DEALING WITH SUBSTITUTIONS TO YOUR DESIGN

Recent research into claims arising against architects has confirmed that many involve substitutions to the systems and designs provided by the architect or its consultants.

Although many substitutions factor in claims involving building envelope failures, substitutions to what the architect or engineer included in its design and specifications may factor in claims elsewhere in the building.

The following advisory and example of a letter to a client are intended to assist the architect to:

- meet its professional obligation to protect the public interest;
- comply with the Architects Act and Regulation thereto;

- protect the public and itself where a client disregards the architect's advice, or substitutes unqualified advice for the advice of the architect; and
- provide tools for the architect to consider for use when a substitution occurs.

The example of a letter to a client at the end of this advisory is a sample based on a specific set of circumstances. Other circumstances and decisions by the architect would require different wordings.

THE PROBLEM WITH SUBSTITUTIONS

It is not uncommon for an architect to find its design and specifications are being disregarded by a client, contractor or trade contractor during construction, and the impacts of substitutions for the architect's design and specifications regularly show up in claims against the architect when the substitution does not perform adequately.

One way or another, the architect will find itself facing allegations of negligence in the provision of its services related to the substitution, including:

- failure by the architect to provide a suitable design in the first place; and / or
- acceptance or approval of an unsuitable substitution by the architect; and / or
- failure of the architect to recognize that what was being constructed did not conform to the architect's design and specifications

Actions or failures to act by the architect may result in the architect being deemed to have accepted or approved of the substitution, thus converting the substitution into the architect's design, regardless of other considerations.

In addition, failure to advise your client of the consequences that may arise where the substitution was incorporated without professional input may constitute professional misconduct.

Regulation 27 under the Architects Act includes as a prescribed Standard of Practice Item 49.8:

Every member or holder shall present clearly to the member's or holder's employer or client the consequences that may be expected from any deviation in a design for which the member or holder is responsible in a case where the member's or holder's judgment was overruled by nontechnical authority.

"Nontechnical authority" may be anyone who is not an architect holding a Certificate of Practice or professional engineer holding a Certificate of Authorization; including a client, contractor, trade contractor, product sales representative etc."

The following suggestions reflect "lessons learned" by Ontario architects. They reflect "good practice" and adherence to the OAA Standards of Practice and will help protect you from claims arising from substitutions made without your involvement or agreement.

SOME IMPORTANT "DO S":

1. Remember that it is your professional obligation and recognized "good practice" to advise your clients about your concerns respecting any proposed changes to your design or substitutions for your design.

   It may be professional misconduct to fail to advise your clients of the consequences or your concerns related to the substitutions.

2. Insist upon an adequate scope of services and fees to carry out sufficient Field Review / General Review and contract administration services necessary to enable you to be on site enough to identify any substitutions or attempted substitutions to your design of an exterior wall system or other aspects of the construction before they occur.
3. Include a no-substitutions without the architect's express approval and oversight provision in your contract or terms of engagement with your clients. Be prepared to enforce it. Refer to OAA Document 800 – 2011, Clause 8. (3) or OAA Document 600-2013, Clause 8.7 for examples of possible wordings.
4. Understand how the design for an exterior wall assembly or other construction is intended to:

   • meet the design objectives;
   • perform adequately for the intended use;
   • comply with the Building Code requirements;
   • avoid water ingress or premature deterioration; and
   • be constructed to achieve these requirements.

   If uncertain, obtain additional expertise from another architect or professional engineer (building envelope specialist) to assist with your design.

5. Ensure that designs that you prepare for any exterior above-grade wall assemblies fully comply with the insurability requirements of the Non-Drained Exterior Wall Exclusion as amended.
6. Where a substitution is sought by your client, or proposed by a contractor, insist upon comprehensive re-design and documentation services to ensure the new exterior wall assembly as designed and constructed will comply with Building Code, performance and insurability requirements.
7. Warn your client that changes or substitutions may result in denial of insurance coverage for future losses.

8. Include a mock-up as a construction requirement, for both your design and for any proposed changes or substitutions.
9. Report any non-compliant or unacceptable substitutions to your design in your Field Review reports, including any reports directed to building officials.
10. Insist upon notification of municipal building officials, other authorities having jurisdiction or any designated review agency such as a Tarion Builder Bulletin 19R Field Review Consultant respecting any substitution from your design.
11. Insist upon submission of the design for the substitution to the municipal building officials and other authorities and receipt of formal approvals and amendments to the Building Permit before proceeding with the changes.

SOME IMPORTANT “DON’T S”:

1. Do NOT accept a commission where the client is unwilling to make a commitment to “no changes or substitutions” without your oversight and approval, or where you recognize that adherence to your design will not be the client’s priority.
2. Do NOT ignore, agree to, accept, or approve of any change or substitution to an exterior wall assembly that does not comply with the Non-Drained Exterior Wall Exclusion’s insurability requirements, regardless of who might promote or encourage the substitution.
3. Do NOT ignore, approve or accept any documentation, submittal, manufacturer’s literature etc., for a proposed change that does not include evidence of suitability for the use intended including:

    • compliance with performance requirements of the Building Code;
    • compliance with any CCMC assessment related to an approval under Part 9;
    • compliance with the applicable referenced standards in the Building Code;
    • compliance with the insurability requirements for water ingress coverage.

4. Do NOT ignore, accept or approve shop drawings or samples that do not reflect your design. Identify and return such submittals as unacceptable, not in compliance with your design.
5. Do NOT issue any certificates or documentation accepting or authorizing payment for a design or system that does not comply with your design and / or the insurability requirements for water ingress coverage. Qualify any certificates respecting substitutions that have been made to your design.
6. Do NOT issue any Field Review Reports / General Review Reports or other reports or submissions to the client, municipality or any other entity advising that a non-compliant

substitution or other failure to comply with your design is nevertheless in “general conformity” with your design. Instead, highlight the discrepancies from your design to avoid any inference that you have “adopted” the non-compliant design as your own.

Finally, recognize that an exterior wall design or construction that is not designed by an accredited professional (architect or engineer) and / or will not be insured for water ingress is not in the public interest, or your own. Be prepared to terminate your professional services on the project if your client does not support your position.

SUSPENDING OR TERMINATING YOUR SERVICES:

If the client does not accept your advice and refuses to abandon a substitution that you consider to be:

• non-compliant with the Building Code; or
• not in accord with your Duty of Care to subsequent buyers; or
• a threat to the health or safety of occupants or the public; or
• in your professional opinion, otherwise not in the public interest; it may be appropriate to consider suspension or termination of your services.

This is a serious undertaking that should not be considered without first consulting a lawyer.

One principle that may apply is failure to comply with the Building Code. Clause GC 9.3.2 in OAA Document 600-2013 provides that the architect may suspend its services “if the architect becomes aware of an action taken by the client which violates applicable building codes or regulations”.

Prior notice to the client of your intention to suspend or terminate your services is required.

Other forms of Client / Architect agreement may include similar provisions to those in OAA Document 600-2013. A lawyer can advise of other law that may apply if the form of contract does not include specific provisions respecting suspension or termination of services by the architect.

Comments that follow address a number of specific areas of concern with suggestions that can help you manage risk associated with changes and substitutions for your design.

CONDOMINIUMS: TARION BUILDER BULLETIN 19R

If the project is a condominium, it may be subject to Tarion (Ontario New Home Warranty) requirements.

You should remind a condominium project client that Tarion's Builder Bulletin 19R requires that any exterior wall assembly using Exterior Insulation and Finish Systems (EIFS), Window Wall or Insulated Concrete Forms (ICF) are to be designed and constructed in accordance with Pro-Demnity Insurance Company's water ingress insurability requirements. Any change or substitution that fails to meet the insurability requirements may have the client in breach of the New Home Warranty conditions, with significant financial consequences for the client.

The Field Review Consultant (FRC) retained to report on adherence to Builder Bulletin 19R should be made aware of any changes or substitutions to the design in order to assess compliance with the insurability provisions.

CONDOMINIUMS: SCHEDULE G

Architects retained on a condominium must be particularly wary of signing a Schedule G where a substitution to architect's design has been incorporated into the exterior cladding assemblies. Warn your client at the outset of your services that you will NOT sign a Schedule G where you have not designed the cladding that was used or constructed and / or have not been retained to carry out sufficient Field Review / General Review of the construction to attest to its adherence to your design, including compliance with the Non-Drained Exterior Wall Exclusion.

EXTERIOR INSULATION AND FINISH SYSTEMS…EIFS

Exterior Insulation and Finish Systems have been particularly prone to claims involving substitutions from what was designed and specified by the architect. Notwithstanding the availability of EIFS assemblies that are described as complying with the insurability requirements for water ingress, other EIFS systems remain available in the market that will not comply. Often these non-compliant systems have been substituted for systems designed and selected by the architect as a cost saving measure.

Too often architects have accepted the substitutions without taking the measures described above, meaning they have been considered to have adopted the non-compliant design as their own.

If you or your client is favouring the use of EIFS, consider having the project enrolled in the EIFS Quality Assurance Program Inc. (EQI). One important aspect of the EQI is restrictions on substitutions to the systems selected and specified by the architect. Information about the EQI is available from the EIFS Council of Canada website via the following link:

http://eifscouncil.org/about-eqi

PART 9: BUILDING CODE COMPLIANCE DOES NOT ASSURE WATER INGRESS COVERAGE

Some cladding assemblies that may be approved as code compliant for use on Part 9 Buildings will not meet the insurability requirements for water ingress coverage under the Non-Drained Exterior Wall Exclusion in your Pro-Demnity policy. One possible omission to be aware of in such assemblies is the required: "…provision for drying of the assembly", including "an air space no less than 10 mm deep behind the cladding with positive drainage to the exterior ".

Where a constructed assembly that does not include ALL the requirements for water ingress coverage, including the required space for drying and drainage, has been selected or accepted by an architect, there may be no insurance coverage for the architect for a water ingress claim.

For most projects outside Part 9, water ingress may be “prima facie” evidence that the design as constructed does NOT comply with the Building Code requirements for environmental separations in Part 5 of the Building Code. An error or omission resulting in water ingress would ordinarily be covered by professional liability insurance; however, there may be no water ingress coverage if the insurability requirements of the Non-Drained Exterior Wall Exclusion have not been met.

IMPORTANT TOOL FOR ARCHITECTS: A MOCK-UP OF THE CLADDING ASSEMBLY CONSTRUCTED AT THE SITE…

Some substitutions have been generated when a contractor has determined that the design provided by the architect for an exterior cladding or components for the assembly does not fit together appropriately in the field. The substitution from the architect’s design has been justified as necessary in order that the cladding may be constructed, and the architect may be faulted for a design that could not be built.

One tool available to every architect is to specify that a “mock-up” of the cladding assembly be constructed and approved at the site BEFORE any construction is commenced on the actual building. The mock-up should include key elements and interfaces including those at windows and other critical aspects of the design. It should be built by the trades who will be carrying out the work on the site and, once approved can serve as the standard against which the workmanship of the cladding assembly on the actual project will be assessed.

If there are constructability or other issues that are identified in this “trial run”, any proposed amendments to the design or substitutions can be addressed by the architect and contractor BEFORE construction has reached the point where it is too late to intervene to carry out corrections or start over.

Where a mock-up is specified, it is critical that the architect and related consultants be on hand to observe construction of the mock-up by the affected trades to confirm constructability of the design or assess what changes, if any, should be made to the design BEFORE construction commences.

The project schedule must identify construction of the mock-up as a key “milestone” ahead of commencement of work on the affected components on the building. Sufficient time must be allocated in the contractor’s schedule for the mock-up to be prepared and evaluated, and any required amendments to the design properly prepared and agreed to BEFORE work commences on the actual building.

SAMPLE LETTER TO A CLIENT

If you become aware of a change or substitution that you are not prepared to accept as “your design”, protect your position by sending a letter to your client setting out your position, complying with the Standard of Practice Item 49.8 that applies in the Regulation. Such a letter may prove pivotal to your defence in the event you are named in a lawsuit arising from a failure of the substituted system.

A substitution may be proposed or adopted by a client (or others) at any stage of the project. The specifics in such a letter will vary with every situation and your determination of what actions are required to meet your professional obligations and expectations. Such a letter should only be sent after receiving legal advice on the content.

The following sample is based on the architect’s discovering a substitution to its design (and the permit drawings) during an early construction review. The project is a condominium where the ultimate owners are not the architect’s client; however, the condominium buyers are those who are most likely to sue the architect respecting damages arising from a cladding or other failure.

The client has not accepted the architect’s warning that:

• the substitution is contrary to the CCMC assessment that was the basis for approval of the cladding system under Part 9 of the OBC; and

• claims for water ingress arising from the substitution will not be covered by the architect's professional liability insurance.

Dear Client,
At the site visit of …(date)… it was noted that the cladding being installed on the above referenced project is not in accordance with our design and specifications that are the basis for the approvals and building permit pertaining to the project. Specifically, the installation being carried out at the site has eliminated the required 10 mm space for drainage and drying of the assembly included in our design.

Upon investigation it was determined that you had (approved of / directed etc.) the contractor to proceed with the substitution (…made without our knowledge, without our input, contrary to our advice etc.)

We must advise you that we will not assume any responsibility or liability for the consequences of the substitution that was made without our professional involvement.

It is a breach of the Architects Act and Regulation thereto to fail to advise you of the consequences that may be expected from any deviation to our design where our judgment has been overruled by a nontechnical authority (e.g. a client, contractor, trade) as appears to be the case in this instance.

Accordingly, please be aware that the cladding product selected is known to be very sensitive to moisture. The manufacturer's product information as well as the CCMC assessment referenced in Part 9 of the OBC warn of the risk of premature failure due to prolonged exposure to moisture and recommend specific provision for drainage and drying as per our design. Elimination of the 10mm space for drainage and drying of the wall assembly may result in premature failure of the cladding material and / or give rise to water ingress should the material fail. The substitution appears contrary to the basis for the Part 9 approval and not compliant with the OBC.

In addition, water ingress coverage under our professional liability insurance is dependent upon the design including the 10 mm space for drainage and drying of the wall assembly. Elimination of *the 10 mm space and loss of water ingress insurance coverage is unacceptable to us and is not in the public interest.*

If assurance is not received that the substitution will immediately be corrected:

• We must notify the Chief Building Official of the change and that it was taken without our professional involvement
• We must notify the Tarion Builder Bulletin 19R Field Review Consultant of the substitution
• We will not sign a Schedule G under the Condominium Act respecting the exterior building envelop.

We are very concerned that you have chosen to disregard our design and recommendations and hope you will reconsider your decision.

Yours truly,
Architect

Disclaimer:

The contents of this PDF are derived from a website and offer information for general purposes only. The material presented does not establish, report or create the standard of care for Ontario architects. The information is by necessity generalized and an abridged account of the matters described. It should in no way be construed as legal or insurance advice and should not be relied on as such. Readers are cautioned to refer specific questions to their own lawyer or professional advisors. Efforts have been made to assure accuracy of any referenced material at time of publication; however, no reliance may be placed on such references. Readers must carry out their own due diligence. Professional Liability Insurance provides valuable coverages and benefits

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YOU HAVE INSURANCE…BUT WHAT ABOUT THE ENGINEERING CONSULTANTS?

SUMMARY:

Pro-Demnity has recently seen a number of instances where the architect’s insurance has been called upon to pay damages for claims that were the responsibility of an engineer, because the engineer’s own insurance was insufficient.

Architects must review the insurance of any engineering consultant they retain and establish required limits as a condition of engagement, recognizing that any shortfall in the engineer’s limits can become the architect’s responsibility. The following are suggested for consideration:

. Require engineers to carry “Per Claim” limits that match or exceed the architect’s
. Require engineers to have “Aggregate” limits at least twice the “per claim” limits
. Require Defence Costs to be “in addition” to the required limits
. Require engineers to provide Evidence of each Renewal of their insurance at the agreed limits
. Risks associated with certain “owner’s specialists” justify higher limits

DISCUSSION:

Many architects retain engineers as sub-consultants on their projects. This arrangement has the architect contractually liable for the professional services of the engineers. Should an engineer be responsible for an error or omission in its own work, it remains liable to the architect for the consequences of its error. However, should the engineer’s insurance prove insufficient to pay the damages, the architect, may be responsible “in contract” to make up any shortfall.

Some Client / Architect Agreements such as OAA Document 600-2008 and RAIC Document 6 -2006 included a provision GC 7.2 that engineering consultants had been employed on behalf of and for the benefit of the client, and the architect was not to be held responsible to the client for the engineer’s errors. The intent was to eliminate the architect’s contractual liability for the engineers’ errors in disciplines where the architect has no professional expertise, making the architect less exposed to these engineering claims.

It is important to note that this particular provision in the standard agreements has not yet figured in a court decision in Canada and it remains uncertain how it would be viewed by a court. It should not be relied upon and architects are advised to require that any engineering consultants carry ample professional liability insurance, no matter who retains them.

The most recent version of OAA Document 600-2013 has amended the provision so that the architect retains contractual liability for the engineering and other sub-consultants it retains while the Client agrees that the architect will have no liability for the sub-consultants the Client retains.

The assumption of contractual liability for engineering and other sub-consultants retained by the architect makes it more important than ever that Architects require that engineering and other sub-consultants maintain adequate professional liability insurance so that the architect is not exposed to unnecessary liability related to the errors, omissions or negligence of the sub-consultants.

RECOMMENDATIONS:

The following are recommendations for insurance requirements that an architect should consider as a condition of engagement for any engineering consultants it retains. Although Ontario architects participating in the mandatory insurance program provided by Pro-Demnity Insurance Company deal directly with Pro-Demnity, consulting engineers will use the services of a Registered Insurance Broker to make applications and receive quotations for their professional liability insurance. The Broker would be the entity that communicates any of their insured's requirements to the insurer.

1. "Per Claim" limits that match or exceed the Architect's:

Ensuring that each of the engineering disciplines carries insurance that is at least equal to the architect's is consistent with the limitation of liability provisions of Document 600 or Document 6 and will reduce the instances where the architect and its insurance ends up paying for an underinsured engineer's mistakes.

2. "Aggregate Limits" at least twice "per claim" limits:

Architects should also look carefully at the "aggregate" limits maintained by the engineering firms involved on their projects. Up to certain per claim limits, an engineering practice should be able to obtain an aggregate limit for all claims in an annual policy period that is twice the "per claim" limit. Although these higher aggregates may be available to them, some firms are prepared to settle for an aggregate that is also the "per claim" limit, meaning that one claim can exhaust all the available insurance for the policy period or reduce the limit available for another claim.

In contrast, Ontario architects insured under the mandatory program provided by Pro-Demnity will have an aggregate limit of twice the "per claim" limit for any one project and an aggregate limit for all claims in the policy period (annually) of four times the "per claim" limit.

Architects could ask the engineers they do business with to try to match the Pro-Demnity limits; however, an aggregate twice the "per claim" limit appears to be the maximum currently available from other insurers. The engineer and its broker may have to specifically request the higher aggregate limit on its application.

3. Defence Costs “in addition” to the required limits:

Architects are advised that any insurance required of the engineers should preferably have the defence costs “in addition” to the limits so that the costs of defence do not erode the limits available to pay damages. If this is not available to the engineer, an alternative is to require higher limits to help safeguard the funds ultimately available for eventual payment of any damages required as a result of the engineer’s own negligence.

4. Evidence of Renewal for required limits:

A firm may choose to change its limits at any time, often at a renewal. As a condition of engagement, architects should require engineering consultants to automatically provide evidence of renewal of their professional liability insurance at no less than the insurance limits being required of them by the architect. Maintenance of the required limits should be a contractual obligation of the engineering consultants that is rigorously monitored by the architect.

5. Owner’s Specialists need higher limits:

Architects are advised to NOT retain “Owner’s” consultants such as Surveyors, Geo-technical and Hazardous Material specialists. That is considered the owner’s responsibility. However, if compelled to do so, architects must ensure any of these they retain are insured with substantial per claim and aggregate limits to reduce the risk that the architect will be required to contribute compensation for the specialist’s errors should the specialist’s own insurance prove insufficient.

Adding to the risk, certain specialist services that are not the “usual and customary” professional role of an architect will not be covered by the architect’s insurance.

As well as insurance considerations, if you agree to retain any of these specialists, you should require contract language in your Client / Architect Agreement where your client indemnifies you respecting the services provided by the specialists.

(Refer to OAA Practice Tip PT.30 for further information respecting retention of Surveyors, Geo-technical and Hazardous Materials Specialists)

Note: Readers are reminded that the insurance industry is subject to market forces and business decisions that may impact the insurance limits and coverage available to engineering consultants. The content of this bulletin respecting limits and coverage available for engineering consultants was based on information available to Pro-Demnity at the time of original publication; however, its accuracy cannot be assured. Engineers will have to obtain specific information respecting available limits and coverage from their own Insurance Broker.

Refer to the “Recommended Checklist for Engineering Sub-consultants’ Professional Liability Insurance” printed overleaf.

RECOMMENDED CHECKLIST FOR ENGINEERING SUB-CONSULTANTS’ PROFESSIONAL LIABILITY INSURANCE:

The following is a checklist of suggested requirements to be met by any engineering consultant you retain as a sub-consultant:

1. Provision to the Architect of a current Certificate of Insurance or Declarations Page issued by the consultant’s insurer.
   The Certificate will include:
   a) Name of Engineer’s Insurer (e.g. ENCON, XL etc)
   b) Type of Insurance (Professional Liability)
   c) Policy No.
   d) Policy Period start / end dates (typically one year for annual practice insurance)
   e) Policy Limits per Claim
   f) Policy Limits in Aggregate for the Policy Period
   g) Deductible per Claim

2. “Per claim” limits maintained by the consultant that are no less than the architect’s own

insurance. E.g. if the architectural practice carries $1,000,000 per claim, require the engineers you retain to also carry $1,000,000 per claim as a minimum.

3. Defence Costs and expenses are to be “in addition” to the stated Limits

   Note: Some insurers provide defence costs “in addition” for policies with lower limits. They may issue “costs included” insurance above certain limits. If the defence costs and expenses are not “in addition” to the claims limit in the policies available to the engineering consultant, consider requiring higher “per claim” and “aggregate” limits to improve the chances that the funds available to pay any damages are not eroded by defence costs.

4. Request “Aggregate” Limits twice the “per claim” limits

   Note: Aggregate limits twice the per claim limits are usually available to the engineering consultant although they may have to specifically apply for them. Some insurers’ application forms may not specifically list aggregates twice the per claim limits for other than low limits.

5. Where the consultant provides more than one engineering discipline, require per claim and aggregate limits that exceed your own.

6. You will need to know that your agreement about the engineer’s insurance is being adhered to. You can require:

A) Written undertaking from the Consultant to maintain, as a minimum, the same limits in future years

B) Written undertaking from the Consultant to advise the Architect of any changes in its insurance limits

C) Written undertaking by the Consultant to provide the Architect with a fresh Certificate of Insurance / Evidence of Insurance at each annual renewal

If you increase your insurance limits, you will need to require your consultants to keep pace.

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ENGINEER'S STANDARD TERMS OF ENGAGEMENT

Many architects are used to seeing an attachment to an engineer's fee proposal titled "Standard Terms of Engagement" or similar. Sometimes these are signed and returned by the architect…often they are unread and filed away.

Either way, they can be likened to a time bomb, waiting to explode when problems arise.

Commonly, the text includes something similar to the following…

Limitation of Liability:

The total amount of all claims the Client may have against the Consultant), or any former partner, executive, officer, director, etc…including but not limited to claims for negligence, negligent misrepresentation and breach of contract, …

a)… shall be strictly limited to the amount of professional liability insurance the Consultant may have available at the time such claims are made.

or…

b)…shall be strictly limited to the lesser of fees actually paid to the Consultant or $50,000 (or other $ figure…sometimes smaller).

or…

c)…shall be strictly limited to the fees actually paid to the Consultant.

DISCUSSION:

In the circumstances, the word "Consultant" refers to the engineer or other specialist you are retaining as your subconsultant, and the word "Client" refers to you, the architect, rather than the owner / client for the project.

You must consider carefully your own circumstances and the content of your own contract with your client when assessing such a provision.

Example a) above reflects language included in OAA Document 600 (2008 and 2013 versions) and may appear benign for that reason. However, unless you have retained the parallel provision in Document 600 (GC 7.2: 2008 version, GC 8.2: 2013 version) in your own contract with your client, acceptance of (a) will leave you exposed to any difference between the unlimited liability you have accepted in your contract with the client and whatever insurance is available to the Consultant / engineer.

Language similar to example b) or c) should never be accepted…and where similar language is included in the "Standard Terms of Engagement" that a Consultant usually attaches to a fee proposal, you should routinely notify the Consultant that such a limitation is NOT ACCEPTABLE, regardless of whether or not you intend to sign back the engineer's proposal document.

ARCHITECT / SUBCONSULTANT CONTRACT:

Rather than attempt to address every version of a "Standard Terms of Engagement" that you are presented with, it would be prudent to require every Consultant you retain to enter into a standard form of Architect / Subconsultant agreement such as OAA Document 900-2014 or RAIC Document 9. Those forms of subconsultant agreement bind the Consultant to the same obligations as you have in your own contract with your Client.

They require you to attach a copy of the "Prime Contract" with your own client to the contract with your subconsultant. That requirement adds a necessary Risk Management discipline to your own practice since a signed contract is a prerequisite.

OAA Document 900-2014 includes insurance requirements for the subconsultant including a specific "default" requirement where the Prime Contract does not address insurance requirements. RAIC Document 9 does not include a similar "default" provision.

A benefit from this approach, binding the subconsultant to the same terms as the architect, may provide a stronger bargaining position with your own client should any recommended subconsultants refuse to accept a client's contract provisions exposing the architect (and the subconsultant) to unlimited or uninsured liability.

Engineers' / Subconsultants' Professional Liability Insurance:

Many claims against architects relate to alleged errors, omissions or negligence of the engineering consultants retained by the architect. By accepting the role of "prime consultant" retaining the engineers and other specialists, the architect can assume liability in contract for the errors, omissions and negligent acts of a long list of subconsultants.

Many clients insist upon this arrangement, effectively transferring added risk onto the architect.

Pro-Demnity will try to defend the architect by pointing out that the engineer's negligence caused the damages and suing (third partying) the engineer on behalf of the architect. Even if the defence strategy is successful, the architect will remain liable for any damages assessed against the engineering or specialist subconsultant if the subconsultants insurance or assets are inadequate.

One important risk management tool available to the architect acting as a "prime consultant" retaining engineering and other specialist subconsultants is to insist that the subconsultants carry adequate professional liability insurance. That usually means per claim limits that match or exceed those carried by the architect.

Refer to Pro-Demnity Bulletin: "You Have Insurance…But What About the Engineering Consultants?" dated April 2015 for a comprehensive discussion of the issues to be considered.

RELATED CONTRACT PROVISIONS:

The following are excerpts from several standard forms of Client / Architect Agreements that are relevant to the issue. They exist to protect the architect from claims by a client that exceed the insurance available to the architect and / or from claims against the architect for a subconsultant's negligence.

OAA DOCUMENT 600-2008 AND OAA DOCUMENT 600-2013:

GC 7.2: 2008 version, GC 8.2: 2013 version

The client agrees that any and all claims, whether in contract or in tort, which the client has or hereafter may have against the architect in any way arising out of or related to the architect's duties and responsibilities pursuant to this contract, shall be limited to coverage and amount of professional liability insurance carried and available to the architect for the payment of such claims at the time the claim is
made…

GC 7.5: 2008 version (Note: wording differs from 2013 version below)

The client acknowledges that either the architect or the client may engage consultants on behalf of and for the benefit and convenience of the client; and agrees that the architect shall not be liable to the client, in contract or in tort, for the acts, omissions or errors of such consultants whether retained by the architect or the client. Nothing in this clause shall derogate from the architect's duty of coordination.

GC 8.5: 2013 version (Note: wording differs from 2008 version above)

The Client acknowledges that either the Architect or the Client may engage Consultants on behalf of and for the benefit and convenience of the Client; and agrees that the Architect shall not be liable to the Client, in contract or in tort, for the acts, omissions or errors of Consultants engaged by the Client identified in Article A 10.2 or the Consultants described in GC 4.3 engaged on behalf of the Client. Nothing in this clause shall derogate from the Architect's duty of Consultant Coordination.

OAA DOCUMENT 800-2011:

Limitation of Liability:

The total amount of all claims, in contract or in tort, which the Client may have against the Architect related to this contract is limited to the amount of professional liability insurance carried and available. …

OAA DOCUMENT 900-2014:

A.6

The Architect has made a contract, herein referred to as the Prime Contract, to provide services to the Client for the Project. A copy of the Prime Contract including all schedules and attachments, from which financial terms may be excluded, is attached to and forms part of this contract, as identified in GC 21.

GC 14

The Consultant shall obtain and maintain at its own cost insurance of the types and limits and for the same periods as required for the Architect under the Prime Contract unless specific alternative arrangements are recorded in GC 22 Other Terms of Contract.

GC 15 (Note: a "default" provision such as GC 15 below is not included in RAIC Document 9)

Where paragraph GC 14 does not apply, the professional liability insurance limits maintained by the Consultant shall be not less than $1,000,000 per claim and $2,000,000 annual aggregate with defence costs in addition to the limits; covering claims arising from errors, omissions or negligent acts of the Consultant in the performance of professional services under this Contract. These limits shall be maintained for a minimum of two (2) years after either the date of Substantial Performance of the Work, or termination of the Contract, whichever shall be later.

GC 16

The Consultant shall verify to the Architect the annual renewal of the required insurance.

GC 17

Where a single policy of insurance includes both the Architect and Consultant as insured, the Consultant agrees to pay its share of any deductible required to be paid by the insured in accord with any determination, by settlement or adjudication, of responsibility for damages or costs.

RAIC DOCUMENT NINE, 2007 EDITION:

Consultant Agreement, first paragraph, top of page 3 of 8:

"…A copy of the Prime Contract (contract between Architect and Client) including Schedules of Services and Client Responsibilities, are attached and made part of this Contract (between Architect and engineering Consultant) as Appendix 1. In respect of all professional services rendered by the Consultant (the engineer or specialist) under this Contract, the Consultant shall comply with and is subject to all the terms and conditions of the Prime Contract applicable to the Architect…"

General Conditions

3.1 Professional Liability Insurance

The Consultant shall during and after termination of this Contract, indemnify and save harmless the Architect from any and all claims, action, costs, expenses and fees resulting from failure on the part of the Consultant to fulfill the provisions of this Contract or resulting from any negligence on the part of the Consultant or any of its employees or agents."

3.1.1 The Consultant shall obtain and maintain insurance of the types and to the extent and for the periods required under the prime contract or as agreed otherwise.

3.1.2 The Consultant shall maintain comprehensive liability and professional errors and omissions insurance (e.g. "professional liability insurance") in accordance with the Certificate of Insurance as attached Appendix 2 to this Contract.

Pro-Demnity Insurance Company cannot provide legal advice, and readers should be sure to review all contract provisions and the content of this Bulletin with their own lawyer.

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INDEMNIFICATION CLAUSES

Many client drafted Client / Architect contracts include "indemnification" language that will expose the architect to obligations and liabilities that are beyond what are already the architect's at law, and will therefore not be covered by professional liability insurance.

The terms and conditions of the Pro-Demnity Policy (or any other insurer's policy) determine whether coverage will be provided regardless of what you may choose to agree to in a contract.

It is in the interests of both client and architect that the obligations you assume in a contract are covered by your (and your consultants') professional liability insurance.

When faced with an "Indemnification Clause" prepared by your client consider adding the following to limit your liabilities to those covered by your insurance:

"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 in force."

and…

If a client has invested in the preparation of its own form of contract, it should be self evident it is intended to be in the client's interest, not yours. You should consult your own lawyer respecting the content of any contract before agreeing to the terms.

If you have any questions respecting the insurance implications of provisions in a contract, please contact the Practice Risk Management service at Pro-Demnity Insurance Company. Contact information can be found on the website: www.prodemnity.com

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GLASS USED IN BALCONY GUARDS

In the summer of 2011, there was considerable media attention focused on “falling glass” from breakage of the glass panels used as guards on several condominium buildings in Toronto.

In each reported instance, it was tempered glass that broke, with fragments falling into neighbouring streets. One individual was reported injured by falling pieces. Sidewalks were cordoned off and the developers arranged to replace the guards. Extensive reports as to cause and appropriate repairs were commissioned. A prime suspect in most instances was the presence of Nickel Sulphide inclusions in the tempered glass panels.

The City of Toronto and the Residential Construction Council of Ontario asked the province to review and amend the Ontario Building Code to help reduce the likelihood of more glass falling from newly constructed buildings.

In response, the Building Code Branch of the Ministry of Municipal Affairs and Housing convened an Expert Panel on Glass Panels in Balcony Guards. The Panel’s mandate was to recommend whether and how the OBC might be amended to address the problem and the risk to persons stemming from such breakage.

A set of seven recommendations was sent to the Ministry for consideration and the province enacted Supplementary Standard SB-13, Glass in Guards, June 12, 2012 which came into effect on July 1, 2012.

As the Panel was completing its recommendations, a number of “Class Action” lawsuits were filed related to some of the affected buildings based on the loss of use of the balconies by the unit owners.

It is understood that the province intends the Supplementary Standard to be an interim measure, pending development of a new CSA Standard suitable for reference in the NBC, OBC, and other provincial and territorial building codes.

In the interim, architects considering the use of safety glass in balcony guards or balustrades, should familiarize themselves with the new code provisions that now apply in Ontario.

Supplementary Standard SB-13, Glass in Guards, June 12, 2012 can be accessed on the Ontario Building Code website: www.mah.gov.on.ca/Asset9717.aspx?method.1

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WHY YOU MUST UNDERSTAND “CLAIMS MADE” INSURANCE…

This Bulletin was updated on February 2, 2026

“Claims Made” insurance and the implications of such policies can be misunderstood by architects and their engineering consultants. Failure to understand the features and consequences of a “Claims Made” insurance policy may lead to loss of insurance coverage.

In any discussion of the features of professional liability insurance for architects or engineers, it will be described as “claims made”. This means the policy you purchase covers claims made and reported to the insurer in the policy period, regardless of when the alleged error, omission or negligent act actually occurred, subject always to the terms and conditions of the policy.

If your policy runs from January 1, 2026 to January 1, 2027, its coverage and limits apply to claims that are first known by you and reported to the insurer between those dates. Even if the project was carried out and completed years earlier, if the claim first arises and is reported to your insurer between January 1, 2026 and January 1, 2027, it is that policy that provides the coverage to you…NOT the policy that you may have had in place at some earlier time when the error actually occurred.

However, at the end of the policy period the insurance ceases and no ongoing coverage exists. It is critical that claims made insurance is maintained continuously to ensure that you are effectively covered. You must renew your insurance before the end of each policy period to ensure continuity of coverage for past work.

Understanding the consequences of claims made insurance will be particularly important when a practice:

- first learns of a claim or circumstance that may result in a claim

- renews its policy and completes a renewal application,

- changes its limits,

- changes a professional liability insurer,
- obtains Spike Up insurance,
- establishes a separate practice outside Ontario,
- merges with another practice, or
- breaks up into several practices, and
- when a member of the OAA retires from practice.

Each of these circumstances is briefly addressed in turn in the following discussion.

CLAIMS REPORTING: TIMING IS CRITICAL !

Each professional liability insurance policy covers claims that arise in a defined policy period, usually one year. The insurance will respond and defend a claim that you first become aware of and report within the policy period as long as you were not aware of the circumstances or actual claim at the time you applied for the insurance. The current policy responds, even though the events giving rise to the claim may have occurred at some time in the past.

If you fail to report a claim to Pro-Demnity or to a current Excess or Single Project insurer when you first become aware of the circumstances, any protection afforded by the policy respecting that claim would expire at the end of the policy period. If you have changed Excess or Single Project insurers, the new insurer would not be prepared to accept such a claim; they would not defend the consultant or pay damages awarded against it that arose from the claim.

Even though you are required to maintain professional liability insurance with Pro-Demnity, each renewal of your insurance is a new, distinct policy covering a specific annual policy period. Should you fail to report a claim prior to the expiry of the policy period, the next policy will not provide coverage.

The clear and simple message is to report all claims and circumstances that might reasonably give rise to a claim to your current insurer promptly. Failure to do so can have severe consequences including loss of insurance coverage.

POLICY RENEWAL:

When your professional liability insurance policy is renewed, the renewal policy is a "new" policy, and the application must accurately reflect the circumstances and claims that you are aware of at the time of the renewal application.

Knowledge of a possible claim would be a material consideration that would impact the decision of an insurer respecting the provision of the insurance. The signed "No Claims" declaration you provide that accompanies any insurance application reinforces the importance of reporting any claims to your insurer during the appropriate policy period. An inaccurate or false "No Claims" declaration may trigger a denial of coverage by the insurer.

CHANGES IN LIMITS:

Pro-Demnity provides the mandatory insurance coverage and limits required by the *Architects Act* and Regulation. A practice seeking increased limits, whether through Pro-Demnity or another insurer, will be required to provide a statement to the insurer that the applicant knows of no claims or circumstances that might reasonably give rise to a claim that have not already been reported to the insurer (a "No claims" declaration). The declaration is required because no insurer will be prepared to provide insurance (or increased limits) respecting a claim or circumstances of which you are already aware.

To obtain increased limits without disclosure of the exposure to the insurer could constitute misrepresentation or fraud.

If for any reason a practice should decide to reduce coverage limits, it should be aware that the reduced limits will come into effect at the date of the change and any unreported claims thereafter will be subject to the new, lower limits.

Be sure to review any insurance commitments included in Client / Architect agreements before reducing your limits.

CHANGING INSURERS:

If a practice decides to change Excess or Single Project insurers, the new insurer will require a “No Claims” declaration in the application as a condition of providing the insurance. If you or any member of the firm knew of any unreported circumstances or claims at the time of the change, the new insurer would not provide coverage.

Should the firm subsequently change to a new insurer after a claim was first reported, the old insurer, if it was properly advised of the claim within their policy period, would continue to be responsible for the defence of the claim and for any damages that might eventually accrue to your practice within the terms and conditions of its coverage.

However, any subsequent new claims, including those added to an existing Statement of Claim already reported, would not be insured and it cannot be certain that the new insurer would provide coverage unless specific arrangements had been made with the new insurer.

SINGLE PROJECT INSURANCE:

It is a condition of your Pro-Demnity professional liability insurance policy that no coverage is afforded where you are insured by another professional liability policy.

If you purchase Spike up insurance, there will be no coverage under your professional liability insurance policy unless the Spike up insurance is specifically arranged to be excess to your Pro-Demnity professional liability insurance. In that case, your Pro-Demnity coverage continues for at least the mandatory limits and the Spike up excess limits are available in addition should your underlying professional liability insurance be insufficient to resolve a claim.

Where Single Project insurance is purchased that is not specifically arranged as excess to the Pro-Demnity professional liability insurance, it replaces your Professional Liability insurance during the time the Single Project policy is in force. In these circumstances, once the Single Project policy is in effect, your Professional Liability Insurance coverage ceases respecting all claims on the project that are first reported during the Single Project policy period.

It is important to understand that where a Single Project policy replaces your Pro-Demnity Professional Liability Insurance policy, your Pro-Demnity Professional Liability Insurance policy will NOT provide coverage for claims arising during the term of the Single Project policy, even if the Single Project insurer declines coverage for some reason.

Claims that first arise after the expiry of a Single Project policy would be covered by the Annual Practice coverage and limits that you maintain at that time.

OFFICES OUTSIDE ONTARIO:

Ontario firms may consider opening a new practice in another province. The mandatory program provided by Pro-Demnity for Ontario practices extends only to work carried out from the office of a holder of an OAA Certificate of Practice situated in Ontario. If you were to open a new office outside Ontario you will have to address the insurance needs of that office with Pro-Demnity.

Where you elect to purchase insurance for an out of Ontario office, you must review the coverage carefully.

In certain areas and provinces outside Ontario, there have been serious losses incurred by providers of architects' professional liability insurance. It is not unusual for an Insurer to include restrictions on past work which might not have applied to your Pro-Demnity coverage. For instance, an insurer offering claims made insurance to a new client or practice may specifically EXCLUDE coverage for past work of the practice in order to not be exposed to past problems that have led to many claims in that area. This exclusion of past projects may expose the practice to claims that would have otherwise been covered by a claims made policy.

You must review the policy provisions and any implications with your insurance broker respecting the insurance you purchase for the out of Ontario office and for your Ontario practice as well, to avoid gaps in coverage.

MERGERS:

When two practices merge, the principals must address the consequences respecting the on-going liabilities of the merging practices and continuity of insurance. No one should settle on such arrangements without legal, accounting and insurance advice.

Each Ontario practice that carries at least the mandatory limits with Pro-Demnity and the new practice is assured coverage under the mandatory program. However, every circumstance is unique and special care must be taken to ensure that insurance expectations and requirements of all parties to the transaction are fully understood and continuity of coverage maintained.

Issues to be addressed include limits of coverage for the on-going practice, deductibles, claims reporting, maintenance or not of the merging firms separate insurance policies and for how long, continuity of coverage for the work of predecessor firms, continuity of coverage for any retiring members, and responsibility for resolution of any claims, whether on-going or that may arise in the future.

Pro-Demnity is available to review issues and questions that arise and can assist with appropriate measures respecting the mandatory program.

If an excess insurer is involved with one or another of the original practices, it will be critical to seek your broker's advice respecting the requirements of that insurer as well.

BREAK UP OF A PRACTICE:

Practices break up or change their ownership. One or more of the principals may wish to retire from active practice or, even establish new practices.

Again, legal, accounting and insurance advice is a prerequisite. The break up of the firm does not end the principals' obligations respecting their own services or for the past work of the practice. Insurance to cover the liabilities of the old practice must be maintained by the individuals and the new practices.

Each practice or Holder of a Certificate of Practice that emerges will be required to maintain the mandatory insurance and limits with Pro-Demnity. Continuity of insurance for past work can only be maintained if the previous practices or the interests of the previous principals are listed as "Insureds"on the new firms' policies by appropriate Endorsements on each policy.

Should a claim arise after the break up of the earlier firm, at least one of the Pro-Demnity insurance policies being maintained by the "new" firms will respond; currently the policy with the higher limits at the time the claim arises. Pro-Demnity may defend the claim as if only one practice was involved and the former principals will be required to cooperate in the defence as determined by Pro-Demnity.

Upon resolution, any deductible will be assessed against the principals of the former firm in proportion to their ownership interest in the previous firm.

RETIREMENT FROM PRACTICE:

Where an OAA member retires from an on-going practice that continues to maintain its Certificate of Practice, the firm's insurance continues to provide claims made coverage respecting the activities of the retired individuals while they were employed by the practice. Since a retired principal or partner of an on-going practice will be relying upon the practice's on-going insurance for personal protection, it would be prudent for shareholders' and partnership agreements to include specific provisions respecting the maintenance of insurance. A lawyer's advice and assistance will be required.

When a firm surrenders its Certificate of Practice, and has met the eligibility requirements for participation, OAA members are covered under the Retirement from Practice Program unless an individual continues in practice in their own capacity with another Certificate of Practice.

To be eligible for the Retirement from Practice Program, the individual must be a current or past member of the OAA, the practice from which he or she is retiring must have maintained insurance with Pro-Demnity or the Indemnity Plan for two or more years and be in "good standing" with Pro-Demnity at the time of the individual's enrolment in the retirement program (e.g. has met all its financial obligations to Pro-Demnity while insured).

"NO CLAIMS" DECLARATIONS: CHECK BEFORE YOU SIGN!

Any insurance application will include the requirement that the insured sign a "No Claims" declaration as a condition of the insurance being provided. Often the wording includes a reference to the applicant having made enquiries as a prerequisite to signing the declaration.

If you are a sole practitioner without employees, the issue of enquiries should be moot. However, for any practice with more than one individual, it is imperative that the practice have a process in place that ensures that potential claims and circumstances that might give rise to a claim are identified and brought forward so that the responsible principal signing the "No Claims" declaration is fully informed before committing the firm.

The principal signing the insurance application and a “No Claims” declaration should only do so AFTER making appropriate enquiries within the practice to ascertain that the declaration is accurate at the time of signing.

If the application includes other practices, be sure that they have also diligently enquired as to existing claims and known circumstances that might give rise to a claim before signing.

As noted, an inaccurate “No Claims” declaration can lead to serious consequences including denial of coverage.

MANDATORY PROGRAM ENSURES CONTINUITY OF AVAILABLE INSURANCE TO ONTARIO ARCHITECTS:

A major benefit of the mandatory program provided by Pro-Demnity for Ontario architects is that practices (unless exempted) are assured continuing availability of insurance in accordance with the mandatory requirements in the *Architects Act* and Regulation as long as the firm maintains its Certificate of Practice, files its renewal applications and pays the premium, taxes, any deductible or other levy when due. Ontario firms holding a Certificate of Practice are able to maintain continuous claims made insurance year after year, for at least the mandatory limits, ensuring that claims arising for work carried out in prior years, if properly reported, can be covered by a current policy.

Upon retirement, the mandatory program includes a “Retirement from Practice” policy that affords claims made coverage for retired members of the OAA. This coverage continues for six years after the death of the retired member for estate resolution purposes. There is currently no premium for this coverage and the deductible is $1,000.00 per claim.

Retirement from Practice insurance is only available to current and former OAA members through the mandatory insurance program provided by Pro-Demnity Insurance Company.

Acquiring increased limits through Pro-Demnity rather than through an excess insurer means that policy language and coverage is consistent and you need deal with only one insurer respecting applications, renewals and claims resolution.

Pro-Demnity Insurance Company is available to assist you respecting the coverage implications of the insurance provided by Pro-Demnity.

IMPORTANT:

The content herein is provided as general information to architects insured by Pro-Demnity Insurance Company. In the case of any actual or perceived discrepancy between the content of this bulletin and the content of a Pro-Demnity Insurance Policy, the provisions of the insurance policy will prevail.

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PROTECTING YOURSELF: WHAT CAN YOU DO WHEN YOUR CLIENT DOESN'T FOLLOW YOUR ADVICE?

This bulletin discusses some of the options an architect might consider when a client doesn't follow your advice or makes changes to your design without your knowledge. Suggestions include:

- Limit your liability in your Client / Architect Agreement
- Qualify your Certificates
- Be prepared to say "I don't know enough about this…"
- Retain a specialist
- Put your concerns in writing
- Advise the Chief Building Official
- If all else fails…consider withdrawing your services

INTRODUCTION

Late in 2006 Pro-Demnity sent you a bulletin dated November 2006 reporting on an Ontario Building Code Commission ruling respecting the use of an EIFS application on a Part 3 building.

One factor in the story was that an inferior EIFS application had been substituted by the Builder / Developer for the "stucco" cladding that had been shown in the documents that had been the basis for the issuance of a building permit.

The bulletin prompted a number of enquiries from architects asking how they could protect themselves when a client chooses to make a substitution over the architect's objections or without informing the architect. We in turn referred the question to one of the lawyers regularly retained by Pro-Demnity.

Although the examples included in this Bulletin were occasioned by the substitution of an EIFS cladding for another, the principles would apply to any change from your design that you disagree with or cannot recommend

YOU OWE A DUTY OF CARE TO WARN YOUR CLIENT…

You will owe a "duty of care" to your client to warn them of your concerns or your lack of satisfactory experience with the product or application. Failure to warn exposes you to liability when the "new" alternative product or system fails to perform satisfactorily.

It is not uncommon for a client, faced with a failure arising from its own insistence to state that "the architect should have been more forceful in its objections" or even "the architect should have forced me to not do what I did".

AND YOU OWE A DUTY OF CARE TO OTHERS…

You must remember that regardless of your arrangements and advice to your client, you will also be exposed to claims from third parties, for instance the purchasers of units in a condominium who may be bearing the costs of repairs or replacement of a defective cladding and claim that the negligence of the architect caused or contributed to the envelope failures.

You may have warned the client / developer of the potential problems but the purchasers of units will not have heard your warnings.

Courts in Canada have been gradually extending liability of consultants to third parties such as the eventual owners of condominium units. Defence of claims that your negligence caused them damages will certainly be helped if there is a clear record of your warnings.

PROTECTING YOURSELF

So what can you do when your client insists upon making a change that you regard as unwise? The following are some suggestions. None of these can be considered “bullet proof” but perhaps they can help you establish that it was not your negligence that led to a failure when your advice was ignored.

Contract Provisions:

The place to start is your Client / Architect Agreement.

Insertion of certain contract provisions into a Client / Architect Agreement can be used to limit architect’s liability for specific circumstances. Liability may be limited by adding a clause that has the client agreeing the architect cannot be held responsible for changes where the architect is not informed by the client.

The following can be added as a new clause GC7.7 in a Document 600 (2005) or RAIC Document 6, 2006 Edition.

“The client agrees that the architect shall not be responsible in contract or in tort for any changes to the architect’s design, drawings or specifications taken without the architect’s knowledge and approval.”

Such a provision does not necessarily mean that the architect will be fully protected. Nevertheless, once informed that a change has taken place, the architect should promptly state his reservations / concerns in writing.

Qualified Certificates

Throughout the building process, architects are called upon to certify the construction for Progress Payments, at Substantial Performance and at Completion.

Too often the architect does not take advantage of these certificates to protect itself from liability associated with unacceptable changes from the architect's plans.

To minimize the risk of liability, where an architect is completing a certificate for Progress Payments or for Substantial Performance, the certification should be qualified with a statement which indicates the "work is in general accordance (or conformity) with the architect's plans and the Ontario Building Code, save and except for…" any systems or products not in accord with the architect's plans and specifications. These should be identified and expressly excluded from the certificate.

The architect issuing a "qualified certificate" may face enormous pressure from its client to not do so as the consequences can impact occupancy, project costs and availability of financing. However, be aware that architects have faced allegations of negligence when they have NOT qualified their certificates respecting construction that is non-compliant with the drawings and specifications.

An architect would be wise to advise its client in writing of its reservations and that it will have to qualify its certificates if a particular change is made as soon as the architect is first made aware of the change or contemplated change. If the change proceeds, the architect should qualify its certificates from that point on, rather than starting to do so at the end of the project.

Be prepared to say "I don't know enough about this…"

It would be appropriate for a professional to recommend that the client obtain advice from another professional with appropriate experience. Stating that you don't know enough about a particular system or product to provide an informed recommendation is preferable to remaining silent and “going along” without stating your reservations or the limitations of your expertise in assessing the products, their service life, maintenance consequences etc.

Retain a Specialist (or advise your client to retain a specialist)…

There is no expectation that every architect has all of the expertise required to address every issue that arises on a design and construction project. It is understood that the success of any project relies upon a range of expertise. Architects and their clients routinely engage other skilled professionals to complement their own knowledge including the various engineering disciplines, and specialists of all kinds. Building enclosures are increasingly complex and subject to various failures. Once the failure occurs, the “Building Envelope Specialists” will be very much involved in determining what went wrong, often leading to the inference that your expertise wasn’t up to the job. Instead of waiting to have this expertise arrayed against you, consider retaining it yourself before you complete your design and details.

The use of “Building Envelope Specialists” is a mandatory requirement in some jurisdictions and increasingly, insurers are making it a condition of single project or excess insurance. Should problems occur, you will have the benefit of being able to refer to your reliance upon the advice of the specialist.

Please note the specific exclusion from coverage in the Pro-Demnity policy regarding ingress of precipitation without provision for drainage in an above grade wall. Other insurers may include a similar exclusion in their policies, in some instances with the possibility of modifying the exclusion when certain conditions are met, including retention of a “Building Envelope Specialist”.

Put it in Writing

No matter what other measures you choose to take, PUT YOUR RESERVATIONS IN WRITING in a letter to your client. If you are unfamiliar with a product or system that is proposed to your client or that your client is proposing to use on the project, say so IN WRITING in a letter to your client.

You are obliged to inform the Chief Building Official

Under the Building Code Act, no one may construct a building except in accordance with the documents upon which the permit was issued, and you have an obligation under the Act to inform the C.B.O. of the municipality of any material change to the project from the permit documents.

This obligation can also be a useful tool. Your insistence upon notifying the C.B.O. of changes that others are making or have been made without your knowledge may serve as a catalyst for reconsideration by your client. If the C.B.O. concludes the changes violate the building code, he has the authority to stop the work. If the C.B.O. determines that the changes do not violate the code, you can take some comfort.

The following excerpts from the Ontario Building Code Act, Section 8, “Building Permits” provide useful leverage to an architect as well as imposing an obligation.

Notice of change
(12) No person shall make a material change or cause a material change to be made to a plan, specification, document or other information on the basis of which a permit was issued without notifying, filing details with and obtaining the authorization of the chief building official

Prohibition
(13) No person shall construct or demolish a building or cause a building to be constructed or demolished except in accordance with the plans, specifications, documents and any other information on the basis of which a permit was issued or any changes to them authorized by the chief building official.

Withdrawal of Services

The architect may choose to withdraw services. In choosing this option, the architect should write a “Confirmatory Letter” to the client stating the reasons for the withdrawal and that the architect will not be held responsible for the consequences of any changes which deviate from the architect’s plans.

Withdrawal of services is a very difficult choice for most architects to make and should not be taken except after consultation with your own lawyer. Your actions must reflect the terms within the contract. There will be other potential consequences that you should consider before taking such action. Nevertheless, the ability and willingness to say “NO” may be a powerful lever in discussions with your client when your professional advice is being rejected. Many architects who have had to live with a claim arising from the consequences of their advice being ignored would say “NO” if given a second chance to do so.

CONFIRMATORY LETTERS

It has been recommended that architects should write a “Confirmatory Letter” respecting changes from their design and construction documents that are taken without their knowledge or against their recommendation or advice. These changes may occur during construction and can represent a material change from the architect’s design, drawings and specifications and the documents upon which the building permit was issued.

One circumstance requiring such a letter is a change made without the architect’s knowledge. Other variants would apply where the architect has reviewed a proposed change and needs to record its reservations about the change should the client insist upon making it or where the architect is withdrawing services.

The circumstances in each instance will determine the appropriate content and wording. Any letter will need to reflect the actual terms of any Client / Architect Agreement or, in its absence, other undertakings that the architect may have agreed to.

Because of the wide range of circumstances that might apply and the potential consequences, such letters MUST be written or reviewed by your own lawyer.

Material changes that occur during construction, after the building permit has been issued MUST be brought to the Chief Building Official's attention in accordance with requirements of the Building Code Act.

Pro-Demnity Insurance Company cannot provide legal advice. Be sure to review the specific circumstances and any measures that you consider taking or communications with your client with your own lawyer.

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REQUEST FOR “CLAIMS EXPERIENCE”

Occasionally, provision of “Claims Experience” is a requirement of a Selection Process for architects. If faced with such request, act with extreme caution.

Most settlement agreements contain provisions prohibiting any of the parties from disclosing the terms of the settlement. You may not breach these provisions and the information in a report on your claims experience would do so if provided to others.

You have no way of knowing or controlling who receives this private information and both you and any client who receives it must be aware of the potential damage to others that may flow from its misuse. This could lead to claims against the client as well as yourself.

Accordingly, we strongly recommend not providing any information related to your “claims experience” to others.

In our view the only legitimate exceptions are:

1. The provision of a “claims history” to another insurer related to the underwriting of an insurance policy providing coverage to you.

2. A request from your own lawyer or accountant related to their services on your behalf.

In these instances we can provide a copy of a “claims experience” to you to forward directly to the insurer involved or your lawyer or accountant.

A POSSIBLE RESPONSE…

If faced with such a requirement from a potential client consider a response as follows:

"As is the case for any professional liability insurance, as a consideration of our insurance policy we are required to report to our insurers any circumstances that might give rise to a claim, including the actions of parties over whom we exercise no supervision or control.

We do this routinely and diligently to ensure that the protection afforded by our insurance is not compromised. Often reported "circumstance" have nothing whatsoever to do with our own performance but are reported our of an abundance of caution to ensure that we do not violate the terms of our insurance.

Our insurer has cautioned us that resolution of actual claims is normally subject to a confidentiality covenant prohibiting us from disclosing information regarding the claim to ANY third party.

Accordingly, our insurer recommends that we do not discuss this privileged information with others as it may breach the confidentiality agreements, and may expose the recipients to claims for damages as well.

We trust that you will respect the reasons why we must decline to provide you the requested "claims experience".

If you have any questions please let us know and we can refer you to our insurers."

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