

## Retention of Specialist Consultants

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### Summary

The Ontario Association of Architects (OAA) has observed that clients (owners) sometimes require architects to retain surveyors, geo-technical or hazardous materials specialist consultants under the client/architect contract in lieu of having direct contracts with these specialist consultants. Such a contractual procedure creates an increased level of liability and risk for the architect.

### Background

#### Owner is Responsible for Existing Conditions:

There is a reason for retaining specialist consultants. They have the special education and experience for these particular types of service. Consequently, the architect and their consultants must accept and be able to rely upon the technical findings of such specialists.

Architects are required to develop an understanding of property owned by others in order to provide their services effectively. However, an architect's need for information does not confer the responsibility to obtain it because of the obligations that flow from ownership of property.

The information about properties typically provided by owners to architects includes land surveys, geo-technical analyses, and the work of hazardous materials specialists. Each of the specialists providing this information is reporting upon and identifying what exists before the architect and their sub-consultants can properly advise the client about proposed design concepts.

It is a fundamental principle that any owner of a property is responsible for that which they own. Provision of data associated with property is related to the owner's requirement to understand their property and this requirement exists continuously regardless of the provision of architectural design services. For example, a land survey is frequently a prerequisite to ownership and the production of such a survey benefits the owner and potentially subsequent owners of a property.

In the case of hazardous materials, the owner is obliged under legislation to understand the extent to which materials associated with property are hazardous and, if hazardous materials are discovered, the legislation obliges the owner to introduce hazardous materials management plans.

The development of geotechnical data is also a form of survey that provides a benefit to the owner which contributes to the owner's understanding of that which they own. It follows, therefore, that when information about a property is required by persons providing service associated with the property, the owner of the property is responsible to obtain and provide the information. Further, if the information required is gathered through the work of qualified persons, the recipients of the information (including the owner) are entitled to rely upon the information provided.

<p>These client's responsibilities are prescribed in OAA 600-2013 and 601-2013 standard forms of contract for architect's services under General Conditions GC4 Client's Responsibilities, clause 4.3.</p>
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## Risk Transfer Concerns:

Architects may find that an owner wishes to have the architect retain specialists to provide the information that would normally be the client's obligation to provide. In these instances it should be recognized that in doing so the client is transferring some of their own legal responsibility and risk to the architect.

As the entity contracting with the specialist consultant, the architect will be joined to the claim "in contract" with respect to the advice and any damages that might flow from the specialist's negligence, error or omission. The architect, who should be entitled to rely upon the information about the existing condition of the client's (owner's) property instead becomes responsible for it.

When an architect engages a specialist consultant, additional risk to the architect may arise in spite of the specialist's liability insurance coverage which, at the time of the claim, could be found inadequate or no longer in place. Such circumstances may result in transfer of risk (and claim for damages) to the architect because of the contractual relationship between the architect and the specialist consultant. It is important for the architect to take steps to mitigate this risk as best possible.

## Suggested Procedure

1. If the client attempts to require the architect to retain specialist consultants through a Request for Proposal, client/architect contract or program of requirements, it is important to raise the matter for discussion and to explain the implications of the request and the responsibilities of the client as owner of the property. If necessary, refer to this Practice Tip
2. If the client continues to require the architect to be responsible for the retention of the specialist consultants, discuss the means through which the architect can assist the client to fulfill their obligations as listed in OAA 600/601-2013 under GC 3 Provision of Additional Services clause 3.1.6. As part of the assistance, the architect may confirm in writing on behalf of the client that the specialist consultant(s) are retained by the owner. Further, the architect can instruct the consultant(s) to address all invoices to the client. If requested by the client, the architect can receive the invoices addressed to the client, review and comment on the amount invoiced, and subsequently forward the invoices to the client for payment.
3. If the architect is willing to assist the owner by taking this responsibility onto itself, it is strongly recommended that the architect incorporate into the contract for professional services, language such as is found in OAA 600-2013 and OAA 601-2013 GC 8 Liability of the Architect clause 8.5.

The *Client* acknowledges that either the *Architect* or the *Client* may engage *Consultants* on behalf of and for the benefit and convenience of the *Client*, and agrees that the *Architect* shall not be liable to the *Client*, in contract or in tort, for the acts, omissions or errors of *Consultants* engaged by the *Client* identified in Article A10.2 [Consultants engaged by the Client] or the *Consultants* described in GC 4.3 [surveyors, geo-technical or hazardous materials specialist consultants] engaged on behalf of the *Client*. Nothing in this clause shall derogate from the *Architect's* duty of *Consultant Coordination*.

**Note:** Reference numbers to other articles and General Conditions need to be adjusted in each specific contract.

In addition, for contracts other than the OAA 600-2013 and OAA 601-2013, it is recommended to also include:

"...the Client agrees that the Architect is entitled to rely upon the information provided by such specialist consultants."

The retention of the specialist consultant(s) raises issues which have a substantial effect on determining fair and reasonable fees. Issues to be considered are:

- Coordination and administration services
- Risk factors:
  - amount of professional liability insurance deductible
  - amount of time to prepare project documentation to assist insurer in defence of a claim (cost not recoverable).

The architect's own legal counsel should review any proposed wording. The minimum objective for any such wording is to leave the architect in the same position respecting liability related to the work of these specialists as would have been the case had the owner retained the specialists themselves.

4. Regardless of who retains these specialists, and even with the protection which may be afforded by the provisions in a client/architect contract, it is essential that these specialists be required to carry their own professional liability insurance with appropriate limits and coverage. It should not be taken for granted that the specialist is insured.

If the architect chooses to retain any of these specialists, it is strongly recommended that the architect require evidence that each specialist carries and maintains insurance covering the services being provided. It would be wise to include a specific requirement in the specialist's contract respecting amounts and maintenance of required insurance limits and coverage at a minimum commensurate with the architect's own insurance obligations.

5. Questions or concerns about professional liability insurance should be referred to [Pro-Definity Insurance Company](#).

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