

Retention of Specialist Consultants

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Summary

On April 1, 2024, Pro-Demnity Insurance Company made [policy updates](#) related to retaining owner's specialist consultants. Holders are encouraged to review their policy and assess impact on active and future projects.

The information about real property typically provided by owners to holders includes land surveys, geo-technical analyses, and hazardous materials reports. Each of the specialists providing this information is reporting upon and identifying what exists or what is likely to exist before the holders and their sub-consultants can properly advise the client about proposed design concepts.

Clients (owners) may require Certificate of Practice holders to retain surveyors, geo-technical, or hazardous materials specialist consultants under the architectural services contract in lieu of having direct contracts with these specialist consultants to provide information about the state of what the client owns. These requests are often stated in Requests for Proposals (RFP). Such a contractual arrangement creates an increased level of liability and risk for the holder.

Holders retaining specialist consultants to provide information about existing conditions is distinct from holders retaining specialist consultants to provide information and assistance related to how the design responds to the site conditions. For example, what type of foundation system or waterproofing system is suitable for the existing soil conditions. For this type of assistance, it may be appropriate for the holder to retain such specialists. However, it is still recognized and recommended that this advice and recommendations come from a specialist consultant retained directly by the owner to reduce the risk that the holder will become vicariously liable for the specialist's services, including errors in its findings and recommendations. This information, recommendations and access to the specialist providing the information on below grade soils and hydrological conditions can be included in the scope of services provided by specialists retained by the owner.

Background

Differences between “Traditional” Consultants and Owner’s Specialist Consultants

There is good reason for retaining specialist consultants. They have the special qualifications and experience for these particular scopes of service. Consequently, holders, their subconsultants (structural, mechanical, electrical, civil, etc.) and the client's other consultants must be able to rely upon the technical findings of such specialists when they prepare their designs.

Owner is Responsible for Existing Conditions:

It is a fundamental principle that any owner of real property is responsible for that which they own. Provision of data associated with real property is related to the owner's requirement to understand their real 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.

Holders are required to develop an understanding of the buildings or land (real property) owned by others in order to provide their services effectively. However, a holder's need for information does not confer the professional responsibility to obtain it. The responsibility to provide the information rests with the owner because of the obligations that flow from ownership of real property.

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

In the case of toxic or hazardous materials and pollutants, the owner is obligated under provincial legislation to understand the extent to which materials associated with a real property are present and the degree of hazard. If pollutants or hazardous materials are present, the legislation obliges the owner to introduce appropriate management plans to protect the public.

These client responsibilities are prescribed in the OAA 600-2021 standard form of contract under General Conditions GC05 Client's Responsibilities.

Risk Transfer Concerns:

Holders may find that an owner wishes to have the holder retain specialists to provide the information that the client would normally be obligated 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 holder. Professional Liability Insurers in general do not consider these to be "usual or customary" services of architects or professional consulting engineers so such services will usually be excluded from their PLI coverage. Accordingly, the insurance industry provides specifically underwritten and priced PLI policies for these types of specialists. In addition, Pro-Demnity's policy includes an additional specific exclusion from coverage for the performance or engagement of geotechnical engineering, surveying and pollution related services.

As the entity contracting with the specialist consultant, the holder will be joined to any claim "in contract" with respect to the advice and any damages that might flow from the specialist's negligence, error, or omission. The holder, who should be entitled to rely upon the information about the existing condition of the client's (owner's) real property instead may become vicariously liable for it – without PLI cover to protect the holder from the additional risk assumed through its contract with the owner.

When a holder engages a specialist consultant, additional risk to the holder can arise because the specialist's liability insurance coverage could be found to be inadequate at the time of the claim, or worse, no longer in place. Such circumstances may result in transfer of liability for claims for damages onto the holder because of the contractual relationship between the holder and the specialist consultant.

It is important for the holder to take steps to mitigate-these risks to the maximum extent possible.

Suggested Procedure

1. Review the RFP, services contract or functional program and talk with your client: If the client attempts to require the holder to retain specialist consultants through a Request for Proposal, a services contract, or a functional program, it is important to raise the matter for discussion, to explain the implications of the request, and the responsibilities of the client as owner of the real property. If necessary, refer to this Practice Tip
2. Assess the impact on your contracts (prime and subcontracts) and professional liability insurance coverage: If the client continues to require the holder to be responsible for the retention of the specialist consultants, discuss the means through which the holder can assist the client to fulfill their obligations as listed in OAA 600 and OAA 800. As part of the assistance, the holder may confirm in writing on behalf of the client that the specialist consultant(s) are retained by the owner.

Further, the holder can instruct the consultant(s) to address all invoices to the client. If requested by the client, the holder 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. Talk with your legal counsel about indemnification and liability clauses: If the holder is willing to assist the owner by taking this responsibility onto itself, it is strongly recommended that the holder incorporate into the contract for professional services, language such as is found in OAA 600-2021, GC09 Indemnification and Liability clause 9.7.

Indemnification and hold harmless clauses create obligations between the parties to the contract. They do not preclude or protect from third party claims. Discuss the limitations of such clauses with your legal counsel.

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

In addition, for contracts other than OAA 600-2021, it is recommended to also include:

“...the *Client* agrees that the holder is entitled to rely upon the information provided by such specialist consultants.”

In OAA 600-2021, this is covered in Article A12.

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

- Coordination and administration services,
- Risk factors:
 - amount of holder's professional liability insurance, insurance deductible, and the duration for which it is maintained,
 - amount of time to prepare project documentation to assist the practice's liability insurers in defending a claim (cost not recoverable).

The holder's own legal counsel should review any proposed wording. The minimum objective for any such wording is to leave the holder 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 directly themselves.

4. Consider the insurance requirements for specialist consultants: Regardless of who retains these specialists, and even with the protection which may be afforded by the provisions in an architectural services contract, it is essential that these specialists be required to carry their own professional liability insurance with appropriate limits, coverage, and duration. It should not be taken for granted that the specialist is adequately insured.

If the holder chooses to retain any of these specialists, it is strongly recommended that the holder 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, maintenance of required insurance limits and coverage at a minimum commensurate with the holder's own insurance obligations. Given that an error in geo-technical information may affect more than an error in the architectural scope, it may be appropriate for the specialist consultant to carry more insurance than required of a holder. For example, if an error in the soils analysis results in a building that shifts or settles, the costs may be several times the cost of the project as a whole.

5. Additional insurance protection: Recognizing there will be insurance exclusions at play where a holder retains these types of experts, the holder including protective language in their own contracts may not provide enough protection for holders who nevertheless choose to provide these services. It is therefore recommended the holder should also seek to have the retained specialists have the holder included as an additional insured on the retained specialist's liability policy and obtain a copy of a Certificate of Insurance or Endorsement as proof of such coverage.

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

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.
