

CLIENT/ARCHITECT AGREEMENT, MINISTRY OF GOVERNMENT SERVICES

**Introduction**

February 9, 2009

The Ministry of Government Services (GS) (formerly Saskatchewan Property Management- SPM) approached Council of the Saskatchewan Association of Architects as part of a Ministry contract review process. This review was timely as SAA Council had received comments from various member firms pertaining to contracts with Government Services. Subsequently, members of the SAA Council met on several occasions with representatives of GS to review and discuss questions pertaining to certain contract clauses. The results of this review are included below as 'Comments on Specific Clauses'. It is anticipated that this Practice Bulletin will be updated in the future in conjunction with updates to contract wording by GS.

This Practice Bulletin is issued to provide members with background information and comments on specific clauses in the GS contract identified as 'Consultant Agreement – Long Form – Standard Document 00010, Mod: 11 Dec-2007'. Members are advised to carefully assess any risks associated with ALL clauses contained within this or ANY OTHER agreement they may sign.

**Comments on Specific Clauses**

Text in italics denotes wording from GS contract is included for case of reference only.

**Article 1- Definitions**

*1.10 Field Services – subject to Article 2.8.2, shall mean full examination and testing Services required by the Consultant relative to the execution of the Project by the Contractor, to a level the Consultant considers necessary to determine that the Work as executed by the Contractor is in general conformance with the Contract Documents.*

Client/architect agreements, including RAIC standard agreements, usually include periodic reviews by the Consultant. GS feels that 1.10 combined with 2.82 allows for a degree of flexibility on the part of the Consultant, if required during the Construction Phase. SAA members should note the difference between the GS agreement and the RAIC standard agreement when pursuing GS work. The SAA will continue to request GS review and modify this clause.

**Article 2 – Consultant's duties and responsibilities to the Client**

*2.2 – The Consultant shall apply and adhere to the Client's Design Standards in place and in force from time to time, and the Client's CAD Guidelines for Consultants (Schedule B), and the Client's Document Submission Specifications (Schedule C), and the Client's Facility Data Retrieval Guidelines (Schedule D).*

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The referenced 'Design Standards' document should be obtained from GS for each project to ensure that the Consultant has all relevant design information. Some SAA members also have observed that the CAD standards adopted by GS are unusual, however GS does not see these as unusual since they are based on AIA CAD Layer Guidelines. Any detailed concerns should be discussed with GS technical staff.

*2.4.7.1 – The Consultant's entitlement to rely on materials provided by the Client shall not absolve the Consultant of any responsibility in respect to the structural integrity on an existing property or the property of any proposed alteration or renovation thereto or as the case may be.*

GS advised that this clause has been in contracts for a very long time, but is being reviewed by GS legal counsel in response to concerns raised by the SAA. Unless and until any modifications are made by GS, the SAA recommends that members take this clause into account when pursuing GS work.

*2.6.7 – Prior to the submission to the Client of Construction Documents which are 75% complete the Consultant shall submit to the Client substantiation that all required consents, approvals, licenses and permits referred to in Article 2.4.6 and the requirements of all statutes, regulations, codes and by-laws referred to in Article 2.4.6 have been obtained by the Consultant, or met, except where the obtaining of any such license, consent, approval or permit requires that Construction Documents be 100% complete before application can be made therefor.*

It is understood that the Consultant is not able to secure (building) permits with 75% complete documents. GS advises that the intent of this clause is to ensure that Consultant obtains approvals from such entities as Wascana Centre Authority or Meewasin Valley Authority during the design phase. The SAA has recommended that GS revise this clause to clarify that only certain preliminary consents and approvals can be obtained prior to 75% complete documents.

*2.8.8 – The Consultant shall enforce the Contractor's obligation to maintain the level of Saskatchewan content as represented to the Client and the Consultant at the time of Contract award.*

GS advises that this clause is being reviewed and may be eliminated. Prior to any modifications by GS, the SAA recommends that the word enforce be manually struck from the contract and replaced with monitor in any executed agreement. GS does not object to this change.

*2.8.14 – The Consultant has the authority in an emergency to stop the progress of the Work whenever, in his opinion, such stoppage may be necessary to ensure the safety of life, or of the Work, or neighboring property. This includes authority to make such changes and to order, assess and award the cost of such Work as an extra to the Contract or otherwise as may in his opinion be necessary.*

It is not the intent of this clause to make the Consultant responsible for safety of the work place since construction contracts make it clear that this is the responsibility of the Contractor. This clause is seen by GS as providing some

protection for the Consultant that can be exercised in an emergency. The SAA advises members to familiarize themselves of the requirements placed upon them by Bill C-45.

**2.11.5** – *If the lowest bona fide bid or negotiated proposal exceeds the Construction Estimate, the Consultant and the Client shall jointly review the lowest bona fide bid or negotiated proposal and; based upon the Client's decision:*

- (1) *the Consultant shall:*
  - (a) *co-operate with the Client in revising the scope or quality of the Work as necessary to negotiate with the low bidder or low proposer for a reduction in the Construction Cost, or a reassessment of his bid or re-negotiate with the low bidder or low proposer for a reduction in the Construction Cost, or to invite new bids or re-negotiate scope or quality of the Work; and;*
  - (b) *without additional charge modify the drawings, specifications and addenda as necessary to reduce the Construction Cost to within the latest approved estimate unless the:*
    - (i) *excess is due to extraordinary market conditions; or,*
    - (ii) *modification occurs as a result of a Client initiated change in scope, or*
- (2) *the Client shall give written approval of an increase in the Construction Cost commensurate with the low bid or negotiated proposal received.*

GS advises that the intention of this clause is to reduce the frequency with which projects need to return to treasury for additional funds. Consultants should be diligent in documenting and obtaining GS approval for required project scope changes. They should also carefully estimate project costs and document the expected cost at each project milestone. It is prudent to include a suitable contingency in all project cost estimates.

The Consultant should ensure that formal approval of any cost and scope/scale changes is received from GS at each project milestone. Without an accepted change to the project budget, the Consultant will lose compensation.

**2.12 Authority of the Consultant** – *The Consultant shall have no right or authority, express or implied, to commit or otherwise obligate the Client in any manner whatsoever except to the extent specifically provided herein or specifically authorized in writing by the Client. The Consultant shall have no right or interest in this Project, nor any claim of lien with respect thereto, arising out of this Agreement or the performance of its services. This Agreement shall in no way be construed to authorize the Consultant to engage in any brokerage services or activities of any nature relating to the Project.*

The current wording excludes lien protection for the Consultant. The Consultant should have protection of Builders' Lien legislation particularly since fees are

subject to Builders' Lien deductions in article 4.2.3. An agreement cannot effectively eliminate the right to lien a property as established by a Saskatchewan law, so this provision is not enforceable. This clause is being reviewed by GS legal counsel.

#### **Article 4 – Fees and reimbursable expenses**

##### **4.2 Fee for basic services** (Text not included)

The contract does not refer to any provision for interest charges on late payments. It is reasonable for the Consultant to receive such compensation - GS advises the following:

- GS endeavors to pay invoices within 30 days
- Interest is calculated automatically after 45 days in accordance with current policy of the Ministry of Finance
- Consultants should ensure that GS Project Managers do not have any concerns with invoices or the above timelines could be affected

#### **Article 8 - Sub-Consultants**

*8.1 – The Consultant shall retain, at his expense, qualified Sub-Consultants considered necessary for providing and performing the Services as defined. These Sub-Consultants shall be named in Schedule A to this Agreement. These Sub-Consultants so retained shall be directly contracted to the Consultant and shall not be considered to be contracted to the Client.*

The Client should engage and pay for the services of specialist consultants such as geotechnical and survey consultants directly since professional liability insurance provides no coverage for these disciplines. GS has clarified this within the 'Consultant Terms of Reference' of an RFP by stating:

*(The Consultant shall) Make recommendations to the Owner regarding the acquisition of all required site information including but not limited to site surveying, environmental testing and contaminant removal. The Owner will engage these specialist consultants.*

SAA members are advised that the approach taken by GS is in line with best practices that should be used on all work performed by Consultants.

#### **Article 10 – Indemnification**

*10.1 – The Consultant shall indemnify, defend and hold harmless the Client, its officers, directors, agents, employees, successors and assigns, and each of them from and against any and all claims, demands, losses, costs, damages, actions, suits or proceedings (including reasonable legal fees) arising directly or indirectly in whole or in part, or attributable to, the Consultant's, Sub-Consultant's and Sub-Sub-Consultant's performance or non-performance of its duties under this Agreement or arising out of the negligence or wilful act or omission of the Consultant, Sub-Consultant and Sub-Sub-Consultant or any of its officers, directors, agents, employees, successors and assigns, or the performance or non-performance by any trade contractor commissioned by the Consultant under this Agreement, excluding only such of the foregoing as result from the fraudulent, negligent*

*or wilful acts or omissions of the Client, its officers, directors, agents and employees. The provisions of this article shall survive the termination of this agreement.*

This clause requires the Consultant to “defend and hold harmless” the Client. The SAA believes that most professional liability insurance policies do not include coverage for “defending” other parties. The clause does not include a reciprocal requirement for the Client to defend or hold the Consultant harmless. Furthermore the indemnification by the Consultant for “wilful” acts of any members of the design team may also not be insurable.

The SAA recommends that members review this clause with their liability insurance provider and will continue to request GS review and modify this clause.



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