Ontario Association of Architects

Important Information for Architects Regarding the Ontario Infrastructure and Lands Corporation's (Infrastructure Ontario) Consultant's Contract
July 24, 2017

Infrastructure Ontario (IO) has issued a new Standard Consultant Contract for IO projects awarded under their Real Estate portfolio. IO has previously used the Ontario Association of Architects' (OAA) Document 600, 2008 version as the basis for their contracts with a set of standard Supplementary Conditions to accompany it. Under the new VOR, IO will be using OAA 600 – 2013 as the basis for its consultant contract with a new set of accompanying standard Supplementary Conditions. This was issued with their recent Request for Proposals for Vendors of Record, dated June 19, 2017.

Members should note that while OAA representatives were involved in discussions around the creation of the Supplementary Conditions and their evolution, the Supplementary Conditions are an IO document **and are not endorsed by the OAA.** *(See Item 4 of 1st page of Supplementary Conditions.)* The following information is provided to OAA members in order that they may gain a better understanding of the intention of the various Supplementary Conditions and their potential impact on architectural practice with regard to liability as well as business issues.

OAA Council does view the new IO Consultant Contract as an improvement over the previous version, and the OAA is encouraged that there continues to be a commitment by IO to the consistent use of one standard OAA Consultant Contract as a base for the engagement of architects and licensed technologists, on IO projects. The OAA however continues to have considerable concern over the inclusion of certain clauses and/or amendments to OAA 600-2013. In an effort to assist members in understanding the implications of IO's SC's the OAA provides the following advice to members. In particular, the indemnification outlined in IO SC8.9 puts in question the availability of professional liability insurance and may raise professional conduct concerns. IO Changes of the following articles and clauses may also raise similar concerns: A10, GC1.1.5, GC4.5.2 & 4.5.3 deletion, GC7.9, GC8.9, GC15.3 & GC19.6.

Members should make their decision to pursue IO work based on a proper understanding of the standard contract as amended by the proposed set of Supplementary Conditions including the business and insurability risks as well as the risks of professional misconduct. Members are also encouraged to contact the OAA directly for more information should they require it. Questions with respect to any liability and insurance matters should continue to be directed to Pro-Demnity Insurance Company (ProDem).

The Ministry of the Attorney General has been drafting new legislation entitled the *Construction Act*, to replace the current *Construction Lien Act (CLA*). The Ministry is aiming for passage of this new legislation at the end of 2017. The procedure for the transition from CLA to the new legislation has not yet been made public and may have critical implications with regards to the signing of architects' contracts prior to enactment of this new legislation. The *Construction Act* contains some provisions, such as, prompt payment and construction dispute interim adjudication, which will be of definite benefit to *Consultants* with regard to fee collection. These provisions may not apply to any contract signed prior to the enactment of this new legislation such as the IO Vendor of Record contract which could be valid for as long as five years. OAA currently has no information as to how IO plans to address this issue.

The following is a partial list of the IO Supplementary Conditions (IO SCs) and their impact on the practice of architecture and *Client* responsibilities including where the practice should analyze the implications prior to signing the new IO Consultant Contract or agreeing to abide by its terms and conditions as part of a submission to be prequalified to be on a Vendor of Record (VOR) list. Architectural Practices should make themselves aware of the requirements of all IO SCs including those not commented on below.

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.

OAA COMMENTARY ON INFRASTRUCTURE ONTARIO SUPPLEMENTARY CONDITIONS to OAA 600 – 2013

Introductory Page to IO SCs

Item 4
It should be noted as stated above that these Supplementary Conditions are **not endorsed by the OAA.**

Item 5
See comments under Definition of Prime Consultant

Item 7
This item notes that:

"…all rights, benefits, or entitlements reserved to the "*Client*" under the terms of this *Contract* shall equally accrue to …IO, Her Majesty the Queen in Right of Ontario (HMTQ), and the Client."

Missing from the list of rights, benefits etc. are such words as "obligations", "undertakings", "liabilities" etc.

Inequity and imbalance in rights of contracting parties

The significance is that the expanded list of parties who are granted contractual rights against the architect do NOT carry equivalent obligations or liabilities in the architect's favour, an obvious imbalance that is potentially unfair or prejudicial to the architect.

Examples of how this arrangement might particularly operate to the architect's detriment can be drawn from some of the expanded contractual obligations to be found under specific Supplementary Conditions.

Refer to discussion of specific clauses

In such cases, the added list of potential claimants can each attempt to assert their claims directly against the architect. The Supplementary Conditions state they are jointly and severally enforceable by such parties.

This means that a situation may arise where the architect is exposed to multiple contract claims by the various parties but has no equivalent cause of action to assert its own claim against the same parties.

In effect, IO, HMTQ and the Project Management Service Providers (PMSP) all have individual contractual claims against the architect but avoid the individual contractual liabilities to the architect (except for the architect's direct contracting party … IO, a PMSP or another government agency).

ARTICLES OF AGREEMENT

Article A-10: Engagement of Consultants
The engagement of *Consultants* by the architect versus those engaged by the *Client* merits careful consideration. Engaging *Consultants* to provide services that may fall outside the "usual and customary" services of an architect (or other design professional), including those that are a *Client's* or property owner's responsibility, may introduce liability and insurance coverage issues. This concern is identified elsewhere in this review.

Architect may be required to assume liability in contract for role and services "not usual and customary" for an architect

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Article A-14: Automobile Travel Costs
Wording changed from allowing automobile travel to be charged as a reimbursable expense to requiring it to be included as part of the total fee. Change in wording results in the architect having to calculate an estimated number of site visits and meetings with the applicable mileage cost with no ability to adjust the costs as a result of conditions beyond the architect's control, e.g. site conditions and/or additional visits due to poor performance of the general contractor.

Business Decision

Article A-16: Invoices
Wording changed from payment on invoices being due upon receipt to 45 days from date of approval. The *Client* (project management service provider) has 10 days to approve the invoice and forward it for payment which means that it could be a total of 55 days until payment is due.

Business Decision

Article A-17: Interest
Interest payments are only due 30 days after payment of an invoice was due and at the Bank of Canada prime rate. This could result in no interest payable for 85 days from the receipt of the invoice and then at a rate which is lower than the interest rate which the architect pays to borrow from the bank

Business Decision

DEFINITIONS

Construction Cost
Wording changed to delete all applicable taxes (including VAT) and cost of avoidable error or omissions from Total *Construction Cost*. Change has no impact if the *Contract* is a fixed fee, but there is an

Business Decision

impact on a percentage fee contract based on the *Construction Cost*.

Prime Consultant
Definition added and replaces all references throughout the *Contract*. The change was made to facilitate the use of OAA 600 as the standard consultant agreement and will also be used for interior projects that may be done by an architect or an interior designer.

However, the use of the term *Prime Consultant* has other ramifications.

Record Drawings
The requirement is that record drawings be "editable CAD files prepared to current IO standards". Members should review and understand current IO standards for preparation of CAD files prior to commencing construction documents.

GENERAL CONDITIONS

GC 1 *Prime Consultant* Responsibilities

GC 1.1.5 Deletion of clause and substitution of new wording

> "…During this time, the *Prime Consultant* shall allow the *Client* and IO access to the *Project* records during normal business hours upon the giving of reasonable notice. The *Prime* …"

Members are cautioned not to allow access to records in situations where there is a claim against the architect or the PMSP and IO are in dispute without obtaining advice from Pro-Demnity or legal counsel. **Liability Issue**

GC 2 *Prime Consultant's* Scope of Basic Services

The entire article has been replaced with Schedule A. Refer to comments on Schedule 'A' listed after discussion of General Conditions.

GC3 Provision of *Additional Services*

3.1 Has been deleted and those services which were included in OAA 600 now form part of Schedule 'A' and are identified as being required and included in the fixed fee or identified as options and if required to be carried out on a time and material basis.

In addition the IO SCSC 3.1.1 to 3.1.7 prescribe the procedure for handling changes to the scope of services. Particular attention is drawn to 3.1.4.2 which states that *Additional Services* that "relate to coordination issues with or between *Consultants*" does not constitute a fee adjustment. **Business Decision**

However, if the coordination issue is the result of a *Client's Consultant* who did not perform in accordance with the architect's instructions, then in such a case, a fee adjustment should be requested and allowed.

3.2 Has been deleted in its entirety.

OAA 600 wording defines unforeseen *Additional Services* and its inclusion in OAA 600 is intended to provide clarity and avoid future debate with the *Client* as to what constitutes an unforeseen circumstance.

Some of the situations defined in OAA 600 have been relocated to IO's Schedule A with an indication of the applicable fees. Architects should review Schedule A to identify these services and whether the indicated fee structure provides for time and material basis of calculation. **Business Decision**

3.3 This clause has been added and requires the architect to provide reasonable changes to its design which are commensurate with the size and complexity of the project. **Business Decision**

Further, this clause requires the architect to confirm and agree "that its fee for such services includes such reasonable changes or

addition to such drawings and specifications during the course of the design phase of the *Project*, and that such changes or additions shall not entitle the *Prime Consultant* to any additional compensation for fees for *Additional Services*." IO is the sole judge of what constitutes reasonable changes.

GC4 Client's Responsibilities

4.4.7 / 4.4.8 The deletion of these clauses removes a clarification as to two services which constitute *Additional Services.*

Deletion of 4.5.2 and 4.5.3

Clauses 4.5.1, 4.5.2 and 4.5.3 in OAA 600 had addressed the potential prejudice to an architect should the owner (its Client) and a contractor agree to the use of arbitration to finally settle any dispute that might arise respecting the construction contract. They are interconnected.

Prejudicial to the Architect

4.5.1 OAA 600 provides for the architect to be informed of the dispute to be settled by arbitration and of any allegations / issues in dispute that involve the architect.

4.5.2 OAA 600 provides that, upon receipt of the notice of the dispute and any issues involving the architect, the architect will have the option to participate as a party in the arbitration, (underlining for emphasis) and

4.5.3 OAA 600 provides protection to the architect respecting any subsequent claim should the provision of 4.5.1 and 4.5.2 not be met.

IO SCSCs delete 4.5.2 and 4.5.3. The result is that the architect is to be informed but is NOT given the option to participate as a party to the arbitration. The intended protection to the architect is removed.

Liability issue

The underlying problem is the assumption that arbitration is the preferable route to resolution of ALL construction related disputes rather than litigation. It is built into the current editions of CCDC construction contracts; however, arbitration is not a panacea and may have significant drawbacks compared to the ordinary litigation process.

Architect must not prejudice the insurer's right to manage the defence of any insurance claim.

Ideally, arbitration would be removed from any of the chain of contracts as a mandatory procedure. It is ill-advised to specify the process for resolution of a dispute before knowing the actual circumstances.

If IO requires an arbitration clause in its construction contract, the architect has no means of representing its own interest should IO proceed to arbitrate or settle a dispute with the contractor which excludes the architect.

This would negatively impact the architect should the arbitration award and decision be used against the architect by IO or the contractor in a subsequent action.

GC5 Budget, Estimates and Construction Costs

5.3 The deletion of the last sentence pertaining to detailed cost estimating services provided clarity as to what is an *Additional Service.* Architects should review IO's Schedule 'A' for required scope of services for *Estimates of Construction Costs.*

Business Decision

GC7 Copyright and Use of Documents

7.1 The deletion of OAA 600 clauses and replacement with the IO SCSCs grants IO a license to use the *Instruments of Service* for the purposes stated in 7.4. However this provision "shall not be affected by any termination of this *Contract*." This wording provides protection for IO should it terminate the *Contract* but is unreasonable and unfair should the architect terminate with cause, at which time the provision of all services should cease.

7.5 The addition of the words "except any amounts withheld pursuant to GC16 or amounts in dispute between parties" effectively eliminates any leverage respecting settlements of accounts at termination or in dispute that the architect might otherwise have flowing from its copyright of the *Instruments of Service.* Copyright has often proven an effective lever for assisting in the collection of fees.

Liability Issue

7.7 The addition of this IO SC stating in part that in the event designs on equipment certified in the design of the *Project* infringe on applicable patents, the architect shall resolve any such situation at no cost to IO, except where there has not been any infringement.

The IO SCSCs do not address recovering the costs involved in resolving the situation where there was no infringement. The responsibility for covering or collecting repayment of the legal costs from the losing party will fall on the architect. The same applies to the time spent and expenses of the architect.

Business Decision

In addition, if IO has directed the use of designs or equipment and situations related to patent infringement arise, IO should be responsible for the resolution of such infringement.

7.9 The addition of this clause confirms IO's right to use the architect's CAD files for the creation of base building drawings for future renovations, alterations and additions, which is already stated in IO SC 7.4. This clause lacks protection for the architect for changes that are made by IO or others which result in a claim by IO or any third party against the architect.

Business Decision

The Copyright Act, which is federal legislation, provides protection for the architect that no entity can make changes to the *Instruments of Service* without permission (limited license). If IO is requiring the right to use the CAD files then it should provide proper protection for the architect both in *Contract* and for third party claims by stating

Liability Issue

that IO is using the files at its own risk and indemnifying the architect against any claim arising out of IO's use.

GC8 Liability of the Prime Consultant

IO SC deleted 8.1 and replaced it with a new clause specifying the required professional liability coverage. Under 8.1.2 the claim limits applicable to each fee category is in some cases higher than the mandatory requirements of the *Architects Act* and Regulation thereunder.

Liability Issue

In addition, the specified amounts do not reflect the multiple aggregates in professional liability policies. These are maximum limits per claim, maximum limit for one project in the policy period (2 times the claim limit), and maximum aggregate for all claims in the policy period (4 times the claim limit).

All sub-consultants retained by the architect should be required to maintain professional liability insurance with limits and features that as a minimum mirror those applicable to the architect.

IO SC 8.9 states:

"The *Prime Consultant* shall indemnify and hold harmless *the Client, IO, Her Majesty the Queen in right of Ontario, and their respective agents, appointees, directors, officers and employees* from and against claims, demands, losses, expenses, costs, damages, actions, suits or proceedings including legal costs on a substantial indemnity basis that are suffered or incurred or that are attributable to the *Prime Consultant's* negligence, error, omission, breach of this Contract or failure to perform its obligations under this *Contract*, including without limitation, claims brought by third parties whether such claims arise from breach of contract, negligence or any other legal theory of recovery . Nothing in this GC 8.9 shall limit any claim that *IO*, Her Majesty the Queen in right of Ontario, or the *Client* may have under the insurance coverage to be provided under General Condition 8.1 - INSURANCE."

Liability Issue with most serious implications

Parties Entitled to Indemnity:
An initial consideration is the scope of the designated indemnitees, namely: *the Client, IO, Her Majesty the Queen in right of Ontario, and their respective agents, appointees, directors, officers and employees.* The architect is asked to indemnify not only its named client, under contract terms which identify rights and obligations of both parties, but also those connected with the C*lient* as funding agents, end users, or otherwise, who are not under contract with

the architect and provide no reciprocal obligations or mutual indemnities. A broad group is entitled to be indemnified, however the indemnities are unilateral rather than mutual.

Expanding the pool of potential claimants connected with the named client, as IO has done, unreasonably escalates the architect's risk of claims in contract.

Professional Liability Exposure:

The Clause includes claims attributable not only to the architect's negligence, errors and omissions but also to breaches of contract "or any other legal theory of recovery". The broad scope of the indemnity coupled with the enlarged group of eligible indemnitees translates into substantially escalated exposure and transference of risk.

It is notable that the architect does not have insurance coverage for breaches of contract which result from acts which are not as a result of errors or omissions. A prime example is a claim for delay (excluded from coverage under the Pro-Demnity Policy), where the *Client* alleges that a scheduled design milestone was not met or shop drawings were not reviewed expeditiously or RFI's not promptly responded to. In that instance, the architect may be called upon under the Clause to indemnify not only its *client* but also the other indemnitees as a result of claims for extras and delay attributed to the architect's breach of contract.

. At a minimum, there should be a cap on the amount of uninsured claims which may be commenced by the indemnitees, individually or collectively.

No Insurance Coverage for Indemnities:

The architect’s Professional Liability Insurance Policy excludes from coverage claims against the architect for warranties, guarantees or indemnities "…unless liability would already have existed at law in the absence thereof".

In a number of respects, the architect would only be partially covered, or not covered at all, for claims made by indemnitees under the Clause. As an illustration, liability of the architect would not have existed at law for payment of substantial indemnity costs of indemnitees but for the Clause; nor would it exist to reimburse non-contracting parties such as *IO or Her Majesty or their respective agents, appointees, directors, officers and employees*, for any indemnity claims beyond what could be established as a result of a formal claims/litigation process with the burden of proof squarely on the claimants.

Scope of Indemnity:

The purpose of an indemnity is for the indemnitor to secure the indemnitee against future loss or reimburse it for its loss. The scope of the indemnity is defined by the contractual language which creates it.

An indemnity clause, if broadly worded, may obligate an indemnitor/architect to pay defence costs of its indemnitee/client

without meaningful regard for the merits of the allegations or contributory negligence of other parties. A broadly worded indemnity clause can represent a substantial burden for the indemnitor/architect if allegations are made against the client which technically fall within the scope of the indemnity. The architect may find itself personally responsible for defending allegations asserted against its client based on thinly supported theories of liability.

Defence of Indemnitees:
Under the Indemnity Clause, in addition to defending the *client*, the architect may also be called upon to defend claims against *IO, Her Majesty the Queen in right of Ontario, and their respective agents, appointees, directors, officers and employees*, alleged to be attributable to the conduct of the architect. Whether or not the claims are meritorious, the indemnitees may theoretically call for a defence(s) from the architect under a broadly drafted form of indemnity. The architect's costs of defending the indemnitees would not be covered by its professional liability insurer as it would be excluded as a liability which would not have already existed at law.

Limits of Indemnity:
There appears to be no monetary cap under the Clause which limits the amount of compensation potentially payable by the architect to the client or the other named indemnitees. As the architect's insurance is limited or non-existent in regard to amount and scope of coverage, the Clause would leave the architect in a highly exposed position.

The IO Clause – Scope of Potential Claims:
The Clause includes claims brought by third parties whether such claims arise from breach of contract, negligence or any other legal theory of recovery. There may be other theories of recovery, for example, unjust enrichment, restitution, or declaratory relief. If a third party emerges with a novel theory of liability against non-contracting parties of the architect such as *IO, Her Majesty the Queen in right of Ontario, and/or their respective agents, appointees, directors, officers and employees*, the architect would be theoretically responsible for defending such parties against these claims pursuant to the Clause.

Exposure to Legal Costs of Indemnitees:
With respect to payment of legal costs, the Pro-Demnity Policy provides insurance coverage for "costs assessed" against the architect. "Costs assessed" means the claimant's legal costs as assessed by the Court at the end of a trial or as a result of a costs assessment process arising from a settlement. However, payment of substantial indemnity costs as provided for under the Indemnity Clause would generally exceed by a wide measure the amount of costs payable as a result of a costs assessment. The architect would likely not be covered under the Professional Liability Insurance Policy for the difference between substantial indemnity costs and "costs assessed".

Furthermore, the architect would have no coverage for any costs payable under the Indemnity Clause to the named indemnitees

other than *"the Client"* unless liability for such costs would already have existed at law in the absence of the indemnity.

Conclusion:
1. The architect's insurance coverage is unlikely to protect it from the nature or scope of claims which may be presented;

2. Entitlements of the various indemnitees under the Clause exceed the architect's insurance coverage;

3. Architects should evaluate whether they have the financial resources to meet the terms of the contract and respond to the additional risk and liability which exceeds that at law.
3. Members are reminded that the OAA, as the provincial regulator, requires its members to be responsible, diligent, and be able to meet their obligations in accordance with the standards of performance and practice as well as other professional requirements under the *Architects Act.*

Knowingly responding to an RFP, or entering into a contract without the insurance protection or personal financial capability to meet the contractual obligations could not only result in serious legal consequences, but also a finding of professional misconduct against the architect or architectural practice.

4. The issues regarding indemnification by the architect also relate to IO SC15.3.

The above commentary relative to the insurance provisions has been developed in consultation with Pro-Demnity Insurance Company. Architectural Practices should also consultant with ProDem on issues relative to insurance and liability concerns.

GC9 Suspension **Business Decision**

Deleted 9.1 and replaced with new paragraphs. Second paragraph states: "In such event …….., and in no event shall the *Prime Consultant* be entitled to be compensated for any indirect, special or consequential damages incurred."

The IO SCSCs removes the definition in OAA 9.7 which clarifies the meaning of "suspension expenses."

The third paragraph extends maximum time of suspension period from 60 days, as stated in OAA 10.4, to 180 days. **Business Decision**

The extended time period from 60 to 180 days raises many issues related to staffing, scheduling of work, etc. and has monetary implications.

The fourth paragraph defines acceptable *Additional Services* related to the resumption of services. However, it does not clearly state that time spent for staff to re-familiarize themselves with the *Project* and to get up to speed is an *Additional Service*. **Business Decision**

Deleted 9.2 and replaced with new clause stating:
"subject to any holdbacks and *Client's* right of set-off and / or deduction and any amounts in dispute between the parties, if any invoice submitted by *Prime Consultant* remains unpaid by the *Client* for ninety (90) days or more from the date the invoice was approved, then the *Prime Consultant* may give seven (7) days written notice to the *Client* that the *Consultant* will suspend services."

In addition to changing the time frame for unpaid invoices triggering the right to suspend, from 45 days from the date the invoice was submitted, to 90 days from the date of approval, IO SC GC 9.2 prevents the architect from suspending its services by reason of non-payment of a set off and / or deduction and of any amount in dispute. Accordingly, until the dispute resolution process has been concluded, non-payment of disputed invoices will not entitle the architect to suspend its services. This obviously removes a strong bargaining chip from the architect in any dispute, to the architect's significant detriment.

Amended 9.6
Adds the word "permitted" following the fifth word of the first sentence. In the second sentence of GC 9.6, delete the words "thirty days of the date that the invoice for suspension of services is submitted" and substitute with the words "forty-five calendar days following the approval of invoices."

IOSCsSC' extend time period for payment from 30 days to 55 days.

Business Decision

Delete GC 9.7 entirely
Deletion of this clause relates to the other amendments in GC 9 eliminating some legitimate costs incurred by the architect due to suspension.

Business Decision

GC 10 Terminations
Delete GC 10.2
The deletion of this clause is unfair in that along with other amendments it creates a one-sided contract which basically either eliminates the architect's right to suspend or terminate services, or creates a costly situation where the architect may incur costly services from its own legal counsel.

Business Decision

Delete GC 10.3 and replace with the following:
"The *Client* may terminate the provision of services by the *Prime Consultant* under this *Contract* at any time for any reason or no reason and without cause upon giving the *Prime Consultant* written notice to that effect. In such event, the *Prime Consultant* shall be entitled to be paid for all services performed to the date of termination and be compensated for all actual costs incurred arising from the termination, but in no event shall the *Prime Consultant* be entitled to be compensated for any loss of profit on unperformed portions of the *Work*, or indirect, special, or consequential damages."

In addition to eliminating the architect's entitlement to an amount of money for loss of profit due to termination by the Client without cause, the IO SC narrows the compensation for damages due to termination as stated previously. **Business Decision**

The implications related to the deletion of GC 10.4, GC 10.5, and GC 10.6 have been covered in the comments above. The new GC 10.4 states:

10.4 "Upon termination, the *Prime Consultant* shall, in addition to its other obligations under the *Contract* and at law:

"1. at the *Client's* request, provide the *Client* with a Report detailing (i) the current state of the provision of services by the *Prime Consultant* at the date of termination; and (ii) any other information requested by the *Client,* acting reasonably, pertaining to the provision of the services and performance of this *Contract;*

2. execute such documentation as may be required by the *Client* to give effect to the termination; and

3. comply with any other instructions provided by the *Client*, acting reasonably, including but not limited to instructions for facilitating the transfer of its obligations to another person or entity."

All of the services noted in the amendment are *Additional Services* and approval to carry out these services must be in accordance with IO SC GC 3 provision of *Additional Services*. The calculation of the *Additional Services* should include all of the time and other costs involved in providing these services, including obtaining the necessary approval from the *Client.* **Business Decision**

New GC 10.5 states:
10.5 "If the *Client* terminates the *Contract* pursuant to GC 10.3 the *Prime Consultant* shall be entitled to be paid the actual costs incurred by the *Prime Consultant* for the services requested and performed pursuant to GC 10.4, as part of the *Prime Consultant's* termination costs."

Actual costs with regard to time means the hourly rates quoted elsewhere in the *Contract,* as stated in GC 3.1.7.

New GC 10.6 states:
10.6 "Termination shall not relieve the *Prime Consultant* of its obligations arising under this *Contract* relating to the services performed or money paid. In addition to its other rights of holdback or set-off, the *Client* may hold back payment or set-off against any payments owed if the *Prime Consultant* fails to comply with its obligations on termination." **Business Decision**

Architects should follow all of the procedures to obtain the necessary approval of these post termination *Additional Services* prior to commencing work.

GC 11 Payments to the Prime Consultant

Delete the first sentence of GC 11.1 and replace with the following three sentences:

"The *Client* will have ten (10) calendar days after the receipt of an invoice to review and approve or reject that invoice. If an invoice or part thereof is rejected by the Client, acting reasonably, the *Client* will notify the *Prime Consultant* of the disputed amount of that invoice and, the nature of the dispute including the reason for rejection within the ten (10) calendar day period referred to above. Payment for all amounts that are not disputed shall be made in accordance with Article A11 of this *Contract."*

Business Decision

The IO SC in conjunction with the amendment to A16 of the Agreement portion of the *Contract* allows the *Client* 55 days to make payment. Besides the implications on the cash flow of the practice, the extended time frame for payment may impact on their ability to place a lien against the *Project*.

Delete GC 11.2 entirely and replace with the following:
"The *Client* shall pay *Prime Consultant* for all *Disbursements*, which are included in *Prime Consultant's* fees. *Prime Consultant* shall not be entitled to payment of *Disbursements* in addition to *Prime Consultant's* fees."

Business Decision

The architect should still be entitled to *Disbursements* for *Additional Services*, such as, suspension and termination services.

Revise GC 11.3, so that it now reads as follows:
Disbursements means the following actual expenditures, disbursements, charges and fees supported by receipts or invoices, where required by the *Client,* incurred by the *Prime Consultant* and the *Consultants* of the *Prime Consultant* in the interest of the *Project* including but not limited to those relating to:

Business Decision

.5 fees, levies, duties or taxes for permits, licences or approvals from *authorities* having jurisdiction, all costs associated with security screening;

.7 all incidental expenses, staffing costs, deliverables, tools and equipment related to the requirements of authorities having jurisdiction.

The IO SC amendment to A16 states that the *Contract* fee includes all *Disbursements,* while Schedule A under item 7.1 acknowledges that the *Client* will pay for the building permit. There may be other disbursements which arise during the *project* and which cannot be foreseen and / or calculated at the time of establishing a fixed fee.

Architects need to verify the costs associated with security screening and include this cost and the time involved in the fee calculation.

Delete GC 11.4 in its entirety and add GC 11.13.

IO SC GC 11.4 deletes the prohibition on *Client* deductions from monies otherwise owing to the architect and replaces it with GC 11.13. The provision provides that:

.1 the *Client* may withhold payment to the *Prime Consultant* on five (5) days' notice, on the understanding that such withholding is not deemed to be an admission of liability on the part of the *Prime Consultant*;

.2 the *Client* is entitled to withhold payment to protect the interest of the *Client* in certain circumstances;

.3 if payment is withheld, the *Client* may set off against any amount otherwise payable to the *Prime Consultant* amounts withheld towards the cost of remedial work, damages or indemnification;

.4 such right of set off shall only be exercised subject to mutual agreement of the parties or a determination against the *Prime Consultant* pursuant to the dispute resolution provisions of the IO SCSCs (GC 19).

The proposed IO provisions draw a distinction between withholding payment and setting off a withheld amount. From the architect's point of view, this is really a distinction without a difference as in either case, it does not get paid the money being withheld by the *Client* pending agreement with the *Client* or a determination under the dispute resolution provisions under IO SCSCs GC 19, which could be a lengthy process, involving legal fees, inhibiting cash flow and incurring interest fees from the bank. **Business Decision**

New GC 11.12 added:

This clause relates to the *Client* statutory holdback on the architect's fees and the conditions for its release.

11.12.6 and .7 states:

.6 Prior to the expiration of the lien period stipulated under the *Construction Lien Act* (Ontario), the *Prime Consultant s*hall submit and invoice to the *Client* for the holdback amount retained by the *Client;* and

.7 The invoice submitted by the *Prime Consultant* for release of holdback under GC 11.12.6 above shall be paid by the *Client* no later than fifteen (15) days after the expiration of the lien period stipulated under the *Construction Lien Act* (Ontario)."

If the architect submits the invoice for release of holdback once the expiry date of the holdback period is established, then the monies **Business Decision**

are due one day later. Again, the delay in payment affects the practice's cash flow.

GC 12 MISCELLANEOUS CONDITIONS

Delete GC 12.2 entirely and substitute the following:
12.2 "For large building *Projects* only, the *Prime Consultant* may request the *Client's* permission, which permission may be granted or denied in the *Client's* sole discretion, to sign the building that is erected by inscription, or otherwise, on a permanent, suitable and reasonably visible part of the building."

If the *Client* in its sole discretion denies the right to sign the building, the architect may be placed in a position where the building permit application drawings are not in compliance with the City of Toronto City Council Item 2011.P4.6.4 pertaining to new buildings 1,000 square metres or greater, in gross floor area, which requires recognition of the architect by inscription.

Liability Issue

GC 14 RECORD DRAWINGS

New GC 14 states:
".1 The *Prime Consultant* shall prepare *Record Drawings* and provide a writable copy of the digital files in addition to a PDF copy of the digital files to the *Client* within twenty (20) calendar days of the date it receives the completed as-built drawings prepared by the contractor.

.2 Unless otherwise agreed by the *Client* in writing, until the completed *Record Drawings* are submitted to it, the *Client* will retain an amount from payments to the *Prime Consultant* as follows:

.1 for *Projects* where the professional fees are less than $25,000 the amount retained will be $2,500;

.2 for *Projects* where the professional fees are greater than $25,000 but less than $100,000 the amount retained will be $2,500, or 5% of the fee, whichever is greater; and

.3 For *Projects* where the professional fees are greater than $100,000, the amount retained will be $5,000 or 4% of the fee, whichever is greater.

.3 Unless otherwise agreed in writing, should the *Prime Consultant* fail to produce completed *Record Drawings* within forty-five (45) calendar days of the date it receives the completed as-built drawings prepared by the contractor, the amount retained will be forfeited to the *Client*, acting reasonably, for the damages deemed to have been incurred by the *Client*, and not as a penalty."

Business Decision

The architect should take note of the importance of this new GC. The *Client* is placing a dollar value, which may or may not be fair

depending on the size and complexity *Project,* in order to obtain the *Record Drawings* in a reasonable time and which impacts the cash flow.

In addition, the percentages associated may have a critical impact on determining substantial performance or deemed completion of the architect's *contract.*

GC 15 CONSTRUCTION LIENS

New GC 15 states in part:

".1 In the event that a construction lien is preserved against or registered against the title of the *Project* by anyone claiming through the *Prime Consultant*, the *Prime Consultant* shall, at its own expense, forthwith take whatever steps may be necessary to vacate and discharge the lien, including the posting of security into court. In addition, the *Prime Consultant* 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 *Prime Consultant* fail to do so, the *Client* may take any measures the *Client* deems necessary to vacate and discharge the lien and defend the lien proceeding. The *Client* may deduct all costs of doing so from fees and expenses properly owing to the *Prime Consultant* under this *Contract*. The *Prime Consultant* acknowledges that the *Client* shall be entitled to withhold in accordance with the *Construction Lien Act*, from amounts due and payable to *Prime Consultant*, all amounts specified in any notice of lien while any such construction lien remains preserved, registered or perfected against the *Project*.

Business Decision

.2 The obligations of the *Prime Consultant* pursuant to this GC 15 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 *Prime Consultant*."

Business Decision

This SC does not address the situation where the lien is not valid for any number of reasons and the architect has complied with 15.1 above. There is no mechanism or acknowledgement that the architect has the right to recover costs from the *Client.* It is noted however that the architect could be awarded costs by the courts if the lien was wrongfully advanced by the other party. It also makes the architect responsible even if 99% of the cause of the lien arising is the client's failure to pay.

GC 15.3 pertaining to indemnification by the architect should be referred to Pro-Demnity for comment.

Liability Issue

GC16 CONFLICT OF INTEREST

New GC 16 states in part

".1 The *Prime Consultant*, all of the *Consultants*, and any of their respective advisors, partners, directors, officers, employees, agents, and volunteers shall not engage in any activity or provide any services where such activity or the provision of such services

Business Decision

creates a conflict of interest (actually or potentially, in the sole opinion of the *Client*) with the provision of the professional services pursuant to this *Contract*. The *Prime Consultant* acknowledges and agrees that a conflict of interest includes the use of confidential information where the *Client* has not specifically authorized such use.

.3 The *Prime Consultant* covenants and agrees that it will not knowingly hire or retain the services of any employee or pervious employee of Ontario Realty Corporation, Ontario Infrastructure Projects Corporation, *IO* or the Ontario Public Service where to do so constitutes a breach by such employee or previous employee of the *Public Service of Ontario Act* and its Regulations as they may be amended from time to time.

.4 A breach of this Article by the *Prime Consultant*, any of the *Consultants,* or any of their respective advisors, partners, directors, officers, employees, agents, and volunteers shall entitle the *Client* to terminate this *Contract*, in addition to any other rights and remedies that the *Client* has in this *Contract*, in law, or in equity."

GC 16.1 allows the *Client* to be the sole judge of what is an actual or potential conflict of interest which provides the *Client* with rights stated in GC 16.4.

Liability Issue

GC 16.3 places the onus unfairly on the architect to determine if a breach by an employee or previous employee of the *Public Service of Ontario Act* may have occurred. The onus to interpret the *Public Service of Ontario Act* should lie with the Government of Ontario and / or its former employee. If such a breach is subsequently determined it may be grounds for dismissal of the architect's employee, but not grounds for termination of the architect's *contract.*

IO Supplementary Condition GC 19

IO Supplementary Condition GC 19 is a new dispute resolution provision. GC provisions 19.1 to .5 are not unreasonable as they contemplate a dispute resolution process which can ultimately end in a determination by a court, if the parties so wish.

GC 19.6, however, includes a provision which is problematic. Under it, the architect agrees to participate as a party in any arbitration between the *Client* and *Contractor* and be bound by the result of such arbitration. This provision would force the architect to participate in arbitration even if it did not wish to do so. This mandatory requirement could prevent an architect from ensuring that all necessary parties (for example, its sub-consultant or others not bound by a similar provision), be parties to the arbitration to the prejudice of the architect.

Liability Issue

The SC also provides that the cost of arbitration be shared by all parties. This may result in the architect paying for an arbitration it didn't want to be part of however the arbitrator has the right to award costs to the architect

The architect could reduce this potential prejudice by ensuring that its agreements with its sub-consultants incorporate the same mandatory arbitration requirements.

This IO SC in conjunction with others related to proposed withholding / set off provisions alter OAA Document 600 language to the architect's detriment and contractually allow a delay in payment to the architect. On many projects to obtain fees owing, regardless of the contractual terms, the architect must still resort to the courts, an equally lengthy process. The proposed clauses will, however, limit the architect's right to suspend services for non-payment of disputed fees, a significant detriment to the position of the architect.

SCHEDULE A
PRIME CONSULTANT SCOPE OF SERVICES

Schedule A is prepared in two separate versions:

1. PMSP (Project Management Service Providers) retained by IO. IO has also inserted a *Project Management Service Provider* (PMSP) entity between itself and the design consultants and between itself and the contractor.

2. Direct Delivery (no PMSP).

Architects should review the Schedule carefully in order to determine the scope of services required depending on type of delivery method and the means of payment (fixed fee or optional service with fees to be determined if and when required).

The IO format differs from OAA 600-2013 GC 2.1, 3.1 and 3.2 by including every service under one schedule. OAA 600 utilizes two schedules "basic" and "additional" services, in order to form a common base on which to establish published percentage fees. The identification of basic services provides greater clarity to clients and architects and provides important consistency with the percentages contained in the RAIC's A Guide to Determining Appropriate Fees for the Services of an Architect which are also based on "basic" services.

The separation of "basic" and "additional" is also beneficial in calculating a fixed fee as it highlights certain services which are added or deleted according to the *Client's* needs. The IO Schedule identifies additional phases of services to the OAA standard five phases of basic services. The result is numerous overlaps in the Schedule, and some contradictions with the IO SC and OAA contract.

Schedule A includes the requirement for architects to complete certain specified forms, which have not been made available to the OAA despite numerous requests. OAA was given the opportunity to review the IO Substantial Performance / Completion Form which was amended to address liability concerns. Members are cautioned about signing any additional forms which may contain wording which increases the architect's liability and / or is the responsibility of the PMSP.

Architects are also cautioned that the IO wording of specific services may be changed from that of OAA-600, or be a totally new service.

For example, some specific concerns relate to the following services:

3.3 If site plan approval is required, the architect should not be the applicant. In addition, if this service is included in a fixed fee contract, the fixed fee should only include the first complete submission. All additional submissions required by the planning approval authorities to satisfy undefined criteria should be on a time and material basis.

4.9 / 4.15 / 6.6 /6.9
Attending meetings as may be reasonably required by the *Client* leaves the definition of "reasonable" to the *Client's* opinion and possible dispute.

7.1 Prepare and submit all applicable building permit applications. Architect should prepare one building permit application with Client's signature as applicant. Additional permits, such as, mechanical and electrical are the contractor's responsibility.

8.4 Contract comparative review and report results of bid call. The recommendation for award of the contract should be made by the *Client's* legal counsel. Procedures related to the award of contracts is currently a legal quagmire and architects should not be providing legal advice.

9.13 Value of Work (VoW) verification is a mandatory service on which the OAA is unable to comment as IO has provided no information on how this service varies from payment certification.

9.18 / 9.19 The timeliness of the architect's response to not cause a schedule delay can be impacted by factors beyond the control of the architect. The architect should not be responsible for delays caused by others.