



Ontario Association of Architects

May 18, 2018

Toni Rossi
President, Real Estate Division
Infrastructure Ontario
One Dundas Street West, Suite 2000
Toronto, ON M5G 1Z3

Dear Ms. Rossi,

I am writing as a follow-up to our meeting on January 24, 2018. I want to thank you and your team for taking the time to sit down with me and OAA Executive Director Kristi Doyle, along with insurance industry representatives from Pro-Demnity and XL.

We were encouraged by the opportunity to meet and discuss specific concerns that the OAA had raised more than a year ago about uninsurable elements within Infrastructure Ontario's supplementary conditions. Our intent had been to understand the rationale underlying IO's opposing position, as well as to ensure that you had a full understanding of the OAA's position and the public interest impact.

Notwithstanding there have been some conversations between our respective staff since January, I feel it important to follow up in this way, given that IO has since issued an RFP for the annual refresh of the architectural and interior design Vendor of Record (VOR) without a resolution of our conflicting views. As you can appreciate, we are receiving many questions from our members as to the status of our ongoing discussions. There has also been heightened confusion around the continued communication by IO that contradicts the OAA's position and continues to misrepresent the issue as being related to the general insurability of the contract. This is puzzling to us since we had left the January meeting having heard a clear acknowledgement on the part of IO that it now understood OAA's position that Supplementary Condition (SC) 8.9 contains specific provisions that are uninsurable and had undertaken to investigate this further.

We have communicated to our members that our research has confirmed that Pro-Demnity Insurance and all other insurers providing E&O coverage for architects are of the view that the indemnification required by Clause 8.9 contains specific provisions excluded from coverage under professional liability insurance should a claim be advanced relying on those provisions. We have also communicated to our members that entering into agreements that contain such indemnifications raise concerns regarding professional conduct and may result in them being subject to a complaints and discipline proceeding.

As the provincial regulator, I must stress our serious concern relative to the protection of the public interest and the professional obligations for architects, under the *Architects Act*, to have mandatory professional liability insurance for the services they provide. Clauses that put in question the availability of this insurance are clearly not in the interest of the public, the client or the licensed professional.

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While we have been focusing our discussion on Clause 8.9 of the VOR Supplementary Conditions, I'd like to note that there remain other clauses that may raise similar concerns but to a lesser degree. We would be happy to discuss these in the future through the process of the anticipated updating our OAA Document 600 agreement and the associated IO Supplementary Conditions to which it relates.

Our January 24 discussion also focused on the *Financial Administration Act* (FAA) and the applicability of Section 28 as it relates to contracts entered into by the Ontario Government. You had advised us that IO's position is that it is constrained by this section of the FAA in how it must contract with architects. At the close of our meeting, we had acknowledged the complexity of the issue and the OAA agreed to further consider the applicability of that section of the FAA. It was clear to us that if that section is indeed relevant, there is then a direct conflict between the FAA and our own legislation—the *Architects Act*.

Since January, we have spent considerable time and effort to ensure we have fully investigated and understood the intent of Section 28 of the FAA, including seeking the views of the legal profession on this fundamental issue. The ultimate goal, which I hope you share, is to find a solution that resolves this conflict and eliminates this serious challenge faced by both our organizations.

As a result of our research, we believe that a legal position can be advanced that Section 28 of the FAA does not require the broad indemnification in Clause 8.9.

The essence of the argument is that based on statutory interpretation principles, the Section 28 language should be understood as a constraint on government agencies, preventing them from providing indemnifications to other parties with which they are contracting that result in increasing the exposure of the government to contingent liabilities. Conversely, these same principles indicate that Section 28 does not require indemnifications from those same parties. If the broad indemnification being asked of architects is not required, this alleviates the concerns that we have raised around the absence of professional liability insurance coverage for specific provisions in Clause 8.9 and the resulting negative impact on the public interest.

Given the clear conflict between the *Architects Act* and Infrastructure Ontario's Supplementary Conditions regarding the SC 8.9 Indemnifications, the impact on architects and practices is to leave them with only two equally untenable alternatives. They can either not pursue the work (as many architects in Ontario are choosing to do) or take on the work and risk being subject to a disciplinary action that may impact their ability to practice and serve IO's projects and indeed their very livelihood.

Given the seriousness of this matter and IO's desire to refresh the VOR for architectural services this year, I trust that you will consider the above and hope that you are open to exploring this issue further with a mind to resolving this conflict. We would ask that, in this context, IO not continue with the current VOR refresh until this matter is resolved or at the very least, not execute the Master Agreement or award any new projects under the VOR.

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I am hopeful that we share the mutual goal of getting as many qualified architectural practices on the VOR as possible without compromising the public interest as defined in the *Architects Act* and the professional responsibilities of architects to protect that public interest.

Sincerely,

A handwritten signature in black ink, appearing to read "John Stephenson". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke at the end.

John Stephenson, Architect, OAA, FRAIC
President

