

## 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 October 2008 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.