CHOOSING AND RETAINING CONSTRUCTION CONSULTANTS

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INTRODUCTION

Having a good consultant for your construction project is critical. It can mean the difference between a smooth process that is completed on time and within budget, and one that is fraught with challenges and ends up taking a lot longer and costing a lot more than you had planned. An owner ought to take great care in selecting a consultant with expertise that is appropriate for the particular project. Once selected, the consultant retainer agreement must deal with a variety of issues relating to the services the consultant will provide, such as: the scope of the services, timelines for delivery of the services, fees for the consultant's services, disbursements/reimbursements, and insurance and risk management, to name a few.

The first part of this paper discusses considerations when selecting a construction consultant. Competitive processes, such as a request for proposals, can be useful in establishing a market fee for the consultant's services. Guidance concerning fees can also be obtained from guides published by industry organizations such as the Ontario Architect's Association. However, the opinion of someone who has worked with construction consultants for similar projects, such as an experienced project manager, offers the best guidance for selecting the right consultant for the job and establishing an appropriate fee.

The second part of this paper serves as a basic checklist of essential terms to be included in any consultant retainer agreement. The checklist will be useful for reviewing, amending, and negotiating any consultant retainer agreement, whether or not it is on one of the often-used standard forms published by industry organizations such as the Royal Architectural Institute of Canada, the Ontario Architect's Association, and the Consulting Engineers of Ontario.

PART I -THE SELECTION PROCESS

Most major developers employ a construction project manager who knows of the construction consultants that are experienced with the kinds of projects that the developer constructs. Smaller developers or owners without in-house staff may choose to retain professional construction project

managers. Major construction contractors such as PCL, Ellis Don, Aecon, Ledcor and Reliance Construction offer project management services. Project managers at these firms can provide useful guidance when considering which architects, engineers and other consultants are appropriate for a particular project.[1]

Arguably, the most effective method for selecting a construction consultant is a request for proposals process. A typical format for this process invites various consultants to submit their pitch for why the owner should select them for the project. Whether a request for proposals or another method of selection is used, it is critical at the initial stage that in addition to describing the project (including proposed budget and timing) the parties set out the key topics to be addressed in the consultant retainer agreement, including the form of contract and supplementary condition to be used, if applicable.

References endorsing the consultant and detailed descriptions of past projects of a similar nature ought to be submitted as part of the consultant's proposal for the owner's consideration. Equally important is a list identifying the subconsultants that the consultant will require to perform the services. As the identity of the individual service provider is an essential consideration for the owner, the identity of key personnel (for both the main consultant and any subconsultants) as well as their availability throughout the project should be addressed at the selection stage.

FEE STRUCTURES

Prior to selecting a consultant, the parties should also address how the consultant will be paid. Generally speaking, construction consultants are paid in one of three ways, being:

(a) "fixed fee" - a known dollar amount that is set out in the consultant retainer agreement;

(b) "percentage" - the consultant's total fee is calculated by applying the percentage set out in the consultant retainer agreement to the construction costs for the project; or

(c) "hourly" - the consultant is paid a fixed rate set out in the consultant retainer agreement for each hour of service it provides.

However, it is uncommon for a consultant's entire fee to be based entirely on only one of these methods. More commonly, the parties employ a combination of the three fee structures - selecting the most appropriate fee structure for the particular stage of service being provided. For example, in dealing with planning authorities and obtaining permits for the project, it may be most appropriate to compensate the consultant on an "hourly" basis as the time requirement and complexity can increase dramatically by forces beyond the consultant's control. Conversely, for the preparation of plans it may be most appropriate to compensate the consultant on a "percentage"

[1] Given that a project manager is a type of construction consultant itself, the checklist in part II of this paper would also be helpful in establishing the terms of a retainer agreement with a project manager

basis. Where the amount of work required is known in advance, such as the preparation of an architectural rendering or marketing materials, "fixed fee" may be the way to go. Perhaps the best guide for establishing the fees for an architect is "A Guide to Determining Appropriate Fees for the Services of an Architect", published by the Royal Architectural Institute of Canada. The Guide has been endorsed by the architectural associations of all ten provinces.

INDUSTRY ASSOCIATION STANDARD FORMS

The most recent form of contract for architectural services issued by the Ontario Architect's Association is document OAA 600 – 2013. It contains a schedule in chart form setting out the various services that the parties may wish to include in the contract. Next to each service the parties can indicate whether the service will be provided by the consultant and if so, whether compensation for the service is included in the basic fee or charged as an "additional service". The OAA 601 – 2013 is virtually identical to the 600 – 2013, except that instead of the chart the 601 – 2013 leaves room for the parties to provide their own customized description of the consultant's services. Both of these forms were updated to reflect changes to Ontario's *Construction Act* that came into force on July 1, 2018. [2]

A useful form produced by the Royal Architectural Institute of Canada is Document 6 – 2018, which comes in both common law and Quebec versions. It is quite similar to OAA 600 – 2013, but it has some additional features. Most notably among them is the inclusion of various forms of Schedule "A", each of which sets out commonly used scopes of work. Schedule A1, for example, sets out those services when the consultant is retained only for the pre-design stages of a project. Schedule A2 sets out those services when the consultant is retained to assess and report on the condition of existing facilities. Schedule A3 sets out those services that consultants would typically provide for a small/mid-sized construction project. Schedule A4 deals with custom residential design. And Schedule A5 is particularly useful for tenant fit outs in shopping centres and office buildings.

Ontario Architect's Association and the Royal Architectural Institute of Canada publish guides to assist parties using their standard forms. Some guides contain suggestions pertaining to appropriate fees for various types of project. The guides are useful, but not comprehensive.

The Consulting Engineers of Ontario and the Municipal Engineers Association have collaborated to produce standard form agreements for professional engineering services. There are other standard forms available in other jurisdictions and guides are published to assist parties using them as well.

"Short form" versions of these forms are also available. OAA 800 – 2011 for example, is a standard short form which can be used for simple consultant retainer agreements on straight forward

[2] RSO 1990, c C.30. The changes included removing the word "lien" from the title of the legislation.

projects. Document 7 produced by the Royal Architectural Institute of Canada is an abbreviated version of its Document 6. Document 8 is even shorter. Where the project is not very complex or the consultant's services are limited in scope, a short form will likely do the trick.

Each of the organization that produced standard form consultant retainer agreements discourage amending them in the usual way. The forms tend to be published in "locked" PDF format. Users are invited to fill-in certain in fields of information, but are prevented from altering the substantive terms of the form. These organizations also make known their copyright to the form and often expressly prohibit unauthorized alterations. It has therefore become typical industry practice when using an association's standard form to append "Supplementary Conditions" that set out amendments often, the form of "delete and replace" to be read in conjunction with the standard form.

Whether the parties are using a standard form and supplementary conditions or have chosen to utilize a custom form of contract, the terms to be considered when drafting a consultant's retainer agreement are the same. The checklist comprising the second half of this paper addresses what to consider when drafting, negotiating, or amending several of these terms.

PART II -THE CHECKLIST

☐ SCOPE OF SERVICES

The scope of services to be provided by the consultant is one of the most important elements in a consultant retainer agreement. The OAA 600 – 2013 form and the RAIC Document 6 2018 form, contain a schedule listing the "basic services" which the consultant will provide. There is also room to list "additional services" which the consultant will provide at the request of the owner for an additional fee. It is critical that the parties review these scopes of services closely because they will have a direct impact on the fee payable to the consultant. Additional services are often provided on an "hourly" fee structure. Where this is the case, a schedule showing the hourly rates for all relevant personnel should be included in the agreement. Sometimes a cap on fees for particular additional services is appropriate.

While the standard forms many of the typical services provided by construction consultants, there are certain essential services that do not appear in most standard forms, such as:

(i) a requirement that the consultant and its subconsultants act reasonably in responding, without extra charge, to requests by the owner for clarification and additional information;

(ii) a requirement that the consultant provide reports that may be required by the party financing the project; and

(iii) where the consultant acts as payment certifier, a requirement that the consultant provide certificates in a timely manner.[3]

Some standard forms include provisions that are intended to prevent the owner from being overly demanding of its consultant. For example, GC 8.4 of OAA 600 – 2013 provide that the consultant shall not "be required to make exhaustive or continuous on-site reviews". The language in this provision is typical of these clauses. It is vague and ripe for dispute. Determining what constitutes "exhaustive or continuous" review will be difficult. Given the importance of site visits to the progress of the project, this provision ought to be fleshed-out in a supplementary condition.

Another change introduced by Ontario's (new) *Construction Act* is the imposition of an adjudication regime that allows a contractor to require adjudication of a dispute regarding payment. The owner may require that the consultant assist with or participate in the adjudication process. These services should be addressed in the consultant retainer agreement.

☐ KEY PERSONNEL

The selection of a consultant is heavily influenced by the particular individual(s) that will actually be providing the professional services. Accordingly, the names of these key individuals ought to be set out in the consultant retainer agreement, along with their precise role in respect of the project. The agreement should expressly provide that changes to the key personnel require the owner's prior approval. Some consultant retainer agreements go so far as to say that if the key personnel are not able to perform the services throughout the project (say for example, where they leave the firm or become ill, etc.) the owner may terminate the consultant retainer agreement and the consultant will be required to reimburse the owner for additional costs incurred in hiring a new consultant and bringing them up to speed.

☐ ADDITIONAL CONSULTANTS

The subconsultants that the main consultant intends to utilize for the project should be identified in the main consultant retainer agreement. It should also be clear whether the main consultant or the owner will hire them. If the owner hires them, they have a direct contractual relationship to the owner and no formal legal relationship to the main consultant. Accordingly, the main consultant's retainer agreement should require that the main consultant coordinate its services with those of any additional consultants. Similarly, the agreements between the owner and the additional consultants should require that they follow the reasonable instructions of the main consultant with respect to the coordination of their respective services for the project. Where the other consultants will be retained by the main consultant, it is the owner who has no contractual relationship with them. Those additional consultants are technically "subconsultants" and relate to the owner exactly the same as a subcontractor in that they are contributing to the project but do not have a contract

[3] This obligation is of heightened importance in light of the changes to Ontario's Construction Act that obliges an owner to pay a contractor's invoices within 28 days.

with the owner. This "pyramid" structure may or may not be desirable based on the nature of the project.

Parties using a standard form should be aware that some contain provisions allowing the main consultant to oblige the owner to hire additional consultants on the main consultants' instruction as the project progresses. In order to ensure the identity of personnel and to keep fees under control, an owner ought to require that all other consultants that the main consultant requires to provide the services set out in the main consultant retainer agreement are included as a schedule.

☐ OWNER DUTIES

Standard forms of consultant retainer agreements produced by industry associations usually contain a list of owner responsibilities. Given that these are associations of construction consultants (not owners), it is no surprise that inclusion of these responsibilities may not sufficiently address the owner's perspective. Owners are cautioned to review these responsibilities carefully. Typically, they include things like: production of certain reports (such as soils reports, environmental reports and surveys), hiring other consultants as directed by the main consultant, and providing detailed information concerning conditions of the project site and adjoining properties. From an owner's perspective, it is preferable to list the specific reports, investigations and studies that the owner is required to provide. Open-ended obligations create open-ended exposure that may allow the consultant to avoid liability on the basis that the owner did not provide proper or complete information.

☐ FEES

As mentioned above, there are various fee structures to be considered when settling the consultant retainer agreement. Regardless of which fee structure is chosen, the following should be considered:

1. Some industry association standard forms require the owner to pay an upfront fee to the consultant simply in consideration for its entering into the agreement. This fee is often deleted.

2. Owners should scrutinize the description of disbursements and reimbursable expenses set out in the agreement. Vague language can lead to disputes. Common exclusions are: employee travel between one's home and the work site, meals (except in specific circumstances) and accommodation expenses. Standard forms typically apply an administration fee (usually 15%) on reimbursable expenses. The parties should consider whether this fee is reasonable in the circumstances.

3. The mileage rate for travel also needs to be considered. Fifty cents per kilometer is not unusual but, it is also not unusual to see mileage charges deleted altogether.

Where the consultant's fee is based on a percentage of construction costs, the cost of construction will require very careful examination. The parties may disagree as to what constitutes a "construction cost." Permit fees and development charges are generally excluded, as are fees payable to consultants retained by the owner. [4]

Where any part of the consultant`s fee is based on an "hourly" fee structure (including for additional services) the hourly rates for key personnel should be set out in a schedule attached to the agreement.

☐ PAYMENT

Scheduling payment of the consultant's fee needs to be addressed in the retainer agreement. Where the consultant will be paid on a "fixed fee" or "percentage" structure, the parties often include a table showing what percentage of the total fee the consultant will be considered to have earned at every stage at the project. Where the consultant is being paid a percentage of construction costs, payments will have to be based on estimates and adjusted once final construction costs are determined.

The inclusion of a form of the invoice as an exhibit is also prudent in some circumstances as the (new) prompt payment requirements of the *Construction Act* (that come into effect in October 2019) oblige the owner to pay a consultant's "proper invoice" within 28 days. Late payments may trigger an adjudication process. The form of invoice and process for approval and submission of invoices ought to be set out in detail in order to avoid ambiguity as to the start of the 28-day clock.

Importantly, some standard forms preclude the owner from using the plans, specifications, etc. provided to by the consultant if the owner has failed to pay the consultant's invoice when due. This "self-help" remedy is often deleted as it is unduly harsh on the owner. Disputes regarding payment ought to be addressed under the default and dispute resolution provisions of the retainer agreement. The consultant should not have the right to unilaterally halt progress on the project by holding hostage its plans until the dispute is resolved.

☐ CONSTRUCTION LIENS

Industry association standard forms invariably neglect to address the fact that most construction consultants can register liens if they are not fully paid for their services in respect of the project. Architect's lien rights are expressly set out in Ontario's *Construction Act.*[5] Most other construction consultants would similarly fall within the definition of "contractor" under the legislation, entitling them to register liens and pursue trust claims just like unpaid contractors and subcontractors.

[4] Including especially the fee to the consultant that is the subject of the calculation.
[5] RSO 1990, c C30, s 15. Lien rights are limited to the services or materials provided to an "improvement," which may not include early stage consultant services such as feasibility studies.

Given the exposure to liens and trust claims, one would expect the parties to follow a holdback procedure in the payment of consultants. However, this is rarely done. Perhaps because of the infrequency with which liens are filed by consultants or perhaps because it is more common for additional consultants to be retained by the owner (and therefore there are no subconsultants), owners are likely to pay their consultants without the same allegiance to the holdback regime as is typically applied to contractors.

Nevertheless, owners are cautioned to apply the same holdback regime when paying consultants as they do when paying contractors. This regime should be followed not only because of the exposure introduced by the consultant's lien rights, but also because of the statutory trust obligations and their potential enforcement against the owner's officers, directors, and persons with effective control over the company.[6] Where the holdback regime is applied to consultant retainer agreements it should deal with certification for payment, especially where the consultant itself will be payment certifier for the work of contractors.

In some instances, it makes sense to break the consultant services into two agreements. One for design services that can will substantial performance early in the project schedule and the other for administering the construction contract. That way the holdback for the consultant's design services can be released when that aspect of the consultant's services achieve substantial performance. The rest of the holdback will have to be retained until the contract administration component of the consultant's services achieve substantial performance, which will likely occur concurrently with substantial performance of the construction work itself.

☐ SUSPENSION OR TERMINATION

The consultant retainer agreement ought to address circumstances where the owner decides to suspend construction of the project or elects not to proceed with the project altogether. Payment of the consultant's services up to the point of suspension or termination is implicit, but it is prudent to expressly set it out. The agreement should also address terms and conditions under which the consultant is required to resume service, taking into consideration the possibility that subconsultants and/or key personnel may not be available when the project is resumed. Often, the fees will need to be adjusted also to ensure the consultant is adequately compensated for costs incurred in connection with the suspension and resumption of its services.

Copyright in the consultant's product becomes of heighted relevance in suspension and termination scenarios. Industry association standard forms typically provide that the consultant owns the copyright in its product. This could be a very serious impediment if the project is suspended and then later resumed using the services of a different consultant or where agreement is terminated because the owner is dissatisfied with the consultant's performance. The consultant's copyright in the plans may prevent the owner from completing the project with a different

[6] RSO 1990, c C30, s 13 (1).

consultant unless a whole new set of plans are produced. Even still, some design elements may have to be redone to avoid infringing on the terminated consultant's intellectual property. Accordingly, the consultant retainer agreement should either transfer copyright to the owner or grant the owner an irrevocable license to use the consultant's instruments of service for the completion of the project, even where the consultant's services are terminated. It is reasonable in these circumstances for the owner to agree to indemnify the consultant from liability arising from changes made to the consultant's plans, drawings and other product without its consent.

☐ DISPUTE RESOLUTION

The parties ought to consider the use of alternative dispute resolution methods, such as mediation and arbitration. Industry association standard forms often require the owner's contracts with third parties involved in the project contain dispute resolution provisions that align with those in the main consultant retainer agreement. In some cases, the consultant retainer agreement requires that the owner notify the consultant of any disputes between the owner and third parties and allows the consultant to participate in the resolution process. Generally speaking, most owners would be better off avoiding an obligation to coordinate their dispute resolution clauses in this manner. Particularly because failure to achieve proper coordination could expose the owner to claims from the main consultant. While it may be prudent to coordinate dispute resolution provisions in respect of the project, the owner should avoid accepting a contractual obligation to do so.

Arbitration has some important benefits over traditional litigation. First, arbitration gives the parties more control over the adjudicative process. Court procedures can be rigid. Arbitration procedures are malleable, so they can be tailored to appropriately deal with a particular dispute. Second, parties to a court action don't get to select their judge or master. Whereas with arbitration, the parties are the ones that select the adjudicators. Third, most court documents are available as part of the public record. Arbitration, on the other hand, is a private process and supplementary agreements can help preserve confidentiality. Arbitration can, however, cost more than a traditional court action. Since the parties are essentially setting up their own mini-court system for the purpose of their particular dispute, the costs exceed those of lawyers and experts. The arbitral panel has to be paid too. In Ontario, appeals of an arbitral award is restricted to questions of law. It is therefore critical that the parties have sufficient control over the process and the selection of the adjudicators so they can live with the award. Establishing the arbitral process and selecting the adjudicators are often addressed in the consultant retainer agreement by reference to the applicable provincial arbitration legislation.

☐ INSURANCE AND RISK MANAGEMENT

It is typical that the consultant retainer agreement require that the consultant maintain professional liability insurance covering errors and omissions. The amount of that coverage should correspond to the size of the project. The consultant's ability to pay the deductible should be given careful consideration. Often a consultant is also required to carry property insurance for assets that it uses

for the delivery of its services. Since errors and omissions insurance are issued on a "claims made" basis, the insurer will only respond to claims made during the term of the policy. If a claim arising from the consultant's services doesn't arise until after the term of the policy, coverage will be denied. There are two approaches to dealing with this potential gap in coverage. The first is to require that the consultant purchase a "project policy" that covers all liability for which the consultant may be responsible in connection with a particular project regardless of when the claim is made. The second approach is to rely on the consultant's "blanket" or "practice" policy which it maintains on a continuing basis in connection with all of its services and for all projects for which project policies are not purchased. As you might expect, where the parties provide for a project policy as opposed to relying upon the consultant's blanket or practice policy, an extra project cost is introduced. Saving that cost provides an incentive to rely upon the consultant's blanket or practice policy. Before deciding to do so however, it's important to have an understanding of the limits of the consultant's blanket or practice policy and its deductible, as well as an awareness of any claims that might be outstanding and unresolved, as they may encroach on the availability of insurance proceeds. A full statement concerning the claims history of the consultant needs to be obtained if the parties are going to rely upon the consultant's blanket or practice policy. Similar considerations should be had with respect to insurance carried by all other consultants engaged in the project.

Invariably the question of limiting the consultant's liability arises. Consultants will often seek to limit their liability to the total amount of their fees under the retainer agreement. In most instances this limitation is inappropriate. The damages an owner may suffer if the consultant fails to adequately perform its services could easily exceed the quantum of the consultant's fees under the agreement. If a limitation is to be included, the parties may decide to specify a particular dollar value to be established having regard to the size of the project, any particular risks, and the limit of the consultant's insurance.

Some industry association forms go further in limiting the consultant's liability. For example, GC 8.4 of the OAA 600 and 601 forms state that the architect is not responsible for acts or omissions of contractors or subcontractors if they fail to carry out the work in accordance with the construction contract documents. Considering the architect's responsibility for reviewing the work as it progresses to ensure it corresponds to the construction documents, this limitation seems overly broad. GC.8.4 goes on to insulate the consultant from liability arising from toxic or hazardous substances or materials. This too seems inappropriately broad because one would normally expect an architect to be fully apprised of the impact of prescribing materials for construction that might be toxic or designing facilities that might be inappropriate having regard to known soil conditions or environmental conditions, particularly when sufficient information was provided to the architect before the work began. GC 8.4 also relieves the architect from liability from any interpretation that it makes in good faith regardless of whether the interpretation was wrong or inconsistent with the standards of performance applicable to the profession. These limitations on liability should be

carefully assessed, bearing in mind that the consultant is required to have insurance to indemnify it from much or all of this liability.

Most standard industry association forms limit the consultant's liability in respect of subconsultants to "coordinating the services" of the subconsultants. The standard forms don't deal with taking responsibility for the errors and omissions that the subconsultants might make. In such cases, the consultant retainer agreement must be amended to clearly affix the main consultant with responsibility for the services of its subconsultants. Absent such a provision the owner has no claim in contract for a subconsultant's failure to adequately provide its services.

When considering limitations of liability, it is important to address liability for consequential damages, including loss of profit. Industry association standard forms generally exclude liability for consequential damages arising from the consultant's errors and omissions. That exclusion greatly reduces the consultant's exposure the damages likely to arise from the consultant's error or omission are consequential in nature - often relating to construction delays.

☐ ASSIGNMENT

If assignment is to be prohibited, it must be expressly set out. Considering the importance to the owner of the individuals providing the consultant's services, it would be very unusual for an owner to allow the consultant to transfer the retainer agreement. It is not, however, unusual for an owner to retain the right to assign the benefit of the contract to a purchaser of the project or to a lender as security. In the interest of clarity, the owner's right to assign is often expressly set out in the retainer agreement. The provision dealing with transfers often addresses compensation to the consultant for extra services associated with the transfer, including bringing the new owner up to speed and adjusting to a new owner team.

☐ TENDERS TOO HIGH

Industry association standard forms often contemplate circumstances where all tendered prices for the project substantially exceed the estimated cost provided by the consultant. In such circumstances, the standard form may require that the owner adjust the scope of the project to reduce the cost, or it may entitle the owner to terminate the retainer agreement so that it may abandon or substantially alter the project. Alternatively, the standard form may oblige the consultant to redesign the project to bring it within the owner's budget. The cost of this redesign may have to be absorbed as part of the consultant's basic services. Although, in some instances it is charged as an additional service. Often, determining which party will bear the cost of the redesign depends on the amount by which the tendered prices exceed the consultant's estimate. For example, some standard forms provide that if the tendered price exceeds 15% of the last mutually approved estimate of construction costs, the consultant must do the redesign as a basic service. On the other hand, if the excess is less than 15%, the cost of the redesign is payable by the

owner as an additional service. That 15% figure typically gets negotiated down. In rare cases, it is eliminated.

CONCLUSION

It is often said that the only certainty in construction is uncertainty. Having an experienced and skilled construction consultant when navigating the uncertainty of a construction project can make a huge difference to the time and cost of the project. However, attention must be given to the terms of the consultant retainer agreement, lest retaining the consultant be a source of additional challenge. The comments set in this paper flag a number of salient issues that parties ought to consider when retaining the services of a construction consultant. The comments are not comprehensive and should not be considered "total gospel". They merely reflect the writers' experiences, spanning several decades of drafting and negotiating agreements with architects, engineers, designers, and project managers for various types of construction projects.