

Loss Control Bulletin

Architects and Engineers

Professional Liability Insurance

Sample Terms of Engagement

*by Stephen Panciuk, P. Eng.,
Vice-President, Architects and Engineers
ENCON Group Inc.*

Over the years, ENCON has stressed the importance of having a written document in place, which clearly sets out the duties and responsibilities of the parties. We have worked with the sponsoring Associations to develop standard contract documents (ACEC-31) and to assist in negotiating equitable agreements with the Federal and Provincial Governments and many private sector clients. While we continue to support the use of comprehensive contract documents, many of our insureds have indicated that these agreements are too complex for smaller projects and may be intimidating to less sophisticated clients. As a result of requests from our insureds, we obtained the attached Sample Terms of Engagement from Singleton Urquhart, which is one of the firms forming the team of legal counsel for the ENCON Program.

These terms of engagement are considered as the bare minimum with respect to contractual provisions for the rendering of professional services. They can be attached to a retainer letter describing a firm's mandate or form part of a proposal to clients.

ENCON encourages design professionals to use these or similar contractual terms for all projects as our experience shows even small assignments can generate large claims. Furthermore, the absence of any form of written agreement will invariably hinder our chances of successfully defending an allegation of negligence.

We welcome your feedback on the use of these contract terms in the area of client acceptance and/or their effectiveness in defining your mandate and liability.

Program endorsed by



Please provide any feedback/comments to Stephen Panciuk – Phone 613-786-2026, or email stephen.d.panciuk@encon.ca

Sample Terms of Engagement

General

The Consultant shall render the Services, as specified in the attached Scope of Services, to the Client for this Project in accordance with the following terms of engagement. The Consultant may, at its discretion and at any stage, engage subconsultants to perform all or any part of the Services.

Compensation

Charges for the Services rendered will be made in accordance with the Consultant's Schedule of Fees and Disbursements in effect from time to time as the Services are rendered. The Consultant's current Schedule of Fees and Disbursements are included in the Consultant's Budget Estimate. All Charges will be payable in Canadian Dollars. Invoices will be due and payable by the Client within thirty (30) days of the date of the invoice without hold back. Interest on overdue accounts is 12 per cent per annum.

Representatives

Each party shall designate a representative who is authorized to act on behalf of that party and receive notices under this Agreement.

Termination

Either party may terminate this engagement without cause upon thirty (30) days' notice in writing. On termination by either party under this paragraph, the Client shall forthwith pay to the Consultant its Charges for the Services performed, including all expenses and other charges incurred by the Consultant for this Project.

If either party breaches this engagement, the non-defaulting party may terminate this engagement after giving seven (7) days' notice to remedy the breach. On termination by the Consultant under this paragraph, the Client shall forthwith pay to the Consultant its Charges for the Services performed to the date of termination, including all fees and charges for this Project.

NB In Quebec, a consultant may only terminate the contract for a serious reason (section 2126 of the Civil Code of Quebec).

Environmental

The Consultant's field investigation, laboratory testing and engineering recommendations will not address or evaluate pollution of soil or pollution of groundwater. The Consultant will co-operate with the Client's environmental consultant during the field work phase of the investigation.

Professional Responsibility

In performing the Services, the Consultant will provide and exercise the standard of care, skill and diligence required by customarily accepted professional practices and procedures normally provided in the performance of the Services contemplated in this engagement at the time when and the location in which the Services were performed.

Limitation of Liability

The Consultant shall not be responsible for:

- a) the failure of a contractor, retained by the Client, to perform the work required for the Project in accordance with the applicable contract documents
- b) the design of or defects in equipment supplied or provided by the Client for incorporation into the Project
- c) any cross-contamination resulting from subsurface investigations
- d) any damage to subsurface structures and utilities which were identified and located by the Client
- e) any Project decisions made by the Client if the decisions were made without the advice of the Consultant or contrary to or inconsistent with the Consultant's advice
- f) any consequential loss, injury or damages suffered by the Client, including but not limited to loss of use, earnings and business interruption
- g) the unauthorized distribution of any confidential document or report prepared by or on behalf of the Consultant for the exclusive use of the Client

Sample Terms of Engagement

The total amount of all claims the Client may have against the Consultant or any present or former partner, executive officer, director, stockholder or employee thereof under this engagement, including but not limited to claims for negligence, negligent misrepresentation and breach of contract, shall be strictly limited to the amount of any professional liability insurance the Consultant may have available for the payment of such claims.

No claim may be brought against the Consultant in contract or tort more than two (2) years after the Services were completed or terminated under this engagement.

NB In Quebec this clause has very limited application. The rules of liability governing architects and engineers, more specifically the five year liability presumption for architects and engineers having supervision or direction mandates (s. 2118), render the above sample term generally inapplicable. Section 2118 of the Civil Code of Quebec is of public order and takes precedence over contract language. It should be noted, however, that the vast majority of claims are settled without the use of the legal system and this clause can be effective in setting out the terms under which you wish to provide your Services.

Further, the architects' and engineers' codes of ethics contain provisions dealing with limitation of liability issues. In particular, the architects' Code of Ethics prohibits the inclusion, in a contract of service, of a clause excluding, in whole or in part, the architect's civil liability. Consultants should therefore seek advice from local legal counsel, to ensure the terms comply with applicable professional regulatory requirements.

Documents

All of the documents prepared by the Consultant or on behalf of the Consultant in connection with the Project are instruments of service for the execution of the Project. The Consultant retains the property and copyright in these documents, whether the Project is executed or not. These documents may not be used on any other project without the prior written agreement of the Consultant.

Field Services

Where applicable, field services recommended for the Project are the minimum necessary, in the sole discretion of the Consultant, to observe whether the work of a contractor retained by the Client is being carried out in general conformity with the intent of the Services. Any reduction from the level of services recommended will result in the Consultant providing qualified certifications for the work.

NB In Quebec this clause has very limited application. The rules of liability governing architects and engineers, more specifically the five year liability presumption for architects and engineers having supervision or direction mandates (s. 2118), render the above sample term generally inapplicable. Section 2118 of the Civil Code of Quebec is of public order and takes precedence over contract language. It should be noted, however, that the vast majority of claims are settled without the use of the legal system and this clause can be effective in setting out the terms under which you wish to provide your services.

Dispute Resolution

If requested in writing by either the Client or the Consultant, the Client and the Consultant shall attempt to resolve any dispute between them arising out of or in connection with this Agreement by entering into structured non-binding negotiations with the assistance of a mediator on a without prejudice basis. The mediator shall be appointed by agreement of the parties. If a dispute cannot be settled within a period of thirty (30) calendar days with the mediator, the dispute shall be referred to and finally resolved by arbitration under the rules of (insert name of arbitration centre) _____ or by an arbitrator appointed by agreement of the parties or by reference to a Judge of the _____ Court.