

GENERAL CONTRACT REVIEW

RISK MANAGEMENT IN PROFESSIONAL PRACTICE

POTENTIAL FOR UNINSURABLE CONTRACTS

Professional liability insurance will soon become a mandatory requirement for the practice of architecture in Alberta. Council for the Alberta Association of Architects (AAA) has responded to this important area of public interest at the urging of the Ministry of Jobs, Skills, Training and Labour (now simply Labour), the provincial ministry that oversees the *Architects Act*.

Alongside this new requirement, the AAA frequently receives inquiries from its membership with regard to onerous contracts prepared by public sector and large organization private sector clients. These contracts generally and unreasonably increase risk and liability to members, to the point where certain types of clauses are not insurable.

Taken together, these developments create a major concern for the AAA. The spectre of an unreasonably worded or uninsurable contract derived from either a response to a request for proposal that commits an authorized entity to contract, or actual contract language itself, is a serious professional practice issue. Moreover, a member who chooses to respond to such documents or commit to such contracts may face an unsustainable business risk as well as a potentially harmful public interest risk.

As the regulator for the practice of Architecture and Licensed Interior Design in Alberta, the AAA owns the sole authority under the *Architects Act* and therefore the duty to intervene proactively on behalf of its members and to assist them in mitigating such risks in the *public interest*.

This is the reason for this important PRACTICE ADVISORY.

EXPECTATIONS FOR PROFESSIONAL CONDUCT

In the future, an unreasonable or an uninsurable contract could represent the loss of a business opportunity between a client and an otherwise qualified architect to undertake its work in service to both the client and the public (users) good.

If a member of the public were to claim harm against an agreement entered into knowingly without an appropriate level of insurance, such a claim may also result in an assessment of unprofessional conduct against the *authorized entity*.

In addition to the above, as the provincial regulator, the AAA expects its members to be responsible, diligent, and true to their word in accordance with the professional Code of Ethics. Signing a contract containing clauses where the *authorized entity* knowingly believes at the outset that he or she cannot or is unlikely to successfully fulfill the stated obligations, can also result in an assessment of unprofessional conduct.

COLLABORATION AND DUE DILIGENCE

The AAA is addressing generic contract clauses that are problematic, having recently completed due diligence with our allied organizations, the Consulting Architects of Alberta (CAA) and the Consulting Engineers of Alberta (CEA), legal counsel, and a major liability insurer. The findings are presented in this Practice Advisory from a risk management perspective and as it relates to the scope of normal professional liability insurance coverage for industry professionals. As such, this advisory is a recommended framework for professional practice.

CAUTION ADVISED

The AAA cannot obligate a client to alter its agreements with members. However, our mandate is to advise our members (and their prospective clients who may be seeking advice from AAA) about potentially harmful contract clauses or outcomes *that could impact both parties*.

AAA is therefore identifying certain types of contract clauses and offering an informed opinion as to

1. the risks associated with them and
2. suggested remedies that support our duty with respect to protection of the public interest.

IT IS ESSENTIAL THAT INDEPENDENT LEGAL AND INSURANCE ADVICE BE OBTAINED by any member confronted with these types of contract clauses and be guided by this advice to derive appropriate, insurable, and professionally responsible contract language in their agreements.

The normally accepted standard form of agreement between architect and client across Canada is the RAIC Document 6 Canadian Standard Form of Contract for Architectural Services. This is a balanced agreement that has been developed through extensive consultation and legal review with the AEC industry and represents the only agreement type that is synchronized with the Standard CCDC agreements between Client and Contractor. It is against this RAIC Document 6 agreement that client-authored agreements should be measured in Alberta.

GENERIC CONTRACT CLAUSES OF CONCERN

The following are the generic types of contract clauses that pose a concern to the Alberta Association of Architects (and suggested remedies to them):

1. ARCHITECT'S GENERAL RESPONSIBILITIES

ISSUE: Increasingly, client-authored contracts are attempting to alter a standard duty of care to which the architect's work is held. Many contract provisions deliberately increase the standard of care to place an unreasonable onus on architects to achieve results that can be interpreted as finite or near perfection.

SUGGESTED REMEDY: Subject to legal review, contracts should generally state that architects are expected to perform services with the ethical and legal duty of a professional exercising a reasonable level of care, diligence, and skill required by accepted professional practices, code of ethics, and procedures normally provided at the time when, and in the location where, the services are performed and that such a standard of care is the sole and exclusive standard to measure the architect's

performance. Words that define superlatives such as “best practice” or “superior quality” are to be avoided.

2. PROVIDING LEED™ (or other third party) PERFORMANCE CERTIFICATION UNDER CONTRACT

ISSUE: Since LEED™ or other building performance measuring tools are subject to third-party adjudication; architects have NO control over whether LEED™ certification at any level will be achieved. Further, the client may actually itself militate against this achievement by not permitting the incorporation of certain LEED™ performance or operations parameters in their project. A contract that binds architects to achieving certification—in some cases including penalty clauses for non- achievement—raises the duty of care beyond industry standards and may not afford coverage. For example, if the architect met the requirements for LEED™ in accordance with the normal standard of care, architects are not liable in law, but LEED™ certification may still not be achieved. Yet the architect would still be contractually bound to obtaining same. It is important to understand that Errors & Omissions policies do not generally respond to contractual obligations in the absence of a firm’s negligence.

SUGGESTED REMEDY: Since such certifications are considered *uninsurable*, it is recommended that such conditions be revised to remove the legal obligation and state that a firm shall “endeavor” to obtain third-party LEED™ certification. Alternatively, such conditions should be removed entirely.

3. CONSTRUCTION BUDGET AND CONSTRUCTION COSTS

ISSUE: Architects cannot and do not control construction costs especially where a lack of normal access to construction material supply or labour resources is present, or where markets are volatile. This is carefully explained in RAIC Document 6 where a contingency is identified that reflects market and commercial realities such as price fluctuations that are out of the control of the architect. RAIC Document 6 places a reasonable industry performance expectation within 15 percent (%) of the probable construction cost, failing which the architect may owe certain reasonable obligations to the client. Contracts that remove these contingencies place an unreasonable burden and increase the potential of conflict between the parties.

SUGGESTED REMEDY: The RAIC Document 6 clauses should be utilized and a reasonable expectation should be agreed to at the time of contract, including the provision for possible pricing contingencies for alternate scopes of work to reduce risk in securing best value in volatile markets.

4. COPYRIGHT

ISSUE: The requirement to relinquish copyright and, in some cases, the right to defend the integrity of one’s work—known as moral rights—is increasingly prevalent. To abandon these rights, not only for architectural design, but for sub-consultants as well, first presupposes that sub-consultants are in agreement and, of course, this must be confirmed.



Some clients may actually misunderstand the capabilities and limitations associated with the use of any or all of the work—known as the *instruments of service*—of an architect. Individual documents ultimately only represent a portion of the works of a project and exclude the verbal and written advice also provided as part of the project record. Further, ownership by others of the architect's copyright must never be confused with the professional responsibilities of another architect to assume full responsibility for his or her work IF the information is transferred by that owner to another architect for use under different circumstances.

Copyright is protected by federal statute. In the absence of any clear reason from the client as to why these clauses are necessary, and given the increased potential liability risk for misuse of these documents, such as when a project is to be repeated on another site in another context or climate without any oversight provided by (or *consideration* for i.e. payment of a fee) the original architect of record, the liability risk to the architect of record is significantly increased. Unless a contract affords protection in these situations, insurers may not afford coverage to the original architect of record for the acts of others.

In addition, contracts sometimes include clauses that identify a client's entitlement to copyright and moral rights to the *instruments of service* as an absolute; that, moreover, can be exercised without any additional consideration to the architect and /or in the case of a dispute, without payment for services rendered, even before the obligation to pay for the *instruments of service* is triggered.

SUGGESTED REMEDY: An architect may or may not agree to assign copyright and/or grant any interest in copyright by license. This is a choice. However, if copyright is vested in the client, then the architect is nevertheless entitled to payment for services rendered, including the creation/production of the *instruments of service* and other deliverables. The courts in Canada have held that an architect may revoke his or her consent to the transfer of copyright if it was given without *consideration*. In addition, the courts have held that in the case of a dispute, the client must pay the architect before using or modifying the design, regardless of who is the copyright owner.

Moral rights are defined as the right to protect the integrity of the architect's work and to be associated with the work as its author. The moral right in an architectural work exists for life plus 50 years and can be transferred upon death.

The Association strongly recommends that all matters of copyright and moral rights be legally reviewed and examined on a project-by-project basis, especially with regard to project complexity and liability insurance coverage. Members can initially begin this process by studying the various AAA Practice Bulletins published on this topic from copyright to succession, indemnification, and documents authentication.

It is also recommended good practice that the client be offered and granted a single (or multiple) use license in lieu of transfer of copyright and moral rights. The *RAIC Canadian Handbook of Practice* (CHOP Manual) contemplates such licensing and is proven to meet the needs of clients who have already used such a methodology in Alberta.

Nevertheless, if copyright is vested to the client, two things should occur:

- (a) It is essential that the client provide a suitable indemnification to the original architect of record and its sub-consultants for any use, reuse, or misuse, alteration, modification, or redesign outside the defined project under the original contract. That is, if the client reuses or modifies the *instruments of service*, or another party with the client's consent does the same, then the original architect and consultants cannot be held liable for any damages the client or a third party sustains.
- (b) The contract should state that as a condition precedent to copyright transfer, with the *instruments of service* becoming property of the client, all fees and expenses will be paid for the use of the *instruments of service*; including that all fees and expenses as a result of suspension or termination, due to the architect and consultants, are also required to be paid in full.

It is worth noting in the case of repeat projects (where many reasons for copyright transfer seem to reside with public agencies), the very nature of contract documents (specific instruments of service) prepared for a particular project, for a particular use, for a particular site, is inherently unique to that specific circumstance, use, and location for which the architect of record has been commissioned, and is not transferable in any manner by law. This is because there is, in essence, no such thing as a singularly repeatable project in a different location on a different site. It is for this reason that copyright transfer is arguably redundant and so many issues of liability and risk—to both parties—can be mitigated by the use of license agreements, which is why they exist.

5. LIABILITY

ISSUE: It is not uncommon for public sector clients to impose what amounts to essentially unlimited liability onto the architect/consultant team under its contracts; outside of the normally accepted industry standard liability insurance coverage. In addition, the architect is often held liable for sub-consultant work including any damages that flow outside their own insurance coverage. It has been noted that some agreements even propose that individuals, partners, directors, etc., may also be held personally exposed to unlimited liability, again beyond available insurance coverage. *These types of arrangements are of serious concern to the Association as they are frequently the subject of complaints and professional discipline.*

These conditions are *not insurable* under standard Errors & Omissions policies.

SUGGESTED REMEDY: Liability insurance coverage should be limited to the extent of available and required insurance coverage to the *authorized entity* under the *Act*. The RAIC Document 6 sets out the accepted standards for limitation of liability in this regard. In the event that the client requires greater coverage than what is normally available, given the complexity, size, or risks associated with the project, then it should consider bearing the increased premium cost for same on the consultant's behalf or, as is common in the industry, acquiring a project-specific insurance policy that protects all of the parties, including the owner and, in some instances, even the contractor.

With respect to legal actions, a client should not be commencing an action against any employees, officers, directors, etc. This should be limited to the architect entity itself as it is the basic right of a professional limited liability organization.

A reasonable legal standard would suggest that neither the client nor the architect should be liable to one another or make claims for consequential losses/indirect damages and it would make sense to revisit the RAIC Document 6 provisions in this regard.

6. FEES and RIGHT of SET-OFF

ISSUE: Architects are entitled to be paid for the services that a client contracts to receive without qualification or conditions. The client should not expect a legal set-off of claims over fees, or own a right to take the architect's design and have someone else complete the work, withhold fees due, and then set-off against those additional costs.

Other burdens such as declaring that, regardless of circumstance, all *instruments of service* are due to the client or that the architect is to vest his or her "rights" alongside the sub-consultants to the client effectively mean the abrogation of

- (a) almost all of the architect's normal rights, and
- (b) presupposes the same for the sub-consultants.

Such types of clauses or conditions again are punitive and extend beyond the normal scope of behavior that two parties to an agreement should be subjected.

SUGGESTED REMEDY: While such clauses may not technically impose themselves on a "protection of the public" mandate, they nevertheless militate against the establishment of a professional trust and "fairness" relationship that is the legal standard for the execution of a professional services agreement meant to benefit both of the parties to it, including the public trust.

Accordingly, any such clauses that require only one party's compliance "no matter what," are an obviously one-sided and unreasonable abrogation of rights and should be avoided.

7. SUCCESSORS AND ASSIGNS

ISSUE: The original clauses in RAIC Document 6 define reasonable terms with respect to a clear understanding that contract documents are for the purpose of construction of a project contemplated by the agreement and are not to be used by the client for any other purpose. This again goes back to copyright issues and, as long as the client is prepared to include an indemnity for reuse and modification of documents per 4.0, then this standard clause can be modified. However, the RAIC Document 6 clause exists for the protection of the architect's rights. So, if the architect, upon production of deliverables, ends up surrendering ownership of the *instruments of service* without such protections, the architect is exposed to liability for any modification of the *instruments of service* by the client or any third party that received the *instruments of service* from the client. This situation may be uninsurable.

SUGGESTED REMEDY: Accordingly, it is recommended that the RAIC Document 6 provisions be kept intact or the client provides suitable indemnifications, as previously described.

8. DISPUTE RESOLUTION

ISSUE: Public bodies hold a predisposition to dispute resolution that often binds all parties, including the contractor, to a mutual process which could include mediation or arbitration. Architects and engineers do not normally engage in mediation or arbitration with contractors when the dispute is related to the contract between the client and the contractor. In addition, the “referee” process involved often proves more costly than litigation. For example, in the event that the contractor brings a claim for extras or delays and enters into dispute resolution with the client, there is the possibility the client will choose to name the consultant(s) as an active, participating party. This is contrasted against the normal process of assisting the client in the dispute resolution process.

SUGGESTED REMEDY: This process is better considered under the RAIC Document 6 provisions that are synchronized with the Canadian Construction Association (CCDC) contracts.

9. BINDING CONTRACTS

ISSUE: Some agreements bind sub-consultants to the same terms and conditions pre-supposing that they are in agreement. When these clauses appear, it is not uncommon for the architect to also be required to agree to be contractually obligated to satisfy any claims brought by the sub-consultants.

This situation is uninsurable. Liability insurance coverage is only provided for one’s own negligence.

SUGGESTED REMEDY: Such clauses are untenable and must be removed.

10. RIGHT OF REVIEW

ISSUE: Some contracts afford the client sweeping authority and exclusive discretion to determine what constitutes a material change to the scope of services. A material change is an objective measure and it should not attract the client’s discretion, but rather be adjudged based on what a reasonable bystander, fully informed, would consider a material change.

SUGGESTED REMEDY: To mitigate this concern, phrases containing the words “in the client’s sole discretion” or “in the client’s opinion” be deleted.

11. CONFIDENTIALITY

ISSUE: Confidentiality of information can be a sensitive issue and the architect can sometimes be held to an unreasonable standard in this regard by clauses that effectively disallow the disclosure of information not already available to the general public and obtained under the performance of the contract. However, disclosure of confidential information by the architect could be compelled by an order from a government authority or by the courts. The architect cannot be in a position to comply with such an order while being in breach of its agreement or, alternatively, comply with its agreement, but be in contempt of a government or court order.



SUGGESTED REMEDY: Legal review is required to ensure contract wording that provides suitable protection of both parties.

12. ERRORS AND OMISSIONS

ISSUE: Contract wording where the architect's obligation to remedy is based upon a client's sole opinion that the architect has erred is not a legal standard. Professional liability policies do not respond. Errors & Omissions policies provide coverage for the negligent provision of professional services for which one becomes legally liable. Insurers do not consider paying at the client's opinion. In the absence of negligence and legal liability for same, such conditions are *uninsurable*.

SUGGESTED REMEDY: The architect can be reasonably held to a standard of care whereby remedial services at his or her own cost may be required, except that an error or omission must be in relation to the standard of care as defined in the agreement.

Such errors or omissions must not arise because of something that was caused or contributed to by the client. If so, such remedial work should be classified as additional services, with remuneration paid to the architect.

GC 22 HOLD HARMLESS

ISSUE: Contracts designed to obligate the architect to hold the client harmless for any reason, including (a) willful acts, and (b) the client's own behavior, increase liability risks significantly. Further, hold harmless clauses that include phrases such as "including legal costs on a solicitor client basis" are *uninsurable*. Errors & Omissions policies only respond to costs for which the architect is legally liable and this is provided on a tariffed basis and not on a solicitor client basis. These or similar clauses increasing contractual liability would not be responded to by the insurer.

SUGGESTED REMEDY: In order for hold harmless clauses to be considered reasonable, they must be amended to *direct damages* only.

In addition, neither party to an agreement should be responsible for indemnifying the other for "willful acts" that would effectively make both parties liable for each and every one of the other party's acts, negligent or not. This is unreasonable. Hold harmless indemnifications should only extend to willful misconduct.

Dated: February 5, 2016

The Practice Advisory Committee of the Alberta Association of Architects develops a consolidated opinion on practice matters consistent with the established Alberta Architects Act, General Regulations, bylaws and policies; based on the input of administration and a group of professional advisors to the Association. Practice advice contained in the advisory above is issued as a general interpretation of the requirements of the Alberta Architects Act, regulations under the act, and the bylaws and in no way supersedes these documents. Advice provided from the Practice Advisory Committee should be read in conjunction with the Act, regulations and bylaws. This Advisory is not intended to be legal advice to the members of the association. Members should consult their own legal, insurance, income tax or financial advisors as to the application of the Act and General Regulations. This communication, including any information transmitted with it is intended for the use of the membership.

