

The Cundall logo is positioned in the top left corner of the slide. It features a white arrow pointing to the right, followed by the word "CUNDALL" in a bold, white, sans-serif font. The background of the slide is a black and white photograph of a modern building's facade, characterized by a complex, geometric pattern of dark, angular panels that create a sense of depth and architectural complexity.

**CUNDALL**

# Commercial risks for consultants

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**ANC Company Meeting, 15<sup>th</sup> March 2016**  
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- **Why bother?**
- **What form of contracts to accept?**
- **Contractual wording/clause examples:**
  - To protect us
  - To be used against us
- **Wording in reports**
  - To help
  - To hinder
- **Who helps you?**
  - Lawyer
  - Insurer



# Why bother?

- **Acousticians don't get sued, do they?**
- **Settled out of court**
- **Withholding of fees**
- **Additional work without additional fees**
- **Protection of copyright**
- **Health & Safety**
- **Cheaper insurance premiums**



# Forms of contract

- **Which form is best to use?**
  - It depends
  - Best to be in control and take initiative
- **ANC form?**
- **ACE**
- **RIBA**
- **Novation**
- **Frameworks**
- **Client bespoke**
- **NEC etc.**
- **Collateral warranties**



# Contractual wording

The Consultant shall provide the Services with **all due skill, care and diligence and expedition** to be expected of or from an experienced and highly competent member of **the consulting profession** performing services of a similar nature, at the time the Services are provided so that the Services are **fit for the intended purposes** of the Employer.



The Services to be performed by the Consultant for the Contract Sum specified in this agreement are all those of Acoustics Consultancy Services referred to in the Proposal and the Letter and as may be required for a *[insert project type]* that meets the Employer's requirements.

The Consultant shall be liable for all loss and damage, including but not limited to any liquidated damages penalty payable by the Employer to third parties, suffered by the Employer as a consequence of any delay in completing the Project if the said delay is caused by the Consultant's failure to make available the said information in a timely manner and/or in accordance with the time schedules in the Program.

The Consultant agrees to indemnify and keep indemnified the Employer from and against all costs, claims, demands, liabilities, expenses, damages or losses (including without limitation any direct or indirect consequential losses, loss of profit and loss of reputation, and all interest, penalties and legal and other professional costs and expenses) arising out of or in connection with the Consultant's negligence, default or breach of this Agreement or any failure by the Consultant to duly and punctually observe and perform the provisions of this Agreement (the "Indemnified Losses"). This indemnity shall cover (but is not limited to) the Employer's liability to third parties arising out of the Services, including (without limitation) liability to any other third parties for negligent or defective Services. This indemnity shall apply whether or not the Consultant may have been negligent or at fault and does not limit any further compensation rights of the Employer.

Notwithstanding anything to the contrary contained in this Agreement, the liability of the Consultant under or in connection with this Agreement whether in contract or in tort, in negligence, for breach of statutory duty or otherwise (other than in respect of personal injury or death), shall not exceed the sum of £ xxxx.

*How much should £xxxx be?*

*Pollution and asbestos limit?*

Without prejudice to any other exclusion or limitation of liability, damages, loss, expense or costs the liability of the [Consultant] for any claim or claims under this Agreement shall be further limited to such sum as it would be just and equitable for the [Consultant] to pay having regard to the extent of his responsibility for the loss or damage giving rise to such claim or claims ("the loss and damage") and on the assumptions that:

- (i) all other consultants, contractors, sub-contractors, project managers or advisers engaged in connection with [the Project] have provided contractual undertakings on terms no less onerous than those set out in Clause [insert number corresponding to duty of care clause] to the [the Client] in respect of the carrying out of their obligations; and
- (ii) there are no exclusions of or limitations of liability nor joint insurance or co-insurance provisions between the [Client] and any other party referred to in this clause and any such other party who is responsible to any extent for the loss and damage is contractually liable to the [Client] for the loss and damage; and
- (iii) all such other consultants, contractors, sub-contractors, project managers or advisers have paid to the [Client] such sum as it would be just and equitable for them to pay having regard to the extent of their responsibility for the loss and damage

- **Appointing sub-consultants**
- **Back to back with architect/surveyor**
- **Joint and several liabilities**
- **Entire Agreement**
- **Copyright**
- **Reliance and Assignment**



# Report wording

The survey was conducted and this report has been prepared for the private and confidential use of the client (insert client name) only and cannot be reproduced in whole or in part or relied upon by any third party for any use whatsoever without the express written authorisation of *[insert business name]*. If any third party whatsoever comes into possession of this report, they rely on it at their own risk and *[insert business name]* accepts no duty or responsibility (including in negligence) to any such third party.



- All
- Ensure
- Guarantee
- Use of third party data?
- Copyright and reliance
- Insurable but not desirable
- Uninsurable?



**Be careful out there...**