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# ***FOREWORD***

Members of the Association are required to conform to the Code of Ethics in every respect including the business practices that they use in the conduct of their professional practice. They must enter into agreements with fairness and good faith and undertake only those assignments which they are competent to perform by virtue of their training and experience.

Many projects require skills and expertise which are beyond the in-house capability of a single professional firm. Such projects require a team of qualified professionals drawn together through agreements between consultants which reflect the needs of the particular project. The terms of engagement and payment in the agreements between the Prime Consultant and Subconsultants can seriously impact the quality of the finished project and the long range interests of the Client.

It is APEGGA's objective in publishing this Guideline, to encourage consistent ethical conduct in the negotiation of the terms of agreements between consultants. The Guideline is also intended to be the basis on which allegations of unprofessional conduct in this area will be adjudicated by the Discipline Committee.

**The concepts described in this Guideline represent a standard of practice that all members are encouraged to adopt. Variations in its application can be made to accommodate special circumstances without detracting from its intent. It is not a legal document and is not intended to supersede or replace contractual arrangements designed to satisfy specific situations.**

# ***SECTION 1***

## ***ETHICAL CONSIDERATIONS***

### **1.1 INTRODUCTION**

The business practices of Permit Holders and individual practitioners, when providing professional services to their clients, must conform to the standards of conduct required by Association members. Such business practices should also respect and complement the legislated duties and professional ethics of design professionals who are not APEGGA members.

### **1.2 PRINCIPLES**

The engagement of Prime Consultants and Subconsultants including fee negotiations, agreements covering scope of services and payment of accounts are examples of business practices to which the Code of Ethics is directly applicable.

The following principles should guide the actions of APEGGA members involved in that process:

1. The Code of Ethics takes precedence over contractual requirements in both spirit and letter.
2. The scope and schedule of assignments should be established contractually and should not be restricted to the extent that the long range best interests of the public are adversely affected. An APEGGA member cannot contract out of his responsibility to protect the public interest.
3. The process of engagement and the terms of agreement between APEGGA members and their clients should reflect the following ethical considerations:
  - a) The Prime Consultant and Subconsultant are subject to the following responsibilities listed in order of priority:
    - protect the safety of the **public**
    - satisfy the expressed needs of his **client**
    - act towards **others** with fairness and good faith
  - b) Consultants must avoid conflict of interest or, as a minimum, formally acknowledge and declare its existence to the affected parties and request their formal approval to continue to act. A conflict of interest can occur not only between the interests of two or more third parties by also between the

financial interests of a Consultant and the performance expectations of his Client or the public.

- c) In requesting and/or responding to proposals, including fee negotiations, APEGGA members should adopt a basis of fee which is not in conflict with their duty to protect the public interest and to provide cost effective solutions to their client's needs.
  - d) Client/Consultant/Subconsultant agreements including standard forms (see Appendix B) do not normally cover all aspects of the relationship and rely on professional ethics to replace that detail. Accordingly, each party to the agreement, and third parties affected by the agreement, are entitled to assume that the professional members will act in accordance with the Code of Ethics in all matters, of both a business and professional nature, pertaining to the project. In essence, an assumption of mutual trust is developed, based on this reliance.
  - e) The Prime Consultant is responsible for engaging the best possible qualified Subconsultants to respond to the expressed needs of the Client.
4. In some cases, the Client may be directly involved in the selection and engagement of Subconsultants and may elect to contract directly with them or be included as a party to the Prime/Sub agreement. While such arrangements will affect the contractual relationships between the parties, the ethical considerations are unchanged.

# ***SECTION 2***

## ***TERMS OF ENGAGEMENT***

### **2.1 INTRODUCTION**

Care should be taken not only to select the best qualified Prime Consultant and Subconsultants but also to establish the scope of assignment and basis of fee that fully complements the services required to meet the needs of the project and the desired quality of the completed work. The most cost effective solution to a client's needs may not coincide with Consultant services of the least cost.

### **2.2 SCOPE OF ASSIGNMENT**

The role to be played by the Client with respect to the planning, financing, management or coordination of a project should be clearly defined before establishing the scope of assignment for the Prime Consultant.

The scope of assignment for the Prime Consultant should reflect his duty to protect public safety and to satisfy the expectations of the Client. Care should be taken to avoid overlap and/or duplication of services when preparing the scope of assignment for each Subconsultant. Even more important is the need to avoid gaps between the various scopes of assignment which will affect the quality of the finished project and also the efficiency of its execution.

Following are guidelines in establishing the scope of assignment for the Prime Consultant and Subconsultants:

1. The scope of assignment must meet the requirements of the governing codes and regulations.
2. The Prime Consultant is responsible for the adequacy of the scope of assignment for the whole project team based on the defined needs of the Client. This responsibility includes formally advising the Client of the consequences of scope restrictions.
3. Subconsultants must make the Prime Consultant aware, at the commencement of a project, of any special scope requirements which will affect the quality of their professional service.
4. Prime Consultants must not dictate, and Subconsultants must not accept, scope restrictions which may prejudice protection of the public and/or the needs of the Client.

5. In many projects, areas of overlap in scope will exist between disciplines. It is the responsibility of each Consultant to notify other Consultants when elements of his discipline may affect their work. The Prime Consultant, in coordinating the design team, should identify overlaps and gaps and deal appropriately with them.
6. The extent of each Consultant's scope of work should be based on the qualifications and expertise of the Consultant and the needs of the project; not on arbitrary divisions adopted in standard specification formats or bid depository rules.
7. The Prime Consultant should establish the degree to which he and his design team will delegate design assignments to the Contractor. Where such assignments are delegated to the Contractor, the design team should specify that qualified professionals be responsible for the design of all delegated components. (Refer to APEGGA Guideline titled Responsibility for Structural Design on General Engineering and Building Projects.)
8. The Client, the public and the approving authorities have a right to expect that each Consultant, whether in the role of Prime or Sub, will be responsible for the design and review of all aspects of the project falling within that Consultant's discipline, unless appropriate scope restrictions are clearly identified in any documents bearing the Consultant's seal.

## **2.3 FEES**

The cost of consultant services is typically a small percentage of the full life capital and operating costs of a developed facility. The basis of fee must complement the scope and quality of service required to meet the needs of the project. While the level of fees may be negotiated to appropriately reflect the Client's needs, it should be recognized that inappropriate constraints in this area may adversely affect the quality of the final project.

Following are guidelines in establishing the basis of fee for Prime Consultants and Subconsultants:

1. The same basis of fee negotiated by the Prime Consultant with the Client should normally be used in his negotiations with Subconsultants. The agreements should be complementary and parallel. The basis of fee should reflect the principles described in the guidelines on Consultant Fees published by APEGGA.
2. The Prime Consultant should be prepared to disclose to the Client the scope and fee arrangements with all Subconsultants and thus establish an atmosphere of professionalism, trust and full disclosure of any potential conflict with the Client's interests.

When the Prime Consultant negotiates reductions in the Subconsultant's fees, (due to re-use of similar designs or the delegation of design work to contractors etc.) the savings in fees should accrue to the Client and not to the Prime Consultant.

3. The Client/Prime Consultant/Subconsultant agreement should be in writing using a clear and simple format (refer to Appendix B).
4. Changes in fee agreements due to unanticipated changes in the scope of services should be communicated in such a manner that all parties affected are informed with respect to the changes proposed and the consequences of not making the changes. Formal notification of requests for changes, combined with evidence of cost management and budget control, should be the basis on which such changes are negotiated.
5. Fees for Specialist Consultants should be negotiated based on their qualifications and experience and time expended. Specialist Consultant fees are normally negotiated independently from the Prime Consultant's fees and are usually paid either directly by the Client or by the Prime Consultant as additional services.
6. Selection of consultants should be made on the basis of qualification and experience and not on the basis of competitive bids. Where Clients request that the Prime Consultant use competitive bidding in the selection of consultants, the Prime Consultant should first advise the Client of the potential negative impact of this method of selection.

## ***SECTION 3***

### ***TERMS OF PAYMENT***

#### **3.1 INTRODUCTION**

The payment of Subconsultant's accounts by Prime Consultants must reflect the mutual trust accorded to each other by virtue of the Code of Ethics.

#### **3.2 TERMS OF PAYMENT**

1. Funds received by the Prime Consultant for services provided by a Subconsultant are received on behalf of the Subconsultant and should be disbursed without delay.
2. When the Client withholds a portion of the Prime consultant's fees due to deficiencies in services performed by a Subconsultant, the Prime Consultant is entitled to withhold a commensurate proportion of the Subconsultant's fees. Any withholding of fees in compliance with legal or statutory requirements shall be applied equitably by the Prime Consultant to all Subconsultants.
3. The Prime Consultant is justified in withholding funds received on behalf of a Subconsultant if the services of the Subconsultant are found to be deficient after the Prime Consultant invoice, including the deficient services, has been submitted. The amount of funds withheld should reflect the cost of correcting the deficiency in the services provided by the Subconsultant.
4. When the Prime Consultant has been paid by the Client but withholds fees from the Subconsultant, due either to deficiencies in services or to statutory requirements, these funds should be held separately from the Prime Consultant's normal operating capital.
5. Their terms of payment included in the Prime Consultant's agreement with the Client should correspond with good business practice and form the basis for the agreements between the Prime Consultant and Subconsultant. The details of the arrangements, including any variations in payment due dates and interest on overdue accounts, should be included in the agreement.
6. In circumstances where the Prime Consultant has assigned all receivables, or where the funds might otherwise be intercepted, the Subconsultants who may be affected should be advised at the time of their engagement, or subsequently if circumstances change during an assignment.



## ***SECTION 4***

### ***OTHER CONSIDERATIONS***

#### **4.1 INTRODUCTION**

The Terms of Engagement and Terms of Payment sections deal with the primary principles in most typical Prime Consultant/Subconsultants agreements. There are a number of other considerations, however, which affect the Client/Prime Consultant/Subconsultant relationship in the execution of a project.

#### **4.2 ORGANIZATION**

The guideline has been written assuming a "typical" Client/Prime Consultant/Subconsultant relationship. The Client retains the Prime Consultant for the total project and the Prime Consultant in turn retains Subconsultant for specific portions.

Other organizational arrangements can be made but any changes should take into account shifts in responsibility between the parties. In come cases the Client may take part in the selection and/or the payment of Subconsultants. In such situations it is important that the Prime Consultant be a party to and approve such selection and payment in order to maintain control of the project.

Regardless of the organizational structure, all Consultants in the chain must continue to recognize their overriding responsibility to the Client and to the public.

Following is a sketch of a typical organizational structure based on the concept that the Consultants act as a extension to the Client's own staff whereas the Contractors are at arms length.

#### **4.3 ERRORS AND OMISSIONS INSURANCE**

It should be recognized that the quality of the finished project is not enhanced by Errors and Omissions insurance. Its purpose is to fund the risk associated with errors in design or other deficiencies in the services included in the scope of assignment. In the fee negotiation

process, Errors and Omissions insurance should therefore be dealt with as a separate and distinct entity.

The Client should consider the need for Errors and Omissions insurance in relation to the risk associated with the execution of a project by a competent design team. Prime Consultants and Subconsultants should emphasize, during the engagement and fee negotiation process, their quality control procedures in design, design checking, review during construction, shop drawing approval and contract administration.

#### **4.4 SCOPE AND FEE CHANGES**

As indicated in Article 2.2 items 3, 4 and 5, the Prime consultant is responsible for establishing an appropriate scope of assignment. Article 2.3 describes the principles on which the basis of fee for both Prime Consultants and Subconsultants should be established.

Changes in the Client/Prime Consultant/Subconsultant agreements with respect to fees are justified if there is a change in scope which was not anticipated. Such changes should be negotiated through the involvement of all parties affected. In the negotiation process, the significance of the proposed scope changes and the consequences of not modifying the agreements to accommodate the changes should be clearly communicated by the Prime Consultant to the Client with copies to the affected Subconsultant.

#### **4.5 RESOLUTION OF DISPUTES**

Resolution of disputes can be achieved through a variety of procedures including negotiation, mediation, arbitration or litigation.

Regardless of the procedure adopted, a members' professional responsibility under the Code of Ethics cannot be ignored during the resolution of disputes.

## ***DEFINITIONS***

### **1. OWNER**

The person, company or other entity who controls the property under consideration and has the authority of ownership.

### **2. CLIENT**

The Owner or Agent of the Owner who establishes the needs that are to be met by the Prime Consultant in the preparation of drawings, specifications or other documents.

### **3. PRIME CONSULTANT**

The Professional Engineer or Architect, acting on behalf of the Client, under whose overall direction and control drawings, specifications or other documents are prepared and stamped.

### **4. SUBCONSULTANT**

The Professional Engineer or Architect, acting on behalf of the Prime Consultant, under whose direction and control construction drawings and specifications for a specific discipline or segment of a project are prepared and stamped.

### **5. CONTRACTOR**

The person, company or other entity who contracts to carry out the intent of the construction drawings and documents for a project.

### **6. SPECIALIST CONSULTANT**

The Professional Engineer engaged to act on behalf of the Client or the Prime Consultant, to provide technical expertise relating to a specific component of the project rather than to an overall discipline.

## ***CLIENT/PRIME CONSULTANT/ SUBCONSULTANT AGREEMENTS***

Standard forms of agreement are available from a number of sources including The Association of Consulting Engineers of Canada, documents ACEC 31 and 32. Many clients who deal with consultants on a regular basis have also developed their own standard forms which reflect their particular needs. Consultants and Clients using these standard forms should ensure that all of the elements of the agreement outlined in the attached format are included.

The attached form is intended as a guide to APEGGA members in drafting Client/Prime Consultant/Subconsultant agreements. It covers the four primary elements of an agreement — scope, schedule, fee basis and payment. Other items included are those that are commonly required in agreements but are not intended to represent a comprehensive list. Each Assignment must be considered specifically for its own special requirements.

# ***CLIENT/PRIME CONSULTANT OR PRIME CONSULTANT/SUBCONSULTANT AGREEMENT***

THIS AGREEMENT made this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ .

BY AND BETWEEN

\_\_\_\_\_ Client  
and

\_\_\_\_\_ Consultant

WHEREAS the Client intends to engage the services of the Consultant in connection with the provision of \_\_\_\_\_ services for the \_\_\_\_\_ *name of project* project.

NOW THEREFORE THIS AGREEMENT WITNESSES that the parties hereby agree as follows:

[Note: If space provided under each of the articles is inadequate, indicate by notation that numbered schedules are attached as appendices.]

## **ARTICLE I**

### **SCOPE OF SERVICES**

#### **1.01 Professional Services**

*Concise but comprehensive description of services to be provided.*

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#### **1.02 Supplementary Services**

*Concise but comprehensive description of support services and sub-contracts*

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## ARTICLE II

### SCHEDULE

Work will commence no later than \_\_\_\_\_ 19 \_\_\_\_\_ and the services described in Article I will be performed in accordance with the following schedule.

*Concise description of the schedule including dates of significant stages of the work.*

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## ARTICLE III

### CLIENT RESPONSIBILITIES

#### 3.01 Information

The Client shall provide the Consultant with a written description of the project and provide all background plans, reports and records that will be required to complete the Consulting Services.

#### 3.02 Authority

The Client shall provide the Consultant with the authority to act as his agent, to gain entrance to property or to seek information from government and other authorities as required in the performance of the Consulting Services.

#### 3.03 Other

*Describe specific items.*

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## ARTICLE IV

### CONSULTANT RESPONSIBILITIES

#### 4.01 Work Schedule

*Describe the schedule for the main elements of the assignment.*

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#### 4.02 Progress Reports

*Describe scope and frequency.*

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#### 4.03 Cost Estimate

*Define the type and quality of estimate to be provided and any specific limitations in schedule or quality.*

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#### 4.04 Other

*Describe specific items.*

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## ARTICLE V

## **FEE BASIS**

### **5.01 Professional Services**

The Client agrees to compensate the Consultant on the following basis:

*Concise description of basis of fee or hourly rates including any targets  
or lump sum limits.*

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### **5.02 Disbursements**

The Client agrees to reimburse the Consultant for disbursements as described below:

*Concise description including mark-ups if applicable and rates for equipment  
or vehicles as applicable.*

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### **5.03 Additional Services**

*Concise description of basis of fee or hourly rates.*

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## **ARTICLE VI**

### **PAYMENT**

Invoices including documentation for professional services and disbursements will be submitted to the Client by the Consultant at the end of each month. Invoices are due and payable on receipt by the Client and are overdue \_\_\_\_\_ days later.

*Describe documentation including format and interest on overdue accounts if  
applicable.*

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## **ARTICLE VII**



## TERMINATION OF AGREEMENT

### 7.01 By Client

*Concise description of circumstances and procedures including  
responsibility and payment.*

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### 7.02 By Consultant

*Concise description of circumstances and procedures including  
responsibility and payment.*

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## ARTICLE VIII

### OWNERSHIP OF DOCUMENTS

*Describe ownership of originals and schedule for transmittal in relation to completion  
of the assignment.*

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## ARTICLE IX

### INSURANCE

*Detailed description of insurance coverage to be provided.*

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## ARTICLE X

### CONFIDENTIALITY

*Describe the specific undertaking, if any, to maintain confidentiality of information associated with the assignment.*

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## ARTICLE XI

### OTHER

*Describe specific items such as special requirements for Arbitration.*

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## ARTICLE XII

### GOVERNING LAW

This Agreement shall be governed by the laws of \_\_\_\_\_.

IN WITNESS WHEREOF the parties hereto have executed this Agreement all as of the day and year first above written.

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[Client]

Per: \_\_\_\_\_

Per: \_\_\_\_\_

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[Consultant]

Per: \_\_\_\_\_

Per: \_\_\_\_\_