

# Legal Viewpoint - Part 2

By James Williams - Associate, Carter Newell Lawyers.



## What Should Engineers Look For In Their Consultancy Agreements?

### Introduction

This is the final part of two part article considering the terms of consultancy agreements. The first part of the article dealt with some important issues for engineers to consider when negotiating their consultancy agreements, such as the warranties and indemnities contained in the agreement, the payment terms and the services to be provided by the engineer. Some further issues which are often difficult to resolve during the negotiation phase are considered below.

### Intellectual Property

Engineers should be prepared to provide principals and contractors with a copyright licence to use their designs for the purposes of the project. This licence should be given to assist, in the first instance, the construction of the building, but should also extend to matters post construction, such as the maintenance, repair and possible extension of the building.

However while engineers are paid for designing the project and for providing their intellectual property,

they should not be obliged to give it away when their services have been completed. Ownership of the intellectual property and in particular, the engineer's designs and drawings, should always remain vested in the engineer. Clauses which require copyright and other intellectual property rights in the engineer's designs to vest in the principal or the contractor should be avoided.

### Assignment Or Novation

Many engineers are wary of clauses permitting assignment of the consultancy agreement by the principal or the contractor. An assignment is the transfer of the benefit of a contract. Where a consultancy agreement is assigned from party A to party B, only the benefit of the contract will be transferred. This will be, in the case of a consultancy agreement, the right to have the services carried out by the engineer and, on an assignment, this right will be transferred from A to B. The burden of the consultancy agreement, in other words, the requirement to pay the engineer will remain with party A.

A novation, however, can have far more serious consequences for an engineer as a novation is the transfer of the benefit and the burden of a contract. This means that the requirement to pay the engineer

will also transfer from party A to party B on novation of a consultancy agreement. Engineers should therefore ensure their consultancy agreements afford them the right to approve any novation to a third party. When considering whether or not to consent to the novation, the creditworthiness of the third party should be a major consideration for the engineer. It goes without saying that an engineer should be satisfied as to the ability of the third party to pay the engineer for performance of the services before consenting to the novation.

### Default And Termination

It is always important to consider not only the circumstances in which a consultancy agreement may be terminated, but also the effect of termination, such as the payment due to the engineer and delivery of drawings or documents to the principal so that the principal may complete the building.

Termination for convenience clauses should be resisted by engineers as they permit termination of the agreement even where the engineer is not in default. If the inclusion of a termination for convenience clause is insisted upon by the principal then the engineer should ensure that he is given a

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## The Department of Main Roads Engineering & Technology Group

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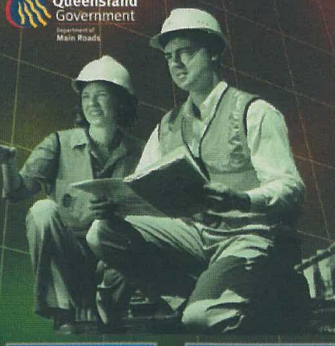
at The Bardon Conference Centre

from 8-10 August 2006

## Main Roads Technology Forum 2006

*'Meeting the Infrastructure Challenge'*

The Bardon Conference Centre, Brisbane  
8 - 10 August 2006



The past two decades have been accompanied by an evolution in technology which impacts on the way we live and the way we work. The increasing complexity of our society demands that services must meet public expectations. This includes providing an effective road infrastructure while meeting challenges including a spreading population, varying transport needs, changing traffic flow patterns and environmental impacts. A competitive Construction Industry also demands greater efficiencies in work practices.

Formerly known as the RS&E Technology Forum, this year's Main Roads Technology Forum will present delegates with a greater understanding and appreciation of new technical developments and contemporary innovations available, and provide more options for delivering solutions for the future.

Main Roads is responding to infrastructure challenges by developing strategic initiatives to encourage the use of innovation and technology in the planning, design, construction and maintenance of its road network.

The 2006 Main Roads Technology Forum will provide a showcase for research into new and innovative technologies from Government and Industry practitioners by way of presentations, workshops and discussion. The Forum will promote advances in areas such as Road Worker Safety, Heavy Vehicles Management, Intelligent Traffic System, Road Design & Construction, Road & Bridge Maintenance Planning.

For further information please contact Kimmi Siu on (07) 3834 5543 or [kimmi.m.siu@mainroads.qld.gov.au](mailto:kimmi.m.siu@mainroads.qld.gov.au)





long period of notice of the pending termination, preferably in the region of 60 days. The engineer should be entitled to receive payment in full in respect of the services provided to the date of termination and should also be entitled to receive costs reasonably incurred in the expectation of providing the remaining services, and any other costs reasonably incurred by the engineer as a result of the termination.

Where the principal terminates the agreement in other circumstances, the engineer should seek to ensure that a stepped procedure applies whereby the engineer is served with a notice specifying the breach and is allowed a reasonable period in which to remedy the breach. What is a 'reasonable' period may depend on the breach in question, but the engineer should insist on a period of, at least, 5 working days. Where the consultancy agreement is terminated through the engineer's default, the engineer should be entitled to receive payment for all the services performed to the date of termination.

A similar stepped procedure could also be used where the principal is in default and the engineer is proposing to terminate the agreement. However the engineer should be entitled to terminate the agreement without notice if the principal becomes insolvent.

Where the engineer terminates the agreement due to the principal's default the engineer should be entitled to be paid for the services provided to the date of termination and should also be entitled to payment in respect of costs reasonably incurred in the expectation of providing the remaining services. The engineer should also be entitled to recover any other costs and expenses reasonably incurred as a result of the termination.

The main breach committed by principals in consultancy agreements is not making payments on time, or at all. Where this occurs, the engineer should be aware of his rights contained in the Building and Construction Industry Payments Act 2004 (the 'Act'), including the right to suspend provision of the services for non payment (provided the principal is given 2 business days notice of the engineer's intention to suspend provision of the services) and the right to make payment claims pursuant to the Act.

## Conclusion

These are just some of the points which arise in consultancy agreements which require careful consideration. If in doubt, engineers should seek specific advice in relation to the terms of the proposed agreement. Seeking this advice at an early stage, when the engineer has a better chance of securing a more favourable agreement, can save the engineer time, energy and money in the long run.

James Williams  
Associate

**May 29th** - "Design and construction of mechanically stabilised earth structures incorporating concrete segmental retaining walls".

This is a two hour technical seminar that will look at the design theory and code requirements for designing segmental retaining wall structures. The seminar will cover all types of segmental retaining wall (SRW) products.

**July 15th** - "Form and function with retaining walls".

This seminar will cover some of the technical aspects of the CPD presentation in May but focus more on applications and case studies on how to utilise SRW structures in subdivision and commercial applications, to not only solve difficult retaining wall problems, but also to have them enhance the overall appearance and value of a project.

**September 15th** - "Land use and turning difficult sites into valuable property with the use of reinforced soil concrete segmental retaining walls".

A challenge facing major cities and populated areas is the decline in available flat land for inner city commercial development or large industrial developments. This seminar will look at how previously "unusable" land or difficult sites can be turned into valuable property in prime locations by the use of SRW's. It will also cover the growing concern over management of overland flow via various retention mechanisms that can be built in and around SRW structures through clever design of permeable pavements and underground storage systems within the wall structure. This is of particular interest to engineers who design large commercial sites with car parking areas etc.

**Venue:** Engineering House, 447 Upper Edward St, Brisbane

For further information or registration details contact: [aherse@anchorwall.com](mailto:aherse@anchorwall.com)



## CONTRACT CONTROL INTERNATIONAL (CCI)

### Public Training Program

May - August 2006



Courses satisfy Engineers  
Australia CPD guidelines

MAY	11th—12th	Brisbane	Contract Auditing Skills
	25th—26th	Brisbane	Administration of Services Contracts
JUNE	5th—6th	Mackay	Administration of Services Contracts
	7th—8th	Mackay	Contract Auditing Skills
	14th—15th	Melbourne	Advanced Contract Superintendent's Workshop
	19th—20th	Townsville	Contract Administration
	21st	Townsville	Preparing Scopes of Work and Specifications
	22nd—23rd	Brisbane	Advanced Contract Superintendent's Workshop
JULY	17th—18th	Brisbane	Contract Administration
	19th—20th	Brisbane	Tender Administration
AUGUST	2nd—3rd	Brisbane	Contract Supervisor's and Inspector's Course
	22nd—23rd	Cairns	Contract Administration
	24th	Cairns	Negotiation Skills for Contract Managers

**Engineers Australia member costs — 2 day course: \$845 + GST / 1 day course: \$525 + GST.**

Price listed applicable to members of Engineers Australia. Further discounts apply for multiple registrations. Registration conditions apply.

All CCI courses can be customised for in-house courses.

Two day courses provide 32 hours (16 hours for a one day course) of Continuing Professional Development (CPD) under Engineers Australia's CPD Guidelines.

**For course outlines, registration forms and further information, please visit our website:**  
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