*  Amount: [*Insert*] |

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***The following optional clause may be inserted into the Consultancy Agreement (Long Form) (December 2022) only. Clause cross references are drafted for this agreement only.***

***Refer to Contracting Practice Note Limitation / Exclusion of Liability for issues to consider when using this clause. This Practice Note is available on request from*** [***Construction Policy Unit***](mailto:construction.procurement@dtf.vic.gov.au)***. Note that while this Contracting Practice Note has been drafted for AS4300-1992 with VPS Special Conditions, the issues raised should be considered to the extent they apply to professional services.***

***If you use this clause, you must also use the applicable item in the Agreement Particulars.***

***After you have inserted the clause and the item in the Agreement Particulars, update the table of contents.***

***At the heading 18.5, remove the words ‘Not used’. Insert this clause at the heading 18.5.***

## 18.5 Exclusion of liability

### This clause 18.5 only applies if Item 50 states that it applies.

### Subject to clause 18.5(c) neither party will be liable to the other party for any Excluded Loss suffered or incurred by the other party arising out of or in connection with the Agreement.

### Clause 18.5(b) does not apply to the extent that:

#### liquidated damages (including any damages at common law or equity), may be construed or are intended to cover such Excluded Loss;

#### such Excluded Loss is covered by insurance proceeds that are available under insurances required by the Agreement in relation to that event or circumstance;

#### such Excluded Loss would have been covered by insurance proceeds that would have been available under insurances required by the Agreement in relation to that event or circumstance but for:

##### a failure of the Consultant to obtain or maintain the insurances (for which it is responsible) in accordance with clause 6;

##### a failure by the Consultant to claim under the relevant insurances (or comply with the claim procedures under the relevant insurances);

##### the Consultant not complying with any provision, obligation or duty owed under the relevant insurance policy (including the Consultant’s duty to disclose); or

##### the inclusion of clause 18.5(b);

#### such Excluded Loss is caused by the wilful misconduct, wilful default, wilful neglect, gross negligence, fraud or criminal acts or omissions of the Consultant or the employees or agents of the Consultant;

#### the Consultant recovers, or would have recovered but for an act or omission of the Consultant, an amount from a third party arising from any Claim made in connection with the Agreement;

#### such Excluded Loss cannot be excluded at law; or

#### losses identified in Item 50.

### For the purposes of this clause 18.5 'Excluded Loss' means any:

#### loss of business or production;

#### loss of actual or anticipated profit or revenue; and

#### loss of business reputation.

***At item 50 in the Agreement Particulars, remove the words ‘Not used’ where appearing. Insert this text at item 50.***

|  |  |  |
| --- | --- | --- |
| 50 | Exclusion of liability - Does clause 18.5 apply?  (clause 18.5) | Yes  No  *If nothing stated, 'No' applies.*  Other losses excluded from limitation of liability: [*Insert*] |