ACEI ASSOCIATION OF CONSULTING ENGINEERS OF IRELAND

Scope Change/Risk Transfer Advice Note

This ACEI Advice Note has been prepared to assist member firms in dealing with risk transfer and scope change on professional appointments, relative to ACEI/EI Standard Conditions of Engagement Agreement SE9101/ME 2000 Normal Services (2020 editions), including associated Collateral Warranty documents.

Scope of Services, ACEI Member Firms for Private Clients and certain Public bodies + Funders

As member firms will be aware, the advice from the ACEI, and in line with proper business practise, is that a written fee proposal is prepared with respect to all professional services for which we are being engaged by our clients. Part of the fee proposal should set out the conditions of engagement, which forms the basis of our fee proposal. These conditions of engagement for design services are those prepared by the ACEI/EI SE9101 Normal Services Section 6 for Civil & Structural Engineers and ME 2000 Normal Services Section 6 For Mechanical & Electrical Engineers. The scope of services included is clearly set out in those documents and our submitted fee is based on that scope of services. Additionally for report advisory work, RA 9101 is the applicable document.

In other cases, the client may issue a bespoke scope of services document at project submission stage. This may or may not include proposed forms of legal appointment/collateral warranty documents. If this is the case, it is very important that the fee bid submitted takes account of the specific scope of works and the nature of the appointment/collateral warranty documents from a risk perspective. In all cases your initial fee total should be based on the standard ACEI/EI documents and then modified to reflect adjusted scope and risk profile of the bespoke appointment documents – assuming your firm has the professional competence to service the additional scope items and such scope items are covered by your Professional Indemnity Insurance. It is our advice that your proposal should clearly outline what the additional fee quantum is to service the client's bespoke documents relative to the ACEI/EI industry standard i.e. it is important your client is aware how much extra they are paying as a consequence of deviating from the standard industry conditions of engagement.

Risk Transfer

As noted in the above section, the Standard Conditions of Engagement Agreements SE9101 and ME 2000 plus associated Collateral Warranties, have been carefully designed to reflect the appropriate scope of services and balance of risk to ACEI member firms on professional appointments. Member firm's fees on projects should then reflect this (Normal Services). When we receive bespoke appointment documents and associated collateral warranties, these invariably result in an increase in scope (addressed later in this document) and risk profile for the services ACEI member firms are providing.

Our advice is as follows:

1. Notify your client that these bespoke documents represent a change to the terms of your appointment/conditions of engagement on the project and reflect an increased risk profile to your firm which you will need to consider carefully.

2. Advise them you intend to have the documents professionally reviewed and where required will seek to have clauses modified. Note some Professional Indemnity Insurance providers, will have the required competence to support member firms in having such documents reviewed at no additional cost.

3. If you chose to seek additional professional advice, you may wish to highlight to the client that you have not allowed for the cost of this advice in your original fee and hence will be passing these costs on to the client.

4. Carefully and with whatever professional support you require, review these bespoke documents, clause by clause and engage in negotiations with your client/client's agents to get the document as closely aligned to the standard ACEI Conditions of Engagement/ Collateral Warranties as possible.

5. Please be aware how clients and their agents often attempt to influence consultants by stating that clauses are "market standard" or telling consultants that "all other consultants" have agreed to something. Please do not allow such claims pressurize you. The contract under negotiation is between your firm and your client and what others may choose to do is their business.

6. If there are onerous clauses that the client's agents are insisting on retaining and imposing on your firm, categorize them as follows:

   a. Clauses that impose risks which are uninsurable.

      Recommended Action: Simply say "No" and refuse to accept these clauses. Advise your client that your PII policy will not respond to claims that would arise on foot of such clauses e.g. they may impose fitness for purpose obligations, which PII policies do not cover. Signing up to such clauses will put the future viability of your firm at risk if there is a claim on foot of them and their inclusion is unacceptable. Your firm should say "No" to their inclusion in the appointment document and be prepared to walk away from the project if your client is unwilling to change/ remove the relevant clauses.

   b. Clauses that are onerous or highly onerous, but are insurable (as confirmed by your Insurance provider).

      Recommended Action: Take a holistic view on the number of these clauses in the appointment document and the risk transfer that is resulting to your firm. Consider the risk/reward equation and advise your client of the level of fee adjustment required before you can accept the document. It is only when a client can clearly see how much extra they are paying to have such clauses included, that they may consider changing them.

   c. Either way, it is really important that risk transfer within legal appointment documents is not done without a fee increase to reflect this transfer. Otherwise there is no deterrent to clients and their agents pushing such onerous contract terms on our member firms.

7. With respect to collateral warranties, ensure these are negotiated in the same way as the appointment document. An important principle is that a collateral warranty should not impose more onerous conditions on your firm than the underlying appointment document. It is very important member firms are aware that a collateral warranty represents a contractual commitment between your firm and a third party, for which you may be held liable at some point in the future i.e. collateral warranties are valuable legal documents which impose potential legal liability on your firm and you should charge a fee for each collateral warranty you are asked to provide. The fee should reflect the risk the document imposes on your firm and should not be simply an administration processing fee.

8. Beware of all other bespoke documents you are asked to sign as they invariably are imposing further risk and legal liability on your firm. A non-exhaustive list of such documents include: differing forms of Project Certification documents, Letters of Reliance, Interim stage payment documents, Funders Certs etc. Always have these documents professionally reviewed and as above consider scope, risk and additional fee implications.

Scope Change

Member firms have brought to our attention various industry changes, which are leading to scope change across a lot of our appointments. These include revised scope of services being inserted into bespoke legal appointment documents, as well as "Design Responsibility Matrix" (DRM) documents, often produced by the Contractor, which are routinely being presented to Consultants on Design and Build + other contract types. If accepted, the above types of documents immediately and invariably result in changes to our member firms' scope of service i.e. member firms are being asked to perform services which are different to those for which they originally submitted a fee proposal to the client. There can be very onerous scope items included in these documents, which are inappropriate and should be resisted. Clearly one document, such as a DRM, cannot summarise or add to the design responsibilities that flow from the contract documents. Therefore, while member firms may choose to engage with DRM's, in the spirit of playing our part in avoiding the common problem of items "falling between two stools", DRM's should not in any way lead to an automatic expansion in member firms scope of services, and supersede the scope that has been priced. This needs to be made clear to clients on all relevant projects.

Typical forms of DRM's record the consultant as having either "primary" or "secondary" levels of responsibility for items. In the context of "secondary" levels of responsibility, consultants must be aware of the Civil Liability Act, which can result in 1% established liability leading to 100% liability – 1% rule. Hence, accepting a "secondary" level of responsibility should take account of the possible implications under the 1% rule. In practice it has proven to be extremely difficult, if not impossible, to disprove 1% responsibility in most cases. In this environment, a DRM poses an existential risk for Consultants and their PII Cover.

We are recommending our member firms do the following when presented with scope change documents:

1. Point out immediately to your client that these documents result in a scope change, which will result in an increased fee.

2. Thoroughly review the revised scope items and establish if you are in a position to service the additional scope items, for which you are assigned primary responsibility (or similar).

3. If you are not in a position to service the additional scope items, because they are not within the normal competence of your practice as Consulting Engineers or they are not covered by the particular conditions of your Professional Indemnity Insurance (PII) advise your client accordingly and be firm about your decision.

4. Thoroughly review the revised scope items for which you are being assigned secondary responsibility (or similar). Consider the possible implications under the 1% rule.

5. If you consider it is not appropriate to have an item/items assigned to your company as a secondary responsibility item, advise your client accordingly and have it/them specifically removed from your scope.

6. If you are satisfied to have secondary levels of responsibility items included in your scope, be very specific about the service you are providing and ensure there is no ambiguity.

7. If some (or all) of the requested additional scope items are inappropriate and/or you are not prepared to service them, ensure they are specifically excluded from your scope of services.

8. Having followed the above process and based on agreed changes to scope under both primary and secondary levels of responsibility, adjust your fee accordingly to reflect those particular changes in your scope of services.