GOING FORWARD IN 2021 DURING COVID-19 – REINFORCING SMART BEHAVIOURS – BULLETIN #8

COVID-19 SPECIAL BULLETIN #8

MATTERS DESERVING IMMEDIATE ATTENTION
Going Forward in 2021 – Reinforcing Smart Behaviours

The consequences of COVID-19 and the measures implemented to prevent its spread will impact the
architectural, construction and insurance sectors for the foreseeable future. Although vaccines are on the
horizon, 2021 is likely to bring new challenges to architects who will be called upon to practice remotely, or
under restrictions imposed by government and public health authorities.

This Bulletin provides risk management advice on several issues that Ontario architects are likely to face
during 2021, and for some time after as work impacted by COVID-19 continues toward completion.

GOING FORWARD – REVIEW, EVALUATE, COMMUNICATE

It's been a long year since COVID-19 work stoppages were first introduced on March 17, 2020. Although we have reason for optimism, the impacts of COVID-19 will be with us for the foreseeable future. While we look ahead to a less chaotic time when the pandemic has subsided, and design and construction can be resumed in a way that is more familiar to us, our professional obligations are more important than ever. It is a good time to remind ourselves and our colleagues of these obligations, and to reinforce smart behaviour.

This Bulletin addresses Health and Safety Issues, Contract Administration, Delay Claims, an architect's Duty to Warn and several other considerations that will apply as we strive to return to normal.

PROJECT HEALTH AND SAFETY ISSUES

Review the project health and safety advice from previous Pro-Demnity bulletins. Ensure that

your firm has (and enforces) COVID-19 protocols for your staff as these relate to projects they are collaborating on. Check the COVID-19 health and safety protocols at your construction projects, even though job safety in general is the domain of general contractors. Periodically review the Canada Construction Association COVID-19 standardized protocols for job site safety – and be familiar with them.

Evaluate the impact of the project-specific COVID-19 policies and procedures on the contractor's ability to perform its work.

Communicate to the contractor that written COVID-19 policies and procedures related to the personal health and safety of all persons working on a job site must be in place, if they are not already. Convene a virtual site meeting with all trades/consultants to review these policies and procedures and, if you notice unsafe practices or failures to adhere to publicized and enforced policies and procedures, notify the contractor in writing, but be careful not to overstep.

CONTRACT ADMINISTRATION

The COVID-19 pandemic will likely result in many claims for delay, lost productivity and additional costs incurred by many participants in the process. Both contractors and owners may seek reimbursement for delays or additional costs due to the impacts of COVID-19 measures that will require evaluation by the architect as anticipated in CCDC 2-2008, General Conditions 6.5 and 6.6. It is important to recognize the types of claims that a contractor or owner might make because of the pandemic and become familiar with the contractual provisions that you may be called upon to interpret.

Most importantly, remember that when administering the owner-contractor Construction Contract the architect becomes a neutral referee. To avoid a loss of professional credibility, and meet its obligations under the Construction Contract, the architect must be scrupulously fair to both contractor and owner. This is not only the role assigned to the architect in a CCDC form of Construction Contract, and the Regulation under the *Architects Act* – it's also the law.

The basic duty on an architect or engineer deciding matters at issue between the owner and the contractor is to act impartially, fairly and with professional competence. – McLachlin and Grant, Canadian Law of Architecture and Engineering, 3rd Ed. P. 275

Failure to assume the role of a neutral referee while administering a Construction Contract is an avoidable source of claims against architects. Note that "professional competence," not professional perfection is required. To the best of their ability, architects should be prepared to fulfil their role as the neutral evaluator of claims from contractors and owners seeking reimbursement of the additional costs and schedule delays that will have impacted many projects

– even in the face of extraordinary pressure from either party.

Review the Client-Architect Agreement and the owner-contractor Construction Contract. Identify and understand contractual clauses that deal with dispute resolution (be mindful of Supplementary Conditions). Note especially any extensions of time that might be granted pursuant to a change of law or force majeure clauses.

Evaluate any of these types of claims, making sure that you are reasonable and impartial in your assessment as described in CCDC 2-2008:

2.2.9 Interpretations and findings of the Consultant shall be consistent with the intent of the Contract Documents. In making such interpretations and findings the Consultant will not show partiality to either the Owner or the Contractor.

Consider the impact of pre-existing or concurrent delays in your evaluations…fairly and reasonably, supported by facts and logic. And be certain to request an updated project schedule from the contractor.

Communicate. There must be open communication, at all times, with all stakeholders, contractors, and owners, and perhaps frequent meetings (virtual as necessary) to discuss the impact on the schedule and the costs. Don't put this off to some later date; be proactive.

Give a timely written response when called on to interpret these clauses as described in CCDC 2-2008:

2.2.10 The Consultant's interpretations and findings will be given in writing to the parties within a reasonable time.

Most contractual provisions for additional money or contract extension for delays or other impact costs require timely notice. Compliance with this requirement is a condition for accessing the contractual relief that is being sought.

Be prepared for the contractor and/or the owner to disagree with your interpretations. In the event of any subsequent disputes, make sure you remind them of any dispute resolution processes that the contract may contain. In the absence of suitable provisions in the contract, step aside and point the parties towards negotiation between themselves or mediation. Your work is done.

CHANGE OF LAW

The Government of Ontario first declared a provincial emergency on March 17, 2020, under the *Emergency Management and Civil Protection Act.* The emergency declaration has been extended

several times since, most recently on January 12, 2021, and is subject to monthly review. While courts have yet to interpret it as such, that emergency declaration is likely to be considered a "change of law" that could trigger contractors' request for relief under change of law clauses.

Contractors may reasonably argue that because of social distancing, public health and safety advisories that limit the number of workers on site, and extended construction periods, the contract price may need to be changed. CCDC 2-2008 General Condition 10.2.7 may be relied upon by contractors to request a change in the contract price because of changes to the law:

10.2.7 If, subsequent to the time of bid closing, changes are made to applicable laws, ordinances, rules, regulations, or codes of authorities having jurisdiction which affect the cost of the Work, either party may submit a claim in accordance with the requirements of GC 6.6 – CLAIMS FOR A CHANGE IN CONTRACT PRICE.

Arguably, in this context, emergency measures imposed by governments at all levels qualify as changes in the law.

Note that there is a difference between "force majeure" clauses and "change of law" clauses in construction contracts. Most change of law provisions entitle a contractor to an extension of time and money. On the other hand, most force majeure clauses do not entitle the contractor to money, only a time extension. If in doubt, or if a dispute arises between the contractor and client regarding terms, insist on obtaining legal advice, and advise your client and the contractor accordingly, since additional costs may be incurred.

Numerous other delay claims and/or claims for additional compensation will likely be made because of reduced labour productivity (social distancing on sites or limits to the number of workers on site, e.g.), or for the additional costs for goods and materials due to supply chain delays or the need to use domestic products that are more expensive than those originally intended.

In short, bend over backwards to be fair – but remember that if either party is unhappy with your assessment, the dispute resolution provisions in the contract are available to them. Refer to CCDC 2-2008, Part 8 Dispute Resolution for a common example. Be sure to document the outcome of any conversations with the parties involved as well as your impartial recommendations.

DELAY CLAIMS VERSUS ARCHITECTS

Delay claims are broadly divided into a) pre-construction delay and b) construction delay. The latter represents a significant risk management concern. Delays during the construction phase giving rise to claims against the architect are common and may result from either delay in

administering the contract or from alleged errors and omissions in the architect's design – along with the impact of correcting those errors.

Pre-Construction Delay

Review your own contractual obligations in your Client-Architect Agreement.

Evaluate your ability to deliver design services or other services that you may have been engaged to perform. If COVID-19 delays have affected your ability to deliver services, consider subcontracting out some of your contractual obligation such as the need for additional expertise. Consider also what impact COVID-19 has had on your sub-consultants' ability to perform their obligations and whether they will be able to meet all project timelines.

Confirm whether your Client-Architect Agreements have a change of law provision that may entitle you to claim for "additional services" (costing, scheduling, legal, e.g.), to assist you in making your assessments and satisfying your obligations as "consultant" in the construction contract. OAA Document 600-2013 contains a provision GC 3.2.3 that additional services may be triggered by changes in laws:

3.2 Upon recognizing the need to perform the following unforeseen Additional Services the Architect shall notify the Client with reasonable promptness explaining the facts and circumstances. The Architect shall not proceed to provide the following services until the Architect receives the Client's written authorization. Compensation shall be at hourly rates identified in Article A11 unless mutually agreed otherwise. This shall include providing services, reviewing, evaluating, revising or providing additional drawings or specifications including proposed change notices, change orders, change directives or other documents which are:

.3 caused by the enactment or revisions of statutes, regulations, codes or by-laws, subsequent to the preparation of such documents;

RAIC Document 6 -2018 contains a similar provision GC 2.2.8:

2.2: The Architect and the Client acknowledge that the need for Additional Services may arise for reasons that include, but are not limited to: .8 the enactment of new or revised statutes, regulations, codes or bylaws,

Communicate with your owner if COVID-19 measures – i.e. working remotely, or the staggering of your staff – have impacted your own ability to deliver services and meet expected/contracted project timelines. Let your owner know promptly if additional services may be required. Communicate, communicate, communicate with both owners and sub-consultants to ensure that everyone is on the same page regarding new project timelines and the impacts of COVID-19.

Avoid surprises. Don’t wait for “the right moment” to broach the subject.

Delays in Contract Administration

Review the progress status of any project under construction that may have been shut down for a period of time. Expect to be very busy addressing the construction back log as construction projects resume.

Evaluate and consider claims by contractors for additional compensation and/or time extension. But also be aware that you may be swamped by numerous shop drawings and RFIs that are delivered as soon as the project resumes.

Communicate immediately with the contractor and its trades if delays occur. Involve them in helping to establish priorities. Keep written records of discussions. Be sure you and your subconsultants meet any commitments you agree to.

DUTY TO WARN

In cases where you are aware of a danger or a problem that may arise and you could reasonably be expected to warn the client about it, you have a professional duty to do so. The COVID-19 pandemic, and measures to prevent its spread, may have triggered the duty to warn in a number of ways:

1. New, untried products or substituted products may be proposed because of supply chain issues. In such cases, document the reason for the change. There may be a duty to warn, so make sure that the owner is properly advised in writing of the implications of using these products, including your own reservations or your unfamiliarity with the products or systems (if any).
2. If you believe that COVID-19 may have caused significant cost overruns and delays – or other unforeseen consequences – there may a duty to warn your client and to discuss your concerns.
3. If you determine that public health and safety protocols on the job site are not being followed, there may be a duty to warn your client and to discuss your concerns.
4. If the COVID-19 pandemic has affected your ability to perform your general review obligations, there may be a duty to warn your client. Be certain to manage expectations by discussing this with your client.
5. If municipal building inspectors are not or were not performing site inspections, be certain to utilize the recommended disclaimer shown below (and also included in COVID-19 Special Bulletins 3, 4, 5 and 7):

DISCLAIMER – Short Form

This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own independent inspections.

DISCLAIMER – Long Form

This report is issued and should be read together with all previously issued reports, including reports issued by any and all consultants. Nothing in this report relieves the contractor from performing its work in accordance with the plans and specifications, pursuant to the requirements of the Ontario Building Code and the requirements of all authorities having jurisdiction. The contractor shall ensure that its work is inspected by all authorities having jurisdiction. ***This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own independent inspections.***

The full wording of the recommended Long Form of the disclaimer addresses a number of issues that can be anticipated may have arisen on construction projects during COVID-19. **The final sentence in bold** should be considered mandatory for any reports or correspondence submitted to any authority having jurisdiction including a municipal building department, whether or not there is any current concern respecting the availability of municipal building inspectors.

ADDITIONAL CONSIDERATIONS

Review the owner's financial condition, since COVID-19 conditions may have affected its ability to continue with the project. While the Client-Architect Agreement rarely provides for requests by the architect for information about the owner's financial viability, some contracts do contain those provisions. For instance, CCDC 2-2008, GC 5.1.1 and 5.2.1 permit the contractor to request, from time to time, evidence that financial arrangements are in place to fulfil the owner's obligations.

Evaluate whether the owner's or the contractor's financial condition may affect the project's continuation.

Communicate with the owners and contractors in a collaborative fashion. Having now experienced COVID-19 and its impacts, architects and their clients should consider appropriate language for contractual clauses dealing with future pandemic-related delays.

When your Client-Architect Agreement was drafted and signed, the present situation was almost certainly not foreseen. If the Agreement doesn't effectively deal with current circumstances, or the possibility of further COVID-19 restrictions, consider collaborating with your client to amend it (provided, of course, that your client is amenable).

While you're at it, consider your upcoming potential projects, and consider whether the contracts

you are using need to be revised to deal with the possibility of yet another COVID-19 shut-down. If you have any questions about this, consult with a lawyer.
