

Employer Instructions

Collateral Warranty for Sub-Consultant.

Introduction

If a Consultant commissions a sub-consultant to carry out a key element of a construction-related service for a Client (Contracting Authority), a contractual link should be formed between the Client and the sub-consultant so that:

- should the principal Consultant cease trading for whatever reasons the Client can continue to obtain the services of the sub-consultant on a contractual basis should it be necessary.
- should there be a professional negligence claim against the principal Consultant the sub-consultant can be joined in the action if it has contributed in any way to the negligence,
- should the principal Consultant fail to renew its insurance and there is a loss caused by the sub-consultant's negligence, the Client can pursue the sub-consultant directly.

If a Client identifies a special skill¹ in the Suitability Questionnaire² and the principal Consultant indicates that it intends to outsource this service, normally a Client would require a contractual link with the sub-consultant once the contract for the principal service has been awarded. The Instructions to Tenderers for Services (ITT-S) should clearly state which sub-consultants are to have this contractual link by listing in the *Particulars* of ITT-S at 3.4 what Warranty Agreements will be required.

ITT-S1(a), S1(b), S2(a) and S2(b)

Section 3.4 of the ITT-S states: “*Where a Candidate (Applicant) comprises a lead Consultant, who will execute the Contract with the Contracting Authority (Client), and a number of sub-consultants, collateral warranties will be required from any Sub-Consultant as listed in the Particulars in the form set out in the Particulars or as otherwise notified to the Candidate (Applicant) by the Contracting Authority and entry into the Contract will be conditional upon the provision of such warranties.*”

Sub-contract part of Service

Clause 3.3, 4, 5 of the Standard Conditions of Engagement for Consultancy Services (Technical) states: “*The Consultant may not validly sub-contract performance of any Services, unless agreed or requested by the Client. The Consultant shall be responsible for the acts and omissions of sub-consultants as if they were its own.*”

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¹ See Section 1.3 *Principal Service Required* in QC1 and QC2

² Questionnaires QC1 and QC2.

Collateral Warranty for Sub-Consultant Continued

Consultant's Contract Terminated

It should be noted that separate to a sub-consultant's Collateral Warranty there is a provision under Clause 14 .19, 20, 21 of the Standard Conditions of Engagement for Consultancy Services (Technical) that allows for assignment. This provision states " *On any termination, the Consultant agrees that on any termination, except Client's termination at will, the benefit of any sub-consultancy, engagement of site staff, relating to the Services shall stand to assigned to the Client or its nominee, with effect from the date of any claim to the assignment from the Client to the Consultant.* "

Professional Indemnity Insurance

While the Consultant's Professional Indemnity Insurance may cover liability for work undertaken by sub-consultants such policies would not indemnify the individual sub-consultant in the case of its negligence. The principal Consultant's insurers would exercise their subrogation rights against that sub-consultant to recover any payment made by the principal Consultant's insurers.

Level of PII cover

The level of PII cover that a sub-consultant should provide should be linked to the degree of damage that a negligence act might cause.

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