

**DESIGN PROFESSIONALS' LIABILITY FOR FIELD SERVICES**

**BRYAN S. SHAPIRO, Q.C.**  
**Shapiro Hankinson & Knutson Law Corporation**  
**Vancouver, British Columbia**

## DESIGN PROFESSIONALS' LIABILITY FOR FIELD SERVICES

### I. FIELD SERVICES - THE PROBLEM

When one thinks of areas of practice where architectural and engineering design professionals ("A/Es") have serious liability exposure, there is a tendency to assume that the greatest danger is to be found in the rendering of design services. In preparing his design, the A/E endeavours to prepare plans and specifications to meet the client's functional, budgetary, time and aesthetic constraints and to tie these needs into local building code, by-law and other building requirements stipulated by authorities having jurisdiction over the project. While it is true that many claims arise against A/Es in connection with their design activities, insurance claim statistics indicate that by far the greatest number of professional liability claims are brought against A/Es in the rendering of field services.

The obvious question that presents itself is... "What are field services and what is it about field services that make this area of professional practice so volatile and dangerous for the A/E?"

The term "field services" is often used synonymously in construction contracts and jargon with the terms "contract administration," "site reviews," "site visits," "general reviews" and "supervision." Some of the writers in the field have suggested that the term "supervision" should never be used when describing the A/E's role in administering the construction contract between the owner and the general contractor. They suggest that "supervision" is something that the contractor does in organizing and coordinating his own forces, including any sub-contractors that he might engage for the purpose of carrying out the work required by the project contract documents. With deference to these august construction lions, the writer submits that the word "supervision" is not anathema to the description of this critical administrative role for the A/E. Ultimately, the issue becomes a matter of semantics. It is submitted that, for reasons to be elaborated upon in this paper, it is not so much the term used to describe "field services" that constitutes the problem as it is the definition that is ascribed to that term within the A/E's contract with the client.

In the early 70's, the writer was engaged by the professional liability insurer in Canada insuring most of the insured architects and engineers to analyze over 2000 claims against design professionals and endeavour to ascertain the nature and makeup of those claims. The mandate also included research into why the overwhelming majority of those claims manifested themselves in the field service area. Collaterally, the writer was to devise new standard contract forms between clients and A/Es which would have the effect of reducing the number and the severity of such claims, while, at the same time, maintaining an equitable balance between design professional and client which would see the A/E remain responsible for his traditional obligations to render his professional services with due care, skill and diligence.

In undertaking such a task, the insurers claim that statistics best illustrate their concerns. Fully two-thirds of all professional liability claims against A/Es were field service-related. The other one-third were, for the most part, related to design concerns. Fully 90% of all claims against A/Es were initiated as contractual claims by clients as opposed to third party claims brought by other parties in tort, who claimed that they suffered loss, injury or damage due to the failure of

the A/E to protect them during the design or field service process, alleging that they were within the A/E's foreseeable risk of harm.

The writer also submits that the definition of field services is just as critical within the construction contract between the owner and the contractor as it is within the contract between the A/E and his client. For reasons to be discussed later in this paper, it is submitted that both the design professional's contract and the construction contract are equally important in not only defining the duties and responsibilities of the A/E in providing field services on a construction project, but also in understanding and effectively dealing with the alarming statistics described above.

## II. FIELD SERVICES - THE DEFINITION

The obvious question which presents itself in any analysis of an A/E's liability for field services is just what are "field services"? An A/E's field services may typically include the following types of services which are listed hereunder in no apparent order of importance.

- (a) Reviewing the contractor's work to ascertain defects and deficiencies from the plans, specifications, building codes, by-laws and good construction practice;
- (b) Reviewing the contractor's periodic applications for payment and certifying those applications, subject to observed defects and deficiencies in the work;
- (c) Preparing and issuing project change orders and reviewing and advising the client concerning the contractor's quotations with respect to same;
- (d) Reviewing the progress of the contractor's work and making determinations as to responsibility for delay, and issuing acceleration orders under the construction contract;
- (e) Certifying the Substantial Performance of the Work, subject to observed defects and deficiencies;
- (f) Performing a twelve month warranty inspection of the work and notifying the client and the contractor of items requiring correction prior to the expiration of the contract warranty period;
- (g) Ascertaining that the requisite surety bonds and insurance policies to be supplied by the contractor on the project are in place;
- (h) Reviewing the contractor's construction schedule and ascertaining its acceptability for the purpose of monitoring the contractor's progress during the course of the work;
- (i) Issuing supplementary design details and instructions during the course of the work;

- (j) Reviewing or taking other appropriate action with respect to the submission of shop drawings, product data and samples by the contractor as stipulated in the contract documents;
- (k) Attending periodic meetings at the construction site with the client and the contractor;
- (l) Coordinating the work of the contractor with any other contractors engaged by the owner on the project;
- (m) Coordination of the A/E's services with any other professional consultants engaged by the client directly;
- (n) Requiring additional or supplementary inspections and testing of the construction work;
- (o) Interpreting the requirements of the contract documents and making findings as to the performance thereunder by both the client and the contractor.

### III. FIELD SERVICES - WHY SO MANY CLAIMS?

Having described the problem of the disproportionate proliferation of claims against A/E's in the field service area and generally describing the nature of field services themselves, we must then answer the question... "Why so many claims"? We are left to analyze the various services described in Section II to ferret out those insidious aspects of field services which may account for the skewed claim statistics referred to earlier.

In the writer's experience, A/E's must endure an eternal dilemma which arises on most if not all construction projects which may account, in no small measure, for the design professionals' problems in the field service area. A/E's appear to have an inherent conflict of interest on most construction projects. The A/E has a judicially-considered duty to act impartially and objectively in administering the contract between the owner and the contractor. The A/E also has a concurrent duty to act with professional care in carrying out its field services. This concurrent obligation is described in the case of John Holland Construction v. Majorca Projects, (2000) 16 Const. L.J. 114. At the same time, the A/E has a duty to protect the client in accordance with his contractual obligations set out within his contract with the client. Of course, he also has a duty to protect himself from self-incrimination and to avoid prejudicing the defence of any liability claims brought against him by the client or the contractor. Some writers hypothesize that the A/E, in wearing these three hats simultaneously, is in an untenable position which in and of itself increases the likelihood of claims, particularly in the rendering of field services.

This problem is described in Hudson's Building and Engineering Contracts, 11th ed, Volume 1, Section 2-182, where it is stated that the A/E has three principal areas of responsibility to his client during the course of supervising a construction contract. These are, first, the prevention, detection and correction of defective work by the contractor; secondly, the more difficult and delicate role of intervention or non-intervention if the contractor's working methods or

temporary works prove unsuccessful or cause concern, and involve a judgment as to whether or not, in the client's best interest, to intervene and give instructions; and thirdly, should there be any indications of potential failure of the permanent design, intervention to correct it.

#### IV. FIELD SERVICES - THE CLAIMS ANALYSIS

The marked weighting of claims in the field service area is not explained by the A/E's inherent conflict of interest alone. In the writer's detailed analysis of professional liability claims against A/Es, four major reasons for the problem stood out. In order of importance, the claims analysis suggested the following four common factors constituted the primary source of the field service problem:

- (a) The inappropriate definition of field services within design professionals' contracts with their clients which is exemplified by repeated attempts to quantify the level of site attendance at the inception of the A/E's contractual relationship with the client;
- (b) The design professionals' habit of injecting themselves into the contractor's means, methods, techniques, sequences, procedures and safety measures in connection with the construction operations taking place at the site of the work;
- (c) The predisposition of A/Es to charge for their field services on the basis of a fixed price or percentage of the cost of the work, rather than on an hourly or per diem basis.
- (d) The A/Es dangerous habit of attempting to identify the contractor's defects and deficiencies in the work and calculating the defect and deficiency holdback at the end of the project, without proper identification and quantification of such defects and deficiencies in passing the contractor's previous monthly progress payment applications throughout the course of the construction of the work.

Each of items (a), (b), (c) and (d) above will be revisited below.

##### (a) Inappropriate Definition of Field Services

Referring to the inappropriate definition of field services within design professionals' contracts, the claims analysis disclosed an alarming trend among the A/E community to quantify the level of site attendances at the inception of the A/E's contractual relationship with the client, in many cases before the client's functional, budgetary, time, aesthetic and environmental project requirements were known. This also occurred, in most cases, prior to preparation of the design, before the nature of any innovative or unusual design or construction problems were known, before the identity of the contractor and his reliability as well as whether he had left substantial money on the table during the bidding process were known, and before the particular nuances of the project under consideration were within the contemplation of the client and the A/E.

It is submitted that it is virtually impossible for an A/E to estimate the amount of time which he will have to spend on site protecting the client from defects or deficiencies in the work of the contractor and periodically certifying the value of the work, without knowing the various criteria described above. Invariably what occurs is the A/E enters into a contract with the client which stipulates either the number of site attendances on a weekly or monthly basis, with a stipend for payment built into the contract based upon such site attendances, or correspondingly, the A/E agrees to provide field services to protect the interests of the client, either pursuant to a lump sum fee covering both design and field services or in accordance with an overall percentage of the cost of the work fee formula. In most cases, these methods for calculating the field service fee prove to be inadequate and unrealistic, given the A/E's lack of knowledge of the critical items described above.

One thing is clear from the field services cases, and that is that the courts will require the A/E to be at the site of the work at the critical times so as to protect the client in accordance with the A/E's contractual mandate. This is exemplified by the High Court of Australia case of Florida Hotels Property v. Mayo (1965) 113 C.L.R. 588.

In the Florida Hotels case, an architect who was engaged to review the construction of the work was not at the place of the work to review the placement of reinforcing steel before concrete was placed in the formwork. Subsequent to the placing of the formwork, several workers were injured when it collapsed. The court found that the architect had breached his duty of supervision owed to the owner. In doing so, the architect was liable to the owner for the damages paid by the owner to the injured workers. The court referred to the failure of the architect to be at the site at the critical times, notwithstanding the failure of the contractor to notify the architect that certain work was taking place.

Many A/Es seek to negate this potential liability situation by placing provisions in project specifications requiring the contractor to advise the A/E prior to certain stipulated construction operations taking place on site. Query whether such a specification requirement will negate the A/E's independent legal obligation to the client to ascertain defects and deficiencies in the work of the contractor from the project contract documents? It is submitted that the A/E has an independent contractual obligation to the client to protect the client and ascertain such defects and deficiencies, notwithstanding any stipulation within the specifications placing an obligation on the contractor to call the A/E to the site at critical times.

The *Florida Hotels* case should be read in conjunction with the case of *Marigold Holdings Ltd. v. Norem Construction Ltd.*, [1988] 5 W.W.R. 710 (Alberta Queens Bench), where an architect was held liable to his client for failing to inspect the construction of an apartment block at crucial stages. This case follows the reasoning in the *Florida Hotels* case, and also suggests that if the A/E specifies a construction method, he will be held liable if his inspection services fail to take place... "at the most critical time..." when the construction method in question is being varied in a way which may foreseeably affect the project in a deleterious fashion.

In many cases, the owner engages a clerk of works with a resident position at the work site, and issues then arise as to what level of site presence is required of the A/E. An interesting case on this subject was *Kensington Area Health Authority v. Wettern Composite* (1984) 31 B.L.R. 57. In this case, the clerk of works was held not to entitle the architect to visit the site less often. Again, the architect was required to visit the site at the critical times.

What the cases and the claim analysis suggest is that A/Es must take all the various key project criteria into account in determining the level of their site attendance on any particular construction contract. To do otherwise would be to invite disaster in the form of the contractor having his defective or deficient work unchallenged and the owner not deriving the measure of protection which he expects from his A/E under the design professional's contract. It is submitted that the best way for an A/E to avoid falling into the field service quantification trap is for him to employ what has been described as a "sole professional discretion field service mandate" in his professional service contracts.

As a result of the proliferation of claims in the field service area and the perceived primary source of the problem described above, the writer drafted a sole professional discretion field service mandate definition of "field services" into the standard contracts between client and engineer which are currently distributed as standard form contracts across Canada by the Association of Consulting Engineers of Canada (See ACEC Document 31). The "field service" definition within those contracts read as follows:

"Field services shall mean applying such selective sampling procedures at the project site as the engineer, in his sole professional discretion, considers necessary to enable him to ascertain whether the contractor is constructing the work in general conformity with the contract documents for the project."

The theory of this "field service" definition is that there is no quantification of the A/E's site attendances. He is simply required, in his sole professional discretion, to decide how often to attend at the project site, the best times to be there, and how long he should remain there. The sole professional discretion field service mandate requires the A/E to make his own decisions as to what constitutes the "critical times" on a particular project, given the various project unknowns referred to earlier, and his own expertise in the field. In short, the A/E is required to be at the project site whenever and wherever necessary, but the decision is his and his alone. Having removed the quantification of site attendances, it now behoves the A/E to be at the site at the crucial times and to structure his fee so as to avoid the pitfalls associated with lump sum and percentage of the cost of the work fees for field service work. This will be discussed in item (c) below.

(b) Contractor's Construction Methods

The second common factor which appears to be a primary source of field service claims relates to the predisposition of design professionals to involve themselves in the contractor's means, methods, techniques, sequences, procedures and safety measures associated with the construction operations taking place at the site of the work. In his

text, Construction Contracts: Principles and Policies in Tort and Contract by IND Wallace, 1986, Section 5-19, the author refers to this ongoing problem and postulates that particularly in Canada, design professionals themselves are largely to blame for their difficulties by reason of the terms they have chosen to frame within their contracts of employment, and also within the construction contracts they specify for their clients and the contractors to execute. These, with their constant references to the approval, directions, opinions and decisions of the professional, suggest strongly to the uninitiated that the professional is in such close and effective control of a construction site that even temporary works and the overcoming of unexpected difficulties during construction are within his jurisdiction and responsibility. The author opines that these provisions, which suggest that virtually nothing can be done on the site unless legitimized by the approval and satisfaction of the design professional, are divorced from reality. He goes on to state the following:

“The professional is, or should be, concerned only with insuring, in the owner’s interest, that the final permanent work accords exactly with its contract description. His powers of intervention, in the absence of express indications to the contrary, should be used and interpreted as limited to that objective. No duty exists to advise the contractor as to how he should carry out his building operations, or to intervene to prevent the contractor from making mistakes or errors. Indeed, contractors will usually be the first to assert their freedom to select appropriate working methods, particularly when rapid progress is being achieved, and only when in difficulty will they seek to obtain instructions from the owner, with a view to presenting a financial claim based upon the instruction itself. Furthermore, the reality is that, in the techniques of construction, modern contractors are frequently as or even more highly qualified and experienced than the consultant professional.”

The above is exemplified by the case of *Demers Estate v. Dufresne Construction* [1979] S.C.R. 146, where the Supreme Court of Canada held a consulting engineer 50% responsible to a contractor for failing to detect a glaring error in the contractor’s compressed air calculations which had been submitted for approval, and which resulted in an explosion and economic loss to the contractor. In the *Demers* case, the engineer offered to be available at all times to the client, the contractor and to the sub-contractors in order to provide them with the information, advice and instructions they needed to carry out the work.

The Demers case was followed in Manitoba in *Trident Construction v. Wardrop Engineering* (1979) 6 W.W.R. 481. In this case, the engineer offered guidance, assistance and supervision to the resident engineers and inspectors of the contractor and sub-contractors to ensure that the construction of the work was in accordance with the drawings. The engineer was held partly liable, together with the specialist subcontractors, to the main contractor for the failure to warn the contractor that his working platform might be too low and subject to flooding.

Both the *Demers* case and the *Trident* cases appear to depend on the particular wording of the consulting engineer's contract of employment. Many standard forms of design professional and construction contracts use equally unrealistic and ill-considered wording about the A/E's powers. In *Hudson's Building and Engineering Contracts*, 11th Ed., Volume 1, in Section 1-299, it is stated that the *Demers* and *Trident* cases are not general authority, even in Canada, and that in principle no affirmative duty of care is owed by an A/E to a contractor to protect him from economic loss. Only a positive unqualified intervention or representation, made or given in circumstances in which the A/E could be said to accept responsibility for its efficacy or accuracy, within the terms of the *Hedley-Byrne* principle, when applied to the real relationships on a construction project, will create liability on the A/E. This judicial reasoning has also been confirmed in the House of Lords in the case of *Peabody Donation Fund v. Sir Lindsay Parkinson* [1984] 3 W.L.R. 953. In that case, a developer had made an unauthorized agreement with a junior employee of a local authority to discard an officially passed and approved system of flexible drainage to substitute rigid pipes instead. A successor to the building inspector who had approved the original scheme later received certain information that a rigid system was being employed, but did not realize its significance. The rigid system failed, and the developer incurred considerable expense in changing the system and meeting the contractor's claims. The English Court of Appeal held that the local authority owed no duty of care to a developer who chose to disregard an officially approved scheme. This decision was affirmed in the House of Lords.

In the case of *Marigold Holdings Ltd. v. Norem Construction Ltd.* cited earlier in this paper, the Alberta Queens Bench affirmed that if an A/E specifies a construction method, then he will be liable if his inspection services fail to take place at the most critical time when the construction method in question is being varied in a way which may foreseeably affect the project in a deleterious fashion.

In situations involving innovative design by the A/E, the A/E may be required to become involved in construction methods, sequences, procedures, etc., because he knows or should know that the contractor will have very little experience in constructing the innovative design which has been developed. This is exemplified by the case of *West Coast Paving Co. Ltd. v. R. In Right of British Columbia and Siu* (1983) 50 B.C.L.R. 234, where the British Columbia Supreme Court determined that in a case involving innovative design, if the contract provides the architect with the right to direct the contractor's method of work, then in these cases, there is likely to be an implied term in the contract that the architect will direct the contractor in accordance with proper design and construction practice.

In the case of *Foyer Valade Inc. v. Red River Construction Co.* [1999] M.J. No. 264 (Manitoba Court of Appeal), the court decided that while it is true that even if the contract documents do not require every aspect of the work to be inspected, there will be an added responsibility on the A/E with respect to critical areas of the work so that the A/E may protect the client in an appropriate manner.

In the case *Clayton v. Woodman* [1962] 2 Q.B. 533, at page 539, Salmon, J. stated:

“Counsel submitted that the architects had no right to instruct the builder as to either the manner in which the work was to be done or the safety precautions to be taken. He contended that the form of specification and contract make it plain that it is for the builders to decide what safety precautions are necessary and to make provision for them in the tender. He further submitted that there is no contractual nexus between the architects and the builders, and that the law imposes no duty on the architect to advise the builders and their servants about their safety. So far as the law is concerned, the architect would be within his rights were he to stand by and without protest or warning watch the Plaintiff doing something which the architect knew to be highly dangerous. Still less could the architect be liable if, through lack of care and knowledge, he failed to appreciate the risks involved in the Plaintiffs’ acts. I agree substantially with all those submissions.”

The same result was achieved in the case of *A.M.F. International v. Magnet Bowling* [1968] 1 W.L.R. 1028, at page 1046. In that case, Mocatta, J. stated:

“An architect has no right to instruct a builder how his work is to be done or the safety precautions to be taken. It is the function and right of the builder to carry out his own building operations as he thinks fit. The architect on the other hand, is engaged as the agent of the owner for whom the building is being erected, and his function is, *inter alia*, to make sure that in the end, when the work has been completed, the owner will have a building properly constructed in accordance with the contract and any supplementary instructions which the architect may have given.”

Query whether the A/E may have a positive duty to intervene if dangerous practices of the contractor compromise the client’s project or constitute a danger to life or to property of third parties? It is submitted that the A/E’s respective Codes of Ethics within their professions and recent cases such as *Winnipeg Condominium Corporation v. Bird Construction Co.* [1995] 1 S.C.R. 85, suggest that tort liability to third parties may accrue to an A/E for failing to detect or prevent breaches of contract by a contractor where such breaches constitute a foreseeable risk of harm to third parties. Certainly, such failure on the part of an A/E will result in contractual liability to his client. The case of *Anns v. Merton London Borough Council* [1978] A.C. 728 provided for similar liability.

The question is how to reconcile the cases with standard terms commonly employed within design professionals’ contracts in Canada which typically stipulate that the A/E shall not be required to make exhaustive or continuous on-site reviews of the contractor’s work in order to determine its conformity with the contract documents while, at the same time, in another section of the same contract, stating that the A/E shall carry out a review of the contractor’s work at intervals appropriate to the stage of construction which the

A/E considers necessary to determine if the work is in general conformity with the contract documents.

It is submitted that the internal inconsistency evident within the wording set out in the previous paragraph has resulted in and will continue to result in judicial pre-disposition in favour of clients for the failings of A/Es to protect the clients' interests *vis a vis* the contractors' work. If the cases say nothing else, they reinforce the courts' determination to protect clients by requiring the A/Es to be at the site at the crucial or critical times during the course of the contractor's work. It would appear that design professionals are the authors of their own demise with regard to the inherently inconsistent contract provisions which they insist on executing. A case in point are the provisions within standard design professional contracts which stipulate that the A/E will not be responsible for the failure of the contractor to perform the work required on the project in accordance with the contract documents. These contracts also stipulate that the A/E shall not be responsible for the acts or omissions of the contractor, sub-contractors or any other persons performing any of the work. To these contractual provisions we would ask the question of the A/E ... "What has he been hired for?" Surely the client has a reasonable expectation that the A/E will protect him and that he will ascertain the contractor's defects and deficiencies in the work from the contract documents, building codes, by-laws and good construction practice. Was this not precisely why the A/E had been engaged and received a professional fee? It is submitted that for the design professions to continue to use inconsistent wording, both approbating and reprobating their field service responsibilities within the body of their contractual arrangements, is tantamount to judicial suicide. The Association of Consulting Engineers of Canada standard contracts appear to have a better idea as to the A/E's legal responsibilities when they employ wording such as the following:

"No acceptance by the engineer of the work of the contractor, whether express or implied, shall relieve the contractor from its responsibility to the owner for the proper performance of its work. The engineer shall not be responsible to the owner for the means, methods, techniques, sequences, procedures and use of equipment of any nature whatsoever, whether reviewed by the engineer or not, which are employed by the contractor in executing any phases of the work or for placing into operation any plant or equipment or for safety precautions and programs incidental thereto."

(c) Inappropriate Field Service Fees

The unfortunate inclination of A/E's to charge a fee for their field services on the basis of a fixed price or a percentage of the cost of the work basis rather than on an hourly or per diem basis also, it is submitted, is a major factor in the exacerbation of field service claims. For the reasons stated earlier, it is not possible for an A/E to determine with any degree of accuracy the amount of time which he will be required to expend in providing field services on a given construction project as of the date that he enters into his own contractual mandate with the client. Accordingly, any fee provisions which tie an A/E's

remuneration to a fixed fee is doomed to failure, and likely to increase the likelihood of field service errors and resulting claims.

It is submitted that in any situation where a design professional knows that he is losing money, where he is required to expend time in supervising a sloppy, negligent or intransigent contractor, the A/E is that much more likely to fail to attend at the construction site at the critical times as required by the courts. In such circumstances, the chances of the contractor deviating from the contract documents, building codes, by-laws and good construction practice in the absence of the design professional becomes that much more likely. Human nature being what it is, A/Es will be inclined to gravitate to activities which appear to be productive or remunerative, rather than expending seemingly endless unpaid hours supervising a technically-challenged contractor.

If A/Es feel that they can realistically estimate the amount of their design time on a lump sum or percentage of the cost of the work basis then so be it. However, it is submitted that for field service activities, nothing short of an hourly or per diem calculation of the A/E's fee should be tolerated, both from the point of view of ensuring that the design professional is adequately compensated for his expertise and time expenditure, and also to take the realities of the field service task into account and provide a means for rendering such services in the context of a contractual mandate which will actually operate to the client's advantage by placing his design professional in a position where he is more likely to protect his interests in discerning contractor construction chicanery.

(d) Delayed Identification and Quantification of Contract Deviations

The A/E's dangerous practice of waiting until the virtual completion of the work to prepare a detailed list of construction defects and deficiencies is contrary to the stated requirements of the CCDC2 (2008) Stipulated Price Contract between owner and contractor, as well as the requirements of the ACEC Document 31 Client/Engineer and the CCAC 6 Client/Architect Agreement forms.

For example, the CCDC2 (2008) Agreement stipulates, in GC 2.2.5, that based upon the A/E's observations of the contractor's work and (monthly) applications for payment, the A/E will determine the amounts owing to the contractor and will issue certificates for payment.

GC 2.2.12 states that the A/E has the authority to reject work which does not conform to the requirements of the contract documents.

GC 2.4.1 requires the contractor to promptly correct defective work that has been rejected by the A/E as failing to conform to the contract documents.

GC 5.2.1 indicates that the contractor's applications for payment may be made monthly as the work progresses. This is in fact the case in most Canadian construction contracts.

GC 5.3.1 states that the A/E will issue to the owner, after receipt of an application for payment from the contractor, a certificate for payment in the amount applied for or in

such other amount as the A/E determines to be properly due. If the A/E amends the application for payment, he is to notify the contractor in writing, giving reasons for the amendment.

Similarly, the design professional contracts referred to above stipulate that the A/E will protect the client's interest by visiting the work site at intervals appropriate to construction progress to become familiar with the progress and quality of the work and to determine that the work is proceeding in conformity with the contract documents.

By choosing to delay the identification and quantification of defects and deficiencies until the last payment period, it is submitted that the design professions are playing Russian roulette with the owner's best interests as well with their own future professional liability exposure. It is entirely conceivable that the value of the defects and deficiencies once they are determined at project end will be beyond the value of the funds remaining in the owner's hands. In addition, the owner will have lost the strategic advantage of having the apprehended value of the contractor's defects and deficiencies deducted monthly from A/E's certificates for payment. The obvious motivation for the contractor to complete and correct such items promptly as the project proceeds, as a condition precedent to his right to reimbursement therefor, will have been lost.

The failure of the A/E to protect his client by meeting his contractual field service responsibilities to be at the work site each month during construction at the critical times so as to ascertain that the contractor is performing the work in general accordance with the contract documents, free from empirically obvious defects and deficiencies will, it is submitted, operate to make the A/E yet another statistic in the proliferation of claims against design professionals in this volatile area of practice.

A review of this curious practice on the part of many design professionals suggests that there is a collective misguided belief that waiting to the end of the project to identify and quantify deviations from the contract documents, codes, by-laws and good construction practice, will somehow make the task easier for the A/E. On the contrary, it is submitted that such practice results in significant additional risk accruing to the owner as well as to the A/E. Should the contractor be unwilling or unable to complete the work and should the remaining project funds prove to be insufficient to cover the value of the contractor's deviations, this will, more often than not, result in the A/E becoming the focus in the cross-hairs of the line of fire initiated by the owner who seeks compensation for having received an incomplete or defective project.

Finally, the writer submits that such a dangerous practice may also provide a possible defence to the contractor's surety who could take the position that the value of the contractor's work has been over-certified on a month-by-month basis as the project has proceeded. Query whether the surety will be able to take such a position, given the principal's monthly applications for payment wherein the contractor will have represented that it was entitled to be paid for the workmanship, materials and equipment incorporated into the project which were alleged to have been provided free from defect and deficiency and in accordance with the contract documents.

## V. FIELD SERVICES - THE A/E AS CERTIFIER

Another major area of field service exposure for design professionals is when they occupy the role of certifier as to the quantity and quality of the contractor's work. This certification function directly affects both the client and the contractor on the construction project. At one time, it was thought that when an A/E was involved in certifying the value of a contractor's applications for payment before any dispute had occurred between the owner and the contractor, the A/E was in a quasi-judicial position of immunity, and that accordingly he could not be sued for any errors, omissions or negligent acts in the course of issuing such certifications. This reasoning stemmed from a line of authorities beginning with *Chambers v. Goldthorpe* [1901] 1 K.B. 624. Subsequently, in the House of Lords decision of *Sutcliffe v. Thackrah* [1974] A.C. 727, the quasi-judicial immunity theory was finally put to rest. In that case, the Court concluded that in the absence of a ruling during the course of a dispute between the owner and the contractor, the A/E certifier was not acting in a quasi-judicial capacity when he issued certificates for payment in response to a contractor's applications for payment.

Since the *Sutcliffe* case, the client has a contractual remedy against the A/E for negligent over-certification in the event of a subsequent failure or insolvency of the contractor. The theory of the *Sutcliffe* case is that the A/E, in determining the value of the contractor's applications for payment, is basing his decision on his empirical observations of the labour and materials provided by the contractor to the date of the application, and that as such, his decision has more to do with his being at the site at the critical times to observe the work of the contractor, its quality and value, than it has to do with his duty to be impartial and objective in deciding upon disputes between the owner and the contractor under the construction contract. In the absence of a dispute, it is clear that the A/E certifier will not be held to be acting in a quasi-judicial capacity.

The intriguing question then is whether an A/E would be liable in tort to a contractor for negligent under-certification? This does not seem likely, however, in view of the cases on the subject. An A/E is employed, to the knowledge of the contractor, to protect the owner's interests, and not to provide protection to the contractor. There is authority to the effect that an owner does not warrant a certifier's competence, only his fairness or honesty. In the great majority of cases, there is no doubt, that the A/E, in carrying out his certifying functions, is acting administratively, not quasi-judicially. In such circumstances, he is acting as the owner's agent. *Hudson's Building and Engineering Contracts*, 11th Edition, Volume 1, in Section 1-302, suggests that it would be strange to impose a duty of care on the agent A/E not accepted by his principal, the owner, in the construction contract, and also in a matter where a remedy against the principal is available under the contract. It is stated that such a duty would clearly be outside the "contractual setting" or the "contractual structure" of the construction contract.

In certain other situations, the A/E certifier will be called upon to render decisions with regard to disputes which have arisen between the owner and the contractor at the behest of one or both of them prior to the A/E actually issuing his formal certificate for payment. In certain other situations, the construction contract itself may expressly refer a dispute between the owner and the contractor to the A/E for a preliminary decision. These contracts typically stipulate that all disputes between the owner and the contractor are required to be settled in the first instance by the A/E prior to any subsequent right to proceed to arbitration. In these situations, Hudson's

Building and Engineering Contracts, 11th Edition, Volume 1, in Section 2-217, takes the position that the A/E's decisions will be reviewable by the courts, but that his actions in rendering such decisions may be cloaked with quasi-judicial immunity.

## VI. FIELD SERVICES - THE PROFESSIONAL AND CONSTRUCTION CONTRACTS

It is submitted that design professionals often fail to realize the significance of the relationship between their own professional contract with the client and the construction contract between the owner and the contractor. It is this relationship which, it is submitted, is the source of many misunderstandings and resulting field service claims on construction projects.

Too often, the A/Es consider their own contract to be divorced from the construction contract, and fail to discern the intimate relationship between the two documents. This failure often results in professional and construction contracts which are at odds with one another and which leave voids in the services rendered by design professionals, with predictable resulting failure to meet the contract-induced expectations of both the client and the contractor.

The design professionals' contracts with the client typically come into existence first in time, prior to any consideration of the construction contract to follow. Too often, the A/E does not pay attention to the relationship between his own design professional contract and the construction contract between the owner and the contractor, perhaps because he is spending most of his time during the negotiation of his own contract concerned with the client's various requirements for the project as well as project financial viability which must be ascertained prior to the project going forward. If the A/E is guilty of focusing on his own contract to the exclusion of the future construction contract, this will be a recipe for future field service disaster. The A/E often enters into a contractual relationship with the client which subsequently proves to be at odds with the form of construction contract which is included within the bid package of contract documents which go to the bidding contractors, and which the successful contractor will be required to execute prior to being authorized to carry out the work.

Because the A/E typically prepares the contract bid package, which includes the plans, specifications, instructions to bidders, information to bidders as well as the form of construction contract itself, the A/E has no one to blame but himself if he specifies a form of construction contract which does not afford him the opportunity to provide field services in a manner consistent with his own professional mandate executed some weeks or months earlier.

There is no point in having a full mandate to provide sole professional discretion field services in order to ascertain the quality and quantity of the contractor's work if the corresponding provisions within the construction contract do not allow the A/E the opportunity to properly review the contractor's work or to order suitable remedial measures in the event that the contractor fails to carry out the work in accordance with the contract documents. Similarly, there is no point in having a construction contract which calls for the A/E to be performing several field service functions between the owner and the contractor, if the A/E's own professional contract with the client does not include within its scope those same activities, and provide reasonable remuneration to the A/E therefore. Obviously, if the A/E's own contract does not provide for his carrying out certain important field services, then he is unlikely to do so for free under the construction contract. Such inconsistencies between the two contracts will

introduce immediate problems between the owner and the contractor, both of whom have an expectation within the construction contract that the A/E will be performing certain stipulated field service activities.

It should also be noted that third party claims against design professionals will also often result in courts' having reference to the professional contract between the A/E and the client as well as the construction contract, in order to ascertain the precise nature of the services that the A/E was supposed to be providing.

Hudson's Building and Engineering Contracts, 11th Edition, Volume 1, in Section 2-190, indicates that the terms of the contract between the owner and the contractor are a relevant factor in determining the extent of the duty of supervision of the A/E. This is all the more true in the majority of cases where the A/E himself recommends the contract in question to the client. Since the A/E includes the form of construction contract between the owner and the contractor in the contract package which he prepares for the bidding contractors, the inference to be drawn from the construction contract is that the A/E will be performing the field service functions described in the construction contract, whether or not his own professional contract with the client so stipulates. Hudson states that construction contracts which call for the removal of the contractor's liability for defects and deficiencies which may be detected by the A/E at any reasonable time during the carrying out of the work, must require supervision of the most painstaking character by the A/E to achieve the necessary degree of protection for the owner.

In the CCDC 2 (2008) stipulated price construction contract between owner and contractor, in GC12.2.1, the waiver provision stipulates that the A/E's final certificate for payment operates to release the contractor from all claims which the owner might have against him, other than claims expressly set out in GC12.2.1. Again, the inference that may be drawn is that since the effect of the A/E's final certificate for payment may operate to release the contractor from all claims other than those set out within GC12.2.1, the A/E must provide field services to a degree that will properly protect the owner, and that no less than the sole professional discretion field service mandate described earlier will suffice in these circumstances.

Lastly, it should be stated that many design professionals' contracts with their clients employ the words "ensure," "assure," and "insure," in connection with the A/E's detection of defects and deficiencies in the work of the contractor. These terms are to be avoided at all costs. It is submitted that these words may be interpreted as constituting a warranty or guarantee of performance. They are often used in the context of the definition of field services within the design professional's contract. Any suggestion that the A/E is guaranteeing or warranting a result or that his field services will "ensure," "assure," or "insure" that the work of the contractor conforms with the contract documents for the project may be interpreted as a guarantee or a warranty. Claims relating to guarantees or warranties are excluded under virtually all professional liability insurance policies. Since the use of these words could conceivably cause a court to interpret the A/E's obligation to provide field services as a guarantee that the work of the contractor will not deviate from the contract documents, this might operate to move the standard of care, insofar as the A/E is concerned, from the standard test of reasonable means to one of strict liability. Under these circumstances, not only will the design professional lose his

professional liability insurance coverage, but his exposure to a finding of liability will be that much greater.

## VII. CONCLUSIONS

It is submitted that in order to alleviate the heavy burden that field service claims represent to the design professional community, A/Es must take a realistic approach to their contracts and to the scope of their on-site field service responsibilities. In order to do this, in the writer's opinion, A/Es do not require to practice defensively so much as they require to practice realistically, taking the full measure of the inextricable relationship between the professional contract and the construction contract into account. In conjunction with this realism, A/Es must do a better job of educating and conditioning their clients to the tangible benefits to be derived from allowing the A/E to do the field service job he was trained to perform. Clients must be made to understand that nothing short of a full field service mandate at the A/Es professional discretion is what is required for him to obtain the most effective quality control for his project.

Attached to this paper, as Appendix "A," is an A/E loss control and risk management checklist which covers professional practice points which may operate to reduce both design and field service-related liability claims for design professionals. It is suggested that A/E's implementation of these types of loss control measures, coupled with client education and other enlightened procedures for dealing with field service responsibilities, will operate to significantly impact the number and severity of field service claims being experienced by design professionals.

Finally, in Appendix "B," the writer has attached a letter from an unnamed architect written in 2000 to our law office, describing his frustrations in carrying out his field service responsibilities in Vancouver. I have suitably entitled it "The A/E's Lament." In the letter, the architect is alluding to the *Ingles v. Tutkaluk* case, [2000] 1 S.C.R. 298, where the Supreme Court held that a public authority owes a duty of care where it is responsible for administering and enforcing the building code.

The frustration expressed by the architect translates into angry relief at his realization that the Supreme Court has let it be known that it expects municipal building inspectors to perform their functions in a manner that would be expected of an ordinary, reasonable and prudent A/E providing field services in similar circumstances.

**APPENDIX "A"**

**A/E LOSS CONTROL AND RISK MANAGEMENT CHECKLIST**

I. PRE-CONTRACT

Client Selection

- (a) Investigate the business integrity, financial capacity and litigation history of your potential client. Do not be afraid to contact fellow professionals to ascertain these criteria as well as utilizing your own intuition.
- (b) Assess the opportunity for establishing a good working relationship with your client.
- (c) Be wary when taking over a contractual mandate from a previously engaged design professional on the same project. Exercise extreme caution when utilizing previously prepared plans and specifications, with their inherent unknowns or when inheriting the results of contract administration (field services) commenced by others in the midst of the course of construction of a project.

Project Selection

- (d) Consider the unique characteristics and requirements of the project in light of your expertise and firm capabilities and resources. Do not offer services beyond the scope of your professional training.
- (e) Do not oversell the project or guaranty your firm's capabilities to perform to such an extent that your client's expectations for the project are raised to a level which can never be achieved. Never guaranty your firm's ability to achieve a particular result.

II. PROJECT ORGANIZATION

- (a) Consider whether your client has his project financing in place before committing to the project. Ensure that his financing structure includes your professional fee.
- (b) Analyze the need for and assess the availability of subconsultants likely to be required in connection with the design and field services for which you are to be responsible.
- (c) Estimate the input which will be required from both yourself and your subconsultants on the project. Do not render advice outside your expertise relating to the project schedule, budget or design without obtaining necessary source data from subconsultants or specialist consultants engaged by the client.

### III. CONTRACT FOR SERVICES

#### Form of Contract

- (a) Verbal contracts with your clients or subconsultants are not acceptable.
- (b) Standard contract forms or customized agreements created or approved by legal counsel familiar with construction practice and its liability exposures should be used on all projects so as to adequately detail the rights and obligations of the contracting parties to one another.
- (c) Contracts should be reviewed in order to ascertain that their provisions are appropriate to the unique requirements of individual projects.
- (d) Where possible, suggest your own form of contract before your client suggests his own customized form with its built-in prejudices in his favour.

#### Content of Contract

- (e) Your contract should provide for adequate compensation for the required scope of your professional services, particularly with respect to field services, and your client should be educated as to the direct benefits accruing to him from your various services. You should endeavour to charge your client a fee based upon an hourly or per diem rate for field services so as to ensure that you will be paid for unanticipated additional time you may be required to expend to protect the client's interest.
- (f) Ensure that the contract provides you with sufficient authority to enable you to act effectively as the client's agent on the project. Explain the rationale for a sole professional discretion field service mandate to your client which will better enable you to monitor the contractor's work on the project.
- (g) If possible, the contract should include a limitation of your professional liability, preferably to the amount of your professional liability insurance coverage as well as a limitation of the time period within which a claim may be brought against you.
- (h) You should understand the meaning and intent of all of the provisions of your contract. Do not sign any agreement whose terms are not totally understood or containing any terms inappropriate to the project under consideration.
- (i) Be vigilant for client drafted indemnification provisions requiring guarantees or warranties of performance which may operate to obviate the coverage provided by your professional liability insurance.

## Subconsultants

- (j) Your client should be encouraged to contract directly with any necessary consultants in order to avoid vicarious liability accruing to yourself as prime consultant for their errors and omissions. In such circumstances, ensure that the contractual mandate of the consultants provides for overall project coordination by the prime consultant so that project continuity may be maintained in your hands, without subjecting you to liability exposure resulting from the errors or omissions of the consultants on the project.
- (k) If you are required to engage subconsultants, ensure that they are sufficiently insured for professional liability in the event that they are negligent in a situation where you, as prime consultant, will be legally responsible in the first instance for their errors.
- (l) Ensure that all of the members of the design team are aware of the provisions of the design and construction contracts on the project so that they can perform their design and contract administration roles in the most effective and efficient manner possible.
- (m) Establish a procedure at the inception of the project to ensure that each member of the design team understands his responsibilities and roles on the project and as to how these interface with the other members of the team.
- (n) Identify the basic services required for the project and select members of the design team who are experienced and qualified in those particular areas.

## IV. CLIENT RELATIONSHIP

- (a) Develop a written project program which is agreed to in writing with your client outlining the scope of the project. This program should be agreed to prior to rendering any professional services, and should be prepared for both large and small projects.
- (b) The project program should define the client's project needs and long-range goals, functional requirements, space requirements, cost limitations, time constraints, aesthetic and environmental considerations, if any.
- (c) Establish the client's single-point liaison person who will have authority to receive project input from yourself as prime consultant and expeditiously give required authorizations and approvals as the project proceeds.
- (d) Educate and keep the client informed concerning the nature of your various services and emphasize as to how these operate to protect him (as opposed to protecting you) from future project-related problems and claims.

- (e) Establish a schedule of regular project status meetings and an “open door” policy encouraging communication both to and from the client. Prepare and distribute, as soon as possible, accurate minutes of project meetings to all involved parties and invite corrections if the minutes do not accurately reflect the discussions held.

V. RELATIONSHIP WITH THE GENERAL CONTRACTOR

- (a) Delegate a single individual to act as liaison with the contractor with respect to contract administration and design clarification functions required of your office.
- (b) Endeavour to maintain an atmosphere of fairness and objectivity in acting as prime consultant between owner and contractor on the project. Always opt for cooperation rather than confrontation, and advise both the owner and the contractor that your job is to be impartial in administering the construction contract.
- (c) Do not advise or direct the contractor as to his construction means, methods, techniques, sequences, procedures or safety measures relating to the work defined by the contract documents which you or others have prepared for the project.
- (d) Prepare contract documents for the project which are compatible with your own professional contractual mandate so as to avoid situations where both the owner and the contractor will be expecting you to fulfil functions described by the contract documents which are not included or properly described within your own agreement with the client.
- (e) Set up an agreed procedure for processing project paperwork prior to the commencement of construction, including procedures for dealing with the contractor’s payment applications, change orders, design changes or clarifications and for resolving project disputes as expeditiously as possible.
- (f) Be careful to ensure that, as the owner’s agent on the project, you do not enter into contracts for the procurement of labour, materials or equipment for incorporation into the project. All contracts must be entered into by your client, the project owner.
- (g) Do not exceed the parameters of your authority to act as prime consultant on the project as defined by both your contract with your client as well as by the construction contract between the owner and the contractor.
- (h) Seek independent legal advice concerning difficult questions of contract drafting or interpretation or an insurance broker’s advice concerning questions of insurance coverage or suretyship. Seek the advice of consultants with regard to areas of engineering or other expertise which you do not possess.

## VI. RECORD KEEPING

- (a) All contracts, subcontracts, change orders, change requests from the owner or the contractor and all other significant project generated documents, including correspondence, minutes of meetings, job site diaries, etc. should be categorized and permanently archived for future reference.
- (b) All project meetings should be fully documented, and expeditiously circulated to all participants, with a request for any necessary corrections or clarifications.
- (c) Significant telephone calls and advice to and from the owner and the contractor should be recorded in writing.
- (d) Photographs should be taken of important project events during construction and properly dated and labelled as to the photographer's name, the subject-matter of the photo and any other distinguishing characteristics of the photograph which will be important to its use as evidence at a potential future court or arbitration proceeding.
- (e) Daily job site diary reports should be prepared contemporaneously with the occurrence of significant events.
- (f) All events involving any change in the scope of professional services or the contractor's work, compensation or any project problems or disputes should be documented with follow-up correspondence to all affected parties, with detailed memoranda to file as appropriate to describe the matters in question.
- (g) Because the limitation period for bringing lawsuits against you as a design professional may be open-ended, you must retain all of your project documents permanently.
- (h) Prepare your project documentation with the realization that in future disputes most of it will be producible to the scrutiny of all parties on the project and their lawyers. Ultimately, a judge will review both your words and your conduct in deciding upon your fate in a professional liability claim.

## VII. FIELD SERVICES

### Scope of Services

- (a) Educate your client to grant you a sole professional discretion field service contractual mandate which will allow you to determine your actual time expenditure necessary on the project site. In this way, you can endeavour to maximize protection to the client by ascertaining that the contractor's work generally conforms to the design represented by the contract documents which you have prepared for the project.

- (b) If you practice in a jurisdiction where a client can decline your field services, then should your client decide that he requires no field services to be performed, forward written confirmation of that decision and advise that you will bear no responsibility for matters arising during the course of construction which would, but for the client's decision, have been the subject of your field review. In such circumstances, also advise the client that you will not be issuing unqualified project certifications or advice to the client, bonding companies or to financial institutions regarding either the quantitative or the qualitative status of the construction work. Do not certify "site/sight unseen."
- (c) If you are taking over a project from another design professional, confirm in writing to your client the limitations inherent in your ability to assess the quality or quantity of previously completed work which may have been covered up. Also advise as to your limited ability to determine the conformity of the previously completed work with the project contract documents. Advise the client that you will require to qualify any certifications which you may give on the project to reflect these facts.
- (d) If you are succeeding a previous design professional on a project, or if you have been engaged to review his designs, ensure that you so advise the previous professional in writing that you are taking over his design or reviewing same on behalf of the client prior to proceeding with such services.
- (e) Avoid either expressly or impliedly guaranteeing the adequacy of the work of the general contractor or the subcontractors on the project.
- (f) Do not "approve" shop drawings prepared or submitted by others on the project. Review shop drawings only for general conformity with project dimensions or other explicitly defined requirements which you are capable of and are being paid to assess.
- (g) Establish communication continuity between personnel responsible for design and field personnel responsible for ascertaining conformity of that design with project contract documents and good construction practice. It is important that the field personnel be familiar with the philosophy of the design if they are to do an effective job in providing field services.
- (h) Utilize the services of specialist subconsultants for those aspects of the work which are beyond your own sphere of expertise, and ensure that the subconsultants are carrying sufficient levels of errors and omissions insurance as a pre-condition of working for you.
- (i) Set up a procedure so that all important project correspondence between the owner and the contractor will be required to go through your office so as to enable you to properly monitor and defuse potential problems and sources of conflict on the project.

- (j) Update your client regularly as construction of his project proceeds regarding the status of the ongoing work.
- (k) Monitor and update project schedules prepared by the contractor and advise your client of any potential revisions to his anticipated occupancy date.
- (l) Scrupulously follow all notice provisions in the construction contract between the owner and the contractor in acting as the owner's agent under the contract documents.

## VIII. CLAIMS

### Procedures

- (a) Set up in-house quality control procedures such as re-checking or peer review of design work and contract administration procedures.
- (b) Utilize legal counsel in the preparation and review of tender and other project contract documents as well as for general contractual and claims advice during the course of the project.
- (c) Employ standard claims procedures, including:
  - (i) early identification and assessment of potential claims against you originating with your client or with others;
  - (ii) immediate provision of notice of potential claims to your professional liability insurer and insurance broker;
  - (iii) organizing personnel and document control in preparation for the defence of any claims brought against you;
  - (iv) avoiding any admissions of liability or waivers of legal rights until you have obtained the input of legal counsel and your professional liability insurer.
- (d) Content of Claim Reports
  - (i) give complete descriptions and full details of the circumstances giving rise to the claim;
  - (ii) if one or more claims have been made against you because of an alleged act, omission or personal injury, and if further claims from the same act etc., or arising out of a series of related acts, etc., are expected, state this in the report;
  - (iii) if more than one transaction or set of services is involved, describe each;

- (iv) if more than one client or potential claimant exists, identify, if possible by name, those persons or entities who you expect may make a claim against you;
  - (v) if you are unable to clearly identify all potential claimants, your report should indicate that there could be a number of claimants, some of whom are presently unknown.
- (e) Verification of Your Records
- (i) keep a copy of all reports and correspondence concerning claims and potential claims. These will be important if the timeliness or sufficiency of a report is challenged later by your insurer.
  - (ii) Check you firm's records to be sure that you have received acknowledgement by or on behalf of the insurer for all reports submitted. If you have not received such an acknowledgment, follow up immediately.
- (f) Office Systems for Reporting Claims

If your firm has not already done so, now is a good time to develop your own system for reporting. We suggest that you make one person in the firm responsible for reporting all claims and potential claims. That person should:

- (i) interview each member of the firm to identify every matter to be reported;
- (ii) submit and monitor the reports and provide the cooperation required by the insurance policy;
- (iii) keep the firm informed of the progress of claims made against it;
- (iv) educate the firm about the causes of claims and develop methods for preventing a repetition of similar claims in the future.

Such a person can generally keep the firm apprised of changes in the insurance program and the dangers associated with policy exclusions or conditions of coverage.

#### Insurance

- (g) Maintain adequate professional liability insurance coverage with an appropriate policy deductible and policy limits. Ensure that you have an insurance broker who is both knowledgeable in professional liability matters and has the ability to communicate with you and with your insurer with regard to ongoing liability and insurance coverage concerns.
- (h) Be aware of problems concerning common errors and omissions insurance exclusions, such as:

- (i) performance of services not customary to your profession;
  - (ii) failure to complete drawings, specifications or other contract documents on time;
  - (iii) the giving of warranties or guarantees which will operate to increase your normal professional liability exposure;
  - (iv) the giving of estimates of profit or return on capital investment;
  - (v) becoming involved with the client to the point where you either directly or indirectly have an interest in the client or where the client has such an interest in you;
  - (vi) advising or failing to advise your client concerning any form of insurance, suretyship or bond;
  - (vii) participating in a joint venture, partnership or any other entity which has not been specially endorsed on to your errors and omissions insurance policy.
- (i) Obtain and maintain separate personal coverage if your former firm goes out of business, fails to renew its liability insurance or if you retire and your former firm is guilty of either of the two aforementioned activities.

#### Professional Fee Claims

- (j) Objectively consider, with the benefit of independent legal counsel, the potential net fee recovery in any claim you may bring against your client relative to the amount involved and the legal and time expenditures necessary to proceed by way of arbitration or litigation. Also consider the likelihood of provoking a counterclaim by your client for professional negligence which will involve your professional liability insurer and future reputation impugment for yourself.
- (k) If allowed by law in your practice jurisdiction, consider the pros and cons of filing a builder's lien against the project property for the full amount of unpaid fees for design and field services. Be advised that a design professional's builders' lien claims also frequently result in counterclaims against the design professional by your client.
- (l) Endeavour to set up alternative security mechanisms with the client to facilitate payment of your future accounts for professional services, especially after a dispute has arisen on the project.
- (m) Ensure that your contract with your client stipulates that unless and until you have been paid your professional fee on the project, the client will not have the right to employ any plans, specifications or other contract documents which you have prepared for any purpose in connection with his project.

- (n) Endeavour to structure your contracts so that you are paid based upon an hourly or per diem rate rather than have your fee based upon a lump sum or percentage of the cost of the work, particularly in the critical field service aspect of your services.

**APPENDIX "B"**

**THE A/E'S LAMENT**

September 20, 2000

Shapiro Hankinson & Knutson Law Corporation  
700 - 555 Burrard Street  
Vancouver, B.C.  
V7X 1M8

Attention: Mr. Stuart Hankinson

Dear Sir,

Enclosed is an article from the Journal of Commerce. It looks as if the Supreme Court considers that city building inspectors owe a duty of care to owners. In my opinion, this is reasonable because city building inspectors:

- are protected by their unions from harassment
- are independently paid by City governments
- cannot be fired by developers or contractors
- have the security of never being in a conflict of interest (having to inspect and reject the work of their employer)
- can rely on ever increasing building permit fees and development cost charges (with little or no effective recourse from the public, developers or contractors)
- as the Authority Having Jurisdiction can interpret the Building Code in any way they like
- cannot be personally sued for construction problems

Architects, on the other hand, do not have any of the above privileges. As an architect, I was not trained to be a policeman. As an architect working for a developer I feel as if I am sometimes in a conflict of interest just as if a lawyer for the defendant were being paid by the plaintiffs. It feels like a conflict. City building inspectors have none of this conflict and can exercise real police-like authority over developers and contractors.

It should be noted that just prior to the "leaky condo" crisis all municipal governments in B.C. moved heaven and earth to create legislation requiring "letters of assurance" from architects and engineers. These "letters of assurance" effectively foisted all liability away from municipal building departments on to architects and engineers.

Yours sincerely,