2.1.9 Risk Management and Professional Liability
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Every business enterprise involves risk. Management of risk requires the identification of potential risks, an assessment of the degree of risk, a considered decision of whether or not to assume the risk, and, if the risk is assumed, what steps to take to mitigate any potential impacts.

Liability for professional services performed is one risk encountered by every architectural practice. Incorporated architectural practices (where permitted) can limit some of the liabilities for the business side of their operations. However, all architects are liable for the professional services they provide.

To a certain degree, risk management is the application of “common sense” and involves proper consideration of all the issues and their potential ramifications.

Risks occur throughout an architect’s career, from setting up a practice, during the life of the practice, and after retirement. One can never totally eliminate risk. Inaction can sometimes be riskier than action, and either course can have unforeseen consequences.

This chapter cannot deal with every conceivable risk in an architect’s practice, but will review certain kinds of risks in order to assist the architect in developing a risk management strategy.

Risks Related to Management of the Practice

Setting up a Practice

Refer also to Chapter 2.1.1, Organization of an Architectural Practice, for further information on setting up a practice.

The architect should check the regulations of the provincial or territorial association of architects, particularly those requirements for:

• structure and ownership of an architectural practice;
• permitted names for an architectural practice;
• other operating requirements such as:
  • bona fide address;
  • telephone, etc.

In addition, the architect should confirm the following requirements of municipal authorities:

• business taxes;
• zoning or land use restrictions for the proposed office.

At the outset, the principals should prepare a “strategic plan” which includes a business and financial plan. Refer also to Chapter 2.1.4, Financial Management, and Chapter 2.1.1, Organization of an Architectural Practice, for more information on these plans.
Professional Liability Insurance

One method of mitigating risks is to obtain and maintain professional liability insurance (sometimes referred to as Errors and Omissions Insurance). This type of insurance is mandatory in some provinces. Refer to “Comparison of Provincial Provincial and Territorial Requirements regarding Professional Liability Insurance” in Chapter 1.1.4, The Organization of the Profession in Canada.

All architects are expected to perform their services to a “professional standard of care.” This means that architects are required to provide service with the degree of care and skill that would be rendered by reasonably competent architects under the same circumstances and in the same geographic location. An architect who does not meet this standard may be found to be negligent.

An architect found liable for an honest error or omission or held to be negligent can be held personally accountable for the damages. Professional liability insurance provides protection from such claims and is intended to cover such liabilities.

A professional liability insurance policy does not necessarily afford total protection, because insurance policies typically have exclusion clauses which void coverage for certain specific activities. The architect should read and understand the policy and pay particular attention to exclusions. Premiums are usually proportionate to the volume of work in the practice. It may be necessary or prudent to purchase excess coverage over and above the basic level of protection required by the regulations or legislation of a particular province. If possible, the excess coverage should cover any exclusions in the primary policy. Excess insurance coverage for a specific project is typically a reimbursable expense.

The Canadian Standard Form of Contract Between Client and Architect: RAIC Document Six contains a clause, GC 7.2, limiting the architect’s liability to the client. A similar clause should be included in all other non-standard, client-architect agreements. However, this clause will not limit exposure to third parties; therefore, additional coverage may still be advisable.

If a situation arises in which the architect believes that a claim might be made, the architect should discuss the situation with the professional liability insurer to minimize exposure. Notify the insurer at the first indication of the likelihood of a claim and follow the insurer’s advice in order not to put the insurance coverage at risk.

Every province and territory has a different statute of limitations. These statutes of limitations usually provide a time limit when a claim can be made. These laws indicate the number of years after which no legal proceeding may be undertaken following a date when the damage (or negligent act) was discovered or ought to have been discovered. However, no time limitation applies to recognition of damage (or negligence) in the life of a building. In other words, professional responsibility and potential liability for each and every project remains with the architect for life.

In Québec, the liability of architects is based in the following articles of the Civil Code:

- Article 1457 — General Liability
- Article 1458 — Contractual Liability
- Article 2118 — One Year Liability for workmanship of a Contractor
- Article 2120 — Five Year Liability in the case of loss of work — this is joint and severable with engineers and the contractor with the possibility of release.

Refer to the “Chart: Comparison of Statutes of Limitations in Each Province and Territory” at the end of this chapter.

The architect should always require sub-consultants to carry professional liability insurance with the appropriate coverage for each project. All consultants should be required to verify that they have obtained this coverage when the architect engages consultants for a project.
Alternative Dispute Resolution (ADR)

In the event of a dispute, the architect may occasionally be requested to participate in some form of Alternative Dispute Resolution (ADR) such as mediation or arbitration. ADR is a conflict management strategy that seeks to avoid the very costly and very lengthy process of litigation. This approach is usually proposed when amicable negotiations do not achieve a mutual agreement to resolve a matter under dispute. Always discuss a proposal for ADR with your lawyer and the professional liability insurer prior to agreeing to participate. The insurer or their legal counsel may wish to represent the architect in these circumstances.

The ideal, of course, is to avoid disputes in the first place. Clear, concise, correct, well-coordinated, and well-checked contract documents will reduce the likelihood of a dispute, but cannot totally eliminate the possibility. Equally important, are regular and good communications with all members of the project team.

Illustration 1 shows a sequence of dispute resolution techniques. These methods of ADR are ranked in ascending order from low to high escalation of hostility and of costs for the parties in dispute.

Partnering
Developed as a method of dispute avoidance, partnering has the following objective: to solve problems as they arise, in a manner that will best achieve agreed-upon collective goals rather than trying to affix blame. Partnering involves a team comprised of owners, design professionals, and contractors (prime contractors and sub-contractors). Each participant in the process earns the trust, respect, and understanding of the others concerning the expectations, goals, and objectives in implementing a construction project. This is often accomplished through a facilitated working session or meeting. Partnering typically takes a few days of meetings which culminate in the issuance of a “charter” stating the mutual “buy-in” or acceptance by the partners to the project’s common goals.
As with all contractual relationships, the “chemistry” among the participants must be compatible; partnering can enhance the chemistry but will not likely replace it.

**Negotiation**

In the event of a dispute, the parties may initially attempt to resolve the matter by negotiation. Negotiated settlements based on strict interpretation of the terms of a contract are generally less successful than those negotiations which focus on the underlying interests of the parties.

**Mediation**

When two or more parties mutually agree to refer their dispute to mediation, a neutral person is usually appointed to act as a mediator. The mediator is a type of facilitator, assisting the parties in their negotiations with one another to resolve or settle the dispute. The mediator:

- does not impose a settlement;
- is not a decision-maker;
- does not act as an expert providing an opinion.

Although the mediator does not need to have special expertise in the matter under dispute, some parties may believe that such expertise is useful.

Once a settlement is made, appropriate written documentation — which releases someone from an obligation or from further legal action — is necessary. These releases should be prepared by a lawyer.

Mediation is not usually successful unless both parties are willing to compromise.

**Arbitration**

In arbitration, two or more parties submit a dispute to an independent and impartial arbitrator or arbitration panel, mutually agreed upon by the parties in dispute. The arbitrator makes a final and binding determination in a judicial manner. The experience and qualifications required for an arbitrator are similar to those required for a judge. An arbitrator must have knowledge of:

- the law, in order to allocate liability between the parties in dispute and determine the amount of related damages;
- statutory procedures applicable to conducting a hearing;
- relevant legislation, relating to arbitration and judicial procedures.

Special expertise in the matter under dispute is not required, although this knowledge may be helpful. The parties must pay for the arbitrator or arbitration panel as well as the venue and other costs. As there are legal and professional liability insurance implications in arbitration whether participating as a witness or as a party; therefore, legal and insurance advice should always be obtained before agreeing to participate in any arbitration. Most professional liability insurers for architects prefer to avoid arbitration.

**Records**

Depending on the provincial statute of limitations or other regulations regarding an architect’s archives, it may be necessary to store the large quantities of documentation, files, and drawings which a practice will accumulate over time. Accurate and comprehensive records can be invaluable when mounting a defence against a claim. Because a long period of time can elapse between the filing of records and the need for retrieval, it is important to establish a retrieval system that can be easily understood and accessed by the senior members of the practice.

“How long?” and “What type of documentation to keep?” remain a dilemma for most architects. Advice should be sought from a lawyer and the professional liability insurer. If the documentation is not copied onto paper then the architect should obtain electronic media that will endure and ensure that hardware and technology to access and read the information is available. Refer also to Chapter 2.1.5, *Office Administration*.

In some cases, long-established practices have had to defend against a claim related to a project designed and constructed before any of the current principals or staff were part of the practice. The records of these projects are the sole source of reference to the project and activities at the time.
Getting Paid

Getting Paid
One of the risks an architect faces is a client who, for whatever reason, is delinquent in honouring a contractual obligation to pay invoices in a timely manner.

The following tips help to reduce the risk of late payment or non-payment of invoices:

- Obtain a retainer representing 5% to 10% of the total fee at the execution of the contract.
- Advise the client that the retainer will be applied against the final invoice. (Note: some architects are reluctant to request a retainer, although many architects do ask for and receive retainers on a regular basis. If the retainer is not requested, it is not likely that one will be offered. A retainer is especially important if the client is unknown to the architect or has a reputation for being difficult to collect from.)
- Ensure that the terms and conditions of the agreement have been discussed with the client, including the right to stop rendering services in the event of non-payment of fees.
- Issue invoices twice a month, every second week, or weekly, in some cases. (Although invoicing is typically a monthly operation, there is no obligation to be bound to a monthly policy. More frequent invoicing will not only improve cash flow, but will be an early alert of a delinquent payer. Using computer software for invoices can facilitate more frequent invoicing.)
- Include a statement of interest on overdue accounts. (Because an architectural practice is not a financial institution, the rate of interest should never be more attractive than that charged by those who fund projects. Even if there is no intention to charge and collect the interest, it should be included in the agreement and its impact on overdue accounts demonstrated in a statement of account.)
- Separate the fees for professional services from reimbursable expenses by using two separate invoices. (This may reduce the chances that the client may withhold payment of an invoice by questioning one or two small items.)
- Follow up invoices to certain clients with a telephone call, after an appropriate period of time, asking whether payment can be expected within the agreed-to time period. (Do not wait until the payment is overdue to make the call. Establish and implement a policy for a sequence of “reminder” calls, perhaps one week apart. Each call should be polite but firm, and after the first two calls, ask for a meeting if payment has not arrived by the due date.)
- Send a letter to the client outlining attempts to receive payment to date, if past-due payment has not been received after three weeks of calls and a meeting. The letter should state that at no time has the client expressed any problem with the invoices. Refer to the clause in the contract providing for the withholding of services for non-payment and express the wish not to have to invoke this, which could seriously affect the success of the project.
- Be aware of provincial lien legislation, particularly for different time limitations for filing a lien for a “contractor” (prime consultant) or “sub-contractor” (sub-consultant). Be prepared to initiate lien action within the time periods specified in the legislation.

Stopping Work

- Advise the client that non-payment or late payment is a serious matter and that services will be stopped if payment is not received and consider seeking legal advice before stopping services.
- Stop work if necessary — if services are not halted at the first instance, there will be no credibility if late payment should re-occur.
- Consider one or more of the following actions:
  - send a lawyer’s letter to the client;
  - file a lien against the property (Refer also to Chapter 2.3.12, Take-over Procedures, Commissioning, and Post –Occupancy Evaluations);
  - attempt to reach an agreement through a mediation process;
  - attempt to reach a decision through an arbitration hearing;
  - turn the collection over to a reputable collection agency;
  - initiate legal action.
[Note: the final alternative to withholding services may be to resign the commission.]
• Notify the building department, whether or not the decision is to withhold services until payment is made, or to resign the commission. These Authorities rely on the architect to provide a general review of the project and in some jurisdictions, “letters of assurance” at the completion of a project.

• Be ready to prepare a defence against counter-claims by the client, whatever course of action is selected (mediation, arbitration, lien action or litigation). The client may make a variety of accusations, including poor performance and negligence.

• Take care not to issue idle threats: if legal action has been threatened for non-payment of an invoice by a certain date, be prepared to initiate the action on the following day.

• Record all communications regarding collection, including all attempts at contact for purposes of payment (faxes, E-mail, phone calls, letters, memos, conversations). These records will be important in formal hearings in resolving the matter of collection.

Risks Related to Management of a Project

Clients/Projects — GO NO-GO

Each prospective client and each prospective project should be considered in a similar fashion, whether the architect is:

• pursuing a specific sector of the market;
• responding to a request for proposal;
• entering a competition;
• negotiating with a single client for engagement of services.

This consideration includes a rigorous appraisal of the commission against a “GO NO-GO” checklist. Such a checklist identifies the risks involved if the architect decides to pursue the “opportunity.” Many checklists have been developed by both large and small practices, and by management companies and financial advisors. Some checklists are short and others exhaustive. Some use a rating formula (for example, if 5 out of 20 questions score negatively, the project should not be pursued). Other checklists permit the architect to determine the degree of risk after answering all the questions. The architect should recognize that the honest answer to a number of questions may be “don’t know.”

There is a common misconception that the GO NO-GO analysis generates only one of two responses. However, the main function of the checklist is to identify which issues need to be changed in order to move from a NO-GO to a GO position, particularly if these issues are readily negotiable or can be corrected.

One of the hardest lessons for an architect to learn is when to decline a project opportunity. A proper GO NO-GO checklist and subsequent analysis can help make such a decision.

Each practice should devise its own GO NO-GO risk analysis process and use it rigorously prior to accepting a commission. The analysis can minimize the risks of accepting a commission under poor terms or conditions.

Refer to the “GO NO-GO Checklist to Assess the Degree of Risk” at the end of this chapter.

Assembling the Consulting Team

If the GO NO-GO checklist process leads to pursuit of the project, it will be necessary to minimize risk by assembling the proper consulting team. The architectural practice may need to hire additional staff, form a strategic alliance with another practice to become a sub-consultant, or form a joint venture with another practice. Each of these options requires careful consideration concerning:

• the competitive position of the practice;
• the performance of services in the event of success in being awarded the project.

Use the “Checklist: Issues to Consider When Assembling the Consulting Team,” at the end of this chapter, to select the main engineering sub-consultants (structural, mechanical, and electrical engineers).

Even if the client plans to engage the consultants directly through separate agreements, the architect will usually be engaged to manage and coordinate their work; therefore, the above referenced checklist is still relevant.

It is also important to recognize the importance of team “chemistry.” The success of a project
often depends on team chemistry, that is, the ability of all team members to work well together. The use of the same consultants on a continuing basis may save the architect time, money, aggravation, and billable time, thereby improving overall quality, coordination, client satisfaction, and project profits. On the other hand, selecting new or different consultants for a specific project may put the architect in a better position to be awarded the commission, particularly if special expertise or client preferences are a consideration.

A written agreement should be prepared outlining the roles, expectations, and responsibilities as well as payment for each consultant. Avoid relying on past experience as the normal method of operating. Good relationships can be soured because of a lack of mutual understanding of routine items such as the scope of services, the number of site visits or the responsibility for the review of shop drawings. Nothing should be taken for granted. The use of the Canadian Standard Form of Contract Between Architect and Consultant: RAIC Document Nine is recommended.

**Client-Architect Agreements**

Good contracts always allocate risks fairly. It is not only professional, but also good business practice, to have a clear, written agreement which outlines the roles and responsibilities of both parties. The use of the Canadian Standard Form of Contract Between Client and Architect: RAIC Document Six or Canadian Standard Form of Agreement Between Client and Architect — Abbreviated Version: RAIC Document Seven is always recommended.

There is no reason to use a customized letter as a form of agreement in place of the Standard Forms of Agreement. Some architects argue that the standard forms of agreement will “intimidate the client.” However, these same “timid” clients may have no difficulty in launching a lawsuit against the architect. Often, the lawsuit will be over the very issues covered in the “intimidating” standard form of agreement, but which are not included in the customized letter form of agreement which was executed. Oral agreements should never be used. The RAIC and most provincial associations of architects have a short form agreement to be used as an interim or “binder” agreement until a full standard form of agreement can be prepared and executed. The Short Form Agreement Between Client and Architect – RAIC Document Eight is available on the RAIC website for downloading.

One of the best ways of minimizing risk is to spend time with the client at the outset, carefully discussing the client-architect agreement, clause by clause, describing:

- what services will be provided;
- what the services entail;
- what will not be included in the agreement.

Architects must manage expectations as well as risks. Problems often occur later in the project because the expectations of the two parties differ. Early review of the agreement helps to avoid problems. Amendments to the standard forms of agreement should be included only if necessary, and if signed or initialled by both parties.

If the client is a corporation, ensure that the person signing the agreement for the client actually has the authority to commit the corporation. If in doubt, request a copy of the appropriate minutes of the board of directors meeting which confers such authorization on the individual.

Some corporate and institutional clients, particularly larger companies and some government departments, will prefer to use their own “standard agreement” forms instead of the Canadian Standard Forms of Contract Between Client and Architect. These agreements generally are written in favour of the client, often to the detriment of the architect’s interests. Prior to executing such an agreement, the architect should review it carefully with legal counsel and with the professional liability insurer to ascertain the extent of risk that is being assumed over and above those risks in the standard forms of agreement.

Client-initiated variations to the standard forms of agreement often include the following phrases:

- architect to warrant contractor’s work;
- architect to assign copyright to client;
- client will not pay for reproduction of drawings;
• architect will supply a stipulated number of construction drawings and specifications;
• architect will guarantee building permit will be issued;
• architect will guarantee construction cost estimate;
• architect will guarantee LEED® certification;
• architect will visit site only when called by client;
• architect will engage surveyor, geotechnical engineer, and hazardous materials consultant.

Certain clients say, “All other architects accept and sign this agreement, why won’t you?” This statement is a “red flag,” and the architect should seriously consider whether or not to assume such risks by signing the agreement. Consider the following:

• the statement is incorrect — “all other” architects do not sign such agreements;
• others may have signed against their better judgement and crossed their fingers hoping all goes well (all may indeed go well, but is it worth the gamble?);
• other architects have signed and have suffered the consequences or damages.

When such clauses are proposed, the prudent architect should:

• discuss the questionable clause with architects who have allegedly signed it;
• review the proposed agreement with legal counsel, the professional liability insurer, and the provincial architectural association;
• determine the extent to which the practice can be exposed to such risk;
• attempt to negotiate contract changes with the client.

Many clauses inserted in contracts not only increase the architect’s liability but also are not covered by professional liability insurance. Examples include:

• warranty of performance;
• guarantee of conformity to code;
• guarantee the work of all others.

The architect should never warrant or guarantee any aspect of professional services.

When the architect is prepared to sign a contract with such adjustments and assume the subsequent risks, it is prudent to review the portions of the agreement that will be the responsibility of the sub-consultants and to obtain their concurrence before executing the agreement with the client. For example, sub-consultants may not be prepared to relinquish their copyright, even though the architect may be prepared to do so. These issues must be resolved prior to execution of the contract, or the architect will not be in a strong negotiating position after the agreement has been executed.

Many clients, in the interest of being, or appearing to be, environmentally conscientious, may request that their buildings meet, or be certified by, a sustainable building rating system, such as LEED®. The architect should never guarantee or warrant that a building will be certified. Such certification involves not only specific design elements but also construction procedures to be done by the builder, and certain operating and documentation standards by the owner, all of which are beyond the control of the architect. Furthermore, the certification is based on an assessment by an independent review agency and it is impossible to guarantee the agency’s conclusion in advance. Finally, the architect must be a cautious to not promise unsubstantiated performance of sustainable design features, such as increased employee productivity or reduced employee turnover, which could result in a claim by a dissatisfied client.

The Project: Design and Documentation

The three main risks in the design and construction documentation phases of an architectural project are:

• the practice will lose money in producing the documents;
• the project will be over budget;
• an error or omission in the documents will result in a claim.

Note: As of 2009, there is no significant history in the use of Building Information Modeling or BIM, many of its proponents claim that these new documentation and modeling techniques will reduce conflicts between design elements, result in better coordination of construction documents, and therefore reduce claims. There now exist new forms of contract produced by the American Institute of Architects to accommodate projects using Integrated Project Delivery with
BIM, as well as Building Information Modeling Protocols or appendices to accompany standard client-architect agreements. It is premature to assess the legal consequences of these forms of contract and architects should review these types of contracts with their lawyer.

Consider the following issues in managing risks related to design and documentation:

**Composition of the Design Team**

The “chemistry” among the various people on the project may require re-assessment. (Consider changing the personnel if working relationships are not harmonious.)

**Professional Fees**

If the fees for a particular project are not commensurate with the professional services required, the architect should attempt to renegotiate. If the fees cannot be re-negotiated, the experience and “lessons learned” should be taken into consideration when calculating fees on future projects. In any event, the professional services must not be compromised. Do not assume that the loss will be offset by gains during the contract administration phase; surveys indicate clearly that profits during contract administration are generally only 50% of profits in the earlier phases of a project.

As mentioned above, the fee must always be commensurate with the scope of services required for the project. Refer to *Mastering the Business of Architecture* (outside Ontario, called *Mastering the Business of Design*). This publication itemizes services that the architect can provide. The client and the architect can jointly use the publication to select the services required for a specific project, following which the two parties can readily establish and agree upon an appropriate fee.

Refer also to the RAIC document, *A Guide to Determining Appropriate Fees for the Services of an Architect*.

**Method of Project Delivery**

There are several methods of project delivery and each has unique risks for the architect.

Refer also to Chapter 2.3.2, *Types of Construction Project Delivery*.

It is critical that the role of the architect and the scope of services for each project delivery method is clearly understood and that the correct form of contract is used. Architects should consult their lawyer and professional liability insurers about any contracts when they are considering entering into an agreement for a method of project delivery for which they are not familiar.

Some governments are using new forms of project delivery such as Public–Private Partnerships or “P3s” to transfer some risks to the private sector (there is different terminology in various jurisdictions for this form of project delivery). As most P3 projects are usually very significant and the stakes very high, all architects are advised to ensure that all professional service contracts for P3 projects are developed and reviewed by their lawyers and professional liability insurers.

**Project Management**

Use some form of project planning to track actual costs (time and expenses) against those anticipated. This information can provide historical data and to assist in future project planning such as assignment of personnel.

A number of software programs are available to facilitate the management process.

Refer also to Chapter 2.3.1, *Management of the Project*, and to the Appendices in Chapter 2.3.2, *Types of Construction Project Delivery*.

**Checklists**

One of the most important elements in the management of risk is a thorough and comprehensive checking process. Unfortunately, this is often rushed or omitted due to inadequate scheduling or unreasonable deadlines. This element may be the singular most important one in mitigating the risk of incomplete, incorrect, non-comprehensive or uncoordinated documents. Many practices develop and use exhaustive checklists to ensure that the many items required to complete a set of drawings have been included.

A proper checking process is highly disciplined and should be followed rigorously. A simple method is to apply — without exception — the rule that the drawings and specifications are not to be sealed until after the checking process has
been completed. For other checklists, refer to “Checklist for the Management of the Architectural Project” in Chapter 2.3.1, Management of the Project, and to the references in Chapter 2.3.7, Construction Documents — Drawings.

Someone other than the originator (designer or CAD technician) should check drawings. Once the documents are assembled for checking, consider using a colour-coded checking process for printed checksets as follows:

- **Step 1:** Check all notes and dimensions. Use a yellow line to cover the agreed-to or correct items, circle incorrect items with a red line, and place the corrected item or information next to the red circle.
- **Step 2:** After the “red-lined” information is corrected, draw a green line over the item on the marked-up print immediately after the correction is made on the original. The individual who did the original checking with red and yellow lines should be the same one to review the corrected original against the red-lined version to confirm that all corrections have in fact been made.
- **Step 3:** Upon confirmation, a heavy black line is then drawn across the green line on the marked-up print. The checking process is not complete until every print is fully marked with yellow for correct items and red-plus-green-plus-black for items requiring correction.

This process — known as “back checking” — is not complete until the back checker signs off on each print. Only after “sign off” are the documents ready for seal and signature, and not before.

Checking to this extent is time-consuming. However, such a rigorous check will avert problems later on, when they are much costlier to correct. All architects should allocate and budget appropriate time for this aspect of risk and quality management.

### The Project: Bidding and Contract Award

The risk of litigation by unsuccessful bidders can be minimized by using clear and concise criteria setting out the method of contractor selection, and adhering strictly to these criteria. The architect should use standard bid documents and become familiar with CCDC 23, A Guide to Calling Bids and Awarding Construction Contracts.

All privilege clauses in the bid documents — such as “The lowest or any bid may not necessarily be accepted” — should be reviewed and written based on Section 2.0, The Principles of the Law of Competitive Bidding in CCDC 23, A Guide to Calling Bids and Awarding Construction Contracts.

A decision to award the contract to other than the lowest bona fide bidder can cause legal action. To minimize this risk, the architect should advise the client to obtain legal advice respecting any award to other than the lowest bidder.

### The Project: Contract Administration

This phase of the project is prone to many risks which expose the architect to potential claims. Refer also to Chapter 2.3.11, Contract Administration — Field Functions, for more detailed information. The architect can reduce these risks by rigidly adhering to standard routines, forms, and policies. Some of these include:

- pre-construction meeting procedures;
- a pre-packaged kit for field reviews;
- proper safety equipment;
- a checklist for field review;
- pre-determined format for field review reports;
- pre-set notes of site meetings;
- timely response to all contractor requests, to avoid potential delays;
- timely review and processing of all shop drawings, samples or mock-ups;
- recognition and understanding of the roles of all participants in the project (avoid assuming issues or problems that do not fall within the architect’s scope of work, otherwise the contractor will readily assign responsibility to the architect);
- adequate assessment of the contractor’s application for payment (experienced...
contract administrators will review the application with the contractor on the site before the application is finalized by the contractor);

- care in issuing the Certificate of Substantial Performance (once issued, these documents cannot be rescinded and they activate the timing for the release of holdback);
- impartiality between the client and the contractor;
- documentation of all communications, findings, and observations, in part to support future defence of any claim.

The Project: Post-construction

Most client-architect agreements provide for the termination of the agreement one year following the date of substantial performance. The architect should maintain contact with the owner and should bring critical or annoying warranty items to the contractor’s attention promptly for rectification. Provide a list of warranty items for correction by the contractor, following a final on-site review scheduled shortly before expiry of the warranty period. Ensure that the critical date is logged in calendars or in a “bring-forward” system to avoid the risk of missing this final field review prior to the expiration of the warranty period. Refer also to Chapter 2.3.12, Take-over Procedures, Commissioning, and Post-occupancy Evaluations.

Projects in Other Jurisdictions

Architects working outside their base jurisdictions should learn about the differences in construction practices and professional services in other jurisdictions which may increase risks. The further from home, the greater the differences. Some differences to watch for include:

In other municipalities within the same province:

- different zoning, land-use, and other bylaws;
- different building code interpretation;
- different processes in applications to Authorities Having Jurisdiction;
- local customs.

In other provinces within Canada:

- different legislation (such as lien legislation);
- architectural registration/licensing and provincial policy with respect to seeking work in another province without a licence;
- applicable provincial law (for example: Civil Code in Québec vs. common law in other provinces);
- local customs;
- bylaws in specific municipalities.

Outside Canada:

- different laws:
  - whether the architect can legally provide services in the jurisdiction;
  - liability laws;
  - tax laws which may affect profitability;
  - laws respecting travel, visas, and freedom of movement;
  - international agreements and treaties;
  - applicable building codes;
- different customs:
  - cultural differences;
  - language which may govern contracts;
  - payments to “sponsors” for the privilege of working in the jurisdiction;
  - political alliances (allies, neutral parties, and enemies);
  - local trade practices;
- forms of contract:
  - standard international contracts, for example, the contract of the International Federation of Consulting Engineers (FIDIC);
  - uninsurable clauses such as guarantees, warranties, higher standards of performance than in Canada, greater indemnification of owner than Canadian architects are accustomed to (for example, the following are not insurable: major disasters, a major settlement of a lawsuit several years after project completion);
  - unusual clauses (for example: “if there is a discrepancy in the documents that which best suits the client will govern”);
- payment:
  - make payment terms very clear;
  - be aware of exchange rate fluctuations if payment will be in a foreign currency;
  - make arrangements for transfer of funds before accepting the commission because many countries forbid local currency leaving the country;
• be aware that some foreign jurisdictions require fees to be either held for performance holdbacks or guaranteed by letter of credit;
• other differences:
  • different time zones between the main office and the overseas location mean that there may be little or no time in which both offices are operating simultaneously;
  • increased communication costs;
  • collaboration — many foreign clients want to deal with a firm that has a strong local presence; this could entail an alliance with a foreign architectural practice, or the opening of an office in the jurisdiction, either of which will require review of the architect’s status with both local and foreign associations, as well as with the professional liability insurer.

Definitions

**Indemnification**: Where one party agrees to pay certain damages or losses incurred by another party.

**Liable**: Legally bound; subject to penalty; under obligation to do; exposed or open to suffer something undesirable. (adapted from the *Oxford Dictionary*)

**Risk**: A chance or possibility of danger, loss, injury or other adverse consequences. (adapted from the *Oxford Dictionary*)
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Stone, David A.


Appendix A — Record Keeping

Introduction
The most valuable advice for managing any project that can be given to an architect is “put it in writing”.

This statement applies equally to:
formal documentation used in the administration of a construction contract;
other forms of communication between the architect and client, subconsultants, manufacturers’ representatives, Authorities Having Jurisdiction, bidders, general contractors and testing and inspection agencies.

Accurate, comprehensive records of all communications with everyone with whom the architect discusses any aspect of the project must be made and kept in a readily-retrievable filing system. A sample system is given in the Chart: A Project Filing Format, in Chapter 2.1.5, Office Administration. This may be adapted to suit the needs of each individual architectural practice.

Means of Communication
contractual:
Prequalification Advertisement as required
Prequalification Submissions as required
Bid Advertisement(s)
CCDC 11, Contractor’s Qualification Statement as required
Bid Closing Date Extension Announcement as required
Addenda
Bids
Construction Contract
Supplemental Instructions
Change Orders
Change Directives
Certificates for Payment

other hard copy documents:
letters
memos
minutes of meetings:
these may be face-to-face meetings, telephone conference calls or video conferencing;
in all cases, minutes are taken and issued, preferably within 48 hours of meeting, to all participants and other interested parties.

frequently hand-written:
transmittals for documents or for faxes.
memos
site instructions
desk diary
electronic:
faxes - documents transmitted by fax remain in the office of origin and should be refilled with the fax transmittal attached or a notation on the document stating that it was faxed, giving the date, time and recipient(s); received faxes may be printed automatically in hard copy or held in fax machine until printed in hard copy or downloaded to an electronic file.

e-mails

oral:
voice mail
face-to-face communications
telephone

Record Keeping

Record everything in writing, dated and filed in an orderly, readily-retrievable system.

In specific circumstances, the time a document is issued or received may also be significant, such as:
issuing the last addendum just prior to the deadline identified in the Instructions to Bidders;
receiving bids at the architect’s office;

Most fax machines and e-mail automatically record the time; however, if hand-written transmittals are used, time of issue or pickup should be recorded. A request for acknowledgment may be desirable for key issues.

Concise, written summaries of all voice mail messages, telephone and face-to-face conversations should be prepared as soon as possible and filed.

For ease of retrieval, use the same filing system format for hard-copy and electronic material. Generally, every e-mail sent or received should be filed. The only exception might be a series of e-mail exchanges leading up to a conclusion/instruction/confirmation. In this case only, it may be logical to retain only the original enquiry and the final resolution; if there is any doubt about whether an intermediate e-mail might become relevant in future, keep it.

Electronic records are more vulnerable to loss than hard-copy, therefore it is essential that backup files are routinely and rigorously created, preferably each time a document is created or received. Make duplicate backup files and store them off-site.
**GO NO-GO Checklist to Assess the Degree of Risk**

<table>
<thead>
<tr>
<th>Issue</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Adherence to Marketing Plan</strong></td>
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<tr>
<td>1) Does the project meet our design objectives/goals?</td>
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<tr>
<td>2) Does the project match our target markets as defined in our marketing and business plan?</td>
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<tr>
<td>3) Does the project match our target services?</td>
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<tr>
<td>4) Is the project within our geographic reach?</td>
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<tr>
<td>5) Is the project consistent with our minimum/maximum project size objectives?</td>
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<tr>
<td>6) Does the project present us with an unusual opportunity to break into a new market that we had not foreseen?</td>
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<td>7) Does the project offer repeat client potentials?</td>
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<tr>
<td>8) If we get this job, will it preclude us from further work with this client?</td>
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<tr>
<td><strong>B. Profit Potential</strong></td>
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<tr>
<td>1) Can we make a profit doing this job?</td>
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<tr>
<td>2) Are there any prevailing reasons to want the job, even though we cannot make money on it?</td>
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<td><strong>C. Project Financing</strong></td>
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<tr>
<td>1) Are project funds secured?</td>
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<tr>
<td>2) Is it likely they will be?</td>
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<td>3) If not, will funds be secured before we complete working drawings?</td>
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<td>4) Is the client experienced or inexperienced in contracting design services?</td>
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<td>5) Is there a discrepancy between the proposed scope of services and the fee?</td>
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<tr>
<td>6) Is the fee adequate?</td>
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<tr>
<td>7) Can we propose a competitive fee?</td>
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<tr>
<td>8) Are there other factors that negatively affect the project’s viability?</td>
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<tr>
<td>9) Is the client’s financial and general reputation good?</td>
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<td>10) Is the project free of speculative aspects?</td>
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<tr>
<td><strong>D. Architect Selection Process</strong></td>
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<tr>
<td>1) Is the selection process reasonable?</td>
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<tr>
<td>2) Is the job “wired” to another firm?</td>
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<tr>
<td>3) Can we compete effectively under the conditions of the selection process?</td>
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<tr>
<td>Issue</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
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<tr>
<td>E. Location</td>
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<tr>
<td>1) Is our location favourable in terms of the client’s criteria?</td>
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<tr>
<td>F. Human Resources</td>
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<tr>
<td>1) Do we have the available human resources to produce the work in the client’s time frame?</td>
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<tr>
<td>G. Marketing / Staff</td>
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<tr>
<td>1) Do we have the staff and time available to pursue this project in a first-class fashion?</td>
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<tr>
<td>H. Client Contact</td>
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<tr>
<td>1) Are we known by the client?</td>
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<tr>
<td>2) Is it a past client with whom we have had a good reputation?</td>
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<tr>
<td>3) Have we become known to the prospect?</td>
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<tr>
<td>4) Will we have adequate opportunity to research the client’s needs before the marketing process begins?</td>
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<tr>
<td>5) Do we have any inside tracks with the primary decision-maker?</td>
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<tr>
<td>6) Do we have any inside tracks with others who are or may be influential in the decision?</td>
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<tr>
<td>I. Competition</td>
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<tr>
<td>1) Do we know the likely competition? (identify)</td>
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<tr>
<td>2) Do we have a chance against them?</td>
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<tr>
<td>3) Does this project offer us an opportunity to compete at a “higher level” against firms with whom we would like to be identified in the marketplace?</td>
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<tr>
<td>J. Message</td>
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<tr>
<td>1) Do we have a strong message?</td>
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<tr>
<td>2) Are we uniquely qualified to do the job? (identify)</td>
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<tr>
<td>3) Can we compete effectively?</td>
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<tr>
<td>K. Making the Short List</td>
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<tr>
<td>1) Are our odds of being shortlisted good? (explain)</td>
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<tr>
<td>2) Are our odds good if/when we make the shortlist? (explain)</td>
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<td>L. Cost to Pursue</td>
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<tr>
<td>1) Will marketing time and effort required be in proportion to our odds?</td>
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<tr>
<td>2) Will the marketing costs be relative to the potential profit? (Spending our profit to get the job may be sufficient reason to decline.)</td>
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<tr>
<td>M. Other</td>
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<tr>
<td>1) Are there specific requirements that we will have difficulty in accommodating? Such as:</td>
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<tr>
<td>a) Insurance requirements?</td>
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<td>b) Copyright assignment?</td>
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<tr>
<td>c) Engagement of specialty consultants?</td>
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<tr>
<td>d) Guarantees?</td>
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</table>
## Checklist: Issues to Consider When Assembling the Consulting Team

<table>
<thead>
<tr>
<th>Issue</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
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<tbody>
<tr>
<td>1. Are the professionals with previous relevant experience still with the engineering consulting firm, and will they be assigned to this project?</td>
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<tr>
<td>2. Does the client know the proposed engineering consultant?</td>
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<td>3. Will the client object to the use of this consultant?</td>
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<td>4. Does the consultant have experience in this project type and this client type?</td>
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<td>5. Does the consultant have prior working experience with your practice?</td>
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<tr>
<td>6. Does this consultant have prior working experience with the other proposed consultants?</td>
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<td>7. Was prior working experience with this consultant positive?</td>
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<td>8. Is the consultant’s proposed fee competitive?</td>
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<tr>
<td>9. Does the consultant have any conflicts of interest on this project or with this client — either actual or perceived?</td>
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<tr>
<td>10. Do the consultants all carry professional liability insurance to the limits required for this project?</td>
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</tbody>
</table>
Chart: Comparison of Statutes of Limitations in Each Province and Territory

The limitation period to bring an action relating to negligent architectural services varies from province to province and with the type of damage that results. The basic rule is that the limitation period starts to run from the date the cause of action arose. Usually, this occurs when the party suffering the loss discovers, or ought to have discovered, that it had the right to sue for damages and knows the identity of the person/entity it can sue. The damage may not be discovered for many years after the construction is complete (for example, precast concrete panels may fall off after incorrectly specified anchors have rusted or corroded and failed).

The following chart sets out the appropriate limitation periods according to whether the action is one in contract or tort (that is, negligence) and whether the damage is to property or person.

*This is a very general outline only and does not replace proper advice, from professional liability insurers and lawyers, which should be obtained as soon as possible in the event of a potential claim.*

<table>
<thead>
<tr>
<th>Province</th>
<th>Limitation Period (Number of Years)</th>
<th>Relevant Legislation</th>
</tr>
</thead>
</table>
| British Columbia | - Negligent design and/or construction or breach of contract causing damage or injury to person or to property: 2 years  
- Time will be postponed if the action is for fraud or breach of trust | Limitations Act, R.S.B.C. 1996 ss.3(2)(a), (5), 6(3) |
| Alberta | - Negligent design and/or construction and breach of contract - 2 years after the date on which the claimant knew, or in the circumstances ought to have known of the claim; or -10 years after the claim arose; whichever period expires first. | Limitations Act, R.S.A. 2000, c.L-12, s.3. |
| Saskatchewan | - Negligent design and/or construction and breach of contract: 2 years  
- Breach of contract: 2 years | The Limitations Act, Chapter L-16.1 of The Statutes of Saskatchewan, 2004 (effective May 1, 2005), as amended by the Statutes of Saskatchewan, 2007, c.28. |
| Manitoba | - Negligent design and/or construction causing injury to a person: 2 years  
- Injury to real property: 6 years  
- Injury to personal property: 2 years  
- Breach of contract: 6 years | Limitations of Actions Act, L.R.M. 1987, s.2(1)(g),(l),(m) |
| Ontario | - Negligent design and/or construction: 2 years  
- Breach of contract: 2 years  
- 15 years is the ultimate limitation period (Schedule B S15(2)) for both negligent design or breach of contract. | Limitations Act, 2002, S.O. 2002 |
| Québec | - Negligent design and/or construction causing injury to real property: 6 years  
- Injury to personal property: 2 years  
- Breach of contract: 6 years | Civil Code of Quebec Art. 2925, 2118 |
| New Brunswick | - Negligent design and/or construction: 6 years  
- Breach of contract: 6 years | Limitation of Actions Act, S.N. 1997, c.L8, s.9 |
| Nova Scotia | - Negligent design and/or construction: 6 years  
- Breach of contract: 6 years | Limitations of Actions Act, R.S.N.S. 1989, c.258, s.2(1)(c) |
| Prince Edward Island | - Negligent design and/or construction: 2 years  
- Breach of contract: 6 years | Architects Act, S.P.E.I. 1990, c.4, s.34 & Statute of Limitations Act, R.S.P.E.I., 1988, c.S-7, s.2(1)(q) |
| Newfoundland and Labrador | Breach of contract and/or professional negligence in design and/or construction causing injury to person or property: 2 years; other breaches of contract: 6 years | Limitations Act, S.N.L. 1995, c. l.-16.1. ss, 5(a), 6(1)c, 9 |
| Northwest Territories | - Negligent design and/or construction causing injury to real property: 6 years;  
- Injury to personal property: 6 years;  
- Injury to a person: 2 years | Limitation of Action Act R.S.N.W.T. 1988,c.8(Supp.) In force July 19, 1993; 51-008-93 |