### Why architects should use OAA contracts

Imagine this simple scenario: you're meeting a potential new client for the first time to discuss an exciting project. What's at the forefront of your mind? Probably doing what it takes to secure the work. The terms of your contract with this new client may be less of a concern, while the potential for this new project to devolve into you being sued would not be on your mind at all.

However, the decisions you make at this very early stage in drafting an architectural contract are going to be essential in any litigation that may ensue, which often could be just years in the future from that initial meeting, or commenced years after a project is complete.

This article highlights the OAA standard form contracts. It will explain which clauses are particularly helpful in litigation, and discuss some best practices which, if implemented, will help protect you if a lawsuit does occur without having to fret about it years before the risk materializes.

## WHAT IS YOUR CONTRACT?

The most basic definition of contract is any agreement to provide something to another party who is to provide some sort of consideration in return. There is *always* a contract in every situation where a client pays for services from a professional, even when it might not be apparent.

This is one reason why it is important to be intentional about your choice of contract – you do not want to later be held to people's memories of a verbal agreement, or a few lines of email detailing a fee arrangement, as containing the basic terms of your contract.

In fact, if you do not have a solidly written contract, a court may decide to apply its own contractual terms to your relationship, what are known as "implied terms" of a contract.

That does not mean any written contract will do. A contract suggested by your client might include a lot of legal boilerplates that do not apply to architectural services.

## OAA STANDARD FORM CONTRACT

The OAA publishes standard form contract templates on their website, free for use by architects.[i] The latest edition date from 2021 is available in the OAA Contract Suite.

The short form OAA 800 is ideal for smaller projects with a construction budget of six or low seven figures, while the long form OAA 600 is best suited for larger projects. **These are the gold standard, and what Pro-Demnity prefers architects to use in each case.**

## WHY WE RECOMMEND OAA STANDARD FORM CONTRACTS

Firstly, standard form contracts can be beneficial to all parties for:

- creating greater certainty in their interpretation, as the same wording becomes familiar to parties, lawyers and even mediators and courts who see it with frequency; and
- helping avoid the need (and expense) to hire a lawyer to help draft the contract, while providing the peace of mind that the contract is sound.

The OAA contracts have the additional benefit of being designed to be specifically applicable to architectural assignments. They set out the duties an architect undertakes, as well as the responsibilities of the client, in clear language.  They also include provisions that help protect you in the event of a lawsuit.

Specifically, Section GC 9.6 of the OAA 600-2021 and Section GC 5.2 of the OAA 800-2021 set out a list of situations for which an architect will not be held responsible. This can be helpful evidence of the reasonable expectations of the parties and standard to which an architect can be held in litigation, and as counsel, I will typically specifically cite them in my written defence of architects in lawsuits where the OAA contract has been used.

As just one example of the helpful language contained in those sections, in many lawsuits the parties misrepresent the architect as having control over certain aspects of a project's physical construction, while Section GC 9.6.3 of the OAA 600-2021 specifically states that;

*The Architect shall not […] have control, charge, or supervision, or responsibility for construction means, methods, techniques, schedules, sequences, or procedures, for temporary works, or for safety precautions and programs required in connection with the Work.*

While this may seem common sense to an architect, setting it out in the contract helps make it clear to a judge or jury at trial, who does not have your specialized knowledge, and may otherwise be mislead by your opponent into misinterpreting your duty as an architect.

Some of the other provisions of the OAA contracts which could protect you in the event of litigation include those:

- restricting damages awards that can be recovered in lawsuits to be no greater than the value of the liability coverage you carry (OAA 800 GC 9.3);

- ensuring an architect is never held responsible for any consequential losses of the client such as lost business or personal income (OAA 600 GC 9.12 & OAA 800 GC 5.2.10);

- clearly setting out the scope of General Review (in the definitions section of OAA 600 and OAA 800);

- making the client responsible for the consultants they hire (OAA 600 GC 5.3.7, 5.3.12 & OAA 800 GC 2.1.2); and

- making the client responsible for problems that result from changes in the architectural design made by others (OAA 600 GC 9.9 & OAA 800 GC 4.4).

## SEVEN BEST PRACTICES TO FOLLOW REGARDING ARCHITECTURAL CONTRACTS

1. No matter how well your discussions with a client may be going at the outset of a project, always insist on having a **SIGNED** written formal contract before doing any paid work on the project.

   Architects may wish to implement a tickler system, administrative reminder when opening a file for billing, or some other catch safe to ensure a contract has been obtained in every case.

2. Present an OAA 600 or 800 to the client as your preferred choice of contract, as part of your proactive client management strategy. Start off on a good, solid footing with your client by always working within a framework tailor-made for you by your professional association and supported by your professional liability insurer.
3. If you are using an OAA 600 or 800, make sure to fill it out in a clear and detailed manner. Your description of the project should be precise, and you should make sure not to leave any sections blank, writing N/A if necessary.
4. Negotiate any non-standard terms carefully. We are aware of certain institutional clients that will agree to use an OAA contract only if certain terms are amended or struck out. Often this is done by way of a separate Schedule to the contract, making it more difficult to

interpret.  We have seen situations where protective clauses are not struck out, but reworded to reverse their intent; for example to specifically state an architect will be held liable for the work of all other consultants. *Be careful in these situations, as it could affect your coverage under Pro-Demnity's policy.**

5. When in doubt about the terms of a non-standard contract, work with your firm's lawyer, or retain a lawyer to assist you.
6. If there is a point in the project where you and the client agree to extend your scope of services, or you are retained for a subsequent phase of a project, this calls for a fresh contract setting out the new scope.  Do not delay – get this signed by the client before continuing your work.
7. Keep a signed copy of all contracts for all projects in your records indefinitely. Remember that a lawsuit may not come until 15 years after a project is complete, or possibly later. For more information on the latest date a lawsuit could be commenced, read Limitation Periods: Is an architect ever free from Litigation?

As the architect, use of an OAA contract mitigates known risks for you and your firm and reinforces your professionalism with the client.

**Afterword:*

Pro-Demnity is familiar with cases where each of the following different types of architectural contracts have been used:

**Verbal Contracts**

This is where you agree to do some work for a client in a conversation, without ever setting terms such as the scope of the work or the cost to be charged in writing. There still is a contract, but if an issue arises, it is very difficult to determine the terms. Pro-Demnity recommends you *always* put your contract in writing and avoid this situation.

**Accepted Fee Proposals**

An architect sets out their proposed pricing for working on a project, whether in a form as simple as an email, or as a letter. The owner agrees to proceed by reply email. The architect then goes ahead and works on the project without ever getting a formal contract signed. In this case, the fee proposal and any correspondence from the client accepting it, are what form the terms of the contract. While this is better than a verbal contract, it is still not ideal. Unfortunately, Pro-Demnity sees this situation more frequently than we'd like.

**Standard Form Contract**

This includes the OAA 600 and 800, as well as the RAIC architectural form contracts.  As discussed in the body of this article, Pro-Demnity recommends using the OAA contracts.

**Custom Formal Written Contract**

Some architects, and more frequently clients, prefer to use a non-standard form of contract. These can range from the simple to the very incredibly long and complex. Be careful when negotiating such a contract to ensure you understand the implications of it on your work, your uninsured or insured liability, and your Pro-Demnity coverage with respect to any future claims. If you agree to a term that would negatively affect your defence in a claim, that could violate your policy.

*[i] The RAIC also publishes standard-form architectural contracts.  However, the writer recommends the OAA contracts be preferred by Ontario architectural practices.*

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**Our Contributor**

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