



PRACTICE ALERT

2 December 2025

An important message about KiwiRail's RFT for Prequalification of Consultancy Services Panel, CCCS

As a chief executive, owner or manager of an ACE New Zealand member firm, we want to contact you about the terms of contract for KiwiRail's Request for Tender (RFT) for the Prequalification of Consultancy Services. KiwiRail's RFT for Prequalified Panel is based on ACE New Zealand's CCCS terms but when originally released contained substantial and onerous amendments.

As you know, we previously sent a Practice Alert on these contract terms in [February 2025](#) and [June 2025](#), both of which included our concerns of the terms and conditions in the *Framework Agreement for Engagement of Consultant*.

In November 2025 KiwiRail provided successful tenderers of the RFP for Prequalified Panel notice of success and provided their *Framework Agreement for Engagement of Consultant* for signature. The terms are based on ACE New Zealand's CCCS terms but contain some amendments. We have reviewed the updated terms against the concerns we alerted on in February 2025 and July 2025. This review is below.

ACE recommends all members exercise caution when asked to agree to terms that contain amendments to the standard form CCCS or AOG CCCS and work with their insurer to ensure the terms they are signing up to are insurable.

Behaviour we're encouraged by

Since issuing our Practice Alert in February 2025 and our updated alert in June 2025, we've continued to raise concerns about contract terms with KiwiRail on behalf of our membership. We're pleased that KiwiRail has listened to these concerns and made improvements that bring their terms closer to AOG CCCS. This is a positive step, and we look forward to ongoing dialogue to ensure fair and insurable conditions for the industry.



Terms we're concerned about

With reference to our [Contract Checklist](#), KiwiRail's proposed terms of contract that we've alerted on previously are:

Term of Concern	ACE Contract Checklist	Special Conditions of the proposed February 2025 KiwiRail Framework Agreement	Special Conditions of the proposed June 2025 KiwiRail Framework Agreement	Special Conditions of the November 2025 KiwiRail Framework Agreement
3.2 Fitness for Purpose	A fitness for purpose obligation, especially in the form of a warranty, is a term of concern because it represents a heightened standard of care, which is unlikely to be covered by the consultant's Professional Indemnity (PI) insurance policy; it is often noted as an express exclusion from PI insurance coverage. Fitness for purpose obligations are also problematic because consultant typically provide professional design and/ or advisory services, but do not build and/ or construct the final product.	Special Conditions 5, 9 and 18. Clauses 2.2, 2.6 and 2.18 all impose "fit for purpose" obligations on the consultant which may extend contractual obligations beyond a consultant's insurance. ACE advocates for removing these fitness for purpose obligations and instead relying on the reasonable standard of care in paragraph 1 of clause 2.2, which still ensures the consultant is responsible for performing their services in a manner consistent with that expected of a consultant performing the same or similar services.	Previous special condition 5: ACE is pleased to see that the amendment at clause 2.2 has been revised to a more moderate and insurable position Previous special condition 9: Clause 2.6 has not been modified and still presents heightened standard of care required from the consultant set out at special condition 5. Previous special condition 18: ACE is pleased to see that the addition at clause 2.18 has been removed.	Previous special condition 9: ACE is pleased to see that clause 2.6 has been modified to state that: <i>Any goods, services, materials or equipment ordered on behalf of the Client in accordance with this clause 2.6 shall be new and of a high to the quality specified.</i> This amendment allows Consultants to negotiate and state this quality in individual Job Sheets.
3.3.1 Proportionate liability	If the contract does not include a proportionate liability clause, the consultant may be forced to take responsibility for another party's liability (including a third party over which the consultant has no control), which may trigger an exclusion in the consultant's PI insurance policy.	Special Condition 30: Clause 6.3 of CCCS, Contributory Conduct is deleted. ACE advocates for the reinsertion of the contributory conduct clause, which allows liability to be attributed to each party based on their degree of responsibility. This	Previous special condition 30: ACE is pleased to see that the removal of clause 6.3 has been removed.	

		results in appropriate risk allocation and encourages fair contractual dealings.		
3.3.2 No limit of liability	<p>Uncapped or unlimited liability exposes the consultant to high liability, which may be disproportionate to the consultant's fees or degree of involvement on a project. A liability cap gives both parties certainty about the amount of risk the consultant will bear in the unlikely event the consultant has made a mistake. ACE supports a more prudent approach, which involves capping the liability consistent with the consultant's role in the project, a genuine assessment of the risks likely to arise as a direct result of the consultant's services, and the consultant's ability to manage those risks.</p> <p>The limitation of liability should be clearly drafted, with an express monetary value (per claim and in the aggregate). Where the liability provision links to a consultant's insurance, the consultant may be unnecessarily exposing the consultant's full</p>	<p>Special Conditions Part A- Clause 6.2: The limit of liability for each Contract Job Sheet is tied to the amount of insurance which the consultant is required to hold (cl 6.2(a)), plus a "catch all" limit of 5x fee" (without upper limit) which operates in addition to the insured amounts (cl 6.2(b)). Assuming a minimum Contract Job size of \$20,000 in fees, this equates to a liability limit of between approximately 15 and 105 times the consultant's fees, depending on the value of the Contract Job Sheet. This is materially larger than the CCCS industry standard limit for small to medium projects, of 5 times fee up to \$2,000,000.</p> <p>There is also no PI insurance requirement for Contract Job Sheets with fees which exceed \$500,000. This puts the consultants' liability at large for projects with fees (either at the outset or via variations) in excess of \$500,000.</p>	<p>Special Conditions Part A- Clause 6.2: ACE is pleased to note that the limit liability has been amended to relate to the Agreement rather than each Contract Job Sheet. ACE further notes that the annual limit of ability remains tied to the amount of insurance which the consultant is required under the Agreement and plus a "catch all" limit of 5x price payable by the Client to the Consultant under the relevant Contract Job Sheet" (without upper limit) which operates in addition to the insured amounts (cl 6.2(b)).</p> <p>In relation to the limit of liability being annual in nature, being tied to the insurance and the additional "catch all" limit, ACE's previous concerns remain.</p>	<p>Special Conditions Part A- Clause 6.2: ACE notes that the limit of liability has been amended to return this to a per Job Sheet limit which allows the Consultant the ability to manage their liability on a case-by-case basis as they enter Job Sheets. Consultant should remember that their liability is cumulative across agreed Job Sheet. ACE recommends that consultants consider the overall liability exposure they are willing to accept under the Framework Agreement</p> <p>ACE is delighted to note that the insurance carveout to such limits has been removed in whole. The contract now provides a five times fee limit with a maximum of \$5million on each Job Sheet. This</p>

	<p>insurance cover, without regard for the parties' relative risks and rewards.</p>	<p>Tying liability limits to insurance reflects a material departure from NZ market practice; whether insurance responds to a loss/claim is ultimately a concern for the insured party and shouldn't be used as a mechanism to increase liability exposure. Given limits of liability and the PI insurance requirements are usually aligned anyway, overly complex liability clauses such as the terms proposed, are unnecessary. ACE recommends that clause 6.2 is replaced with a standard limit of liability clause which is expressed as a clear monetary value, reasonably aligned to the value of the fees.</p> <p>The "insured" limit at clause 6.2(a) is also a 12 monthly limit, meaning liability for a Contract Job Sheet is multiplied if a project extends over multiple contract years. This is neither a reasonable, nor market standard, practice. ACE recommends a single limit of liability per Contract Job Sheet regardless of duration.</p> <p>There is also no aggregate limit for the Framework Agreement so the</p>		<p>reflects New Zealand market practice and consultants now have a clear ability to assess the risk/reward balance as they enter into Job Sheets.</p> <p>ACE does note that an earlier version of the updated Framework Agreement included a redundant phrase in clause 6.2: <i>(which amount is exclusive of any amounts paid by the Consultant by way of deductibles under any insurance policy effected under or in accordance with this Agreement)</i></p> <p>KiwiRail, at ACE's suggestion, has confirmed removal of the bracketed section from the clause. If your copy of the contract still contains this redundant, we encourage you to contact KiwiRail and request an updated version.</p>
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		consultant's liability is multiplied each time a Contract Job Sheet is agreed. ACE recommends that consultants consider the overall liability exposure they are willing to accept under the Framework Agreement and, in addition to a clear "per Contract Job Sheet" limit, consider requesting an overarching aggregate limit of liability for all Contract Job Sheets.		
3.3.3 Carve outs to the limit of liability	Carve outs to the limit of liability can undo the consultant's liability cap, particularly where the carve outs extend to the consultant's negligence, full insurance cover and other broad categories. ACE advocates for no carve outs, or carve outs for risks the consultant can control	Special condition 29: Clause 6.2 includes carve outs to the limit of liability including for wilful misconduct and wilful default. Neither of these terms have a clear meaning under New Zealand common law. Such carve outs also expose the consultant and client to risk of interpretation dispute, as the state of mind of the defaulting party would need to be considered and open to dispute. ACE recommends deleting the carve outs for wilful misconduct and wilful default on the basis these are not standard exceptions to the limit in NZ consultancy contracts.	Previous special condition 29: ACE notes that this clause has not been amended and the previous concerns remain.	Previous special condition 29: ACE notes that clause 6.2 has not been amended and the previous concerns remain regarding the definitions of wilful misconduct and wilful default.
3.3.4 Duration of liability	Liability provisions can be a term of concern where there is a disproportionately long duration	Special Conditions Part A clause 6.4: The duration of liability is expressed as 6 years from	Special Conditions Part A clause 6.4: ACE is pleased to see the duration of liability has been	

	<p>of liability. Where the contract states a disproportionately long duration of liability, this may unnecessarily expose the consultant's PI insurance policy and could result in uninsured liability for the consultant if it extends the liability of the consultant beyond their natural liability at law.</p>	<p>completion of the Works. Completion of the Works is dependent on the work of the contractor and is outside the consultant's reasonable control. Where Works are delayed this could extend the consultant's liability beyond an insured period. ACE recommends that this is amended to 6 years from completion of the Services.</p>	<p>amended to the completion of Services.</p>	
<p>3.4 No fault/contractual warranties</p>	<p>Warranties are contractual promise that are problematic for consultants if the warranty heightens the standard of care because this risks the consultant's PI insurance policy not responsible if the consultant breaches the warranty. Warranties are particularly concerning where they require the consultant to take responsibility for an outcome or something else beyond the consultants' control and/or force the consultant to promise something that goes beyond the consultant's common law or statutory obligations.</p>	<p>Special Condition 3 and 4: Clause 2A.4 requires the consultant to behave in a manner which is, "to the maximum extent possible, aimed at achieving a successful outcome for the Project" and Clause 2.1 requires the consultant to endeavour "to the maximum extent possible to perform the Services in accordance with the key principles set out in clause 2.A" Whilst certain courses of action may be "possible" they are not always practicable, and might not align with the consultant's own reasonable commercial interests. ACE recommends the word "possible" is replaced with the word "practicable" in each of these clauses.</p>	<p>Previous Special Condition 3 and 4: ACE is pleased to note that clause 2A.4 has been removed and that the reference to clause 2.A in clause 2.1 has been removed.</p> <p>Previous Special Condition 18: ACE is pleased to note that clause 2.18 has been removed.</p>	

		<p>Special Condition 16: Clause 2.16 includes a requirement to ensure any parts of the Project being designed by the consultant comply with all legislative requirements to the extent applicable to the Project. An aspect of the Project may fail to comply with legislative requirements for reasons other than consultant fault (e.g. contractor fault, or error in design standards). Consultants are already required to provide designs which comply with legislative requirements by virtue of having to comply with the general standard of care at clause 2.2. ACE recommends Special Condition 16 is deleted.</p> <p>Special Condition 18: Clause 2.18 requires the consultant to produce design documentation which is complete and in accordance with the requirements of Appendix A, performs Services generally in accordance with any budgetary requirements notified from time to time, and provides the Services so that the cost of completing the Project will be minimised wherever reasonably practicable but without detrimentally altering the quality of</p>		
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		<p>the Project or adversely impacting on its fitness for purpose. Whilst the consultant can seek to manage its own costs, it is beyond the reasonable control of a consultant to provide commitments regarding broader Project budgets and costs (e.g. construction costs etc). Additionally, minimising cost will inevitably impact some aspect of the design, such as quality. ACE recommends that these obligations are subject to the consultant exercising the standard of care in clause 2.2.</p>		
<p>3.5 Unqualified indemnities</p>	<p>An indemnity term, marked with words like “the consultant indemnifies the client”, results in the consultant accepting responsibility to cover the client’s losses. Consultants should avoid indemnity clauses, particularly broad drafting, like “arising out of or in connection with.” If accepting an indemnity, the consultant should ensure that the indemnity is only triggered by the consultant’s own fault.</p>	<p>Special Condition 28: New clause 6.1A introduces a broad indemnity for liability, loss, damage, cost and expenses suffered by the client in connection with the consultant’s negligence or breach of this Agreement. The indemnity is expressly subject to clause 6.2, limit of liability.</p> <p>This indemnity is not required for the client to recover loss suffered as a result of the consultant’s negligence or breach of the Agreement, which could be pursued through a breach of contract claim. ACE recommends</p>	<p>Previous Special Condition 28: ACE notes that the broad indemnity has been replaced with an indemnity which is subject to the limitation of liability and is based on negligence and breach of contract.</p> <p>ACE recommends that the indemnity should be made expressly subject to the other limitation of liability provisions, including 6.1 (indirect and consequential loss), 6.3 (contributory conduct) and 6.4 (duration of liability), to ensure the indemnity only covers loss arising</p>	<p>Previous Special Condition 28: ACE notes that no changes to clause 6.1A have been made, our previous comments remain.</p> <p>ACE notes, however, that failure to explicitly include reference to other contractual clauses does not remove the Consultant’s ability to claim reliance on them, and as such, ACE would expect Consultants accepting this clause as</p>

		<p>that members seek to delete this indemnity.</p> <p>Failing deletion of the indemnity ACE recommends, at a minimum, the indemnity should be made expressly subject to the other limitation of liability provisions, including 6.1 (indirect and consequential loss), 6.3 (contributory conduct) and 6.4 (duration of liability), to ensure the indemnity only covers loss arising from the consultants' fault, and aligns with insurance cover.</p>	<p>from the consultants' fault, and aligns with insurance cover</p>	<p>drafted to claim reliance on clauses 6.1, 6.3 and 6.4 in the event of any event giving rise to 6.1A.</p>
<p>3.11.2 Insurance values and amounts</p>	<p>Insurance requirements are problematic if they are disproportionate or unreasonable in relation to the actual work being performed. For example, in duration or amount. Policies should be renewed using "reasonably endeavours" acknowledging the potential for fluctuations in the insurance market over time.</p> <p>ACE advocates for limited insurance requirements that align with commercial realities.</p>	<p>Special Condition Part A clause 6.5. The Agreement requires consultants to hold professional indemnity insurance of:</p> <ul style="list-style-type: none"> • \$2,000,000 for Contract Job Sheets with fees up to \$200,000, and • \$5,000,000 for Contract Job Sheets with fees greater than \$200,000 but less than \$500,000. <p><i>Also note ACE's comments above regarding tying liability to insurance at section 3.3.2.</i> The PI amounts also provide the basis for the consultant's limit of liability, in addition to a "catch all" limit of 5x fee" on top of the insured amounts.</p>	<p>Special Condition Part A clause 6.5. ACE notes that the Insurance has split across three categories rather than two and has been modified to reference the fees payable under the Agreement rather than any Job Sheet. A new, lower category has been introduced, providing insurance coverage as follows:</p> <ul style="list-style-type: none"> • \$1,000,000 where the Agreement has fees up to \$200,000, and • \$2,000,000 where the Agreement has fees greater than \$200,000 but less than \$500,000 • \$5,000,000 where the Agreement has fees 	<p>Special Condition Part A clause 6.5. ACE notes that the Professional Indemnity Insurance requirements reference Job Sheets. ACE is pleased to note that the carve out to the limit of liability no longer includes insurance proceeds.</p>

		<p>Assuming a minimum Contract Job size of \$20,000 in fees, this equates to insurance, and liability, of circa between 15 and 105 times the consultant's fees. This is materially larger than the CCCS industry standard limit for small to medium size Projects, of 5 times fee up to \$2,000,000.</p> <p>PI insurance amounts are required per Contract Job Sheet with no aggregate value for the Framework Agreement. Consultants will generally have group policies which provide cover across multiple projects; it is impractical to expect separate insurance be placed on a Contract Job Sheet basis. Given the insurance requirements form the basis for the consultants' limit of liability, consultants should consider discussing with their insurance broker whether their insurance policies are of sufficient substance to support entering into multiple Contract Job Sheets.</p> <p>There is no PI insurance requirement for Contract Job Sheets with fees which exceed \$500,000. Given liability is tied to</p>	<p>greater than \$500,000 but less than \$2,000,000</p> <p><i>Also note ACE's comments above regarding tying liability to insurance at section 3.3.2.</i> The PI amounts also provide the basis for the consultant's limit of liability, in addition to a "catch all" limit of 5x fee" on top of the insured amounts.</p> <p>There is no PI insurance requirement when the Agreement fees exceed \$2,00,000. Given liability is tied to insurance, this puts the consultants' liability at large where their fees are in excess of \$2,000,000. ACE recommends the use of a limit of liability which is reasonably aligned to the estimated value of the total fees.</p> <p>Previous Special Condition 31: ACE is pleased to see the removal of "reasonable endeavours" has been removed from the amendments.</p> <p>Previous Special Conditions 32 and 33. ACE is pleased to note that the amendment to clause 6.6</p>	
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		<p>insurance, this puts the consultants' liability at large for projects with fees in excess of \$500,000.</p> <p>ACE recommends the use of a limit of liability which is reasonably aligned to the estimated value of the total fees.</p> <p>Special Condition 31. Clause 6.5 seeks to delete "reasonable endeavours" from the standard CCCS obligation to maintain insurance. ACE recommends to members that this aspect of Special Condition 31 is deleted.</p> <p>Special Conditions 32 and 33. Clauses 6.6 and 6.7 impose a requirement on the consultant to reinstate professional indemnity cover to the full cover required by the Agreement, at the consultant's expense, in the event a claim is made and accepted under the professional indemnity policy. ACE cautions consultants considering accepting this. Professional indemnity policies generally do not include provisions which can be reinstated without limit.</p> <p>Procurement of new insurance in the event of a claim is also likely to</p>	<p>has been removed. ACE notes that the amendment to clause 6.7 remains as drafted and the previously advised concerns remain.</p>	
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		be unrealistic. In addition, given the Consultant's limit is tied to insurance proceeds, the obligation to reinstate insurance could be seen to extend in a cumulative matter, the Consultant's limit of liability under clause 6.2.		
3.11.3 Certificates and policy terms	<p>It is unreasonable to impose obligations the consultant cannot meet (like securing specific policy terms).</p> <p>ACE advocates for limited insurance requirements that align with commercial realities.</p>	<p>Special Condition 31. Clause 6.5 imposes specific requirements for the consultant's insurance policies including a requirement to seek client consent to any sub-limits under the consultant's policies, and a requirement to procure that all insurance provides that settlement of any claims are not to be deferred or delayed by reason of the exercise by the insurer of rights of subrogation. ACE recommends that consultants review these requirements with their brokers to ensure your policies align with these requirements.</p>	<p>Previous Special Condition 31: ACE is pleased to see that the previous requirements of consent in relation to sublimits has been removed.</p>	
3.12 Novation without consent	<p>A novation is a legal mechanism for switching out one party for a new party but with the effect that the original contract is terminated and a new contract is formed. Novation clauses are a term of concern when the novation may occur without the</p>	<p>Special Condition 53. Clauses 12.9.1 provides a mechanism for novation of the Agreement (or any part thereof) to a contractor. Whilst consultant consent is required (not to be unreasonably withheld), the consultant will be deemed to have given consent</p>	<p>Previous Special Condition 53: ACE notes that with the exception of one amendment, this clause has been retained in whole. ACE notes that the Deed of Continuity has been provided with this form of the Agreement and does contact a clarification that the</p>	

	consultant's consent and where a "clean break" does not occur between the original client and the consultant, meaning the consultant has liability under both the original contract and the new contract.	with ten working days, unless specific criteria are met. ACE understands that the form of the deed of novation has not been provided in the RFT. ACE recommends that consultants reserve their position on novation until such deed has been provided for review. At a minimum, deeds of this nature should clarify that the consultant's aggregate liability is no greater because of the novation.	consultant's aggregate liability is no greater because of the novation. ACE notes that the ability of the Client to withhold payment has been removed, however, ACE's previous concerns remain.	
3.18 Third Party Reliance	Clauses allowing third parties to rely on the consultant's services or deliverables are problematic as they expose the consultant to additional liability to that third party, often extending the consultant's duty of care beyond an insurable positions. ACE recommends that consultants carefully consider the legal and commercial implications of agreeing to these high risk clauses.	Special Condition 53. Clause 12.9.2- In the event of novation under clause 12.9.1 the client can require the consultant to enter into a subconsultant continuity deed in favour of KiwiRail. ACE understands that the form of this deed has not been provided in the RFT. ACE recommends that consultants reserve their position until the deed has been provided for review. At a minimum deeds of this nature should clarify that the consultant's aggregate liability is no greater because of any third party reliance.	Previous Special Condition 53: ACE notes that the Deed of Continuity has been provided with this form of the Agreement and does contact a clarification that the consultant's aggregate liability is no greater because of the novation.	

Our message to members

We have continued to reach out to KiwiRail to discuss these concerns on our members' behalf. We are pleased to note that our concerns have been listened to and KiwiRail have aligned their terms in the majority to the position which ACE agreed with NZTA Waka Kotahi on their AOG CCCS market terms earlier in 2025.

We reiterate our commitment to members to advocate on your behalf for fair and equitable terms and conditions that are commercially viable and insurable. We remain steadfast in our view that the standard form ACE New Zealand CCCS or AOG CCCS should be the starting point for engagements with our members, and we encourage members to request the CCCS or AOG CCCS as their preferred terms of engagement.

As we have sent out in this Practice Alert, KiwiRail have recently improved their terms of condition, bringing their Framework Agreement closer to the AOG CCCS standard. While this is a positive step, it's still important to remain vigilant. If you are presented with a contract that is not the CCCS or AOG CCCS, or one that has been modified from the standardised version, exercise caution and ensure the terms are insurable – particularly in the areas we've highlighted above.

Although you will seek your own legal and insurance advice and make commercial decisions about the engagements you enter, for the sustainability of your business and the health of the sector, we all need to understand the implications of agreeing to uninsurable terms. By doing our part to work towards fairer conditions, we help strengthen the industry for everyone.

Please don't hesitate to reach out in the meantime if you want to discuss this.

Ngā mihi nui,

Helen Davidson

Chief Executive

Note: This practice alert is for general guidance only. ACE New Zealand cannot provide legal or insurance advice. Members should obtain professional advice on any specific matters relevant to their situation.

