Ontario Association of Architects

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Best Practices for Review of RFP Language and Supplementary Conditions to OAA 600 and Other Client-Architect Contracts

Summary

More work is being solicited through Requests for Proposals (RFPs) and similar vehicles than in the past. Unfortunately, there are many terms and conditions being used that contravene the *Architects Act* and Regulation 27, are uninsurable, or inappropriately transfer risk.

What You Should Know, What to Look For, and What to be Wary Of:

Architects, including Licensed Technologists OAA (Lic Tech OAA), are governed by professional standards and an extensive body of applicable law. They therefore should approach with caution supplementary conditions or contracts authored by others that attempt to redefine their roles and obligations. Contracts should be fair and balanced to reflect professional obligations and appropriate relationships.

The following information is provided to assist practices in this area. The OAA continues to endorse the current edition of OAA 600 as the standard form of contract for an architect's services. It is recognized that there are often specific client and or/project conditions that will need to be addressed through client or project specific supplementary conditions. In other instances, a client may insist on the use of a custom contract for consulting services. The following does not constitute legal advice and members are urged to seek advice from their own legal counsel when reviewing RFP and contract language. This document should also be considered alongside Pro-Demnity Insurance Company's Bulletin of March 22, 2018: *Client Authored Contracts for Architectural Services*, which articulates specific circumstances and/or language that is uninsurable, or has considerable impact on the level of risk and liability that members are being asked to assume.

The OAA continues to review RFPs and contracts with the intent of identifying requirements and/or provisions that may; (i) be uninsurable; (ii) require an Architect or Licensed Technologist OAA to contract out of their professional obligations as set out in the *Architects Act* and Regulation 27; (iii) which are a contravention of either piece of legislation; or, (iv) unreasonably increase their obligations beyond those at law. Members are once again advised that entering into contracts with requirements and/or language of this type may result in allegations of professional misconduct [Refer to OAA Regulatory Notice – September 6, 2016 (member login required)].

The OAA supports quality based selection (QBS) for the provision of professional services. While QBS is finding some traction in the marketplace, many clients still look to lowest fee as the selection criteria. Even for those RFPs that include a matrix of selection criteria, the criteria are often subjective, leading in many cases to selection based on lowest fee. Members should not forget that they have a responsibility under the *Architects Act* to maintain professional standards in the provision of their professional services regardless of the fee obtained. Failure to maintain professional standards exposes practices to additional liability and the possibility of charges of professional misconduct.

[1] References to Request for Proposal (RFP) in this document includes Requests for Quotation (RFQ), Requests for Qualifications (RFQ), Requests for Supplier Qualification (RFSQ), Expressions of Interest (EOI), Request for Vendor Qualification (RFVQ), Request for Consultant Services (RFCS), Request for Design Proposal (RFDP), Invitation to Tender (ITT), and other such documents issued to elicit proposals to provide architectural services.

Checklist of Key Principles to Consider:

When reviewing any RFP or contract for professional services, the following are key principles that should be considered carefully within the context of the contract itself.

- Use OAA standard contracts with minimal supplementary conditions whenever possible.
- Understand all of the contractual requirements and in particular insurance coverage implications.
- Check for inconsistencies within the contract and the RFP documents.
- Check the priority of documents in the contract and ensure the contract has priority over the RFP documents if the RFP is part of the contract.
- Check that there is not a duplication of roles and responsibilities with those of other parties, and delete or revise responsibilities that are not part of the practice of architecture.
- Check that the contract does not include broad indemnifications that require the architect to assume liability for third parties or go beyond an architect's responsibility under the law.
- Check that the contract does not include unlimited liability for the architect's services. Liability for errors, omissions or negligence should be limited to the coverage and amount of the contractually required professional liability insurance or to a reasonable contractually specified cap.
- Verify that the client assumes the responsibilities which are clearly theirs.
- Check for any wording being deleted, not just that which is being replaced or new wording being added. All the terms and conditions in the OAA standard contracts are there for a reason. Be especially aware where the new wording has nothing to do with what is being deleted.
- Check for additional clauses and rewordings in other parts of the document. Clients do not always address issues in the same place or general condition in which they are addressed, in the original document.
- Understand the duration and implications of any provisions that survive the termination or completion of the contract.
- Consult legal counsel before entering into a non-standard contract or OAA 600 with supplementary conditions.
- Consider not responding to an RFP or refusing to sign a contract containing inappropriate terms and conditions, and then advising the issuing authority of the reasons for your decision.

1. Issues of Most Serious Concern vs. Terms Requiring Business Decisions.

The OAA's increased activities and clear focus on member awareness around the issue of RFP and contract language is directly related to its mandate to regulate the profession of architecture in the public interest.

Practices agreeing to RFP terms and conditions and entering into contracts that have them engage in activities outside their professional capabilities or put the certainty of the mandatory coverage under professional liability insurance in question may become subject to allegations of professional misconduct.

1.1. Language that Affects Professional Liability Insurance Coverage

Language of terms and conditions that puts the certainty of professional liability insurance coverage in question should be of great concern. Practices entering into a contract with such language are at risk of not complying with regulatory requirements for mandatory professional liability insurance.

Pro-Demnity Bulletin dated March 22, 2018 articulates specific contract terms and conditions excluded from professional liability insurance coverage, or which seriously impact the ability of the insurer to respond to a claim. In the light of the information in the Bulletin, practices need to evaluate the terms and conditions in the RFP and contract documents and govern themselves accordingly before responding to the RFP or signing a contract.

1.2. Language that Impacts Professional Responsibilities under the Architects Act

Terms and conditions that result in a practice not complying with their professional obligations under the *Architects Act* and Regulation 27 must be avoided. Agreeing to such language may result in allegations of professional misconduct and may result in exclusions from professional liability insurance coverage. As members of a self-regulating profession, architects should be fully aware of, and fulfil, their obligations and responsibilities under the governing legislation for the professional services for which they are retained.

1.3. Terms Requiring Business Decisions

The OAA respects the right of each practice to make business decisions as well as accept and manage business risks. However, poor decisions about business risks and the resulting liabilities may lead to financial instability, which can be detrimental to the public interest. Members must clearly understand that they cannot contract out of their professional standards and responsibilities that include having professional liability insurance coverage for the services provided. Professional services must be provided in accordance with established professional standards and the standard of care at law regardless of the fee obtained.

In order to demonstrate how the above manifests itself, representative clauses drawn from actual terms and conditions are attached as a reference as Appendix A.

2. Limitations

The examples are drawn from a variety of RFP and contract sources brought to the attention of the OAA in recent years. As such, they are representative of what was current at the time they were reviewed.

Changes in applicable legislation and case law may result in changes to the terms and conditions being proposed by clients. For example, some procurement authorities have already adopted a 28-day payment period despite the prompt payment provisions of the *Construction Act* not coming into effect until October 2019. Others have not. The implementation of all the prompt payment provisions and of the adjudication provisions of the *Construction Act* will likely result in additional changes to RFP and contract terms and conditions and to the number of supplementary conditions to be reviewed.

Members should be alert to the impact of changes in all applicable law.

Attachment

APPENDIX A – Examples of Specific Contract Language of Concern.

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.

Examples of Specific Contract Language of Concern

1. Introduction

The following are examples of wording that practices should be most concerned about when reviewing RFPs and contracts. These are NOT exhaustive, but are representative of RFPs and contracts reviewed by the OAA Practice Advisory Services.

The examples noted below should assist practices in making a 'go/no go' decision with respect to responding to an RFP or in contract negotiations. In some cases, there is an option to request the terms of the RFP be amended or to submit a qualified response that addresses the offending clause(s).

The following does not constitute legal advice.

2. Examples of Specific Contract Language of Concern

2.1. Overly Broad Indemnification Clauses

Practices should not agree to provide broad indemnities that expose the practice to liabilities and obligations beyond those which are already theirs at law (i.e. what a court would determine in the absence of such contract provisions). An indemnity does not simply mean that the architect promises not to pursue a claim against the named parties. It also means that the architect agrees to compensate the named parties for defined losses claimed by the named parties.

The practice's professional liability insurance (PLI) coverage "umbrella" extends to the architect's obligations to indemnify a client in accordance with established law. Additional indemnity obligations that exceed what are already theirs at law will not be covered by the PLI insurance "umbrella", will likely have financial repercussions and could result in allegations of professional misconduct against the practice.

Examples

Example Clause 1:

> *The Consultant agrees to indemnify and hold harmless the City, its Council, officers, employees and agents, against and from **any and all** loss, claims, actions or suits, including costs and **attorney's fees**, for or on account of injury, bodily or otherwise, to or death of persons, damage to or destruction of property belonging to the City, or others, resulting from, **arising out of, or in any way connected with** the Contractor's operations hereunder, excepting only such injury or harm as may be caused **solely by** the fault of negligence of the City, its Council, officers, employees or agents.*

Implications

> This example is overly broad in scope and creates an unbalanced contract. If agreed to, a practice would be liable to not only the City, but in addition its Council, officers, all employees and agents and not only in tort, but also in contract. Regardless of whether the practice has provided the most exemplary professional services and nothing has gone wrong nor failed, it is still responsible to indemnify the entire list of named persons. Further, if the City is anything less than 100 per cent ("solely") liable, the practice is still fully responsible. The additional named persons may have no liability for their actions, but are protected by the practice's indemnification.

Use of the words “any and all” individually or in conjunction, or wording with a similar meaning is an attempt to transfer as much risk as possible onto the shoulders of the practice. Professional liability insurance provides coverage for claims arising out of errors, omissions or negligence in the performance of professional services. It does not cover “any and all” claims. Insurance companies will evaluate the specifics of any claim in order to determine if the claim falls within the insurance coverage or not. Agreeing to such wording exposes the practice to liability in excess of what exists at law.

This indemnification goes far beyond the scope of professional errors, omissions, and negligence liability insurance coverage. In part it accepts responsibility beyond what is an architect’s responsibility at law. Agreeing to such broad indemnification, could result in a practice and its architects being liable for monies beyond the coverage “umbrella”.

Example Clause 2:

The Architect and its Consultants shall indemnify and hold harmless the Client and those for whom it is in law responsible from and against all claims, demands, damages, losses, lawsuits, causes of action, liabilities, claims for lien, liens, civil or ***criminal penalties and charges****, or other costs and expenses (including without limitation,* ***reasonable legal fees****) arising out of or incidental to any property damage or personal injuries including, but not limited to, bodily injury including death* ***resulting directly or indirectly, in whole or in part****, from the fault of or any negligent act or omission or error of the Architect or any of the Consultants and their respective agents in connection with the performance or conduct of any services provided under this Contract.*

Implications

This example creates disproportionate liability, as it contractually requires the practice to provide 100 per cent indemnification even if the practice is only partially or indirectly responsible, even if it is only one per cent responsible. Be aware that the client’s legal fees can skyrocket and may well exceed the legal costs awarded by a court, and payment of such legal fees may not be covered by the practice’s professional liability insurance coverage.

There is no insurance coverage for criminal penalties.

Recommendations

In addition to refusing and/or negotiating contracts with such wording, practices should consider a number of tools developed by Pro-Demnity Insurance Company for use by architects to bring any indemnity obligation included in a contract back within the coverage “umbrella”. These include:

- A “Notwithstanding Clause” that can be utilized to amend any indemnity provision, good, bad or indifferent, to limit the architect’s indemnity obligations to those that are covered by professional liability insurance. Available to Ontario architects since 2005, it has most recently been included in the information booklet “Architects Insuring Architects…The Ontario Architects Professional Liability Insurance Program”. The booklet has been distributed to every member of the OAA, holder of a Certificate of Practice, and participant in the 2016 and 2017 OAA Admission Course; it is also posted on every page of the Pro-Demnity website.

The example is:

“Notwithstanding the foregoing, the obligations and liabilities of the Architect are limited to the professional liability insurance provided by Pro-Demnity Insurance Company and any specific or excess professional liability insurance coverage in force.

- A “benign” Indemnification Clause with wording that has the architect’s indemnity obligations to a client in sync with its professional liability insurance coverage and limits. The wording below would replace whatever indemnity wording the client has included.

"The Architect shall, within the limits of its insurance coverages, indemnify the Client from claims, demands, losses, costs, damages, actions, suits or proceedings in respect of claims by a third party and from losses, costs or damages suffered by the Client, provided these are attributable to error, omission or negligent act in the performance of professional services of the Architect or of those for whom it is responsible at law."

In both cases, these clauses are examples provided to guide members in conjunction with their legal counsel. While appropriate when written, they may need to be revised due to subsequent case law or the specifics of a particular RFP/contract.

2.2. Standard of Care

Like express warranties and guarantees, practices must avoid terms and conditions that increase the standard of care to that which exceeds anything reasonable or what is required by the *Architects Act* and Regulation 27 and at law. The standard of care does not require performing services perfectly. To determine negligence, performance is measured against what architects practicing in the same area, in the same or similar locality, under similar circumstances would have done in similar situations.

Examples

Example Clause 1:

*Without prejudice to any other right or remedy available to the Client, the Architect shall promptly **correct, at its sole cost and expense, errors, omissions or deficiencies** in the Instruments of Service and services not in accordance with the requirements of this contract.*

Implications:

The client expects perfection. The architect must have perfectly complied with the contract requirements or must absorb the entire cost of achieving perfection regardless of any prior acceptance by the client. This standard of care far exceeds anything reasonable, required by the *Architects Act* and *Regulation 27* or at law.

Example Clause 2:

*The architect shall perform the basic services for the benefit of the client in accordance with the **highest standards** of practice observed on successfully completed projects similar to this project designed by the architect and firms of comparable size, experience and.*

Implications:

The client wants the highest standard of performance over and above the professional standard of care required at law.

Example Clause 3:

The Architect shall not, through any act or omission, do anything that will result in the Client being considered the "constructor" under occupational health and safety legislation.

Implications:

The architect has no authority to control or direct the client's actions or to be advised about what the client intends to do. However, if the architect does anything or fails to do anything (e.g. warn the client), and the client becomes the constructor, then the architect may be in breach of the contract. This may apply even if the architect is ill-informed or unaware of the client's actions.

Example Clause 4:

> ***General Review*** *means review during visits to the Place of the Work (and where applicable, at locations where building components are fabricated for use at the Project site) at intervals appropriate to the stage of the construction that the Architect in its professional discretion, considers necessary to become familiar with the progress and quality of the Work and to determine that the Work is in* ***total conformity*** *with the construction contract documents, and to report, in writing, to the Client, Contractor and chief building official.*

Implications:

> General Review is defined in Section 1 of the *Architects Act*, and is elaborated on in Practice Tip 5 and Regulatory Notices 6, 7 & 9. The redefinition of the term raises the standard of care to perfection, by requiring the determination of strict, 100 per cent, total conformity by the contractor. This would only begin to be possible if the practice had a full time representative observe each and every construction worker and manufacturer's employee every minute of every day they were working on the project, and each batch of every product was fully tested. It is questionable whether any client would be willing to pay for that level of service or inspection and testing; hence the appropriate language is 'general conformity' with the standard of care and the provision of 'general' review.

2.3. Use of the Words "Ensure", "Warrant" or "Guaranty"

These words usually mean "make certain" and may create a binding obligation akin to a guaranty. If these words are used inappropriately, the practice may become a guarantor of performance, and such guaranties are not covered under the professional liability insurance "umbrella".

Examples

Example Clause 1:

> *Cost Control: (a) ensure the design of the project does not exceed the approved project budget;*

Implication:

> It is impossible for an architect to guarantee that a design meets a budget. Architects have no control over the costs of labour, materials or equipment, interest rates, foreign exchange rates, supply chain shortages, legislative changes, imposed tariffs, other projects that may go to bid at the same time, catastrophic events, or any of the myriad other factors that determine the bid prices for any project.

Example Clause 2:

> *Referring to the Proponent's corporate quality control and assurance policy, manuals and systems, describe the approach and methodology proposed to ensure quality of product and outcomes*

Implications:

> Having a quality control and assurance process is good practice. At their best, quality control processes, even ISO-certified ones, result in consistent quality. Nothing in the ISO 9000 series of standards addresses the level of that quality. It is just a system of checks, balances and procedures aimed at producing a consistent quality. An ISO-certified manufacturer of lower-quality product is going to produce a consistently low quality product. This clause does nothing to establish a level of quality required even though that was probably the intent.

Example Clause 3:

> *Construction Contract Administration Phase:*
>
> *(a) provide an appropriate level of site review necessary to* ***ensure*** *the quality specified is obtained with a corresponding inspection report;*

(b) ***ensure*** *that construction site meetings are held and that minutes of meetings are recorded and distributed, along with biweekly progress reports;*

(c) *supply drawings to the Contractor(s) for recording changes as built; during the progress of the work* ***ensure*** *that the Contractor(s) is keeping as-built drawings up-to-date;*

(d) *as an agent of the Owner* ***ensure*** *compliance by the Contractor(s) with the requirements of the* Occupational Health and Safety Act *and its Regulations;*

(e) ***ensure*** *minimal interruption of tenants and building occupants, operations of site systems, security and safety;*

(f) *direct all concerns related to the* Residential Tenancies Act *or other applicable legislation, safety, housekeeping, operations and security to the Contractor(s) Site Superintendent and* ***ensure*** *immediate response;*

Implications:

To ensure something is to offer a guarantee, and guarantees are not insurable. If a claim arises relating to the architect's failure to ensure that some condition is met, there is no professional liability insurance coverage for that claim.

The use of the word "ensure" is often based on the invalid assumption that architects control or can direct the work of other parties. Architects do not have the authority to force contractors do anything. Architects can determine that work is or is not in accordance with the contract and report conclusions, but ultimately do not have the contractual authority to make the contractor do anything. Similarly, architects cannot force a client or authority having jurisdiction to make a decision in a given time frame.

(a) The use of the word ensure is also often based on an oversimplification of cause and effect, as if periodic site review in and of itself is the sole determinant of construction quality. See item (a) immediately above.

(b) Architects may request or schedule site meetings, but have no means of forcing the other parties to attend nor do they have any control over other factors that may determine whether a meeting takes place or not.

(c) Architects cannot guarantee the as-builts are being kept up-to-date or that all appropriate information is recorded.

(d) Architects are not police to enforce compliance with applicable law. Architects interpret the requirements of the construction contract, not laws applicable to construction operations.

(e) This is the contractor's responsibility. An architect can only periodically review for compliance by the contractor.

(f) The architect can forward the information, but has no authority over the Site Superintendent nor the priorities assigned to their tasks.

Recommendations

The use of the words "ensure", "warrant" and "guaranty" must be avoided in order to preserve PLI coverage. Practices should substitute these words with words that do not create a binding obligation that exceeds what is required at law. In instances where these words are incorporated into the contract there may be no coverage for insurance claims.

In many cases, the word "ensure" can be replaced by "use reasonable efforts", "will assist in", "confirm", "will endeavour to", or "require". In other cases, these words can be eliminated by rewording the requirement using active rather than passive voice. For example, replace "Ensure the meeting minutes are recorded" with "Record the meeting minutes". Often rewording in active voice helps clarify if the action is being required of the appropriate party.

Professionals (architects, doctors, lawyers, etc.) do not ensure their services but perform them to meet or exceed the standard of care of their profession.

2.4. Client's Right to Set Off

Established law does afford a client the right to set off funds. However, where an architect has given the client the right to withhold fees through such a contract provision, the architect and client have essentially agreed to a settlement for what might have otherwise qualified as an insurance claim. There is no professional liability insurance coverage for defence or damages in this case as the settlement has already been reached through contract at the sole discretion of the client, and without any due process or opportunity for the insurance company to defend the claim.

Examples

Example Clause 1:

> *The Client may withhold any further payment of outstanding fees and expenses then due the Architect until such time as the issue is resolved by one of the means set out herein, at which time any outstanding fees and expenses shall be paid as provided in GC11.*

Implications:

> The client asserts the right at its sole discretion and without due process to suspend further payment to the architect for however long it takes to resolve the issue. The result may be that the practice has no or only limited liability. It may take several years to reach this conclusion, during which the practice is out- of-pocket. This is often accompanied by clauses that remove any right of the architect to suspend or terminate services. Be sure to check what interest, if any, will be paid on the monies owed and for what period. Often the wording is such as to make it financially advantageous for the owner to delay payment as long as possible.

Example Clause 2:

> *Notwithstanding the foregoing, where the Project is abandoned due to receipt of bids in excess of the variance described in GC 5.5, no termination expenses are payable, subject to and without prejudice to the Client's right to invoke,* ***set off*** *or otherwise take proceedings to recover any loss or damage which it may have suffered as a result of the abandonment of the Project in those circumstances. The Client shall have no further or other liability to the Architect as a result of termination except as described in this GC10.5.*

Implications:

> The client asserts the right at its sole discretion to decide: that it has suffered some form of damage; that the architect is responsible; and what the amount of damage is. The architect's only recourse is potentially lengthy and expensive dispute resolution. Agreeing to a right of set off may be considered an admission of guilt/settlement resulting in the potential exclusion of insurance coverage. The clause circumvents any requirement for due process or to prove an allegation to the satisfaction of an independent third party

Recommendations

> With regard to this matter, OAA 600 in GC 11.4 states "No deductions shall be made by the *Client* from amounts payable to the Architect on account of penalty, liquidated damages, or other sums withheld from payments to contractors, or on account of the cost of changes in the *Work* other than those for which the *Architect* is proven to be legally responsible or has agreed to pay." This clause should be retained.

2.5. Contra Proferentem

Contra Proferentem is a Latin term that means “against the offeror”. It refers to a principle in contract law stating that if a clause in a contract appears to be ambiguous, it should be interpreted against the interests of the person who insisted the clause be included. In some cases, clients are insisting that architect’s contract out of this doctrine through language noted below. This is clearly unfair and heavy handed, particularly in situations where the client has indicated that there is no opportunity to negotiate any of the terms of the contract.

Examples

Example Clause 1:

> *In addition to the foregoing, the Architect shall provide all services noted in the Request for Proposals for consulting services for the Project issued to the Architect and the Architect’s proposal to offer services. In this regard,* ***any conflict or ambiguity in the services to be provided shall be resolved in favour of the Client and the doctrine of contra proferentem shall not apply.***

Example Clause 2:

> *The parties understand and agree that: (a) this Agreement has been freely negotiated by both parties; and* ***(b) in any controversy, dispute or contest over the meaning, interpretation, validity or enforceability of this Agreement or any of its terms or conditions, there will be no inference, presumption or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.***

Implications:

> No matter how poorly worded is the RFP or contract, or how inconsistent or contradictory the clauses are within the RFP or between the RFP and the contract terms and conditions, the architect has lost the right to the benefit of ambiguity.

2.6. Responsibility for Consultants

An architect is responsible at law for the work of any sub-consultants. Therefore, it is unnecessary to write this into the contract. However, architects should be wary of instances where a clause, intended to reiterate this responsibility, is added that includes additional requirements related to this responsibility that create insurability issues as noted below.

Examples

Example Clause 1:

> *The Architect must retain or utilize Consultants in respect of any portion or portions of the Architect’s service who or which are* ***selected by the Client****. Notwithstanding the foregoing, and as provided in Article 16.1 of the agreement, the Architect is fully responsible for the performance by its Consultants’ duties hereunder and* ***errors and omissions by any of its Consultants shall be deemed to be those of the Architect****.*

Implications:

> In this instance the architect can only hire consultants already selected by the client, but despite the consultants having their own professional liability insurance, the architect agrees that their errors or omissions are the architect’s errors or omissions.

Example Clause 2:

The Vendor shall be responsible for the following:…

***Manage**, coordinate **and be responsible for** any Owner appointed sub-consultants (i.e. commissioning);*

Implications:

The architect assumes a greater role and liability for consultants retained by the owner than for the consultants retained directly. Architects coordinate consultant services. Managing the consultants involves a degree of control that architects do not have. Architects do not have a contractual relationship with consultants hired by others. To agree to be responsible for them is an assumption of liability beyond what is the architect's at law and may be uninsurable.

Recommendations

Require any sub-consultants to carry an appropriate level of insurance coverage. For the major engineering disciplines, the coverage should meet; if not exceed, the architect's coverage. Note that defence costs paid by Pro-Demnity do not reduce the amount available to settle a claim. For some other insurance providers, money spent on defence costs is paid for out of the claims limit, which reduces the amount available to settle the claim.

Require any sub-consultants to maintain their insurance coverage for the same duration as required of the architect.

Require the client to require similar insurance coverage and duration of their consultants. Refer to OAA 600 GC 4.4.

The architect's role should only include coordination of consultants retained directly or by the client.

The party who retains a consultant is responsible for them and their services. Do not agree to perform services such as "managing" or "supervising" the work of others.

2.7. Specialist consultants

Specialist consultants include land surveyors, and geo-technical or hazardous materials specialist consultants. Typically, they provide information relating to the client's/owner's facility or property. The information they provide should be available to all potential consultants at the start of the procurement process. The existing condition of the site and facility makes a difference to the scope and cost of the consultants' services. There is ample time for the client to investigate such issues before an RFP is issued.

Examples

Example Clause 1:

Amend OAA 600 GC 4.3 by deleting everything prior to ":" and replacing with the following:

*The Client shall provide information, surveys, reports and services as set out below, **where available and up-to-date**, the accuracy and completeness of which the Architect shall be entitled to rely upon, **unless the Client stipulates otherwise at the time** such information, surveys, reports or services are provided to the Architect. The balance of the information, surveys, reports and services shall be provided by the Architect:*

Implications:

This transfers risk for the accuracy and reliability of information relating to what the client/owner owns from client/owner to the architect instead. The scope of work cannot be determined until the client determines if the information is available and up-to-date which will not be until after the contract is signed. Even if the information is available and up-to-date, a simple stipulation by the client means the architect cannot rely on it. If the architect does rely on it, they may end up liable for damage caused by any errors or inaccuracies in the information and any changes required in the construction documents.

Example Clause 2:

*The Prime Consultant will be required to carry, but not limited, to the following sub consultants in the proposal fees: Electrical engineering, Mechanical engineering, Civil engineering, Life safety/fire code, Structural engineering, **Site surveying**, Quantity surveyor/cost control, Interior design, Audio/Visual, Arrange and coordinate the independent inspection and testing, including soil or soil specialist testing.*

Implications:

There is an inappropriate transfer of risk from the client to the architect. If the information provided by the specialist consultants (land surveyor, geotechnical consultant, hazardous materials consultant) is inaccurate or incomplete, it may result in the architect not developing a proper solution, and the architect may have to redesign at no cost to the client and may have to indemnify the client for costs or damages.

Recommendations

Refer to Practice Tip PT.30 “Retention of Specialist Consultants” in order to address this requirement in the most appropriate way. The architect should not accept responsibility for the accuracy or completeness of any services provided by the client’s specialist consultants. Any RFP response should be qualified if accurate or up-to-date information is not available. Any project delays related to obtaining such information should not be the architect’s responsibility.

2.8. Instruments of Service

The Instruments of Service are at a minimum the drawings and specifications issued to authorities having jurisdiction, used to put the project out for bid or negotiation or construction. Depending on the project, they may also include such other documents as instructions to bidders, change documents, reports and letters. As defined in OAA 600, Instruments of Service do not include the editable CAD or BIM files or other original editable documents.

The re-definition of Instruments of Service is often done in conjunction with clauses that require the architect to relinquish copyright and control of their use, and to provide editable (CAD or BIM) files without any indemnification of the architect.

Examples

Example Clause 1:

In the definition of “Instruments of Service”, delete the phrase “non-editable” and “or computer-aided design documents (e.g. CAD or BIM – editable files)”

Implications:

This, in concert with other clauses is used to allow the client to use all the drawings and documents including editable CAD or BIM files for whatever purpose they want, possibly leaving the architect liable in contract and in tort, and without providing any acknowledgement of risk or indemnification for claims by the client or any third parties.

Example Clause 2:

*All plans, drawings, submittals and other documents submitted to the City by the proponent **become and are the property of the City, and the City may, without restriction, make use of such documents and underlying concepts as it sees fit**. The proponent shall not be liable for any damage that may result from any use of said documents for purposes other than those described in this proposal.*

Implications:

If agreed to, the architect gives up ownership of anything submitted to the City for any purpose. This includes any office standard details and specifications. Technically, the architect could not use them again without first obtaining permission from the City.

Recommendations

The *Copyright Act* is clear that the architect has copyright in the Instruments of Service. The architect may grant the client an appropriate limited license rather than assigning copyright or transferring ownership. In doing so, it is prudent for the architect to require being indemnified and held harmless.

Where a client has any right of future use of the instruments of service with or without a copyright transfer, a release, and indemnity for future use is reasonable and appropriate. The architect should not be subject to defending any claim resulting from others using the instruments of service for other purposes than originally intended. This applies whether or not the original intent was for a single building, for facility management or for repeat projects to the same design.

Have the client and any consultants sign an electronic document transfer agreement such as those recommended in CHOP chapter 2.3.7 or in RAIC Practice Builder 19, “The Exchange & Transfer of Electronic Documents”.

2.9. Arbitration

The arbitrator of a client/contractor dispute may make a finding based on the evidence presented that the architect is at fault and therefore liable. Unless the architect is a party to the arbitration, there is be no opportunity to question the evidence or to provide a defence. The arbitrator’s findings may later be used against the architect with Pro-Demnity or another insurer having had no opportunity to present a defence or to have other relevant consultants involved in the process.

Examples

Example Clause 1:

Delete OAA 600 GC 4.5 *and replace with the following:*

In no event shall any decision made, approval given or review conducted by the Client limit, relieve, reduce or release the Architect and its Consultants from any and all of their obligations, duties or liabilities under this Contract.

Implications:

By deleting the provisions in OAA 600 and replacing them with an unrelated topic, this clause subtly removes the right of architects to choose to be part of any arbitration of dispute between the client and contractor.

Example Clause 2:

If [the client] has entered into contracts with any other parties which provide for a submission to arbitration in the event of a dispute and should the dispute involve the consultant in some manner, [the client] shall be entitled by written notice delivered to the consultant identifying the dispute and have the matter and the consultant’s involvement determined in the same arbitration and the consultant by executing this Agreement shall ***be deemed to have consented to be a party to and by bound by such proceeding as though it were a signatory to a written submission to Arbitration****.*

Implications:

The architect by agreeing to such a clause gives up any choice as to whether they participate in the arbitration or not, and as to the manner of that participation. This may impact the ability of an insurer to mount a defence, to settle without arbitration or to pursue a different dispute resolution process, and may result in exclusion from coverage. Further, by consenting to be a party to such proceeding, the architect may find that they have agreed to pay an equal portion of the cost of the arbitration, regardless of the degree of their involvement in the dispute being arbitrated.

Recommendations

It is as important to review what is being deleted as it is to review what is being added or what it is being replaced with.

One recommended approach is to add a supplementary condition to the construction contract stipulating that when an architect is not involved in an arbitration, the parties to the construction contract agree that neither can use the result of the arbitration in support of any subsequent proceedings against the architect.

Avoid agreeing in advance to anything where the potential liability, scope, impact, or costs are undefined or ill-defined or which limit the architect's options before the circumstances are known.

2.10. Construction Liens

Architects will be familiar with liens arising because money due and payable through a certificate for payment did not find its' way to a subcontractor or supplier. Architects may be less familiar with liens arising because funds did not flow to sub-consultants or suppliers. RFPs often contain clauses requiring contractors to vacate or discharge liens. This requirement is now being imposed on architects.

Examples

Example Clause 1:

.1 In the event that a construction lien is preserved against the Project by anyone claiming through the Architect, the Architect shall, at its own expense, forthwith take whatever steps may be necessary to vacate or discharge the lien, as the case may be, including the posting of security into court. In addition, the Architect shall take all further steps necessary to protect the interests of the Client, including, but not limited to, providing a defence to the Client in any lien proceedings. Should the Architect fail to do so, the Client may take any measures the Client deems necessary to vacate or discharge the lien, defend the lien proceeding and deduct all costs of doing so from fees and expenses owing to the Architect.

Implications:

If anyone claiming through the architect preserves a lien because they have not been paid (whether or not the architect has properly paid), the architect must pay out of pocket to have the lien vacated or discharged. Legal fees to defend a client accumulate quickly. Professional liability insurance does not pay the defence costs of a third party, so any such legal fees that you agree to will come out of pocket and may quickly exceed the architectural services fee for a project.

In addition, there is no compensation from the client for dealing with false or vexatious liens. The final phrase is another instance of the right of set off.

Example Clause 2:

.2 The obligations of the Architect pursuant to this GC shall not apply to a construction lien arising ***solely because the Client failed to make timely payment on proper, undisputed invoices*** *rendered to the Client by the Architect or to a construction lien arising because the Client has given instructions to the Architect's Consultants to perform extra work or services without the privity of the Architect.*

Implications:

If the Client is anything less than 100 per cent responsible, the architect is entirely responsible for the requirements of OAA 600 GC14 paragraph .1. Even if the client is 100 per cent responsible, if the reason was anything other than failure to make timely payment, the architect is entirely responsible for the requirements of paragraph .1. This is unfair and disproportionately shifts the rise to the architect.

2.11. Confidentiality

Revealing confidential information without the client's permission is a contravention of *Regulation 27* section 42.44 and is considered professional misconduct. Such confidentiality provisions are often used in conjunction with clauses that define any information provided in any manner as confidential information.

Examples

Example Clause 1:

> *.3 The Architect shall not, without the prior written consent of the Client, use, exploit or divulge or allow access to the Confidential Information to* ***any third party*** *(except to employees of the Architect or Consultants who require such use or disclosure to fulfil the obligations of the Architect under this Contract).*

Implications:

> This clause is overly restrictive. It would restrict the release of information to prospective consultants, authorities having jurisdiction, insurance carriers and regulators.

Example Clause 2:

> *The Consultant shall return forthwith and without demand all Confidential Information of the client as may be in documentary form or recorded electronically or otherwise upon the termination of its Services.*

Example Clause 3:

> *All correspondence, documentation, and information of any kind provided to any Proponent in connection with or arising out of this RFP or the acceptance of any Proposal: …*
>
> *(d) must be returned upon request by the client and/or provide the client with appropriate proof of destruction.*

Implications:

> Agreeing to this would put the practice in contravention of *Regulation 27* section 42 9 due to a violation of section 47 (1)(b)

Recommendations

> Architects should amend such clauses to permit the architect to divulge to the architect's insurers, lawyers, to authorities having jurisdiction and the OAA any information these parties require without having to get the client's permission each time for each document, and to retain in compliance with *Regulation 27* a copy of all information received.

2.12. Conflicts of Interest

Conflicts of interest are defined in *Regulation 27* section 43. Some can be resolved by declaration, others cannot. RFPs and contracts may expand on what is considered a conflict of interest or may create conflicts.

Examples

Example Clause 1:

> *.1 During the term of this Contract, the Architect* ***shall at all times act in the best interests of the Client****, and, in the event of a potential conflict between the Architect's obligations under this Contact and any of the Architect's other obligations or interests, the Architect shall immediately notify the Client of the nature of such potential conflict and shall not proceed to perform any further or additional services unless and until the Client consents to same.*

Implications:

> Architect's have a primary responsibility to public safety and to design in compliance with the building code and other applicable law. The best interests of the client may at times appear to be or actually be in conflict with the architect's primary regulatory responsibility. To put the client's interests ahead of public safety, the building code or any applicable law would be professional misconduct.
>
> Further, putting the interests of the client ahead of those of the contractor would be in violation of *Regulation 27* 42.46 and of CCDC 2 GC 2.2.9 "In making such interpretations and findings the Consultant will not show partiality to either the Owner or the Contractor", and of similar clauses in other contracts.

Example Clause 2:

> *Any Proposal is subject to disqualification if, in the client's sole discretion, the current or past corporate or other interests of any Person named in the Proposal* ***might, in the client's sole opinion****, give rise to* ***an actual, potential or perceived conflict of interest*** *in connection with the Work…"*

Implications:

> The client reserves the right regardless of whether there is a conflict or not to act as judge, jury and executioner, in making the decision with no recourse to due process. The client is thus permitted to act unreasonably to the detriment of the architect.

Example Clause 3:

> *.2 The Architect acknowledges that, in the event that there is a breach or a threatened breach of any of the provisions of this GC16,* ***irreparable harm*** *may be caused to the Client and that the injury to the Client may be difficult to calculate and inadequately compensable in damages. As a result, the Architect agrees that the Client shall be entitled to any available legal or* ***equitable remedy****, including, without limitation, injunctive relief, and that no such remedy or claim therefor shall disentitle the Client from claiming any other legal or equitable remedy, including, without limitation, monetary damages.*

Implications:

> It is as difficult to understand the intent of this paragraph as it is to understand how a threatened breach of conflict of interest could result in irreparable harm. The key appears to be in getting the architect to agree to the remedies to which the client is entitled. To the extent that any such agreement exceeds what the architect is liable for at law, such agreement results in uninsurable liability that may expose the architect to both loss of coverage and charges of professional misconduct

2.13. Hierarchy of Documents

Architects are familiar with the hierarchy of documents in a construction contract. The same concept applies to the documents in a consulting contract.

Examples

Example Clause 1:

> *The provisions of this **Request for Proposal document shall take precedence** over the more general provisions of the OAA Contract.*

Implications:

> Depending on which clauses “more general provisions” is interpreted to apply to, those provisions of the RFP govern and are unlikely to be coordinated with the rest of the contract.
>
> Given that RFPs are typically less precise than contracts or supplemental conditions, including the RFP in the contract may result in significant unexpected changes.
>
> The other result is that all the provisions relating to the preparation and submission of a proposal (which are now irrelevant) become part of the contract.

Example Clause 2:

> *In the event of any conflict between the Exhibits, the provisions of these documents will prevail in the following order of precedence:*
>
> *i. Any Change Order issued pursuant to this Purchase Order*
>
> *ii. Exhibit “A” – Purchase Order*
>
> *iii. Exhibit “B” – Purchase RFP (including any addenda)*
>
> *iv. Exhibit “C” – Proposal (including any clarifications)*

Implications:

> Be mindful of the hierarchy of documents especially when the RFP or bid documents are included in the contract. If the contract is silent, then the provisions of the RFP or bid documents are in effect.
>
> In the case above, nothing revised or proposed in the architect’s proposal has any effect unless all other documents are silent about the issue addressed. If the other documents have anything to say, they govern over the architect’s proposal.

Recommendations

> The recommendation is to speak with the issuing authority about how they are organizing their RFPs and to suggest that they be organized similar to architectural bid packages so that the instructions to bidders and the RFP itself do not have to be included in the contract.

2.14. Time is of the Essence

The use of the legal phrase “time is of the essence” has a very specific meaning and implications related to breach of contract and professional liability insurance coverage.

Examples

Example Clause in RFP:

Consultant agrees that time is of the essence

Example Clause in Contract:

Consultant agrees that time is of the essence in the performance of services. The Consultant agrees to prosecute the services with all due diligence and to complete the services within the time stated in the contract documents.

Implications:

Where “time is of the essence” has been agreed to, practices should be aware that the phrase applies to both parties to the contract, imposing strict time requirements on the client as well.

If agreed to, “time is of the essence” becomes a contractual obligation and if the architect fails to meet any of the time requirements, the practice can be liable for breach of contract even in the absence of any error, omission or negligence, and if not meeting the strict time requirements is caused by others. This voluntary assumption of liability may lead to the loss of insurance coverage.

Recommendations

Replace “time is of the essence” with “time is critical”.

2.15. Additional Miscellaneous language/requirements that gives rise to concern

Where there is little understanding of the role of the architect or for the purpose of transferring additional responsibility and/or liability to the architect the architect’s various roles or tasks may be described differently.

Examples

Example Clause 1:

Use of the words: “inspect”, “supervise”, “recommend”, “obtain”, “secure”, “direct”, “approve”

Implications:

The use of these words may serve to increase the standard of care or otherwise expose the architect to inappropriate liability. Inspection is a higher standard than review. Architects do not supervise the construction work. With all the complexities of Contract A/Contract B, architects should not recommend to whom to award the contract. To do so implies a legal determination of substantial compliance. Such determination should be left to a lawyer.

Architects can “assist in” or “submit for”, but cannot “obtain” or “secure approvals”. The issuance of an approval is at the discretion of the authority having jurisdiction over which the architect has no control. Architects do not direct the work on site. There are many things which architects do not approve, but rather review, such as shop drawings. In general, independent testing and inspection companies inspect, contractors supervise, and architects review.

Example Clause 2:

Use of the words: "contractor", "proponent", "respondent", "prime consultant", "goods/services", "provider" and "vendor", "this trade" in relation to the architect

Implications:

The use of these terms may indicate that the RFP and the contract were not written specifically for the provision of architectural services, but are generic procurement documents. The inconsistent use of these terms indicates a poorly edited document cobbled together from a variety of sources. In either case, beware of provisions suitable for the purchase of construction services, or commodity items such as paper towels, but inappropriate for the provision of professional services. Beware of inconsistencies, incompatibilities and contradictions in the terms and conditions and near duplicate clauses in different parts of the documents.

These concerns are compounded where the RFP is included in its entirety by reference in the resulting contract. Where this happens, it becomes very difficult to determine which of several inconsistent clauses governs. If a hierarchy of documents is stated, it may not resolve conflicts within the individual documents.