



SAACE – Client Information Sheet

INFORMATION SHEET No 2 in a Series PROFESSIONAL SERVICE CONTRACTS

STANDARD CONTRACTS AVAILABLE FROM THE SAACE

SAACE has a number of standard contracts that suit different situations. These are available from the Directorate.

- **SAACE Form of Agreement for Consulting Engineer Services (see note *)**
- **Trilogy of Documents (Guidelines for the Engagement of Consulting Engineers).**
- **FIDIC Guidelines for Selection of Consultants.**
- **FIDIC Client/Consultant Agreement**
- **FIDIC Short Form Agreement**

* Note: All equivalent CIDB documentation such as the CIDB Professional Services Contract (March 2004), are available from the CIDB directly.

FIND A CONSULTING ENGINEER

SAACE offers a service for clients looking for a suitable consulting engineer through its website or by phoning the office and discussing your needs with staff. A list of firms in your area who may be available to help can be provided.

WHAT IT MEANS TO USE A SAACE CONSULTANT

SAACE members are firms managed by qualified professionals who undertake to abide by a code of ethics, and modern business practice to provide clients with quality service.

Why Clients Should Use Standard Conditions of Contract For Professional Consultants

The Standard of Uniformity, Notice 62 of 2004 (SU), renders compliance with its provisions **mandatory** to all organs of state*. It was gazetted in terms of the Construction Industry Development Board Act (Act 38 of 2000). The SU contains a list of contractual documents, relating to procurement, which is “indispensable” for its application. Any client falling under the description of an organ of state (mostly public sector clients) is therefore compelled to use a form of contract contained in the list. This list also features in the Construction Industry Development Board (CIDB) Best Practiced Guidelines. Private sector clients are not bound by the SU, however, it would be in their best interest to make use of the above list of contract documents.

Consulting Engineers contract to accept liability for negligent acts. In an attempt to avoid liability relating to other risks a client may attempt to transfer risk to the Consultant through onerous contractual conditions. This course of action is not in the client’s or industry’s best interests.

Examples of such conditions include:

- Clauses requiring the Consultant to indemnify the client against any act, error or omission on the part of the Consultant. (This does not mean that the act, error or omission is necessarily a negligent one);
- Clauses requiring the completed works to be “fit for purpose”. (Apart from being impossible for the engineer/designer to give effect to such a clause, evidence of negligence would not be required for the Consultant to be held liable);
- Clauses requiring a collateral warranty, such as warranties to the principal where the consultant is engaged by the contractor (eg in a Design-Build project). These can create an obligation between the Consultant and a third party, often creating liabilities to the third party greater than to the client. (In some cases, these can effectively require the Consultant to guarantee the work of a third party, such as a contractor).

Such clauses appear to give the client added protection. The reality is that the “protection” may not be real, and will not be sustainable over time.

Where a Consultant accepts such a contract, a number of risks can arise for the client:

- a) The Consultant may be unaware of the risks and may not have the assets or insurance to back them up. For example, Professional Indemnity (PI) insurance policies may not respond where contractual obligations exceed Common Law requirements relating to negligence. It is unrealistic therefore, for a client to rely on a Consultant’s liability and insurance to cover other risks.
- b) The Consultant faces a series of claims and consequently:
 - Defends the claim and makes counter claims to the extent that the project and client suffer; and/or
 - Raises fees on the next project; and/or
 - Provides conservative advice and programmes which may cost the client more.
- c) The Consultant may operate through a shell company with limited PI insurance cover, and liquidate in the event of a significant claim.

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A recommended risk management strategy for clients is to:

- Appoint a professional Consultant with a good track record and relevant capabilities, for a fee that does not encourage short-cuts (Quality Based Selection**);
- Adopt contract conditions that do not impose obligations greater than reasonable skill and care of a competent professional experienced in providing similar services;
- Require the Consultant to have PI insurance matching the limit of liability under contract (set at about twice the fee);
- Budget for a contingency sum for construction work to cover the inevitable minor changes and additions that do not arise from negligence, but which are necessary to bring about a complete job.

It is in the client's interest to adopt standard conditions of contract that are well proven over decades of experience in many countries. They balance the risks in a well understood and time proven manner to give economic and sustainable outcomes.

Consultants are frequently presented with non-standard contract conditions prepared by legal advisors acting as advocates for their clients. Reviewing, amending, and re-negotiating such contracts inevitably adds costs for both parties, with little if any gain, as the risks may not be insurable, and the client not protected.

** Organs of state - see s239 of the Constitution of the Republic of South Africa Act 108 of 1996, for a full definition.*

***QBS – A guide on this selection method is available from SAACE (free of charge).*

SAACE: Representing the Consulting Engineering Profession of RSA

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