Guiding Principles for Balanced and Insurable Client/Architect Agreements

Royal Australian Institute of Architects

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Foreword

The RAIA 'Guiding Principles for Balanced and Insurable Client / Architect Agreements' is intended for use by architectural practices and their clients, including government departments and agencies, developers and other construction industry participants; and financial and legal professionals.

The Guiding Principles provide guidance to architects, clients and the authors of agreements between them, on the respective roles and responsibilities of architects and clients in the provision of architectural services.

The Guiding Principles can be used in contractual negotiations to explain the reasons why certain types of obligations may be acceptable or unacceptable.

The Guiding Principles aim, therefore, to save time and expense for architectural practices and their clients during these negotiations.

The Guiding Principles are issued by the RAIA for general guidance only and do not provide legal, insurance or other advice in relation to any specific or individual circumstances. No responsibility for their accuracy or currency is accepted by the RAIA, its office-bearers, members, staff or authors.

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Introduction

Successful projects share a common characteristic: the existence of fair and reasonable contractual arrangements between clients and architects. Architects want to sign balanced and equitable agreements, and want to work with clients to make a project a success.

Experience shows that contracts which are:

- unduly prescriptive
- focus too strongly on inappropriate risk transfer rather than acceptance of the responsibilities which each party has to the project, and
- promote an adversarial culture between the client and architect,

almost never result in a successfully completed project, but simply engender a spirit of distrust and dispute.

Contracts for the provision of an architect's professional consulting services need to be clear in their terms and the obligations which each party has to the other. Architects do not seek to escape their proper professional obligations and responsibilities, but it is important to them (as it is to clients) that the architect's professional obligations be insurable under the architect's professional indemnity policy.

The RAIA has published these Guiding Principles to assist clients and their advisers (as well as architects) who choose not to use standard form contracts when entering into consultancy agreements for the provision of architectural consulting services.

These Guiding Principles identify common terms and conditions frequently encountered in client-drafted contracts which may be regarded as unfair*, uninsurable* or simply unreasonable.

'Unfair' in this context means creating legal obligations that are greater than those imposed by law – it is unfair for contracts to impose obligations or require architects to assume risks which are outside their reasonable professional ability to provide or control, or for which a court would not otherwise hold them responsible.

'Uninsurable' in this context means, either that insurance cannot be obtained in the first place or if a policy is obtained it has relevant exclusions or limitations. Neither situation assists the architect or the client, and both parties should be keen to avoid a situation that will lead to subsequent disputes regarding the ambit of the insurance.

Key Principles

The following five key principles provide the foundation for the establishment of balanced, equitable and insurable client/architect agreements

Principle 1

Clauses should not unfairly extend the scope of the architect's services, or their legal duties

1.1 Requiring architects to contract with parties other than the client

The Contracting Parties should be limited to the architect and the client. Extending the architect's contractual duties to a third party (e.g. parent companies, financiers or project managers) creates for the architect potential conflicts of duty to one party as opposed to the other, in relation to obtaining instructions and reporting obligations.

The architect should not be compelled to accept novation to a contractor or other third party without an opportunity for the architect to raise reasonable objections (e.g. novation to a contractor with whom the architect is unfamiliar or may have had bad experience) and if that occurs, the architect should have an opportunity to renegotiate the contract terms.

1.2 "Mid-project" further contracts on unknown terms

It is unreasonable to oblige the architect to enter into a contract on the basis that the architect will, in future, enter into contractual arrangements with other parties once financing arrangements for a project are confirmed (e.g. financiers and special purpose companies created for the project), if the terms of that future contractual arrangement are unknown when the architect enters into the original contract.

1.3 Standard of care

Contracts should not require the architect to exceed the standard of care set by the courts under the general law of negligence. Professional indemnity insurance covers the accepted community standard of care – beyond which is uninsurable.

1.4 Requiring architects to assume obligations;

- outside their area of expertise
- beyond that which they have the capacity to control
- which are uninsurable.

For example:

- to meet unrealistic brief requirements
- to accept responsibility / risk for client supplied information
- to achieve subjective standards of performance e.g. "to the client's satisfaction"
- fitness for purpose clauses
- by the use of language equivalent to the giving of a guarantee e.g. to ensure outcomes
- to initiate and certify occupational health and safety outcomes unrelated to design advice or design services
- to take responsibility for job site safety (this is the contractor's responsibility)
- arising from unclear delineation and understanding of the architect's role in providing limited construction stage services, (particularly when a project manager is also engaged)
- to accept responsibility for the contractor's quality assurance compliance (this is the contractor's responsibility)

1.5 Requiring architects to assume responsibility for others

Architects should not be obliged to engage or assume ultimate responsibility for the performance of other consultants in the consultant team. The architect accepts the responsibility for coordinating the services of other consultants.

1.6 Authority approvals

Contracts often require architects to accept the risk and responsibility for delays and other unforeseeable contingencies associated with obtaining authority approvals, when those delays or events occur for reasons beyond the architect's control. This is project risk, the responsibility for which should remain with the client.

1.7 Liquidated damages

Liquidated damages for late delivery of building work outcomes are inappropriate in contracts for the provision of professional services. They are applicable to building contracts where the contractor is in complete control of the building work, but are not applicable to an architect's professional services because the architect's services are provided in a collaborative manner with the client, authorities and other consultants, whose conduct and decisions the architect does not control.

Furthermore, to the extent that liquidated damages do not represent actual damage suffered, they are also generally uninsurable.

1.8 Certification of services performed (including inspections of the works)

It is unreasonable to expect an architect to certify as to the existence of any matter beyond that which the architect can actually know, or can state as an expression of reasonably held professional opinion.

Commonly encountered problems with client-drafted certificates include requirements for the architect to certify:

- in absolute, unqualified terms (i.e. rather than as an expression of professional opinion, or with appropriate provisions)
- in relation to aspects of the project beyond the knowledge, control or expertise of the architect (e.g. in relation to the work of other consultants or the contractor)
- in favour of non-clients (e.g. authorities, lenders) where such a certificate is required it should be provided by an independent person
- in respect of the provision of 'as-built' drawings (in contrast to 'as issued for construction' drawings)
- as to the standard of construction, when the architect was not retained or paid to inspect during construction.

1.9 Budget / cost responsibility

Contracts should not make the architect responsible for ensuring (i.e. guaranteeing) a particular budget outcome or for indemnifying a client for any cost overruns.

Architects should accept responsibility for preparing a design with reference to the client's budget, but only the contractor is able to guarantee the price for which the works will be constructed.

Principle 2

Clauses should not unreasonably increase the architect's liability for the services provided beyond that required at law

Clauses that commonly cause concern include the following:

2.1 Indemnities

Client-drafted contracts increasingly seek indemnities from the architect for various liabilities and contingencies that may beset the client. Such indemnities are often expansively framed and seek to transfer project risk inappropriately.

Indemnities are always problematic from an insurance perspective. Uninsurable indemnities include those which:

- operate even when the architect has not been negligent in the performance of services
- do not recognise the client's responsibility for its own negligence
- are enforceable on the basis of allegations rather than proven facts
- provide indemnity for consequential (as opposed to direct) loss
- are given in favour of non-clients (e.g. parent companies, financiers, project managers and other agents)

2.2 Warranties and guarantees

Architects should not agree to consultancy agreements containing warranties and guarantees, or which use imperative language amounting to the equivalent of a guarantee (e.g. to ensure a result). Such terms not only misconstrue the nature of the professional services being provided, they are also uninsurable, as professional indemnity policies respond to the nature of professional services accepted by the courts and exclude cover for claims arising from contractually assumed liabilities beyond that, such as the provision of express warranties and guarantees.

2.3 Releases and waivers of rights

Unacceptably wide releases and waivers of rights are often contained in novation agreements, or may otherwise be stipulated by the client as a pre-condition to the architect receiving payment for the services provided. Forcing releases or waivers of rights in this manner is a misuse of bargaining power.

The reason for this is that releases and waivers of rights potentially place the architect in an uninsurable position. Claims are also generally excluded from cover under professional indemnity policies where releases and waivers of rights have been given without the insurer's consent – and insurers almost never provide their consent.

2.4 Unlimited liability

Instead of an unspecified monetary extent of liability, it is appropriate that the client should allow the architect a liability cap. This is condoned by the Trade Practices Act, it is contemplated by the Professional Standards Acts and Standards Australia, and it is common practice for professional consultants, including architects, to agree with their clients to limit their liability for services rendered. This monetary limit should reflect a fair balance between the client's realistic exposure should the consultant act improperly, and the consultant's fee, insurance position and legitimate commercial interest in protecting its business against insolvency.

Principle 3

Clauses should not undermine the architect's entitlement to appropriate remuneration for services

3.1 Set-off and retention

It is unreasonable for clients to include set-off and/or retention clauses which give the client an unfettered right to unilaterally decide there are defects in the architect's services (rather than first obtaining a court judgment), and to then deduct monies which are otherwise due, impacting on the architect's cash flow.

3.2 Variation claims

Variation clauses are often not included in contracts, but should be. The definition of what constitutes a variation should be clear and should recognise the situation whereby a series of small amendments may culminate in substantial variation to the extent or scope of professional services.

3.3 Requiring architects to re-document without additional fee when not at fault

A requirement to re-document may be due to a change in the client's requirements for the project or the result of a mistake by others for whose conduct the architect is not responsible. Contracts obliging the architect to re-document without an entitlement to additional fees are unreasonable if the error, unsuitability or inadequacy of the original documentation is not due to any fault of the architect.

3.4 Suspension of services

"Suspension of Architect's Services" clauses which operate where the client for one reason or another suspends the project, are often omitted from contracts. A maximum acceptable period for suspension of services before the contract terminates should be established, and provisions included that recognise demobilisation and remobilisation expenses.

3.5 Extension of time

The architect should be given the right to an extension of time for the delivery of professional services when delays occur beyond the architect's reasonable control.

3.6 'Deemed' clauses

Clauses which reverse the normal onus of proof are unreasonable – for example:

- clauses which 'deem' documents to contain errors if they subsequently require revision, regardless of the reason for the need for the revision or without any reasonable allowance in fast-track projects for any tolerance, error or omission

- clauses which deem the architect's pre-tender site inspection as waiving the right to vary the contract on account of any latent conditions subsequently discovered

3.7 Fee payment

It is manifestly unreasonable for contracts to include clauses requiring the architect to release the client from liability for claims of any nature as a pre-condition to obtaining payment of fees.

Principle 4

Clauses should not override common law and statutory rights

4.1 Moral rights

An architect cannot at law compel its employees, sub-consultants and other holders of moral rights to consent to infringement of those rights.

4.2 Deeds

Agreements are sometimes prepared for execution as a deed. This heightens the exposure of architects by doubling the period for which the architect is at risk under contract. There is no justification for this – accordingly, consultancy agreements should be expressed as simple agreements.

4.3 Confidentiality

Confidentiality clauses need to recognise prior knowledge, information already in the public domain, and the requirement to make disclosure required by law. Disclosure should also be allowed for the architect to obtain professional advice.

Information that is required to be kept confidential should be restricted to that which is identified as confidential or by its very nature should be treated as confidential.

4.4 Copyright and intellectual property and ownership and delivery of documents

Architects' fees are generally based upon the architect retaining all copyright in the designs they create, with the client being granted an exclusive licence to build the design on the site for which the design was prepared.

Copyright and intellectual property rights are integral to an architect's practice. Assignment of these rights to the client restricts the architect in the use of design details on other projects, and for that reason is not desirable. In fact, clients should realise that loss of future use of creative effort can be a disincentive for an architect to apply creativity on their project.

The client is protected by a licence to use the design details in relation to the project, although it is reasonable that this licence should be conditional upon payment of the architect's fee. This will not prejudice clients who pay the fees to which their architect is entitled, but will prevent clients who improperly withhold fees from benefiting from that for which they have not paid.

Contracts may seek to impose a requirement on the architect to give to the client, or to destroy, all documents and drawings on completion of the services. This practice is not desirable. File or archive copies need to be retained by the architect for legal and insurance reasons.

4.5 Security of payment legislation

Security of payment laws have been enacted by Parliament as a remedial measure, which architects are entitled to invoke in prescribed circumstances. Contract clauses which exclude, modify or restrict the operation of security of payment laws (for example, by requiring an architect to indemnify a client against the operation of the security of payment laws) are void. Attempts by clients to alter these regulatory regimes by contract offend the spirit of the legislation's provisions against 'contracting out' and are also a misuse of a client's bargaining power.

4.6 Proportionate liability and contributory negligence laws

Clauses which seek to override or get around the laws of proportionate liability and contributory negligence established by the Parliaments and courts of Australia are objectionable; as such clauses seek to undermine the accepted legal framework within which an architect's services are provided.

4.7 Insurance policies

Contract clauses should confine insurance requirements to reasonable limits of indemnity, and ongoing maintenance of annual policies to reasonable lengths of time.

Architects should not be asked to agree to contract clauses which impair the rights of the architect's insurer, and to which insurers will not agree.

For example:

- clauses restricting the insurer's rights of subrogation
- clauses requiring the insurer to modify the terms of the policy to suit the client's requirements
- clauses requiring insurance to be in joint names

Principle 5

Mutual Obligation

The client has an obligation, and it is in the client's best interest, to engage with the architect in the provision of clear, timely and responsible information, advice and direction.

5.1 Provision of a sufficient brief

Development of the brief is a joint endeavour. The architect is entitled to rely on the finalised brief, and to require the client to acknowledge that the brief adequately describes its requirements for the project.

Clauses that place sole responsibility on the architect for the form which the brief ultimately takes misunderstand its nature, namely that it is a statement to the architect of the client's requirements.

5.2 Provision/confirmation of timely and reasonable directions and information

The following types of clauses are unreasonable:

- clauses releasing the client from all responsibility associated with the review and approval of documentation.
- clauses releasing the client from responsibility for the client's own decisions and directions.
- clauses that place responsibility for the client's own delay onto the architect, or which enable the client to take advantage of its own delay to the detriment of the architect.

5.3 Accepting responsibility for client supplied information

Clauses which seek to abrogate the client's responsibility for the information it provides to the architect, and on which the architect needs to reasonably rely are objectionable, unless an appropriate fee allowance for that level of service is accepted by the client (including where necessary, fees to allow engagement of expert sub-consultants to provide the information the architect needs).

Summary

The issues identified in this guide are not intended to be exhaustive and nor would they be applicable in every situation. They highlight, however, the areas of some non-standard forms of agreement which commonly cause concern to architects and their insurers.

The Royal Australian Institute of Architects and major architectural practices seek to work with clients and their advisors to apportion risk appropriately, and minimise insurance issues.

Clients and their advisors should find that observance of these Guiding Principles will assist them to reach contractual consensus with architects in a prompt and cost effective manner.