

**Crown Construction Clients Group**  
**CCCS Special Conditions – Guidance Document**

**Core Amendments Guidance**

Clause Number	Amendment	Supporting Guidance
1.1	<p>Insert the following definition of "Prior Services":</p> <p>"Prior Services means any of the Services that have been provided by the Consultant to the Client under any arrangement between the Parties which was made in contemplation of this Agreement."</p>	<p>Best practice would ensure that the Agreement is executed (signed) prior to any Services commencing. However on some occasions, circumstances may arise where the Services are required to commence prior to execution (signing) of the Agreement.</p> <p>This definition is to be read in conjunction with the new clause 12.19.</p> <p>Inserting a definition of Prior Services means that the terms and conditions of the Agreement will apply to any Services provided by the Consultant prior to the execution (signing) of the Agreement (i.e. under a letter of intent).</p> <p>The Prior Services must be in "contemplation" i.e. considered or planned to be part of the CCCS agreement and therefore must ultimately be included in the scope of the Services detailed in the Agreement.</p> <p><b>Please note:</b> some Consultants' Codes of Practice may prevent them from providing the services without a signed agreement in place.</p>
2.1	<p>Add the following bullet points to the end of clause 2.1:</p> <ul style="list-style-type: none"> <li>• "Provide sufficient employees (including Key Personnel) with the necessary qualifications, licenses, skills and experience to</li> </ul>	<p>These additional clauses expand the Consultant's obligations under the Agreement to include things that the Client can reasonably expect from their consultant (e.g. providing enough employees to</p>

	<p>perform the Services to the standard required by this Agreement; and</p> <ul style="list-style-type: none"> <li>• Co-operate with the Client and use all reasonable endeavours to co-operate with any Other Consultants (as applicable); and</li> <li>• At the Consultant's cost, correct any errors, omissions or both in any documentation prepared as part of the Services by the Consultant where the error or omission is the result of the Consultant failing to exercise the duty of care required by clause 2.2; and</li> <li>• Comply with all applicable legislation, regulations and any of the Client's rules, policies and standards that the Client may notify to the Consultant in writing from time to time, except to the extent that compliance with any of the Client's rules, policies or standards would constitute a breach of the Consultant's duty of care under this Agreement. The Consultant may notify the Client where it considers any rule, policy or standard notified after the commencement of the Services results in a material increase in the Consultant's costs and such shall be treated as notice of a Variation for the purposes of clauses 2.13 and 7."</li> </ul>	<p>provide the Services, correct errors in the Services, comply with laws, etc.).</p> <p>The reference to the duty of care in relation to correcting errors or omissions is designed to reiterate that the Consultant is responsible for such corrections.</p> <p>The provisions relating to the Consultant's compliance with the Client's rules, policies and standards cannot require the Consultant to breach its duty of care (e.g.: a Client policy cannot call for design requirements which would be in breach of the building code). Whilst the Client can update the rules, policies and standards after the commencement of services, the Consultant will be entitled to a variation where such updates materially increase the Consultants' costs.</p>
<p><b>2.2</b></p>	<p>Add the following words to the end of clause 2.2:</p> <p>"for a project of a similar type and size to the Client's Project."</p>	<p>The amendment ensures that the standard of diligence and care expected of the Consultant is relative to the type, size and scale of the Project and is intended to recognise that different Projects will require different skill sets.</p>
<p><b>3.3</b></p>	<p>The following wording is added to the end of clause 3.3:</p> <p>"The Consultant shall, in every case where it requires the Client to make a decision, accompany the request for a decision with a reasonable level of information to enable the Client to consider the matter at issue. The Client is entitled to request further information as may be reasonably required by the Client to assist it in making</p>	<p>This clause seeks to ensure that the Client has the information required with which to make a decision noting that this has to be of a reasonable level of information expected to be provided by the Consultant as part of the Services.</p>

	<p>the relevant decision. The provision of information pursuant to this clause 3.3 shall be at no additional cost to the Client except where such is beyond what would reasonably be expected to be provided by the Consultant as part of the Services.”</p>	
<p><b>3.6</b></p>	<p>Clause 3.6 is amended by adding the following at the end:</p> <p>“Notwithstanding the forgoing, in an urgent or emergency situation the Client may give instructions directly to Other Consultants and/or Third Parties directly contracted to the Client but in such an event the Client as soon as reasonably practicable such must be notified to the Consultant.”</p>	<p>Where the Services requires the Consultant to direct or co-ordinate work carried out by Other Consultants or Third Parties (<b>note:</b> the Client has to state this in the Scope of Services) this special condition allows the Client to give instructions directly to Other Consultants or Third Parties rather than through the Consultant (e.g. for time critical health and safety issues). It is intended that the Client would only exercise this ability where to do so is made necessary by such urgent matters.</p> <p><b>NOTE:</b> This clause still requires the Client to notify the Consultant of any instructions it has given. It is important that this notification occurs to ensure that the Consultant can still effectively co-ordinate the works and Services.</p>
<p><b>3.7</b></p>	<p>The words “, as soon as reasonably practicable,” are inserted on the second line after the word “must”.</p> <p>The following is inserted as a second paragraph:</p> <p>“The Client shall not be required to inform the Consultant of anything which will affect the scope or timing of the Services that is related to another Government agency or entity outside of the direct matters for which the Client is responsible as a Government agency or entity.”</p>	<p>Where the Agreement specifies that the Client is the Crown or a public sector agency (e.g. the Ministry of Education) this additional paragraph clarifies that that the obligation of the Client to give early warning to the Consultant of matters which may disrupt the Services or the Project are reduced, (specifically the Client is not deemed to have knowledge of the actions of the ‘Government’ as a whole).</p> <p><b>Note:</b> This exclusion does not remove the Client’s obligation to give any early warning at all. Rather, it seeks to make clear that the Client will not be required to give the Consultant early warning of things like yet to be finalised and publicly released government policies that will affect the scope or timing of services.</p> <p>The Client would however, still be obligated to give the Consultant early warning of all matters that an ordinary non-government</p>

		client would be expected to provide early warning of over the course of an engagement.
<b>3.9</b>	<p>The following is inserted after the last paragraph:</p> <p>“Without limitation to the Client’s obligations in the 4<sup>th</sup> bullet point of clause 3.2, any approval by the Client of information submitted to it by the Consultant (such information must in all cases be provided by email or hard copy by the Consultant) shall not be taken to signify that the Client has checked the accuracy or completeness of such information received from the Consultant and shall not relieve the Consultant of any of its obligations under this Agreement unless approval is expressly given on that basis or the parties expressly agree such in writing.”</p>	This amendment allows the Client to rely on the accuracy of the information provided to it by the Consultant. During the course of the Services the Client will need to be vigilant in respect of any approvals requested from the Consultant to ensure that where signing off there is no ‘fine print’ relating to an unintended acceptance of accuracy of information.
<b>4.3</b>	<p>Clause 4.3 is replaced with the following:</p> <p>“The Consultant must obtain the Client’s prior written consent before replacing or substituting any of the Key Personnel, including where the Client has required the replacement in accordance with this clause 4.3, such consent not to be unreasonably withheld or delayed.</p> <p>The Client may, for good reason, require the Consultant to replace any Key Personnel, any other person engaged by either the Consultant or any Subconsultant if they are unsuitable or are not sufficiently available to perform the Services by giving written notice to the Consultant specifying the Client’s reason(s). The cost of replacing any person pursuant to this clause shall be borne solely by the Consultant and any replacement or substitute person proposed must be no less skilled and experienced than the Key Personnel to be replaced.”</p>	<p>This amendment requires the Consultant to first seek written consent from the Client before replacing Key Personnel. This is to avoid the scenario where the Consultant may have tendered on the basis of the skills of a particular employee but then not make them available for the project.</p> <p>The Client also has the ability to remove any person working on the project for unsuitability, poor performance, unavailability, etc. The Consultant is responsible for the cost of replacing people who are removed by the Client.</p>
<b>6.5</b>	The first bullet point is deleted and replace with the following:	Replacing the first bullet point allows the Consultant to take out a professional indemnity policy of a different value than the

	<ul style="list-style-type: none"> <li>“professional indemnity insurance for the amount as set out in the Special Conditions;”</li> </ul> <p>The following is added at the end of clause 6.5:</p> <p>“The Consultant’s public liability insurance shall include the Client (which shall include the Client’s officers and employees) as an additional insured in respect of their vicarious liability arising from the Consultant’s negligence in relation to the performance of this Agreement.</p> <p>The Consultant insurances required to be taken out by the Consultant shall be with insurers with a minimum unsecured credit rating of least “A-” from Standard &amp; Poor’s (or equivalent) immediately on the execution of this Agreement. The Consultant shall keep them in force for the length of time set out in the Special Conditions except that in the case of professional indemnity insurance the maintenance obligation is as stated in the second paragraph of this clause 6.5.”</p>	<p>contractual limitation of liability. This needs to be reflected in the Special Conditions.</p> <p>The further paragraphs have been inserted to ensure that the wording of the Consultant’s insurance policy covers the Client’s vicarious liability for actions of the Consultant. It is important that the Client draws the Consultant’s attention to the requirements contained in this clause relating to the Consultant’s insurance policy in its request for a quotes, bids, proposals, tenders, etc. for the Services. The Client should (best practice) ask the Consultant to provide confirmation from the Consultants insurer that th Consultant’s insurance policy includes the required cover.</p>
<p><b>9.1</b></p>	<p>Clause 9.1 is amended by inserting the following at the end:</p> <p>“Notwithstanding the foregoing, where any New Intellectual Property includes Confidential Information, the Client’s or the Consultant’s use of that New Intellectual Property is subject to ensuring compliance with clause 8.1 or 8.2 (as applicable). For example, any Confidential Information is to be redacted or removed from the New Intellectual Property prior to any further use.”</p>	<p>This amendment explicitly requires New Intellectual Property that contains Confidential Information then the Confidential Information is also to be handled in accordance with the confidentiality rules in the Agreement.</p>
<p><b>9.2</b></p>	<p>Delete the words “to the extent reasonably required to enable the Client to make use of the Services or use, adapt, update or amend the Works” and replace with the following:</p> <p>“to the extent reasonably required in relation to or in connection with this Agreement, the Services, the Works or the Client’s</p>	<p>This wording clarifies the uses that the Client may reasonably use the intellectual property of the Consultant from the general conditions.</p>

	Project, including for the planning, design, engineering, procurement, construction, testing, commissioning, completion, operation, maintenance, repair, replacement, modification, renewal, expansion and/or alteration of the Services, Works or the Client's Project."	
<b>9.3</b>	Insert the words: "part of the" after the words "concerning the" on the fourth line.	This new wording clarifies that the Client does not have to pay for the entirety of the Services before it receives the ownership of intellectual property – just those that relate to the production of the particular intellectual property.
<b>10.1</b>	Delete the words "best endeavours" and replace them with "reasonable endeavours".	The standard 'reasonable endeavours' has been adopted because it is less onerous on the parties given the nature of the clause relating to resolving disputes.
<b>10.2</b>	Replace clause 10.2 with the following:  "If the parties cannot resolve the dispute themselves within a reasonable time (but in any event within 20 Working Days or such longer period agreed in writing), then either Party may require that the dispute be referred to mediation by serving written notice on the other."	Inserting a time frame for the resolution of a dispute gives both parties certainty about when disputes may be resolved. 20 Working days is a default timeframe only. The Client may consider agreeing a longer or shorter timeframe with the Consultant depending on the complexity of the relevant project or dispute.
<b>10.3</b>	Delete the words "a reasonable time" and replace them with "20 Working Days of the date of either Party's notice requiring mediation issued pursuant to clause 10.2 (or such longer or shorter period as may be expressly agreed by the Parties)"	Inserting a time frame for the resolution of a dispute gives both parties certainty about when disputes may be resolved. This is a default timeframe only. Consider agreeing a longer or shorter timeframe depending on the complexity of the project or dispute.
<b>10.6</b>	Add a new clause 10.6 as follows:  "Nothing in this clause 10 shall prevent or prejudice the ability of either party to apply to any court in order to seek interim injunctive relief against the other."	This clause clarifies that, notwithstanding the agreed procedure for resolving disputes, the parties may apply to the courts for an injunction if necessary.

<b>12.10</b>	Add the following after the reference to "9" in clause 12.10:  "and 10, 11 and 12"	This amendment means that the ongoing obligations (e.g. paying a Consultant on early termination, resolving disputes, etc.) will survive termination of the Agreement.
<b>12.19</b>	A new clause 12.19 is added as follows:  "For the avoidance of doubt, where the Consultant has performed any Prior Services, this Agreement will retrospectively apply to those Prior Services from the date that it is executed by both Parties."	This clause means that the terms and conditions of the Agreement will apply to any Services provided by the Consultant prior to the execution of the Agreement (i.e. under a letter of intent).

## Project Specific Amendments Guidance

Clause Number	Amendment	Supporting Guidance
5.5	<p>A new clause is inserted as follows:</p> <p>“Provided that it first gives written notice to the Consultant, the Client is entitled to set-off against any sums that would otherwise be due to the Consultant under the Agreement any actual amount owing as a debt due and payable in respect of any claims the Client has against the Consultant in relation to the Client’s Project. This right of set-off, deduction and withholding is without prejudice to any other right of set-off, deduction or withholding provided for pursuant to this Agreement or otherwise.”</p>	<p>If the Consultant owes money to the Client in relation to the Client’s Project, the Client is entitled to subtract the amount owed by the Consultant from any amounts it was required to pay to the Consultant on that Project. This clause is only relevant where a Consultant has been engaged to provide a range of services for the same project under different Agreements.</p> <p>This right to ‘set-off’ enables the Client to recover amounts owed to it by the Consultant which are “debts due” (i.e. where the amounts are legally due and owing to the Client and are not in dispute).</p> <p>The powers conferred by this clause are expected to be exercised where payments owed to the Client are not in dispute, not as a point of leverage during the provision of the services.</p>
6.2	<p>The following paragraphs are added to clause 6.2:</p> <p>“However, such limitation shall not apply to the Client’s liability to pay the Consultant’s fee or any liability of either party which arises:</p> <ul style="list-style-type: none"> <li>• in relation to any unauthorised use of the other party’s Intellectual Property or Confidential Information in breach of this Agreement; or</li> <li>• in relation to an indemnity provided by the Consultant under clause 9.4.”</li> </ul>	<p>This provision bolsters the Client’s rights in respect of intellectual property and confidentiality. If the Consultant breaches the intellectual property or confidentiality provisions of the agreement, the Client may seek full recovery of any loss suffered as a result on an indemnity basis.</p>



<p><b>7.4</b></p>	<p>A new clause is inserted as follows:</p> <p>The Client may reduce either or both of the scope of the Project, and the scope of the Services, and may engage another party to undertake any such works so removed from the scope, and in any such event the Consultant shall not be entitled to claim any breach, damages or loss of profits against the Client.</p> <p>Within 15 days of any notice under this clause, the Consultant shall forward to the Client:</p> <ul style="list-style-type: none"> <li>(a) the proposed reduction in the consultancy fee for the reduction in the Services, such amount to be agreed in accordance with Clauses 7.2 and 7.3; and</li> <li>(b) the proposed amount of any reasonable out of pocket costs that the Consultant incurs solely because of the reduction in Services.</li> </ul> <p>Upon determination of the reduction of the consultancy fee in accordance with this clause the consultancy fee shall be reduced accordingly.”</p>	<p>This clause allows the Client to reduce the scope of the Services, or remove items of work from the Services.</p> <p>Only to be used where there is a likelihood that certain elements of a project may not be required (e.g. a block of classrooms which are no longer required on a New School Project) at the time of letting the Services. In the absence of such a risk this clause should not be included.</p> <p>When the scope is reduced, the fee payable for the Services will also reduce. The amount of the reduction is assessed according to the procedure for valuing Variations in the Agreement.</p>
<p><b>9.1</b></p>	<p>Clause 9.1 is deleted and replaced with the following:</p> <p>“All New Intellectual Property held in any medium, whether electronic or otherwise shall be solely owned by the Client. The Consultant may not copy, use, disclose, distribute or sell any New Intellectual Property without the express written consent of the Client (which it may grant or withhold in the Client’s sole and absolute discretion on whatever conditions the Client deems appropriate) except as required for the purpose of delivering the Services.”</p>	<p>This amendments mean that new intellectual property that is developed out of the Services remains the property of the Client, and may not be used by the Consultant without express permission.</p> <p>Rule 61 of the Government Rules of Sourcing provide guidance on the ownership of intellectual property. Generally the ownership of the intellectual property should be joint. However, it may be appropriate for the Client to retain sole ownership of New Intellectual Property, for example, in circumstances where such New Intellectual Property is sensitive, commercially sensitive (e.g. where the client wishes to control further use of it) etc.</p>

		<p>Additionally, there may be circumstances where it is necessary for the client to retain sole ownership of a part or parts of the New Intellectual Property. In such cases, this particular information should be identified and the balance of the New Intellectual Property should be jointly owned.</p>
<p><b>9.4</b></p>	<p>This clause is amended by adding the following at the end:</p> <p>“The Consultant will indemnify the Client against any loss, claim, damage, expense, liability or proceeding suffered or incurred at any time by the Client as a direct result of any breach of any of the Consultant’s obligations, undertakings or warranties contained or implied in this clause 9.4.”</p>	<p>This requires the Consultant to indemnify the Client against losses suffered as a result of the Consultant breaching the intellectual property rights of any third party.</p> <p>To be used in conjunction with the new clause 6.2 and it is only appropriate to use this clause where the Services will produce, or involve, critical and sensitive intellectual property or information (e.g. valuable IP from a third party designer, a design which the Client plans to use for commercial gain, etc.). The second bullet point means that any intellectual property indemnity sits outside of the liability cap. The Client should seek legal advice if any indemnities are being considered for inclusion into the agreement.</p> <p><b>Note:</b> On projects it will often be the case that such a clause is only justified for use in relation to some intellectual property and/or confidential information associated with a project but not all. Where this is the case, the specific information that it applies to should be listed.</p>
<p><b>11.2</b></p>	<p>Add the following paragraph at the end of clause 11.2</p> <p>“The Client will not in any circumstances be responsible for abandonment costs or lost fees for stages of the Services not performed as at the date of termination (including without limitation any loss of profit, or lost opportunity costs or claims suffered by the Consultant) or for any fees for any Services for which the Client had not, as at the date of termination, instructed the Consultant to proceed with.”</p>	<p>This amendment explains what the Client will be liable to pay if it terminates the Agreement.</p>

## 11.6

A new clause is inserted as follows:

"The Client may suspend the performance of the Services by the Consultant at any time by written notice specifying the reasons why the Services are suspended. As soon as such notice is received by the Consultant, the Consultant will stop the performance of the Services. The Client may withdraw the suspension of the Services at any time by giving further written notice to the Consultant.

Suspension of the performance of the Services will not prejudice or affect the accrued rights or claims and liabilities of the Parties.

Where the Services are suspended other than for the default of the Consultant the Client shall:

- grant the Consultant additional time to complete the Services commensurate with the period of suspension plus the period of time reasonably required by the Consultant to remobilise should the Client later withdraw the suspension, and the Consultant shall not be entitled to a Variation due to suspension under this clause 11.6;
- pay the Consultant for the Services provided to the date of suspension and any reasonable costs incurred by the Consultant solely as a result of such suspension (the Consultant will take all reasonable steps to minimise all such costs);
- have no claim against the Consultant solely by reason of any delay caused by the suspension; and
- not be responsible for any costs or losses resulting from any such suspension other than the reasonable costs which may be payable under the 2<sup>nd</sup> bullet above.

The Consultant may terminate this Agreement by written notice to the Client where the Services remain suspended for a continuous period of more than three months and the Client has not withdrawn

This new clause establishes a regime for suspending the provision of the Services. The Client may only suspend the Services for up to three months before it must terminate the Agreement, withdraw the suspension or agree to extend the suspension with the Consultant.

This clause enables the Client to halt work without terminating the Agreement. It can be used where the Client considers that there is a risk that the project will be delayed by factors which do not prevent the Consultant from carrying out Services (e.g. while waiting for ministerial approval).

Please be aware the Consultant is entitled to reasonable costs incurred as a result of the suspension. These costs should be out of pocket costs and expenses of the Consultant caused by the suspension - the Client should, prior to suspending, confirm what these costs are likely to be (if any).

	<p>the suspension or the parties have not agreed a further extension of the suspension.</p> <p>Where the Client gives notice to the Consultant withdrawing a suspension the Consultant must remobilise, and as far as reasonably possible reassign Key Personnel to the Project and provide sufficient employees (including Key Personnel) with the necessary qualifications, licenses, skills and experience to perform the Services to the standard required by this Agreement within a reasonable time from the date it receives the Client's notice."</p>	
<p><b>12.9</b></p>	<p>Clause 12.9 is deleted and replaced with the Following:</p> <p>"12.9.1 The Client may novate all or any part of its rights and/or obligations under this Agreement to the Contractor with the prior consent of the Consultant, such consent shall be deemed to be provided ten Working Days following the Client's request unless the Consultant can provide reasonable evidence (prior to the expiry of the ten Working Days) that:</p> <ul style="list-style-type: none"> <li>(a) the Contractor will be unable to fulfil its financial obligations to Consultant under this Agreement;</li> <li>(b) an actual conflict of interest exists between the Consultant and the Contractor;</li> <li>(c) the Consultant is currently engaged in litigation or other legal proceedings against with the Contractor;</li> </ul> <p>or</p> <p>The Consultant must, within a further ten Workings Days of providing its consent to the Client's proposed novation, duly execute and deliver to the Client, in triplicate, a deed of novation, such deed of novation to be in the form provided by the Client in the form set out in Appendix H.</p>	<p>This clause provides for the assignment / novation of the Agreement and is intended to be used for design/build projects where the Client is entering into a contract for the Services (design services such as architectural, structural engineer and building services engineer) before it has engaged a Contractor to undertake the construction works for its project.</p> <p>The Client <b>must make clear</b> in any RFx documentation to engage a Consultant that there is an intention to novate the Agreement. The Client should make it clear in the RFx documentation that where consent (supported by the required reasonable evidence) is not provided by the Consultant then the Client may seek to terminate the agreement with the Consultant and re-tender the Services. This ensures that potential bidders are aware and can make an informed decision for their organisation if they wish to bid or not for these services. Clients need to be aware that inclusion of this clause may reduce the number of potential bidders and should consider this as part of their procurement strategy, market engagement and risk management for the project.</p> <p>Following execution of the Agreement, the timing of any intended novation should be advised to the Consultant with as much as</p>

	<p>Where the Consultant fails to comply with the foregoing provisions of this clause 12.9.1, then the Client may withhold payment of any amounts otherwise due and payable by the Client to the Consultant under this Agreement until the failure has been rectified.</p> <p>12.9.2 In the event the Client novates all or part of its rights and obligations under this Agreement to the Contractor pursuant to clause 12.9.1, the Consultant:</p> <ul style="list-style-type: none"> <li>(a) acknowledges it will, as a result of such novation, become a 'consultant' of the Contractor;</li> <li>(b) acknowledges that the terms of the construction contract to be entered into between the Contractor and the Client will include a provision requiring the Contractor to deliver sub-consultant continuity deeds for the benefit of the Client; and</li> <li>(c) agrees to deliver an executed sub-consultant continuity guarantee deed to the Client in the form set out in Appendix I."</li> </ul>	<p>notice as practicable and the feedback of the Consultant obtained in relation to nature of the design/build arrangements with the Contractor.</p> <p>To minimise the risk of Consultants raising concerns which result in the Consultant not providing consent for the Client to novate the Agreement, the Client should:</p> <ul style="list-style-type: none"> <li>• Clearly identify in the RFX documentation for engaging main contractors the Consultants who will be novated. Request suppliers who respond to the RFX to confirm there are no conflicts of interest, litigation or legal proceedings relating to the listed Consultants which the Client plans to novate.</li> <li>• Seek the Consultants input when shortlisting potential Contractors to highlight any concerns regarding the Contracts. (Note: this could be done at the ROI stage of a two stage RFX process or when shortlisting from a panel as part of a secondary selection process).</li> <li>• Carry out financial due diligence and other due diligence on the ability of the Contractor to fulfil the obligations of the Client prior to entering into an agreement with the main contractor.</li> </ul>
<p><b>12.15</b></p>	<p>The following is added to the end of clause 12.15:</p> <p>"For the avoidance of doubt, any exercise of a regulatory function by the Client shall not constitute a breach of this Agreement."</p>	<p>This clause ensures that the Client cannot be deemed to breach the Agreement solely because it has complied with its obligations at law (e.g. Worksafe engaging an engineer to the contract for a construction contract, and then closing the project site due to safety concerns). Its use can be considered where the project may be impacted by the Client exercising its regulatory functions.</p>