## Infrastructure Ontario Supplementary Conditions to OAA Document 600-2013

The most recent IO Supplementary Conditions to an OAA Document 600-2013 were issued by Infrastructure Ontario (IO) in June, 2017. As was the case with the previous amendments to the 2008 version of OAA Document 600, the new IO amendments are extensive, changing much of the original content.

The OAA's advisory document is available on the OAA website:

http://www.oaa.on.ca/news%20&%20events/rfp-alerts-and-regulatory-notices/details/importantinformation-forarchitects-regarding-the-ontarioinfrastructure-and-lands-corporation's-(io)-consultant's-contract/20.

This Pro-Demnity Bulletin complements the OAA advisory, focussing on two IO changes to GC 8 LIABILITY OF THE ARCHITECT:

- Deletion of the fi rst sentence of existing GC 8.2, and
- Addition of an IO authored "Indemnity Clause" GC 8.9.

The deletion of the first sentence of existing GC 8.2 exposes the architect to obligations and liabilities that can exceed its insurance limits, even though the architect complies with the IO insurance requirements.

GC 8.9 is an “Indemnity Clause” that exposes the architect to uninsured obligations and liability.

Any professional, including an architect, has an obligation to indemnify a client respecting damages and costs arising from error, omission or negligence in the provision of its services. This obligation is imposed by existing law rather than through a contract provision such as GC 8.9.

There is no professional liability insurance coverage for additional liability assumed by an architect through a contract provision such as GC 8.9.

One way to address these concerns is refusal to pursue work under these IO Supplementary Conditions unless amended as recommended later in this Bulletin. An alternate is to make your response conditional on incorporating changes as recommended.

## ARCHITECTS ARE ARCHITECTS

An additional concern is that IO insists upon using the term “Prime Consultant” in place of the word “Architect.” It would be preferable if IO retained “Architect” since Ontario architects are subject to unique regulations, professional standards and professional liability insurance requirements that do not apply to other design professionals.

The OAA has advised architects that members agreeing to RFP conditions and entering into contracts that put the
certainty of their professional conduct in question may not meet the insurance requirements set out in the governing legislation, and may become subject to the Complaints and Discipline

process.

## IO AMENDMENTS TO: GC 8. LIABILITY OF THE ARCHITECT

Delete First Sentence of GC 8.2:
In Pro-Demnity's opinion, acceptance of the deletion of the first sentence of GC 8.2 by any architect is very unwise.

The deleted sentence reads:

> "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 payment of such claims at the time the claim is made." (underlining for emphasis)

Deletion of the above sentence by IO means that the Architect (Prime Consultant) is exposed to claims that may exceed both *the coverage* afforded by a professional liability insurance policy and *the limits* of liability available under its insurance. (underlining for emphasis)

IO's deletion of GC 8.2 removes an important protection to the Architect who must purchase

professional liability insurance. Without such a limitation on the Client's (IO's) actions, architects working on IO projects may find themselves facing claims that could bankrupt them and their practices where insurance is not available or an award of damages exceeds the architect's claim limit.

## ADDITION OF NEW GC 8.9:

New GC 8.9 exposes the Architect to liabilities and obligations that exceed what are already imposed "at law" in the absence of the wording, and / or exceed the coverage and claim limits of a professional liability insurance policy.

PART III EXCLUSIONS, Exclusion 1. f ) of a Pro-Demnity policy provides that there is no coverage for claims arising out of:

> "express warranties, guarantees, *indemnities* or penalty clauses you (the insured) have given for the benefit of others *unless your liability would have already existed at law* in the absence thereof;"
> (underlining for emphasis)

Accordingly, there is no professional liability insurance coverage for the additional liability assumed by an architect through a contract provision such as GC 8.9.

In combination with the deletion of GC 8.2 that specifically limited Client claims to the coverage and limits of available insurance, the wording of IO's GC 8.9 amending OAA Document 600-2013 is very risky and unwise for any architect to accept.

Pro-Demnity describes such provisions as “Murder Clauses”. Another professional liability insurer active in the Canadian market describes such clauses as “Deal Breakers.”

## WHAT CAN AN ARCHITECT DO?

Architects who decide to pursue IO projects using the IO Supplementary Conditions to OAA Document 600-2013 might consider adopting one of the following alternate approaches, for example:

- Insist upon retaining the first sentence of GC 8.2 and deletion of new GC 8.9.
  Retention of the first sentence of GC 8.2 limits claims by the Client to available professional liability insurance. The absence of a specific “Indemnity Clause” such as new GC 8.9 is not an issue in itself. Absence of GC 8.9 means that the Architect’s liability and obligations to the Client will be determined in accordance with established law, rather than by IO’s contract wording. The Architect’s existing liability at law is what is covered by a professional liability policy.

If the first sentence of GC 8.2 is not restored:

- Add the “Notwithstanding Clause” to the end of the current IO wording for GC 8.9.
  “Notwithstanding the foregoing, the obligations and liabilities of the Architect (or Prime Consultant) are limited to the professional liability insurance provided by Pro-Demnity Insurance Company and any specific or excess professional liability insurance coverage in force.”; or

- Replace the current Indemnity Clause GC 8.9 with the following alternate Indemnity Clause:
  “The Architect (or Prime Consultant) shall, within the limits of its insurance coverages, indemnify the Client from claims, demands, losses, costs, damages, actions, suits or proceedings in respect of claims by a third party and from losses, costs or damages suffered by the Client, provided these are attributable to error, omission or negligent act in the performance of professional services of theArchitect (or Prime Consultant) or of those for

whom it is responsible at law"; or

- Revise IO's new GC 8.9 as recommended by the lawyer starting on page 5 under the heading: Alternate Wording for IO GC 8.9:
  "The Prime Consultant (or Architect) shall indemnify and hold harmless the Client from and against claims, demands, losses, expenses, costs, damages, actions, suits or proceedings including legal costs, that are suffered or incurred or that are attributable to the Prime Consultant's (or Architect's) negligence, error, omission, breach of this Contract or failure to perform its obligations under this Contract, including claims brought by third parties, which fall within the limits of the Prime Consultant's (or Architect's) insurance coverage. Nothing in this GC 8.9 shall limit any claim that the Client may have under the insurance coverage to be provided under General Condition 8.1 – INSURANCE."

The intended effect is to bring the obligations and liabilities of the architect into alignment with the coverage and limits afforded by its professional liability insurance, thereby complying with the OAA's Regulatory Notice of September 6, 2016.

## WHY IS GC 8.9 SO DANGEROUS? ADVICE FROM A LAWYER:

In order to assist architects to better understand the impact of the wording of IO's new GC 8.9 before agreeing to such a clause, Pro-Demnity retained a lawyer to explain the "legalese."

## QUOTING THE LAWYER…

I understand that IO wishes to incorporate the following Clause as a standard condition of Client/ Architect Agreements applicable to provincially funded projects.

It reads as follows:

> “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.”

You have asked me to review the Clause and advise how it affects the Architect’s professional liability exposure and secondly, how it interacts with the Architect’s insurance coverage under the Pro-Demnity Insurance Policy. For the purpose of this memo, I will treat “indemnify and hold harmless” as synonymous terms and will simply refer to “indemnities.”

## 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 client as funding agents, end users, or otherwise, who are not under contract with the architect and provide no reciprocal obligations or mutual indemnities. I question why such a broad group is entitled to be indemnified, particularly when the indemnities are unilateral rather than mutual.

An analogous arrangement in the private sector would, as an illustration, ostensibly result in the architect being asked to grant an indemnity to its client's mortgage lender, tenants and end users with respect to claims "attributable to the architect" which of course would never be accepted by the architect.

## WHY IS THIS A PROBLEM?

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

There are enough opportunities to be sued by one's own client without inviting the client's service providers to be beneficiaries of the architect's added largesse. In my view, the architect should not agree to indemnify such additional parties.

## 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, omissions or negligence. 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.

## WHY IS THIS A PROBLEM?

Architects will not have the financial resources to pay such potentially onerous claims and should not commit to obligations they cannot realistically meet. 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 Pro-Demnity 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" (Part lll Exclusions Section 1(f)) .

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.

## WHY IS THIS A PROBLEM?

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.

## WHY IS THIS A PROBLEM?

Such costs could be prohibitive and beyond the means of most, if not all, architects.

## LIMITS OF INDEMNITY

Consistent with the deletion of the first sentence of GC 8.2, there is 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.

***This should not be agreed to.***

## 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.

## WHY IS THIS A PROBLEM?

An architect could not realistically perform such obligations if called upon to do so.

## 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 Pro-Demnity Policy (or any professional liability 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 wording.

**This is accordingly unacceptable.**

## CONCLUSION

This commentary is not intended as an exhaustive analysis of the Clause or its effects, rather I have attempted to illustrate some risks to architects who accept such indemnity obligations. In summary:

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 cannot afford to pay such potentially onerous claims as may arise under the Clause;
4. Parties should prove their claims in accordance with the applicable law, consistent with current and historic practice and existing standard forms of client/architect agreements. In other words, parties should be required to prove their claims if they maintain that the architect failed to perform the contract in accordance with its terms or as a result of conduct which fell below the professional standard;

5. Any recoverable losses should follow the established law of damages. Costs should be payable as assessed by the Court, not as a blank cheque to the client and its related claimants.
6. The Clause should either be dropped from the contract altogether or limited in content or scope

## ALTERNATE WORDING FOR IO GC 8.9:

An example of revised wording of the Clause which is more realistic and evenly balanced, might read as follows. Deletions are crossed out and additions are in bold.

> "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 which fall within the limits of the Prime Consultant's

insurance coverage. 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."

After the above amendments, the revised indemnity would now read:

"The Prime Consultant shall indemnify and hold harmless the Client from and against claims, demands, losses, expenses, costs, damages, actions, suits or proceedings including legal costs, 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 claims brought by third parties, which fall within the limits of the Prime Consultant's insurance coverage. Nothing in this GC 8.9 shall limit any claim that the Client may have under the insurance coverage to be provided under General Condition 8.1 – INSURANCE."

## IMPORTANT NOTES:

To the best of our knowledge and belief the comments in this Bulletin refer to a set of Supplementary Conditions prepared and utilized by Infrastructure Ontario. The document is titled: **Supplementary Conditions to OAA 600-2013**

However, the document does not carry identification as being an Infrastructure Ontario document

or a date of issue. The document provided to Pro-Demnity is understood to have been included as part of an Infrastructure Ontario RFP titled:

Request for Proposals
RFP No. 16-493
Vendor of Record
For
Province Wide Architectural and Interior Design
Services
Date Issued: June 19, 2017

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It is strongly recommended that any architect considering accepting the IO Supplementary Conditions to OAA 600-2013 refer the entire contract, this Bulletin, the OAA Regulatory Notice of September 6, 2016, any proposed amendments to OAA Document 600-2013 or amendments to the IO Supplementary Conditions to OAA 600-2013 to their own lawyer for review and advice.




***Disclaimer:***