

Conflict of Interest Guideline – Provision of Architectural Services and Construction Services

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Summary

This Guideline has been prepared by the Ontario Association of Architects (OAA) to assist members and practices in understanding the issue of conflict of interest and exclusion of professional liability insurance coverage as they relate to the provision of architectural services and construction services.

Background

It is the position of the OAA that construction services should **not** be provided through a Certificate of Practice in Ontario. While the OAA does not discourage members from pursuing other avenues of business, such as the provision of construction services under a separate entity, doing so may create conflicts of interest and other issues that need to be addressed.

It is also the OAA's position that in the traditional Design-Bid-Build situation there is an inherent conflict of interest in a situation where construction services are provided by an entity with which a member is affiliated or involved, where that same member is also providing architectural services in respect of the same project or part thereof.

This conflict is described below.

Sub-section 42(16) of Regulation 27 under the *Architects Act* states that it is “professional misconduct” to have a conflict of interest. Sub-sections 43(1)(c), (d), (e), and (f) all provide specific and particularized examples of conflicts of interest regarding construction services.

- “43. (1) A member or holder has a conflict of interest where the member or holder or an officer, director, partner or employee of the member or holder,
- (c) has a direct or indirect financial or other interest, whether personal or otherwise, in or with a person, firm, partnership or corporation that is the owner, contractor, subcontractor, construction manager, design-builder or project manager of a building project with respect to which the member or holder provides architectural services;
 - (d) has a direct or indirect financial or other interest in a contract or transaction, other than the agreement between the architect and the client, to which the owner, contractor, subcontractor, construction manager, design-builder or project manager is a party on a building project with respect to which the member or holder provides architectural services;
 - (e) has a direct or indirect financial or other interest, whether personal or otherwise, that may adversely affect the judgement of the member or holder as to any question that may arise on a building project with respect to which the member or holder provides architectural services; or

- (f) has a direct or indirect financial or other interest, whether personal or otherwise, in or with any person, firm, partnership or corporation that submits or has submitted tenders or bids on a building project with respect to which the member or holder provides architectural services.”

All applicable clauses must be considered and applied as appropriate. Based on the specifics of a situation, more than one sub-section may apply. **Conflict of Interest**

It is the position of the OAA that a conflict of interest exists where the holder of a Certificate of Practice or companies a holder has a financial or other interest in are engaged to provide both architectural and construction services on a project. It is extremely difficult to be impartial in such circumstances. The holder's duties often include responsibility for certifying the value of work completed and advising the owner on the quality of construction work performed. It creates a potential conflict of interest to act in both capacities on the same project. Whether or not the conflict can be addressed by disclosure depends on the specifics of the situation and which clause(s) apply.

The specific conflict of interest is addressed in sub-section 43. (1)(c) of the Regulation, as noted above. While the conflict appears to be currently manageable pursuant to sub-section 43. (3) of the Regulation, holders, through experience, have found that conflicts of interest can arise through a holder having any contractual relationships or financial interest outside the Client/Architect or Client/Licensed Technologist OAA contract that might affect their ability to exercise impartial professional judgment with respect to their duties under the contract. Sub-section 43. (1)(f) of the Regulation may also apply, and cannot be mitigated by disclosure.

If a holder finds themselves inadvertently in a position of conflict, they shall promptly notify the parties and be prepared to withdraw from the relationship with one or both parties unless they receive the written consent of both to continue.

If a holder proposes to engage in a relationship that may possibly give rise to a position of conflict, it is advisable to discuss the proposed arrangement in advance, in confidence with an OAA Practice Advisor.

Professional Liability Insurance

With respect to professional liability insurance, holders are advised to review their coverage carefully with Pro-Demnity Insurance Company and any other insurer prior to entering into any unusual or special contractual obligations to ensure that their protection is not inadvertently voided or their activities excluded from insurance coverage.

Professional liability insurance covers “errors, omissions or negligent acts in the provision of professional services to others.” Coverage applies to the services that would be considered “usual and customary” for Architects or Licensed Technologists OAA operating within their recognized professional sphere of practice.

A professional liability insurance policy will NOT extend coverage beyond professional services / advice provided by the insured. That means it will NOT cover the actual performance of construction work by the holder or companies a holder has a financial or other interest in, whether or not the work is correct, defective, inadequate, or incomplete construction or construction not conforming to the contract documents.

There is a wide range of services and activities that may be characterized by one entity or another as “construction services,” ranging from an entity with construction expertise acting as an additional consultant retained by the owner providing only professional advice related to the construction (e.g. CCDC 5A-2010 Construction Management Contract – for Services) through to activities akin to those of a general contractor delivering the actual construction of the project (e.g. CCDC 5B-2010 Construction Management Contract – for Services and Work).

Holders contemplating providing both design services and construction services through one or more legal entities should pay particular attention to Pro-Demnity's Excluded Services Endorsement. While it does not apply to projects where a holder is only providing usual and customary architectural services, where a holder is wearing “two hats” (i.e. providing both design and construction services to the same project), the exclusion likely applies. The fine print of the endorsement is critical, and the definitions of “construction phase architectural services,” “delivery of construction services,” and “entity affiliated with you” are all important to

addressing many questions. Read the fine print, check Pro-Demnity's FAQ, and contact Pro-Demnity to discuss your particular circumstances

Even before Pro-Demnity's Excluded Services Endorsement came into being, coverage for the review or approval as a holder of your own work as a contractor was excluded.

Regardless of the scope, most available descriptions of construction services anticipate that the "consultant" (holder of a Certificate of Practice) is a different entity from the constructor, general contractor, construction manager, or design-builder on any particular project. Maintaining that arm's-length distance will help holders avoid any risk of exclusion or loss of coverage.

Your insurer(s) are the experts at explaining what your policy provisions mean and under what circumstances they apply. Do not hesitate to contact your professional liability insurer(s) should you have any concern regarding your insurance coverage.

Construction Services

If you are concerned about any of the information provided in terms of the provision of services under your Certificate of Practice or under existing business relationships, it is recommended you take time to review these guidelines.

In the construction industry, the term "Construction Management" refers to an alternative contracting method whereby the construction manager acts as advisor / agent for the owner. This entity may provide construction site management, as well as administrative and technical services as it pertains to construction issues only (e.g. CCDC 5A). The Construction Manager may also execute some of the work (e.g. CCDC 5B). The provision of construction services is not confined to the construction phase of a project. Such services may be provided during the design phases as well. As a result, Pro-Demnity's "Excluded Services Endorsement" may apply to some services that may be provided during the design phases.

It is important to note that this Guideline is intended to supplement the Act and Regulation, and Pro-Demnity's "Excluded Services Endorsement"; however, it does not supersede them. This Guideline refers to the practice of architecture in Ontario as described under the jurisdiction of the *Architects Act*, RSO, 1990 Chapter 26.

References

Pro-Demnity's [Excluded Services Endorsement](#)

The OAA does not provide legal, insurance, or accounting advice. Readers are advised to consult their own legal, accounting, or insurance representatives to obtain suitable professional advice in those regards.
