

## **RETAINING SURVEYORS, GEOTECHNICAL AND HAZARDOUS MATERIALS SPECIALISTS**

A recently issued OAA Practice Tip PT.30 reminds architects that the OAA recommends against architects retaining any of these three specialists.

Consistent with this advice, standard forms of Client / Architect Agreement provided by the OAA and RAIC require the Client to supply information provided by Surveyors, Geotechnical and Hazardous Materials specialists to the Architect and, where necessary, for the Client to retain any of these specialists in order that the necessary information can be supplied.

Surveyors, Geotechnical Engineers and Hazardous Materials specialists provide critical information to an architect about the existing condition of a client's property. The services of these specialists are beyond the normal expertise of an architect and it is therefore important that an architect be entitled to rely upon the information provided by a client or these specialists as the foundation for its own services.

Accordingly, the standard forms of contract with a client also provide that the architect is entitled to rely upon the information about the existing property provided by the client or these specialists.

Standard forms of contracts between an engineer and a client endorsed by the engineering profession include similar provisions respecting the client's responsibility to provide information to the professional.

However, in the event the architect chooses to retain any of these, how does the insurance provided by Pro-Demnity apply, and how can the architect manage the added risk?

There are two issues in the policy wording to be considered:

- i) What is excluded from coverage in the Policy, and
- ii) What constitutes the "usual or customary" services provided by an architect.

### **POLICY WORDING:**

Pro-Demnity policies specifically excludes coverage for "the performance of services that are NOT usual or customary for holders of certificates of practice (i.e. architectural practices), or members of the Association (i.e. architects) or holders of certificates of authorization under the Professional Engineers Act (i.e. professional engineering practices);"

The common assumption is that unless the architectural practice includes "in-house" engineering services, any engineering services related to the architect's own services will be provided by professional engineers retained by the architect as subconsultants.

Architects are not qualified as engineers and may not practice engineering themselves. If an architect provides engineering advice or services without using the services of a qualified professional engineer, there may be no insurance coverage available to the architect for damages arising from such services.

Where the architect retains any subconsultant to provide services, the architect acquires contractual liability for the subconsultant's services to the client with whom the architect has a contract. If the engineer or other subconsultant makes an error that causes damages to the client, it is the architect who will be sued by the client "in contract" even if the architect played no role in the error or negligence involved.

The architect can try to recover any damages assessed against it from the subconsultant; however, its ability to do so may be hampered by a number of factors including the availability of insurance covering the engineer and contract provisions. Pro-Demnity's policies need to be understood by architects considering retention of any of these three specialists. Different factors apply to each type of specialist.

## **SURVEYORS AND GEOTECHNICAL:**

**Policy No. 1** (annual practice: mandatory limits) includes Exclusion 1. p) that excludes coverage respecting YOUR performance of geotechnical engineering service or services provided by surveyors.

The intent is that if the architect provides such services itself, there will be no coverage. However, subject to the "usual or customary" services of an architect or engineer test being met, there will be coverage for the architect respecting the contractual liability assumed by an architect retaining such specialists.

**Policy No. 4** (annual practice: increased limits / broader coverage) does not have a similar exclusion respecting services by geotechnical engineers or surveyors. Again, subject to the "usual or "services of an architect or engineer test, there will be coverage for the architect respecting a claim that arises from the services of these, or any other subconsultants it retains.

## **HAZARDOUS MATERIALS SPECIALISTS:**

**Policy No.1** (mandatory limits) does not have an exclusion respecting claims arising from "Hazardous Materials" or "Pollution". Coverage will be afforded the architect for such claims, subject to the services giving rise to the claim qualifying as the "usual or customary" services of an architect or engineer.

**Policy No.4** (increased limits) includes Exclusion 1. o) respecting “the performance of professional services which directly or indirectly relate to the discovery, presence, handling, removal, or disposal of or exposure of persons to asbestos, asbestos products and polychlorinated biphenyl (P.C.B.) in any form or to contaminants as defined by the Environmental Protection Act, R.S.O. 1990, c.E 19 on, in or under lands;”.

However, **Endorsement No.1 to Policy No.4, Item 11. Pollution Inclusion** deletes the foregoing Exclusion 1. o), except for claims instituted in the USA, and establishes the same mandatory limits for such claims as apply with Policy No.1.

The impact is that under either annual practice policy, “Pollution” claims related to asbestos, P.C.B’s and contaminants defined by the Environmental Protection Act are covered for limits of \$250,000 per claim \$500,000 maximum for one project and \$1,000,000 aggregate, subject to the services provided by the architect or its subconsultant meeting the “usual or customary” services test.

### **“FULL POLLUTION” OPTION:**

Pro-Demnity’s annual practice insurance application for “increased limits” asks whether the architect wants to apply for higher limits for “Full Pollution” coverage that matches whatever increased limits it is applying for...e.g. limits higher than \$250,000 for a “pollution” claim. The higher limits are available, subject to completion of a Pollution Questionnaire and underwriter’s approval.

The higher limits are commonly available for little or no additional premium, in part reflecting that most architects have been unwilling to provide “Pollution” or “Hazardous Materials” services, whether directly or by retaining a subconsultant.

Clients that are asking or requiring architects to retain a Hazardous Materials or Pollution specialist typically require higher than the mandatory limits, and it may be assumed the client’s expectation for the higher limits will apply to ALL claims, including those related to Pollution. Therefore, compliance with the Client’s insurance requirements may require “Full Pollution” coverage.

Where any architect is prepared to retain a Pollution or Hazardous Materials Consultant, it is recommended that the Full Pollution option be applied for and the Pollution Questionnaire completed in order that a premium for the increased Pollution limits may be provided to the architect.

## **SUBCONSULTANT CONTRACTS:**

Standard Client / Engineer contracts endorsed by the engineering profession such as ACEC Document 31 may include a blanket indemnification provided by the “Client” to the engineer respecting any Hazardous Materials or Pollution related matters.

Where an architect retains the engineer as its subconsultant, the architect becomes the “Client”, and may find that it has agreed to provide an indemnity to the engineer...meaning the architect will be fully liable to the client or others for the engineer’s errors, omissions or negligence respecting the engineer’s services.

Exclusion 1. f) of the Pro-Demnity policies excludes coverage for the architect where it has given such an indemnity for the benefit of the engineer or specialist.

Accordingly, provision of such an indemnity to an engineer or other specialist should not be acceptable to the architect.

The only possible exception would be where the architect has obtained a similar indemnification from its own client, the project owner. Legal advice would be essential for the architect to pursue this approach.

Unfortunately, those clients that are most likely to demand the architect (aka a “Prime Consultant”) retain these specialists may be the least likely to provide a suitable indemnification, leaving the architect exposed for claims and services beyond its recognized professional expertise and capability and its insurance coverage.

Accepting contractual liability for a wide array of specialists under the guise of “Prime Consultant” exposes the architect to contractual liability for a much broader array of services than it may recognize or be comfortable assuming.

## **ARCHITECT’S RISK MANAGEMENT OPTIONS:**

- Use standard forms of Client / Architect Agreements such as OAA Document 600-2013 or Document 601-2013 (or earlier versions of Document 600) that include a limitation on the contractual liability assumed by the architect retaining any engineering or specialist subconsultant. (OAA Document 600 / 601-2013, General Condition GC8, Clause 8.5)
- Consistent with OAA advice, whenever possible, insist that the Client / Owner assume responsibility for retaining any specialists required to provide necessary information about the client’s property and the existing conditions of the property. This assignment of responsibility is consistent with a client / professional relationship and is reflected in OAA

standard forms of contract such as OAA Document 600 / 601-2013, GC 4 Client's Responsibilities, 4.3.1, 4.3.2 & 4.3.3; and OAA Document 800-2011, Clause 2 (1).

- Do NOT accept a fee proposal or agree to a subconsultant contract with any engineer or specialist that includes a clause limiting the liability of the subconsultant, or any indemnification in favor of the subconsultant.
- Insist that any subconsultant, including Surveyor, Geotechnical or Hazardous Materials / Pollution specialists, carry professional liability insurance with per claim and aggregate limits that meet or exceed those carried by or required for the architect.
- Recognize and understand the significance of key features in the engineer's / specialist's policy including whether
  - i) the aggregate limit is a MULTIPLE of the claim limit, and
  - ii) defence costs are IN ADDITION to the claim limits.

Where these features are not provided in the engineer or specialist's policy, insist upon higher claim limits to compensate.

- Recognize that insurers, including Pro-Demnity, DO NOT define architectural practice or determine what are the "usual or customary" services of the profession. That is determined by legislation and the profession itself as evidenced by the activities of its practitioners. Architects should govern themselves accordingly so as to not find they are providing services outside the "usual or customary" test.
- Recognize that Pro-Demnity, as with any other insurer, does NOT endorse any activities or products. An architect's professional liability insurance policy covers damages that arise as a result of the architect's errors, omissions or negligent acts. However, no one would imagine this means that Pro-Demnity or the OAA "endorses" architects making errors or omissions or being negligent in the provision of their services.

The fact that coverage is available or not excluded for any activity does NOT mean that it is a good idea!

## **IMPORTANT INFORMATION:**

This advisory is for information only. It is NOT a legal opinion and cannot be relied upon as assurance of coverage in any particular circumstance.

Coverage is determined in accordance with the Certificate of Insurance, policy wording and any endorsements. Coverage decisions can only be made at the time a Claim arises, based on the allegations and then known circumstances.

Policies issued by different or excess insurers may have different policy wordings. Architects are

encouraged to contact Pro-Demnity Insurance Company directly to review any insurance questions or concerns, or for risk management advice.

Pro-Demnity Insurance Company website: [www.prodemnity.com](http://www.prodemnity.com)

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