

OAA 900

2021 GUIDE

Version 1.0, September 2022

Guide to the Standard Form of Subcontract
Between Licensed Member and Subconsultant



Ontario Association
of Architects

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The Ontario Association of Architects would like to express its appreciation to the following individuals, participants, and groups whose input and comments were significant in the preparation of the new versions of OAA 600-2021 and this Guide:

- participants in the OAA's Roundtable for Construction Law Lawyers,
- participants in the OAA's Roundtable for Procurement Officials,
- McMillan LLP,
- Bhole IP Law,
- OAA's Practice Review Committee,
- Pro-Demnity Insurance Company, and
- various members and interested parties who provided commentary and criticisms since the previous version was published.

Revision History

Version	Date	Description
1.0	September 2022	Original issue to accompany OAA 900-2021 Version 1.0

Table of Contents

Introduction

Background & Changes

Availability and Use of Older Versions of OAA 900

Basis of the OAA 900 Subcontract

Where the Client Engages Consultants Directly

Letter Agreements

Which Subconsultants is the OAA 900 Appropriate for?

Subconsultant's Services and Subconsultant's Portion of the Work

Schedules

General Review

Instructions for Use of Contracts

Commentary

General

Cover and Front Matter

Agreement

Definitions

General Conditions

Schedules

Appendices

Note: Changes to the text from previous versions will be identified in this guide by a vertical line in the right margin alongside the applicable paragraph.

Introduction

This Guide is provided to assist users in completing the contracts and to give users a better understanding of some of the more important parts of the documents. The Guide is provided to assist both clients and OAA members in completing the contracts, and to provide a better understanding of some of the more important aspects of the documents.

The information in the Guide applies equally to OAA 900-2021 A for use by Architects and OAA 900-2021 LT for use by Licensed Technologists OAA. For simplicity, the excerpts from the contract which are included in this Guide are taken from OAA 800-2021 A, and retain the term Architect. In this Guide, the term “*Holder*” is used to refer to both Architects and Licensed Technologists OAA who hold a Certificate of Practice issued by the OAA, rather than referring repeatedly to both Architects and Licensed Technologists OAA.

The instructions and commentary in this document were considered accurate and correct when written. Members are cautioned that changes to the applicable legislation and court decisions, particularly those relating to prompt payment and adjudication, may require adjustments to be made in the use of this document and the related contracts. Since the prompt payment and adjudication provisions are newer and, as of August 2021, had not yet been tested in court, members should consult their legal counsel to determine if there have been court decisions, and what impact those decisions may have on the terms of the contract, liabilities, or responsibilities.

The subcontract has been significantly re-organized in a fashion similar to the other OAA standard client/*Holder* contracts OAA 600-2021 (long form) and OAA 800-2021 (short form). The OAA contracts are now organized around the Agreement, Definitions, and General Conditions similar to CCDC contracts, with all the variable / fill-in-the-blanks information being moved out of the General Conditions. Most of this information was relocated to Articles of the Agreement. Some of it will be found in the Schedules and Appendices.

Background & Changes

Process

OAA Practice Advisory Services (PAS) began a review of the OAA 900-2014 *Standard Contract Between Architect and Consultant* in 2019 subsequent to work starting on a new OAA 600 and OAA 800 contracts. Various external factors including a new CCDC 2-2020 (which itself was delayed by COVID-19) delayed the completion of OAA 600-2021, OAA 800-2021, and OAA 900-2021. However, the process continued, culminating in OAA Council approving a Practice Resource Committee recommendation in June 2022.

The following general goals for the update were established early on:

- rename the document as a subcontract to better reflect its role among the OAA standard documents.
- make minor corrections to references, syntax, numbering, and content collected by Practice Advisory Services since the 2014 version was released;
- amend sections found to be problematic;
- identify from RFPs and similar documents those clauses most commonly impacted by client-authored supplementary conditions to the prime contract;
- create a platform-neutral document that would pass provisions of any prime contract through to the subcontract;
- comply with accessibility standards, and reformat for consistency with other new OAA standard contracts;
- provide the contract as a secure fillable (fill-in-the-blanks) type document;

-
- obtain legal review by lawyers who include public and private sector users, Architects, and Licensed Technologists OAA as clients with the aim of developing a balanced document; and
 - produce a unified guide document, reformatted for clarity with text and colour variation, and appropriate new content addressing revisions to the OAA standard contract.

Contracts and Attachments Provided Only as PDF

The contracts are provided in PDF format only, with no editable Microsoft Word or Excel version available. Having a non-editable template reinforces the premise of having a 'standard' contract. Supplementary Conditions and Amendments can still be added easily by using Schedule 5, which is referenced in GC12 Other Terms of Contract, and these modifications will be clearly visible to all users as changes to the standard OAA contract language.

As before, there is information that must be added to complete editable fields or to populate fillable text boxes. To simplify use, all the editable fields and text boxes have been moved out of the General Conditions and placed either in the Agreement or in the Schedules. The user then only needs to look at the Agreement and the Schedules to see how the contract has been defined for any particular project. In the absence of Supplementary Conditions, the General Conditions portion of the contract remains constant.

Can't Fix Everything

The new versions include best attempts at solutions for some of the problems that seem to be persistent. However, it is important to note that good management of the process, project, and client expectations can minimize these problems, whereas, changes to contractual language alone cannot. The Guide provides suggested wording for some common situations encountered where special terms and conditions are appropriate.

Some of the language in the contract is intended to best describe the responsibilities of each party and avoid misunderstandings. The contract relies on plain language as much as possible.

Specific Revisions from 2014 Versions

1. Copyright notice was added to restrict authorized use of OAA 900 to the period it is available on the OAA Website.
2. Too numerous to identify, changes and additions made throughout required the renumbering of many Articles and General Conditions along with any references to them.
3. A Definitions section has been added so it is no longer necessary to read OAA 600 in conjunction with the use of OAA 900, and to allow it be used in conjunction with any prime contract.
4. Wording was modified and grammar clarified throughout.
5. Added default professional liability insurance requirements. (GC08)
6. Some of the user-fillable text boxes have been pre-populated with examples of the recommended information that should be considered for use. This was done to provide guidance, and to promote discussion of the issues addressed by the suggested wording. This suggested text can be changed by the user without requiring the generation of supplementary conditions or amendments.

Availability and Use of Older Versions of OAA 900

The OAA strongly recommends members and clients use the most current version of the standard contracts.

The current versions of OAA 900-2014 will remain available on the OAA Website for a transition period to allow users to become familiar with OAA 900-2021, and to develop any needed supplementary conditions. Once the previous OAA 900 contracts are removed from the website, permission to use them will have been rescinded.

The OAA retains archive copies of older versions of the standard contracts. The OAA is aware some users have prepared documentation coordinated with older versions of OAA standard contracts, and that they prefer to continue to use those. However, since applicable law has changed and the older contracts may no longer be compliant with current law or industry standard practices, it is OAA policy that archived copies of these documents are retained for information only and are not distributed for use as contracts for new projects.

Users referencing older versions of OAA contracts or who have supplementary conditions to older contracts should update their documentation as the older versions have been withdrawn from use, permission to use older versions has also been withdrawn, and they are no longer available from or supported by the OAA.

Basis of the OAA 900-2021 Subcontract

The basis of OAA 900 is a *Subconsultant* providing services to a *Holder* of a Certificate of Practice, for the *Subconsultant's portion of the work*, to the same extent the *Holder* is providing services to the *Holder's Client* in their contract (*Prime Contract*), and under the same terms and conditions. A copy of this *Prime Contract* shall be attached to and form part of the OAA 900 contract.

OAA 900 is properly a subcontract as it is dependant on the presence of a Prime Contract. It is not a standalone document as it is not appropriate to use OAA 900 without a *Prime Contract* attached.

The *Prime Contract* must contain appropriate terms and conditions and description of the scope of services that the *Architect* provides to the *Client*. The OAA 900 should not need to contain many additional terms and conditions or a detailed description of a *Subconsultant's Services* where an appropriate *Prime Contract* is used, such as OAA 600-2021 or OAA 800-2021; however, OAA 900 is not limited to use with other OAA contracts.

Where the *Prime Contract* is a custom contract prepared by the *Client's* legal counsel, or has supplementary conditions that modify an OAA 600 or OAA 800 contract, the terms for the *Holder* may be more onerous or less balanced. If *Holders* choose to accept conditions that are in some way more onerous, they should have all *Subconsultants* that they engage in the same boat—that is having the same terms and conditions. The worst situation would be for the *Holder* to have agreed to special conditions in the *Client* contract—such as providing CAD drawings, a higher than normal number of site visits, waiving of copyright or increased liability—but not have these same requirements in their contracts with *Subconsultants*, or to have a *Subconsultant* with liability limited to the amount of the *Subconsultant's* fees when the *Holder's* liability relating to the *Subconsultant* is significantly more.

The use of standard contracts will minimize these potential situations.

The applicable OAA 900-2021 version should be coordinated with the same appropriate version of OAA 600-2021 or OAA 800-2021.

Where the Client Engages Consultants Directly

Where the *Client* engages some or all of the consultants directly, *Holders* should consider the following:

- Are the terms consistent with the terms of your *Prime Contract* such as is required in OAA 600-2021 GC05.3.6?
- Do the consultants have appropriate professional liability insurance such as is required in OAA 600-2021 A14?
- Did you receive a copy of the contracts so that the services and terms and conditions can be confirmed and coordinated?
- Are the consultants listed in the *Prime Contract* or is the *Holder* providing *Consultant Coordination* for them and, if so, is the *Holder's* fee for coordination sufficient? (Refer to the [RAIC Fee Guide](#)).

Letter Agreements

Holders who use a letter proposal with fees and only a brief description of services, such as “design and drawings for permit and construction,” may find it is better to have a more detailed list of services for their *Subconsultant(s)* than they have in their *Client* agreement letter.

In a situation of dispute, the *Holder* can point to the list and confirm certain things were required. On the other hand, a long list tends to give the impression that anything not on the list is excluded. Language such as “including but not limited to:” is not always an effective solution. An omnibus simple description in an *Holder’s* letter agreement may be considered to encompass ‘anything’ that is required; whereas, a long, detailed list for the *Subconsultant* may not. In such a case, a claim against a *Holder* may be successful without providing the *Holder* the ability to claim from the *Subconsultant*.

Again, the advice is to use standard contracts and consult with legal counsel as required.

Which Subconsultants is the OAA 900 Contract Appropriate for?

Traditional Subconsultants

The OAA 900 is primarily for contracting with the traditional engineering subconsultants on a building project (structural, mechanical, electrical, and civil) to provide part of the professional services. Additional *Subconsultants* may include acoustic engineers, landscape architects, or interior designers.

Miscellaneous Subconsultants

In situations where the subconsultants are not professionals, do not carry professional liability insurance or are not specifically involved in design for a portion of the project, the OAA 900 may not be appropriate. Such subconsultants may include:

- project managers;
- programmers;
- CAD or BIM technologists;
- Model-makers, renderers, or photographers;
- movers or furniture system installers; and
- testing or inspection companies (this can be considered construction).

Consult your own legal counsel and consider the use of a different form of contract for such services.

Subconsultant is Another Architect

The OAA 900 is also appropriate if the *Subconsultant* is another Architect or a Licensed Technologist OAA and the full services to the *Client* are described in the *Prime Contract*. It is critical to identify the *Subconsultant’s Portion of the Work* or if there is no such appropriate split in the *Project*, the sharing and division of services must be defined to avoid misunderstandings and disputes.

Owner’s Specialist Consultants

The OAA 900 is not intended for use for owner’s specialist consultants including geotechnical, survey, or hazardous materials specialists. Contracts for these services are intended to be direct with the owner. Refer to Practice Tip [PT.30 Retention of Specialist Consultants](#).

Non-Standard Scenarios

With non-standard scenarios such as public/private partnerships (P3s) or other design/build/own/operate procurement methods, the contractual arrangements can be quite complicated, with the *Holder* having to agree to their *Client’s* “prime contract,” which may originate from the entity providing the financial basis for construction. Using the OAA 900 and attaching a complicated *Prime Contract* requires careful review and legal advice for the contracts to be properly coordinated.

Subconsultant's Services and Subconsultants Portion of the Work.

The *Services* the *Holder* provides to the *Client* are defined by their description in the *Holder’s Prime Contract* and include the services of any *Subconsultants* retained by the *Holder*. Normally, the *Subconsultant* provides all the same ‘services’ (e.g. design, drawings, tender, permit, and construction phase services), but only for a ‘portion’ (e.g. the mechanical, electrical, structural, civil, or landscaping portion) of the services required for the *Project*.

Misunderstandings between a *Holder* and a *Subconsultant* can be a question of who is responsible for a particular portion rather than what *Services* are required for it. Article A17 is the location to clarify what is included or excluded. A *Holder* may have had a successful relationship, over several years and many projects, with particular *Subconsultants* and not feel the need for any description more than "Electrical" but additional clarification is seldom a bad idea. A discussion and list of what is included and any items that are particularly not included may assist in coming to a mutual understanding.

It is important to have a mutual understanding of services to be provided, to know which *Subconsultant* is responsible for what portions of the project, to have no gaps or overlaps in the scopes of work, and to record it.

Schedules

OAA members may be familiar with the *Schedules of Consultant's Services and Deliverables* provided with the RAIC DOCUMENT NINE – 2018 Canadian Standard Form of Contract Between Architect and Consultant. These optional inclusions for RAIC DOCUMENT NINE are not included as part of OAA 900 as they are not considered necessary where an appropriate *Prime Contract* is used, such as OAA 600-2021 or OAA 800-2021. Most items of service for what the *Subconsultant* must do are actually described as *Basic Services* in OAA 600-2021 Schedule 2, such as participating in preliminary analysis of the *Client's* requirements, provision of written information and preliminary drawings, schematics, line diagrams, etc., for schematic design and design development stages, and as *Additional Services* listed in OAA 600-2021 Schedule 3 such as services for multiple bid packages or a project with multiple phases.

Holders may wish to develop their own lists for particular items or types of *Subconsultants* that they want to confirm are included based on their own experiences. These can be used for negotiating the agreement or to include as a list attached to the contract. OAA 900 Schedule 4 may be used for this purpose. One must be careful not to remove any required services identified in the *Prime Contract*.

General Review

Where services during construction and for *General Review* are part of the scope of *Services*, they will be identified in the *Prime Contract*; the *Subconsultant* is required to do likewise for their *Services*. The 'Standards' and minimum requirements for *General Review* for *Holders* are set out in Regulation 27 of the *Architects Act*. Standards and Guidelines for Engineers are not identical. It is important that all *Subconsultants* understand the full extent and terminology of all of the *Services* required in the construction phase of the *Prime Contract*.

Instructions for Use of Contracts

Note: Some features of Adobe PDF forms do not view as intended with other PDF software, including Apple's standard "Preview" software on Mac's. Efforts have been made to keep the documents Mac-compatible, but the OAA has no control over what features software developers incorporate in their programs. In some reported cases, older versions are more compatible than newer ones. Adobe Acrobat Reader DC or Adobe Acrobat Pro DC may be required to properly view, fill in, and print PDF forms. Adobe Acrobat Reader DC for the PC, Mac or Android is available at:

Detailed instructions for the use of the contract are contained in the Quick Start Instructions: How to Use the Template Files and Customize Your OAA Contract document available on the OAA Website

Commentary

General

In this section of the Guide, headings corresponding to those in the contract are in **black text**, and commentary and guidance on the content under each heading are in blue text. Additionally, an example of a completed subcontract is available on the OAA Website as an attachment to this Guide. The commentary and references to other information are intended as assistance and guidance to users but are neither a complete nor comprehensive analysis of the subcontract. It is simply impossible to anticipate all possible circumstances. The commentary is not intended to provide legal advice nor replace advice from your own legal counsel.

It is always recommended that parties obtain legal and insurance advice when entering into a contract. This is a particular need when there are significant revisions to the standard terms and conditions via supplementary conditions or amendments, when using non-standard contracts for construction (contracts other than CCDC contracts), or if there are amendments or supplementary conditions to the construction contracts.

Any amendments to OAA 900 such as revised wording, deletions, or additions should be documented in Schedule 5 Other Terms and Conditions of the contract attached to and forming part of the contract. Alternatively or for minor changes, hard copies of the contract can be amended by hand and initialled by both parties. Again, legal advice is recommended.

Consistency between the *Client-Holder* contract and the *Holder-Subconsultant* subcontract is essential, particularly in relation to passing requirements for confidentiality, conflict of interest, licensing of instruments of service, insurance, and indemnification from the head contract to the subcontract.

Cover and Front Matter

The cover identifies which contract is being used and provides a text box in which to insert the *Project* name and a brief description.

The inside of the cover contains the copyright notice tying valid use of the contract to the availability of the contract on the OAA Website.

The inside of the cover also credits those who assisted in suggesting changes and additions, and in reviewing drafts of the contract with the goal of producing a contract that reflects current industry practices and fairly balances the needs of clients, OAA members, and subconsultants.

The Table of Contents lists the major components of the contract and how the contents are organized to assist in locating appropriate clauses. Check boxes are included to indicate that information is provided in an attached document (such as a Schedule or Appendix) instead of included in the main contract file. Where this method is used, ensure that any attachment is identified in Article A18 or Schedule 3.

Agreement

A01 Effective Date

Enter the effective date of the contract, which could be:

- the date an oral agreement was reached;
- the date an interim or letter agreement was executed;
- the date the contract was submitted to the *Subconsultant* for signature;
- the date the *Holder* first authorized action;
- the date of execution of the contract; or
- some future date at which the parties want the services to start.

It is important both parties agree on the effective date of the contract and arrange other related contracts accordingly.

A02 Architect

Enter at least the legal name and address of the *Holder* of the Certificate of Practice. If desired, also enter contact information such as telephone number, email address, FTP site, and website. The name of the *Holder* should be the same as that which is registered with the OAA as the *Holder* of the Certificate of Practice.

A03 Subconsultant

Enter at least the legal name and address of the *Subconsultant*. If desired, also enter contact information such as telephone number, email address, FTP site, and website.

A04 Project

Enter a detailed description of the Project and its characteristics. The description should be consistent with that on the *Prime Contract* cover.

A05 Client

This would be applicable in situations such as when the *Holder* is engaged by a professional engineer, a project manager, or a contractor who is not the owner or if the *Client* is a tenant or leasee. If the *Client* is the owner enter "Not Applicable" (N/A).

A06 Subconsultant's Discipline

State the engineering discipline(s) of, or other service to be provided by, the *Subconsultant*.

A07 Prime Contract

As stated, the terms and conditions of the *Prime Contract* apply to the contract between the *Holder* and the *Subconsultant*. The OAA 900 is not intended to be a standalone contract; it is intended to be a subcontract relying on the terms and conditions, and description/scope of services of the *Prime Contract*.

Article A07 does not allow for options—it requires a copy of the *Prime Contract* to be attached, which is recorded with the appropriate references to date, etc., in Schedule 3 as an additional document. Remember to remove or redact the commercial clauses from the *Prime Agreement* prior to attaching to the *Subconsultant* agreement.

Attachments to the *Prime Contract* must also be included. These may include an owner's *Program of Requirements*, a Confidentiality Agreement or other items of the *Contract*. To keep to the principle of not providing separate conditions or information in the contract that limits or reduces the *Subconsultants'* responsibilities to less than that of the *Holder*, the RFP or *Program of Requirements* should only be included if they form part of the *Prime Contract*.

A08 Same Terms and Conditions

This ties the *Subconsultant* to the same terms and conditions that apply to the contract between the *Client* and the *Holder*. Provision is made to list any variations to or limitations on, the scope of services as described from the scope noted in the *Prime Contract* in Schedule 4.

A09 Coordination

This Article notes the list of items included in the services is to be found in Schedule 4, and clarifies the *Subconsultant's* responsibility to coordinate with the rest of the design team and its *Subsubconsultants*. The lists of other *Subconsultants* or other consultants involved in the *Project* are as indicated in the *Prime Contract*.

A10 Sub-subconsultants

List *Sub-subconsultants* providing part of the *Subconsultant's Services*. The *Holder* needs to be aware if any of the *Services* for this subcontract are being done by an individual or entity other than the *Subconsultant* such as specialty lighting designer or storm-water management consultant. The *Subconsultant* and *Holder* should agree on the insurance to be carried by any *Sub-subconsultants*.

A11 Reliance on Information

Just as the *Holder* needs to rely on the validity of the information provided by the *Client*, the *Subconsultant* needs to rely on the information provided to them by the *Holder*. There may also be information provided by the *Holder* that does not originate with the *Client*. Such information should be listed in Schedule 4.

A12 Review of Information and Site

It is prudent for *Subconsultants* to review not just the information provided to them, but also the site itself. This article commits the *Subconsultant* to review the site to the extent permitted by the *Client*.

A13 Fees for Services

The basis of the fee or the method of calculating fees and reimbursable expenses must be clearly defined. Sometimes all that is needed is one or two lines. In other cases, it may be more complex. To accommodate the fee information, Schedule 2 is provided. Refer also to the fee legend and explanation in *Prime Contract* and any accompanying guide.

A14 Invoices Contents

The information provided with an invoice from the *Subconsultant* to the *Holder* is required to be consistent with that required in the proper invoice from the *Holder* to the *Client*. Additionally, the *Invoice* must include the information listed in Article A14 and that listed in Schedule 2.

For ease of tracking and filing, both the *Holder's* and the *Subconsultant's* project numbers should be included. Anything less will not be considered an acceptable *Invoice*.

In the event the *Client* fails to pay a *Proper Invoice* in accordance with the requirements for prompt payment under the *Construction Act*, the *Holder* should give careful consideration to the implications and obtain advice from legal counsel. Non-payment by the *Client* may also impact the *Holder's* obligation to give notice or pay *Subconsultants*. The *Construction Act* replaces "pay when paid" with "pay or commit to adjudicate". In all scenarios in Ontario, the terms and conditions of prompt payment and adjudication under the *Construction Act* govern and cannot be contracted out of. The situation may vary in other jurisdictions.

A15 Invoicing

The timing of *Invoice* submission is tied to the proper invoice timing in the *Prime Contract*, and is intended to allow for review of the *Invoice* by the *Holder* and revision to the *Invoice* if required. Where possible, discussion of the proportion of the work complete and the amount to be invoiced is recommended prior to submission of the *Invoice*.

A16 Disputed Invoices

This Article requires disputes relating to an *Invoice* be resolved according to the dispute resolution procedures defined in the *Subcontract*, and requires Notice in Writing be given in accordance with the governing legislation.

A17 Payment Provisions

This Article requires the *Architect* to advise the *Subconsultant* when the *Subconsultant's Invoice* is included in the *Architect's* invoice to the *Client*, comply with the statutory holdback provisions of the applicable legislation, pay the *Subconsultant* promptly, and pursue payment of unpaid amounts.

Under the *Construction Act* in Ontario, "pay when paid" is no longer allowed. The prompt payment provisions require payment of unpaid amounts of an *Invoice* be actively pursued.

A18 Hierarchy and Contract Documents

List in this Article all the documents that make up the contract, such as:

- supplementary conditions;
- information documents and reports with titles, number of pages, and dates; specifications, giving section number, date, number of pages; drawings, giving drawing number, title, date, revision date, or mark;
- addenda, (giving title, number, and date);
- schedules, (giving title, number, and date);
- appendices, (giving title, number, and date); and
- *Prime Contract*.

List them in order of priority from highest to lowest. The text box has been pre-populated to indicate a normal list of the parts of the *Subcontract* and their priority order.

Commercially sensitive information in the *Prime Contract* may be redacted from the copy included in the *Subcontract*.

A19 Entire Contract

This Article makes explicit this contract supersedes and replaces any previous agreement for the *Project*, and that taken together, the documents listed in Article A18 is the entire contract.

A20 Amending the Contract

This Article confirms the contract can only be changed in writing. Spoken changes are not binding, so it is important change orders be issued and signed to implement any desired changes.

A21 Signing in Counterparts

To facilitate signing by parties who are not physically present, this Article permits the signing of counterparts. This provides for each party to sign and then exchange identical copies of the contract where sending a single copy back and forth for both parties to sign would be inconvenient or cause undue delay.

A22 Delivery of Notices

Sometimes (where the *Architect* or *Subconsultant* have multiple offices or a special project office), the desired location for delivery of invoices or notices differs from the addresses noted in Article A02 or A03. An alternate address may be added here. Where the distribution of documents is more intricate than either A or B, issue a *Notice in Writing* that details which type of document goes to which address.

Signing Space

A statement that those signing on behalf of the *Subconsultant* and the *Holder* have the authority to do so has been added.

Definitions

Many of the definitions herein are self-explanatory. Guidance is provided where deemed appropriate. OAA 900-2021 includes all the critical definitions in itself. The definitions are consistent with those used in OAA 600-2021 and OAA 800-2021. Defined terms from the contracts are shown in italics with initial capital letters.

Adjudication

Architect

Client

Construction Act

Consultant

Dispute

Effective Date

Extra Services

The category *Extra Services* was added to remove the need to redefine basic and additional services.

Instruments of Service

The drawings, reports, and specifications are communication tools required to convey the design recommendations that are the result of the provision of professional services. They are not work products; they are *Instruments of Service*. Attempting to redefine the *Instruments of Service* as work products is highly problematic and inconsistent.

The transfer of work product may be construed by a court to be subject to strict liability or product liability standards with implied warranties of merchantability and fitness for use. This is inappropriate for the output of professional services.

Unless specifically contracted otherwise, the *Instruments of Service* do not include the *Holder's* or the subconsultant's prior intellectual property, draft versions, files, computations, emails, or superseded documents of any format or description, etc., which remain the *Holder's* personal files.

Invoice

A *Proper Invoice* relates to an invoice under the *Prime Contract*. An invoice under a subcontract is not a *Proper Invoice*. For consistency, invoices should contain at least the same information required for a *Proper Invoice*.

Licensed Technologist OAA

Lien Legislation

Moral Rights

Notice in Writing

Other Subconsultant

Place of the Work

Prime Contract

Project

Proper Invoice

A *Proper Invoice* is consistent with the requirements of the *Construction Act*. In jurisdictions in which a proper invoice is not defined, the requirements for a *Proper Invoice* may be applied to any invoice for payment.

Reimbursable Expenses

Services

Standard of Care

The standard of care is that of an ordinary member, not an expert. There should be no expectation of perfection. Any agreement to increase the contractual standard of care above that required at law may be outside the coverage of professional liability insurance, as such, it is likely to reduce the protection of the *Holder*, client, and public.

Subcontract

Subcontract Services

Subconsultant

Sub-subconsultant

Work

The construction industry through the CCDC documents has adopted *Work* (italicized) to refer to components of the work, such as the general or trade contractor's construction work. In this contract, *Work* is used with the same meaning. It does not refer to the *Holder's* services.

Working Day

General Conditions

GC01 Consultant's Scope of Subcontract Services

The *Basic Services*, *Additional Services*, and *Other Services* that the *Holder* provides the *Client* will be designated in the *Prime Contract* (e.g. in the check-off Schedules 2 and 3 in the OAA 600-2021). The OAA 900 states that the *Subconsultant* will be providing, for their portion of the work, the same *Services* to the *Holder* which would include: preliminary analysis, confirmation of the budget, cost estimates, assistance with bidding, obtaining a permit, and reviews during construction if these are included in the *Prime Contract*.

GC02 Representatives

"Where identified" applies only if the specific personnel are listed in this contract or in the *Prime Contract*. If it is important to either party that certain individuals are not be reassigned off the project, then this can be included as part of Schedule 5 Other Terms and Conditions.

GC03 Communications

At an initial team meeting, the *Holder* should set out any protocols for correspondence, information exchanges, distribution of drawings, etc. (e.g. direct communication between *Subconsultants* and *Other Consultants* is acceptable provided that the *Holder* is copied). In the absence of other specific direction regarding the flow of communications, all correspondence must go through the designated representative of the *Holder*.

Whatever provisions for confidentiality contained in the *Prime Contract* are applicable to the *Subcontract*.

GC04 Coordination

The *Holder* in the standard OAA contracts is the coordinator of *Subconsultants* and *Other Consultants*, and *Consultant Coordination* is defined, but the *Subconsultants* must also do coordination of their designs with other inter-related *Other Consultants* and *Sub-subconsultants*. (refer also to OAA Practice Tip [PT.27 Professional Coordination of Consultants](#), OAA 600-2021 - Definitions & GC01.1.4, and OAA 800-2021 Definitions & GC01.1)

GC05 Timeliness

Best practice for the *Holder* and the *Subconsultant(s)* is to jointly develop a schedule and / or work breakdown for the *Project* with timing of deliverables, permit applications, and other identified milestones to which everyone adheres.

GC06 Right to Audit

The right to audit does not apply to work done for a fixed fee. In order to facilitate an audit, proper records must be kept, and made available.

GC07 Copyright and Use of Documents

When the client requests editable CAD or BIM files for future use in managing the facility complete the licensing agreement included as Appendix A.

GC08 Insurance and Liability

The default is for the *Subconsultant* to carry at least the same insurance protection as required of the *Holder* in the *Prime Contract*.

If there are no insurance requirements for the *Holder* spelled out in the *Prime Contract* and there are no separate insurance requirements for the *Subconsultant*; agreed and put in writing in Schedule 5, then this GC establishes the minimum requirements for the *Subconsultant*. If there is any doubt, consult with Pro-Demnity.

GC09 Termination of Subcontract Services

This GC allows the *Holder* to suspend or terminate the *Subcontract* if the *Prime Contract* is suspended or terminated. It also allows either party to terminate should the other party fail to perform. The *Subconsultant* shall be given *Notice in Writing* of the suspension or termination of the *Prime Contract* or this *Subcontract*.

GC10 Dispute Resolution

Where the dispute resolution provisions of the *Prime Contract* do not apply, this GC establishes the steps to be taken. Subject to the provisions of the *Lien Legislation*, both parties agree to continue to perform their respective obligations while the *Dispute* is being resolved.

GC11 Miscellaneous Conditions

This GC allows the *Holder* to suspend or terminate the *Subcontract* if the *Prime Contract* is suspended or terminated. It also allows either party to terminate should the other party fail to perform. The *Subconsultant* shall be given *Notice in Writing* of the suspension or termination of the *Prime Contract* or this *Subcontract*.

GC12 Other Terms of Contract

This GC allows the *Holder* to suspend or terminate the *Subcontract* if the *Prime Contract* is suspended or terminated. It also allows either party to terminate should the other party fail to perform. The *Subconsultant* shall be given *Notice in Writing* of the suspension or termination of the *Prime Contract* or this *Subcontract*.

Schedules

Schedule 1 – List of Sub-subconsultants

When the space provided in Article A10 is insufficient to list the *Sub-subconsultants* to be retained by the *Subconsultant*, list them in Schedule 1 instead. Be sure to click the check box in Article A10, and in front of the Schedule 1 Table of Contents entry to confirm the inclusion of the schedule in the *Subcontract*.

Schedule 2 – Fee Basis and Payments

When the space provided in Article A13 to list the basis for the calculation of the fees or reimbursable expenses is insufficient, list them in Schedule 2 instead.

Insert such provisions of invoicing and payment as may apply that differ from payment provisions in the *Prime Contract*, including timing and frequency of billing, manner and procedures for invoicing, conditions, progressive invoicing, and interest on unpaid invoices.

Describe the fee, including any formulae for calculation.

The fee or method of calculating fees and expenses must be clearly defined. For consistency, even if the *Prime Contract* is neither OAA 600 nor OAA 800, refer to the fee legend and explanation in OAA 600-2021 GUIDE or in OAA 800-2021 GUIDE as examples

Consider:

For time-based fees such as hourly or daily fees, include applicable rates for all categories of personnel, including principals. It is useful to have this established even with fixed or percentage fees in case time-based rates are needed at some time during the project such as if the scope changes or extra services are requested.

For a percentage fee, include a formula for calculating the fee—normally based on the value of the *Construction Cost of the Subconsultants Portion of the Work*. Where this type of fee is used, noting inclusions in or exclusions from the *Subconsultants Portion of the Work* is very important.

Phases for engineers typically differ from those of architects, as they often include detailed design and construction documents together. Verify the percentages of total fee by phase (e.g., design, documentation, etc.) prior to commencing billing.

However, prior to signing the *Subcontract*, any changes to the provisions of the *Prime Contract* must adhere to the requirements for Prompt Payment and *Adjudication* in the *Construction Act*.

Articles A15 and A18 are optimized for coordination with the provisions for prompt payment in the *Construction Act*. The specifics may need to be altered if the laws of another jurisdiction govern.

In the event the *Client* fails to pay a *Proper Invoice* in accordance with the requirements for prompt payment under the *Construction Act*, it is recommended that the *Holder* give careful consideration to the implications and obtain advice from legal counsel. Non-payment by the *Client* may also impact the *Holder's* obligation to pay *Subconsultants*. The *Construction Act* replaces “pay when paid” with “pay or commit to adjudicate.” In all scenarios, the terms and conditions of prompt payment and adjudication under the *Construction Act* govern and cannot be contracted out of. The situation may vary in other jurisdictions.

Even if the *Client* is late in paying, the *Holder* is required to distribute funds promptly upon receipt of payment, which is a basic requirement under the *Construction Act*.

Be sure to list Schedule 2 in Article A18, and click the checkbox in front of the Schedule 2 Fee Basis and Payments entry in the Table of Contents to confirm the presence of the schedule as part of the *Subcontract*.

Schedule 3 – Additional Documents

Article A18 references Schedule 3 as the location to find the list of all the documents that comprise this subcontract that do not fit in the space provided in Article A18. Include the *Prime Contract* in either A18 or Schedule 3.

Be sure to list Schedule 3 in Article A18, and click the checkbox in front of the Schedule 3 Additional Documents entry in the Table of Contents to confirm the presence of the schedule as part of the *Subcontract*.

Schedule 4 – Subconsultant’s Portion of the Work

Article A09 refers to Schedule 4 as listing the scope of work for *Subcontract Services*. List in Schedule 4 what, if anything, is at variance with the *Prime Contract*. These could be items the *Architect* provides as services to the *Client* but which are excluded from the *Subconsultant’s* services (such as estimating) or could be items that are not specifically noted in the *Prime Contract* that the *Architect* wants to define as a requirement of the *Subconsultant* such as attendance at systems testing, number of copies of documents or review submissions.

Be sure to list Schedule 4 in Article A18, and click the checkbox in front of the Schedule 4 Subconsultant’s Portion of the Work entry in the Table of Contents to confirm the presence of the schedule as part of the *Subcontract*.

Schedule 5 – Other Terms and Conditions

GC12.1 references Schedule 5 as the location to find the other terms and conditions that comprise this contract. This includes variations from and changes to the provisions of the *Prime Contract* as well as additional terms and conditions that are not in the *Prime Contract*.

Be sure to list Schedule 5 in Article A18, and click the checkbox in front of the Schedule 5 Other Terms and Conditions entry in the Table of Contents to confirm the presence of the schedule as part of the *Subcontract*.

Appendices

Appendix A – Provision of Editable CAD or BIM Files

The Appendix, if required, must be listed in Schedule 5.

In most cases, the *Client* does not require copies of the editable CAD or BIM files to satisfy their needs. A licence for the *Instruments of Service* will satisfy most clients' legitimate needs. They should be aware that drawings and specifications do age, and that what is compliant with applicable law today may not be tomorrow. Also, there is significant liability associated with providing CAD or BIM files to others for use beyond the original design team. Clearly distinguish among the various issues of the *Instruments of Service* (e.g. Issued for Tender, Issued for Permit, Issued for Construction, As-builts, Record Drawings), who provides them, what information they are based on, and what may be an appropriate use.

Legitimate uses for editable files include incorporation of new information into facility management systems.

It should be expected that the editable files will include disclaimers to identify the purpose of the editable files, to limit their usage to purposes suitable to the *Project* milestone achieved, and to restrict usage to the information that shows up as part of plottable sheets, and not information stored off to the side.

While multiple working copies of the editable files may be circulated as needed among the design team, most of those iterations will be irrelevant, and of little use to the *Client*. Refer to Appendix A in the *Prime Contract* for the specification of milestones for which the editable files are to be provided to the *Client*.

BIM Requirements

Consideration should be given to including the IBC BIM Contact Appendix if the provisions of this Appendix are inadequate for the *Project*.

Appendix B – Waiver of Moral Rights

The Appendix must be selected in the Table of Contents, and listed in Article A18 to be included in the subcontract.

The creator of a work has moral rights under the *Copyright Act* of Canada. The moral rights are distinct from economic rights and provide the creator with the right to the artistic integrity of the work. Moral rights are vested in the *Instruments of Service*, which express the design and in the built form (the building) that is the expression of the design.

Where the *Client* requests the right to modify the *Holder's Instruments of Service*, it may be appropriate to waive moral rights in the *Instruments of Service*.

Where the *Client* requires the right to modify the *Project* after it is built by renovating or erecting an addition, it may be appropriate to waive moral rights in the building.

Since moral rights vest in the creator of a work, *Holders* and *Subconsultants* should consult with legal counsel about the advisability of including a standard waiver of moral rights in employment agreements and *Subconsultant* contracts.

At the time of writing, the classic moral rights lawsuit in Canada was brought by artist Michael Snow in relation to his sculpture of geese in the Toronto Eaton Centre. It is interesting reading.