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ORC Consultant Contract: Clause GC 3.5

WARNING:

Clause GC 3.5 in the new ORC Consultant Contract is hazardous to architects. It is NOT COVERED BY PROFESSIONAL LIABILITY INSURANCE and could lead to denial of insurance coverage that would otherwise be available.

The architect will be on its own disputing the imposition of the fee reduction, and the professional liability insurer will NOT provide a defence, assist the architect or pay the financial settlement or penalty.

Pro-Demnity recommends AGAINST agreeing to Clause GC 3.5 in the new ORC Consultant Contract. Architects must obtain legal advice respecting the consequences of agreeing to Clause GC 3.5.

BACKGROUND:

Ontario Realty Corporation (ORC) has finalized a new form of Consultant Contract that is to be used on ORC projects in Ontario. The OAA has advised its members that, although ORC engaged in discussions with the OAA, the OAA has NOT approved the contract since ORC was not amenable to making changes to accommodate several important OAA concerns.

Pro-Demnity provided comments to the OAA on liability and insurance aspects of the contract and concurs with the OAA's decision to not endorse the current version. Architects contemplating work for ORC using the new ORC "standard" supplementary conditions to a Document 600 should review the contract with their own lawyer and recognize the uninsured liabilities and potential loss of insurance coverage they may face should they accept some of the provisions.

In order to more fully advise its insured, Pro-Demnity has commissioned a review of the ORC Consultant Contract. That review is not complete; however, one clause in particular (GC 3.5) is unprecedented and merits a special "warning" to architects as to the consequences of acceptance.

Clause GC 3.5 in its latest revision now reads:

3.5 The Prime Consultant will develop an estimate of final construction costs immediately following the tender of the construction - Post Tender Estimate. Except where increases in construction costs are beyond the reasonable control of the Prime Consultant, should the cost to complete the Work exceed the Post Tender Estimate by more than 5%, the Prime Consultant's fee shall be reduced by the percentage amount that the cost to complete the

Work exceeds the 105% of the Post Tender Estimate, but in no case shall the fee be decreased by more than 10 percent under this provision. Where the Prime Consultant's fees are reduced pursuant to this GC 3.5 the Client or Ontario Realty Corporation, acting as agent for Her Majesty the Queen in Right of Ontario, either jointly or severally, will not assert any other claims against the Prime Consultant for exceeding the Post Tender Estimate.

Although ORC is the author of the contract, the parties to it will most likely be a Prime Consultant (architect) and a Project Manager retained by ORC to act as "Client" in ORC's stead.

Every construction project involves too many factors to be able to assure anyone as to the final costs. The architect is a professional advisor, not a contractor and it cannot guarantee the outcome of its services, or the performance of other parties such as the Contractor, Project Manager or ORC over which it has neither responsibility nor control.

The estimate that is the subject of GC 3.5 is to be provided AFTER the receipt of tenders and has the architect predicting the final construction costs. The wording appears intended to have the architect predict the eventual post tender "extra" construction costs that may be attributed to alleged errors or omissions in the architect's documents and the architect agrees that its fees will be reduced in accord with a formula in the contract.

THE INSURANCE ISSUES:

1. THERE IS NO INSURANCE COVERAGE RESPECTING GC 3.5

GC 3.5 has the Prime Consultant (architect) in effect contracting that the final construction costs attributed to "matters within its reasonable control" will not exceed an estimate provided by the architect by more than 5% and agreeing to a "penalty" or "financial settlement" should the final construction cost exceed 5% of whatever estimate might have been provided.

A professional liability insurance policy specifically excludes from coverage any "guarantee" as well as any "penalty" or "financial settlement" agreed to by the insured in a contract. That means that there is **NO INSURANCE COVERAGE** respecting this clause and the architect will **NOT HAVE A DEFENCE PROVIDED** by its insurer. The architect will have to pay for its own lawyer should it wish to dispute the application of the fee reduction by its client.

2. ADMISSION OF LIABILITY

There are other potential consequences to the inclusion of GC3.5 that could result in a loss of coverage.

It is a condition of a professional liability insurance policy that the insured **MUST NOT** admit responsibility, assume any obligation or make any commitment of money or services without the consent of the insurer...even if the insured believes there may have been an error, omission or negligent act on the part of the insured. (*Refer to Part IV General Conditions, "What you Must Not Do" in any Pro-Demnity Policy*). Similar language will be found in other professional liability insurance policies, it being self evident that decisions as to liability are the prerogatives of the Court.

Even if the architect accepts the penalty imposed under GC 3.5, neither ORC nor the architect's client is indemnifying the architect against allegations relating to the same issues made by other parties involved in the project. Should the architect accede to the financial settlement acknowledging liability it can be used in evidence of such in subsequent actions against the architect.

Accordingly, there is a risk that in the event of a claim for damages against the architect based on otherwise insurable allegations, the architect's actions respecting GC 3.5 may trigger a denial of coverage by a professional liability insurer.

This is in no one's interests. It remains unclear why ORC would prefer to exact a fee reduction and risk prejudicing the Prime Consultant's insurance coverage as a consequence.

Clause GC 3.5 has been revised several times through the addition and recent revision of the last sentence.

Where the Prime Consultant's fees are reduced pursuant to GC 3.5, the language included in the current version of the last sentence of GC 3.5 as quoted earlier may avoid other claims by the Client (Project Manager) or ORC for failure to predict an eventual cost. However, the current wording offers no protection respecting claims by any other entity or third party who might seek damages in a tort action against the architect (such as the contractor) or claims by the Client or ORC respecting other issues arising from the same circumstances that resulted in the increased costs (such as a delay claim).

Pro-Demnity cannot provide legal advice. Any decision respecting acceptance of the ORC Consultant Contract as well as any estimate and correspondence to the client accompanying a Post Tender Estimate in accord with GC 3.5 or any communication respecting imposition of the penalty should be reviewed by the architect's own lawyer in recognition of the legal and insurance implications.

Note as well that there are other provisions in the ORC Consultant Contract that merit careful review by the architect and its own lawyer before any decision to accept the contract terms is made.