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## PRACTICE NOTE PN07

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### Topic: Using the ACA Consultancy Agreement

### Purpose of this Practice Note:

To ensure the correct usage of the ACA Consultancy agreement.

### Introduction

It is important to clearly state what you will and won't do for a project. This is normally explained in a Consultancy Agreement. On larger projects, the client will typically require the use of their preferred agreement, and often, this is used to provide consistency between all parties to the work. However, on smaller projects, a consultancy agreement is typically not provided by the client. We recommend that our members formally contract with their client, and to assist, we have engaged a lawyer to document suitable consultancy agreement.

This Practice Note explains how to use the agreement.

### General

To ensure a level of understanding between yourself and your client you should have a consultancy agreement with every fee proposal. Your agreement should cover the following as a minimum:

- What you will do
- What you expect from your client
- Who owns the copyright
- How you will invoice and when you expect payment
- What happens if the client doesn't pay
- What happens if you can't perform the required tasks
- How you solve disputes

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The ACA agreement is in 2 parts. There is a letter and services schedule which you can customise for each project and the consultancy terms which **must not be altered**.

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## The Letter & Services Schedule

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The letter outlines what you will do and for what fee on a particular project. You should add your details and logo to the template and fill in the details where highlighted.

The schedule should be completed to suit the project. If you wish to limit the number of meetings or site inspections, this should be noted in the schedule.

## ACA CONSULTANT-CLIENT AGREEMENT LETTER AND SERVICES SCHEDULE – REFERENCE COPY

[Date]

[Client Name]

[Street Address]

[SUBURB] NSW [Postcode]

Attention: [Name]

Email: [Email address]

Dear [Client Name(s)]

### [Project Address] – Proposal for access consultancy services

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Thank you for inviting [me / us / name of firm] to [provide a fee proposal to] access consultancy services on [description of the project, including address] (the **Project**).

Note: The Consultant may add a personalised paragraph or two to mitigate the feel of the balance of the letter, which may come across as too detached or business-like. It is an opportunity, for instance, to explain the Consultant's enthusiasm for the project and what challenges the Consultant sees.

The scope of the **Services** is set out in the attached **Services Schedule**. It shows:

- the Services [I / we] (the **Consultant**) will carry out and complete for you (the **Client**) in respect of the Project;
- how [my / our] **Fees** are calculated, whether as a lump sum, on the basis of hourly rates, or a combination of these; and
- the **Reimbursable Expenses** [I / we] may reasonably incur in the performance of the Services and in respect of which [I am / we are] entitled to be reimbursed.

This offer to carry out and complete the Services is subject to my standard terms, a copy of which is **attached**. You may accept this offer within 30 days after the date of this letter by:

- giving [me / us] a written notice that you accept my offer;
- returning a signed copy of this letter to [me / us] by email or otherwise; or
- directing [me / us] verbally to proceed with the Services, in which case [I / we] will promptly confirm your direction in writing.

Please contact me on [telephone number] if you would like to discuss any aspect of this offer.

Yours faithfully

[CONSULTANT]

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## SERVICES SCHEDULE

*Services and Fees	Services	Lump Sum (ex GST)
	<input type="checkbox"/> 1. Design Stage	LS / HR
	<input type="checkbox"/> 2. Documentation Stage	LS / HR
	<input type="checkbox"/> 3. Detailed Documentation Stage	LS / HR
	<input type="checkbox"/> 4. Construction Stage	LS / HR
	<input type="checkbox"/> 5. Expert Witness	LS / HR
	<input type="checkbox"/> 6. Audit	LS / HR
	<input type="checkbox"/> 7. Performance Solution	LS / HR
	<input type="checkbox"/> 8. Home Modification	LS / HR
	Totals	
	Legend: 'LS' means lump sum; 'HR' means hourly rates.	
Hourly Rates	Personnel	
	Principal / Director (\$ / hr, ex GST):	
	Senior Consultant (\$ / hr, ex GST):	
	Assistant (\$ / hr, ex GST):	
Reimbursable Expenses	Item	
	Couriers	
	Meetings	
	Additional site inspections	
	Travel costs	
Payment		As agreed or, if not agreed, as advised by the Consultant from time to time
	<input type="checkbox"/> Time for Consultant to provide tax invoices (CI 4.2):	
	<input type="checkbox"/>	Last business day of each month
	Time for Client to pay tax invoices (CI 4.3(a)):	10 business days after the date of the invoice
	Interest rate on overdue payments (CI 4.3(b)):	12% per annum

## \*SERVICES

### Design Stage

- carry out a generalised analysis of the proposed design by reference to relevant codes and standards
- provide advice relating to access for people with a disability, Livable Housing and adaptable housing and include advice on any significant areas of concern
- prepare a statement of compliance in a form suitable for submission for development consent
- attend meetings with relevant authorities if required
- assist, as required, with the lodgement process

### Documentation Stage

- carry out a generalised analysis of the detailed design by reference to relevant codes and standards
- provide advice relating to access for people with a disability, Livable Housing and adaptable housing and include advice on any significant areas of concern
- prepare a statement of compliance or an access report (as may be required) for submission for a construction certificate
- attend up to [two] meetings with relevant authorities if required

### Detailed Documentation Stage

- provide advice relating to access for people with a disability, Livable Housing and adaptable housing and include advice on any significant areas of concern
- review construction details (including door schedules) and provide advice as to compliance with codes and standards
- review shop drawings and other submissions by the contractor
- if appropriate, prepare a statement of compliance

### Construction Stage

- visit the site as required
- observe, generally, whether the relevant works are in accordance with the construction documents and the relevant codes and standards
- respond to requests for information from the contractor
- if appropriate, prepare a statement of compliance on completion of the relevant works

### Expert Witness

- provide independent assistance to the court
- comply with the relevant code of conduct that applies to expert witnesses
- attendance at any conclave of experts

### Audit

- carry out inspection of relevant building by reference to relevant codes and standards
- if appropriate, prepare a scope of work to be carried out
- if appropriate, prepare a statement of compliance after the completion of the works

### Performance Solution

- carry out inspection of relevant building
- prepare a scope of works to be carried out to allow for a performance solution
- document a Performance Based Design Brief
- document the Performance Solution
- prepare a statement of compliance after the completion of the works

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## The Consultancy Terms

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These terms legally define the basis of the agreement. They have been written by a lawyer and should not be altered. If you wish to change them for any reason you should seek legal advice before doing so and the reference to ACA must be removed.

*DISCLAIMER: The standard terms in the ACA Consultant-Client Agreement are intended to be used without amendment. Accordingly, anyone intending to amend them should seek legal advice.*

## ACA CONSULTANT-CLIENT AGREEMENT STANDARD TERMS – REFERENCE COPY

THIS AGREEMENT IS COMPRISED OF OUR LETTER OF OFFER (INCLUDING THE ATTACHED SERVICES SCHEDULE) AND THESE STANDARD TERMS

### 1. PERFORMANCE

#### 1.1 Consultant's Responsibility

The Consultant must:

- (a) perform the Services with the professional skill, care and diligence that would be expected of a professional consultant experienced in providing services for projects similar to the Project;
- (b) promptly notify the Client of each matter of which the Consultant becomes aware that could have a material impact on the Services or the Consultant's ability to perform them;
- (c) report to the Client, at least monthly, as to the progress of the Services; and
- (d) keep accurate records (including financial records) relating to the performance of the Services and give the Client access to those records on reasonable notice.

#### 1.2 Client's Responsibility

The Client must:

- (a) in a timely manner:
  - (i) provide all information and documents required by the Consultant to perform and complete the Services; and
  - (ii) cooperate fully with the Consultant to ensure the efficient performance of the Services;
- (b) ensure that any other consultants engaged in respect of the Project cooperate fully with the Consultant; and
- (c) allow the Consultant to erect signage at the Project site.

#### 1.3 Provision of equipment and materials

The Consultant's obligations under this agreement exclude (and the Fee does not cover) providing equipment, material or services not expressly referred to in the Services Schedule.

#### 1.4 Prior Services

The terms of this agreement apply to any Services performed by the Consultant prior to the date of this agreement.

#### 1.5 Standard of Services

- (a) Subject to clause 1.5(b), the Services must comply with:
  - (i) the Client's express requirements for the Project;
  - (ii) the law, including any authority having jurisdiction in respect of the Services or the Project; and

- (iii) the National Construction Code.

- (b) The Consultant gives no warranty (express or implied) that:

- (i) the Services will be fit for the Client's purposes; or
- (ii) any statement of compliance provided as part of the Services will be accepted by any authority having jurisdiction in respect of the Services or the Project.

### 2. VARIATIONS

#### 2.1 Agreement to Vary

The Client may vary the scope of the Services only by agreement with the Consultant and confirmed by the Consultant in writing detailing:

- (a) the scope of the variation; and
- (b) the:
  - (i) Fees for the variation;
  - (ii) rates to apply to the variation; or
  - (iii) some other mechanism for valuing the variation.

#### 2.2 No Prior Agreement to Vary

If, in the Consultant's reasonable opinion, the Client has given the Consultant a direction:

- (a) that will result in a variation to the scope of the Services; and
  - (b) without the matters referred to in clause 2.1 first having been agreed upon in writing,
- the Consultant must, before complying with the direction, provide a written notice to the Client:
- (c) identifying the direction;
  - (d) advising the Client:
    - (i) of the Fees for the variation; or
    - (ii) if the Fees cannot reasonably be determined in advance, the mechanism the Consultant will use for valuing the variation once it is completed.

#### 2.3 Client Confirmation

If the Client receives a written notice from the Consultant under clause 2.2, the Client may, within three business days after the date of the notice:

- (a) direct the Consultant in writing:
  - (i) to proceed with the direction; or
  - (ii) not to proceed with the variation; or



- (b) give no direction, in which case the Consultant must (at the Consultant's discretion) advise the Client in writing that the Consultant will:
  - (i) proceed with the variation; or
  - (ii) not proceed with the variation.

#### 2.4 Client Liable for Additional Fees

If the Consultant proceeds with a variation under clauses 2.3(a)(i) or 2.3(b)(i), the Client will be liable for the additional Fees referred to in the written notice from the Consultant under clause 2.2.

#### 2.5 Deemed Variations

It will be a deemed variation to the scope of the Services if:

- (a) the Consultant is delayed in the performance of the Services for any reason beyond the Consultant's reasonable control, including any failure by the Client to comply with its obligations under clause 1.2;
- (b) the Consultant is required to perform any part of the Services more than once, including where:
  - (i) the Client is comprised of more than one person; and
  - (ii) the Consultant receives (from those different individuals comprising the Client) inconsistent instructions, information, or documents; or
- (c) the Client directs the Consultant to provide any supplementary drawings or other documents after the Client has entered into a building contract.

#### 2.6 Valuation of Deemed Variations

If there is a deemed variation under clause 2.5, the Consultant must promptly provide a written notice to the Client:

- (a) identifying the delay; and
- (b) advising the Client:
  - (i) of the Fees for the deemed variation; or
  - (ii) if the Fees cannot reasonably be determined in advance, the mechanism the Consultant will use for valuing the deemed variation once it is completed.

### 3. TIME

#### 3.1 Performance of the Services

The Consultant must:

- (a) provide a timeframe for the provision of the Services; and
- (b) use its best endeavours:
  - (i) to perform the Services in a timely manner and in accordance with the timeframe; and
  - (ii) mitigate any delays in the performance of the Services.

#### 3.2 Consultant's Suspension

If the Client fails to pay in full (within the time provided under clause 4.3) any one or more of the tax invoices provided by the Consultant (under clause 4.2), the Consultant may (on giving two business days' written notice):

- (a) suspend the performance of all or part of the Services; or
- (b) exercise its rights under clause 9.2.

#### 3.3 Resuming Performance after Suspension

The Consultant may, on giving two business days' written notice, resume the performance of the Services or the relevant part.

#### 3.4 Consequences of Suspension

If the Consultant exercises its rights under clause 3.2, the:

- (a) Client may not terminate this agreement under the general law (or otherwise); and
  - (b) the licence granted under clause 8(b) is revoked,
- during the period of the suspension.

#### 3.5 Suspension Costs

- (a) The Client must pay the Consultant a reasonable amount agreed or determined under clause 3.5(b) in respect of the Consultant's costs (including losses and expenses) incurred in any way in connection with any suspension under clause 3.2.
- (b) The amount payable under clause 3.5(a) must be:
  - (i) agreed by the parties; or
  - (ii) failing agreement, determined by the Consultant acting reasonably.

### 4. PAYMENT

#### 4.1 General

The Client must:

- (a) pay the Consultant the Fees (as adjusted under this agreement) and the Reimbursable Expenses incurred; and
- (b) otherwise perform its obligations, in accordance with this agreement.

#### 4.2 Tax Invoices

The Consultant may (on or after the times set out in the Services Schedule) provide a tax invoice to the Client setting out:

- (a) the total value of the Services performed; and
  - (b) the Reimbursable Expenses incurred,
- by the Consultant in respect of the Project less the payments received to date.

#### 4.3 Payment Due to the Consultant

The Client must pay the Consultant:

- (a) the amount of each tax invoice referred to in clause 4.2 within the time provided for in the Services Schedule; and
- (b) interest at the rate set out in the Services Schedule on any overdue payments.

### 5. RELEASE AND INDEMNITY

- (a) Subject to clause 5(b), the Client releases and indemnifies the Consultant from any liability or obligation to the Client (or anyone claiming through or on behalf of the Client) in respect of:
  - (i) physical loss, or damage to, any real or personal property; or
  - (ii) personal injury, disease or illness to, or death of, persons,

arising out of or in connection to the performance of the Services, but the indemnity shall be reduced proportionally to the extent that the Consultant's negligent act or omission contributed to the loss, damage, injury, disease, illness, or death.
- (b) The release and indemnity in clause 5(a) does not apply to the extent the Consultant's liability or obligation:
  - (i) is covered under one of the policies of insurance referred to in clause 6 and the relevant policy responds (or the policy would



- have responded but for this clause 5(b)(i)); or
- (ii) arises out of or in connection with the Consultant's fraud, wilful misconduct, wilful negligence, or criminal conduct.

## 6. INSURANCE

The Consultant must maintain:

- (a) public liability insurance (provided such insurance is available upon reasonable commercial terms); and
- (b) professional indemnity insurance, covering legal liability in connection with the Consultant performing the Services and its other obligations under this agreement.

## 7. LIMIT OF LIABILITY

### 7.1 Generally

Subject to clauses 7.2 and 7.3(a), the Consultant's maximum aggregate liability to the Client (or anyone claiming through the Client) arising out of or in connection with this agreement (including liability for breach of contract, for tort including negligence, or on any other legal basis) is limited to:

- (a) the insurance proceeds actually recovered; or
- (b) in all other instances, the Consultant's liability is limited (at the Consultant's discretion) to:
  - (i) supplying the relevant Services again; or
  - (ii) payment of the cost of having the Services supplied again.

### 7.2 Consequential Loss

Subject to clause 7.3 (and to the extent permitted by law), neither party will have any liability to the other (including liability for breach of contract, for tort including negligence, or on any other legal basis) for:

- (a) loss of revenue, use, production, goodwill, profit, income, business, contract or anticipated savings;
- (b) financing costs or increase in operating costs; or
- (c) other financial or economic loss or any other special or indirect loss or damage (excluding any losses and damages to the extent arising naturally according to the usual course of things from the relevant conduct or breach).

### 7.3 Exclusions

- (a) Clauses 7.1 and 7.2 do not apply where the Consultant's liability arises out of or in connection with the matters referred to in clause 5(b)(i).
- (b) Clause 7.2 does not apply where the Client's liability arises out of or in connection with:
  - (i) an express right to payment under this agreement, including under clause 2.6; or
  - (ii) the Client's:
    - (A) fraud, wilful misconduct, wilful negligence, or criminal conduct; or
    - (B) repudiation (or otherwise unlawful termination) of this agreement.

## 8. INTELLECTUAL PROPERTY

- (a) All copyrights coming into existence in connection with the performance of the Services vest in and are owned by the Consultant.
- (b) Subject to clause 3.4(b), the Consultant grants to the Client a revocable, non-transferrable licence to use the documents created by the Consultant in relation to the Project.

- (c) The Services exclude the provision of any documents in digital formats other than Portable Document Format.

## 9. TERMINATION

### 9.1 Generally

This agreement may be terminated:

- (a) at any time by mutual agreement of the parties in writing;
- (b) by either party at its sole discretion (without giving reasons) by giving no less than 15 business days' written notice to the other party; or
- (c) immediately by the Consultant in writing if, in the Consultant's professional judgment, the provision of the Services (or any part of the Services) requires the Consultant to act:
  - (i) in a manner the Consultant considers unethical; or
  - (ii) in contravention of the law.

### 9.2 Default

If:

- (a) the Consultant:
    - (i) considers that the Client is in breach of its obligations under this agreement; and
    - (ii) gives the Client a written notice identifying the breach and the time within which it must be rectified; and
  - (b) the Client fails to remedy the breach within the time provided for (which may not be less than two business days after the date of the notice),
- the Consultant may by further written notice terminate this agreement.

### 9.3 Consequences

- (a) If the agreement is terminated under clauses 9.1 or 9.2 (or otherwise), the Consultant may submit a tax invoice showing:
  - (i) the total value of the Services performed and Reimbursable Expenses incurred up to the date of the termination less the payments received to date; and
  - (ii) all other costs incurred (or anticipated to be incurred) by the Consultant in bringing the Services to an end.
- (b) The Client must pay the Consultant:
  - (i) the amount of the tax invoice referred to in clause 9.3(a) within the time provided for in the Services Schedule; and
  - (ii) interest at the rate set out in the Services Schedule on any overdue payment.

## 10. TAXES

- (a) The parties acknowledge that, unless otherwise expressly stated, all amounts of monetary consideration in this agreement are exclusive of GST.
- (b) If GST is or becomes payable on a supply made by a party (Supplier) under or in connection with this agreement, the party providing consideration for the supply must pay an additional amount to the Supplier equal to the GST payable by the Supplier in relation to the supply.
- (c) Any amount payable under clause 10(b) will be paid to the Supplier at the same time as the consideration for the supply is paid to the Supplier.



**Disclaimer:**

This consultancy agreement has been procured by the ACA Committee for use by its members. Any member using the agreement should make their own investigations as to its suitability for the use to which they propose. ACA committee does not accept any liability to any person or organisation using the information or advice.

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