



Association of Consulting Architects
The Business of Architecture

Professional Services Subcontract

an ACA member resource



Prepared with Minter Ellison & Planned Cover

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Professional Services Subcontract – Explanatory Note

The ACA has prepared the attached subcontract for use by its members. It is provided as a guide for the straightforward engagement of sub-consultants by a lead consultant. Under no circumstances is this document intended to replace legal and insurance advice.

This subcontract is intended to be used when:

- a) a principal (i.e. development owner) has engaged a lead consultant to provide lead professional services pursuant to a head contract;
- b) in order to deliver some or all of those professional services required under the head contract, the lead consultant wishes to engage a sub-consultant; and
- c) the lead consultant wishes to enter into a subcontract with the sub-consultant that passes down to the sub-consultant some or all of the lead consultant's obligations in the head contract (i.e. so that the subcontract provides 'back-to-back' consistency with the head contract).

This template subcontract has been developed on a general basis. It may not address all risks specific to a particular project that a lead consultant or sub-consultant may wish to manage on a particular assignment. If additional matters require agreement, these need to be agreed either as an amendment to this subcontract or as a separate agreement between the lead consultant and sub-consultant. Legal advice should be sought by the parties before they agree to any amendments to this subcontract.

As a general contracting principle, a risk should be borne by the party that is best able to manage the risk. If a party assumes a risk that it cannot manage, that party may suffer serious financial harm if that risk materialises. The parties may also not achieve the successful outcome they intend from the bargain. Ideally, those types of risks should either be removed from the contract between the parties or allocated appropriately between the project participants.

This document assumes that the head agreement reflects a reasonable risk allocation (such as the Australian Institute of Architects Client and Architect Agreement or AS4122-2010 General Conditions of Contract for consultants) and that the lead consultant does not intend to unfairly pass on risks to sub-consultants. For example, the standard of care for a sub-consultant should always be based on 'reasonableness', with regard to the task at hand and the experience of the consultant engaged for the work. If the head agreement contains a greater standard of care and the lead consultant attempts to pass this standard on to the sub-consultant, this may lead to professional indemnity insurance risk for the sub-consultant.

The head agreement should explicitly ensure that proportionate liability applies and include a limit to the lead consultant's liability under the head agreement to drive each party to be responsible for the risks they are able to control.

Except in the simplest of agreements, this document should refer to the thorough description of project responsibilities, roles and the scope of works as outlined in the tender documents.

We thank the following partners for their assistance and support in developing this document:

MinterEllison

Minter Ellison Lawyers SA/NT
(Grant Mitchell)



Planned Cover
(Cos Cirocco and Wendy Poulton)

Planned Cover recommends that you seek advice from your professional indemnity insurance broker regarding the insurance implications of this document.

Date: **[Insert date]**

**PROFESSIONAL SERVICES
SUBCONTRACT
(BACK-TO-BACK)**

[Insert project or matter name]

[Insert Lead Consultant entity name] (Lead Consultant)

[Insert Sub-consultant entity name] (Sub-consultant)

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DETAILS

Date [Insert date]

Parties

Name	[Insert name of Lead Consultant entity]
ABN	[Insert ABN]
Short form name	Lead Consultant
Notice details	[Insert address details for service of notices]
	Email: [Insert email address]
	Attention: [Insert name]
Name	[Insert name of Sub-consultant entity]
ABN	[Insert ABN]
Short form name	Sub-consultant
Notice details	[Insert address details for service of notices]
	Email: [Insert email address]
	Attention: [Insert name]

Background

- A The Lead Consultant is a party to the Head Contract.
- B The Head Contract requires the Lead Consultant to carry out certain professional services.
- C The Lead Consultant wishes to engage the Sub-consultant to carry out some or all of those professional services set out in the Head Contract on a 'back-to-back' or direct pass-through basis.
- D The Sub-consultant agrees to perform the Services on the terms and conditions set out in this subcontract.

AGREED TERMS

1. Defined terms & interpretation

1.1 Definitions

In this subcontract:

Fee means the fee identified in Schedule 1.

Head Contract means the contract identified in or set out in Annexure 2.

Pass Through Entitlements has the meaning given to it in Schedule 2.

Principal means the counterparty with whom the Lead Consultant has entered into the Head Contract.

Services means the professional services identified in Schedule 3.

1.2 Head Contract definitions

Unless otherwise defined or the context otherwise requires, defined terms used in this subcontract have the same meaning given to them in the Head Contract.

1.3 Interpretation

- (a) Subject to paragraphs (b) to (d) inclusive below, the interpretation provisions of the Head Contract apply to this subcontract.
- (b) Any reference to this subcontract includes all schedules and annexures and appendices to it.
- (c) Headings are for convenience only and do not affect the interpretation of this subcontract.
- (d) No provision of this subcontract will be construed adversely to a party solely on the ground that that party was responsible for the preparation of this document or that specific provision.

2. Services

The Sub-consultant must perform the Services in accordance with Schedule 2.

3. Payment

The Lead Consultant must pay the Sub-consultant the Fee in accordance with Schedule 1.

4. Key acknowledgements

4.1 Time

The Sub-consultant must deliver or complete the Services by the date and (if applicable) time required by the Head Contract in accordance with Schedule 2.

4.2 Standard of care

The Sub-consultant must provide the Services to the standard of skill, care and diligence required by the Head Contract in accordance with Schedule 2.

4.3 Intellectual property

The Sub-consultant acknowledges and agrees that all intellectual property rights (including moral rights) arising under or in connection with the Services shall be subject to the back-to-back mechanism set out in Schedule 2.

4.4 Liability

The Sub-consultant acknowledges and agrees that its liability profile (including any limit of liability, exclusions from such limitation, the scope of indemnities provided and insurance requirements and the like) under or in connection with this subcontract shall be subject to the back-to-back mechanism set out in Schedule 2.

5. General provisions

5.1 Entire agreement

This subcontract constitutes the entire agreement between the parties with respect to its subject matter and will supersede all prior agreements and understandings between the parties in connection with it.

5.2 Amendment

No amendment or variation of this subcontract is valid or binding on a party unless made in writing and executed by the parties.

5.3 Jurisdiction

The laws of [*Western Australia / South Australia / ACT / Victoria / Tasmania / New South Wales / Queensland / Northern Territory*] govern this subcontract and the Lead Consultant and the Sub-consultant submit to the non-exclusive jurisdiction of the Courts of that place. [*Note: Choose appropriate jurisdiction*]

SIGNING PAGE

EXECUTED as an agreement.

Signed for and on behalf of the **Lead Consultant**:

Signature of witness ←

Signature of Lead Consultant ←

Name of witness (print)

Name of Lead Consultant signatory and position held (print)

Signed for and on behalf of the **Sub-consultant**:

Signature of witness ←

Signature of Sub-consultant ←

Name of witness (print)

Name of Sub-consultant signatory and position held (print)

SCHEDULE 1 – FEES

[Note: This schedule sets out a number of options for payment. Tick the boxes that are appropriate. Insert the details requested by the options as appropriate. If an alternative fee arrangement is agreed, replace this schedule with that other fee arrangement]

1. Fees payable

The Lead Consultant will pay the Sub-consultant the following fees (tick appropriate box):

- Lump sum amount of \$*[insert lump sum amount]*
- As per the schedule of rates (as set out in Annexure 1)
- A lump sum amount for the Services (as at the date of this subcontract) plus an amount calculated in accordance with the schedule of rates (as set out in Annexure 1) for any variation of the Services agreed by the parties (after the date of this subcontract).

[Note: If the second or third options are selected above, attach the applicable schedule of rates in Annexure 1]

2. Fee structure

The Fees will be payable (tick appropriate box):

- in *[weekly/monthly]* progress payments
- in the amounts and upon completion of the milestones *[as set out in the Head Contract subject to the operation of Schedule 2 / as set out below]:*

[Note: Select appropriate option]

Milestone	Description	Date for completion of Milestone	Amount of Fee payable
<i>[#]</i> <i>[Note: Insert Milestone number here – e.g. Milestone 1, Milestone 2, Milestone 3 etc.]</i>	<i>[#]</i> <i>[Note: Describe Milestone here – e.g. completion of concept designs, completion of technical design, completion of mechanical design etc.]</i>	<i>[#]</i> <i>[Note: Insert date for completion of the Milestone. If there is no date for completion mark this column: 'There is no date for completion of a Milestone.'</i>	<i>[#]</i> <i>[Note: Insert dollar amount payable for the Milestone]</i>
<i>[#]</i>	<i>[#]</i>	<i>[#]</i>	<i>[#]</i>
<i>[#]</i>	<i>[#]</i>	<i>[#]</i>	<i>[#]</i>

[Note: If milestones apply, the description of the milestones and dates for completion of each milestone should align with milestones identified in clause 4.1 of the subcontract. If the milestones are selected to be consistent with the Head Contract, select that option above and delete this table]

3. Payment claims

- (a) The Sub-consultant shall submit a valid tax invoice for all payment claims in accordance with this subcontract.
- (b) The Lead Consultant shall pay the claims within *[7, 14, 28]* days of lodgement.
[Note: Choose number of days or propose an alternative]

SCHEDULE 2 – BACK-TO-BACK PROVISIONS

1. Acknowledgements

The Sub-consultant acknowledges that:

- (a) it has reviewed the Head Contract and is aware of the Lead Consultant's obligations under it;
- (b) the Lead Consultant is relying on the Sub-consultant's performance of this subcontract to enable the Lead Consultant to perform its obligations under the Head Contract as they relate to the Services;
- (c) the Sub-consultant's failure to perform the subcontract may cause the Lead Consultant to incur loss under the Head Contract;
- (d) it must carry out its obligations under the subcontract in such manner as to ensure that the Lead Consultant is able to comply with its obligations under the Head Contract as they relate to the Services; and
- (e) it must not do anything to prevent, or interfere with, the Lead Consultant's performance of the Head Contract or cause the Lead Consultant to breach the Head Contract.

2. Back-to-back arrangements

The parties acknowledge and agree that in respect of the Services, this subcontract is intended to pass down the risk allocation in the Head Contract, subject to the terms of this subcontract. Accordingly the:

- (a) Sub-consultant will perform the Lead Consultant's obligations; and
 - (b) Lead Consultant will perform the Principal's obligations,
- under (or as reasonably inferred from) the Head Contract as they relate to the Services as though those obligations were reproduced in this subcontract subject to its terms.

3. Pass Through Entitlements

In respect of the Services:

- (a) where the Lead Consultant has certain rights and entitlements against the Principal under the Head Contract;
- (b) those rights and entitlements are incorporated in the subcontract for the purpose of providing the Sub-consultant with comparable rights and entitlements against the Lead Consultant (**Pass Through Entitlements**) and;
- (c) the Lead Consultant will act in a manner consistent with the Pass Through Entitlements regime so as not to alter or inhibit the Sub-consultant's position.

4. Claiming Pass Through Entitlements

In respect of a claim by the Sub-consultant for a Pass Through Entitlement:

- (a) the Sub-consultant will submit details of the claim to the Lead Consultant;
- (b) the Lead Consultant will pass that claim up to the Principal under the Head Contract; and
- (c) without prejudice to either party's interest in the claim, the parties will cooperate with each other to prosecute the claim against the Principal under the Head Contract and there shall be no settlement or compromise, or acceptance of a settlement or compromise, of the claim under the Head Contract without the other party's consent.

SCHEDULE 3 – SERVICES

The Sub-consultant will provide the following **Services** to the Lead Consultant:

The type of professional services to be provided is as follows:

Please specify, for example, 'As set out in the fee request letter from the Lead Consultant to the Sub-consultant dated [#]':

The scope of the professional services to be provided is all of the obligations in the Head Contract as they relate to the professional services specified above

Notes: -

1. The 'scope' clause above is a convenient mechanism to create a 'back to back' sub-consultant contract. However you need to be aware of the potential for lack of clarity about obligations where one party or another might argue that certain terms of the head contract do not 'pass down' to the subcontract or that they don't 'pass down' in the way you would like.

Here are a couple of examples-

If you are required to provide a program of works to the principal within a particular time period, is the sub-contractor to also have an obligation to provide a program within the same timeframe – or earlier - and is the program to be provided to the principal or to you or both?

If you are required to arrange insurance cover for damage to the principal's property, is the sub-consultant obliged to arrange insurance cover for damage to your property (which might not even make much sense), or the principal's property, or both?

2. If you want to avoid the potential for uncertainty, you will need to consider each of the clauses in the head contract and decide whether and how they are to apply to the subcontract. You will then need to specify which of those clauses form part of the subcontract.
3. We recommend that you seek expert advice as to whether you should use the 'scope' clause above and as to the rights and obligations that will be created by the terms of the subcontract.

ANNEXURE 1

Schedule of Rates

[Refer to attached / The Schedule of Rates entitled [# - insert title] document no. [# - insert document number if applicable], version no. [# - insert version number if applicable]

[Note: Select appropriate option above and either attach a copy of schedule of rates or identify the schedule of rates document by reference to its details sought above]

ANNEXURE 2

Head Contract

[Refer to attached / The contract titled '[# - insert title on front page of Head Contract]' between the Lead Consultant and [# - insert name, address and CAN or ABN of principal] dated [# - insert date].

[Note: Select appropriate option above and either attach a copy of the Head Contract or identify the Head Contract by reference to its details sought above]