Non-Standard Contract Clauses – Can You Afford to Ignore Them?

FINAL REPORT

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for:

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Executive Summary

Background

Alberta Construction Association (ACA) promotes adoption of standard "CCDC" forms of contract by Project Owners. These are widely utilized by the private sector Project Owners; yet most public sector Project Owners have been reluctant to adopt them. This lack of adoption creates an issue **- *lack of true understanding of the terms and conditions of the non-standard contract!***

Many small to medium sized contractors don't have access to in-house or cost-effective legal expertise to help them price in their bids the risk they are obliged to absorb from non-standard commercial construction contracts. These contractors and their employees face significant risk to their continued operations due to this lack of understanding.

ACA received funding from Alberta Economic Development for an initiative to support small to medium size contractors by improving their understanding of risks in commercial construction contracts. The funds were used to collect, analyze, and publish this report that addressed the risk and cost implications of terms frequently found in public tender contracts in Alberta.

What Was the Workshop About?

Four workshops were held in 2018: June 20th in Calgary, followed by Edmonton Oct 4th and Oct 12th and Red Deer Oct 23rd.

Led by Kees Cusveller, a seasoned construction professional, mixed sector participant groups (including General Contractors, Subcontractors, Insurance/Bonding Specialists and Lawyers) reviewed and presented their discussions on six common non-standard clauses. To determine financial implications of these types of clauses and other clauses, the groups were given a mock project that is typical of some of the projects being tendered in Alberta. This project's front-end specification only contained 15 clauses intentionally including a few that should have no bearing on costs. All clauses utilized in the Workshop were obtained from a variety of recent public Alberta projects including ones issued by Alberta Infrastructure, Alberta Health Services, and the cities of Calgary and Edmonton. Groups were tasked to submit bids based on the information provided.

What Were the Results?

This Workshop approach ensured better, more inclusive dialogue among small groups and diversity of opinion, and as importantly kept the participants engaged. All Workshop participants learned through their team dialogue and the presentations from other teams for each exercise.

All but one of the 21 tenders submitted added costs to their bids based on their assessment of the risks inherent in the non-standard clauses. These costs ranged from a low of $20,000 to a high of $923,000, with the average being $277,000. To put this in perspective, the overhead and fee portion of the bid was set at $500,000, meaning that the average bidder increased their fee to cover risk by more than 55%; a significant amount. A number of bidders also indicated they likely would not have bid the project as the potential risks were too great.

There is a belief that these clauses and their inherent risks get passed down the contracting chain. Project Owners pass to the General Contractors, General Contractors pass to Subcontractors, and Subcontractors pass to Sub-Subcontractors. This may sound like an ideal process in theory, but unfortunately there was also a recognition that the majority of subcontractors would not have properly included for these items, but if better educated about the ramifications, they would also increase their costs. Although a mock tender, the results clearly showed lower competition and higher cost to the Project Owner while arguably not reducing the risk; a lose-lose situation for all parties.

Small to medium sized contractors don't have readily available access to legal expertise and thus are the least prepared to address risk that may be inherent in non-standard contract clauses. For smaller Subcontractors, often reliance is placed on administrative staff with no training to read the front-end of the specifications and bring forward questions to the estimating/project management team. This lack of understanding can create a problem in the competitive bidding environment where some contractors assess risk and some don't; the low bidder being the one who may NOT have assessed and priced the risk accordingly. While it was the intention of this Workshop to focus on increasing the Subcontractor representation, Subcontractors were under represented and thus reinforced the risk associated with their lack of understanding that these clauses flow down to them by contract whether they read the clauses and/or understood them.

The more sophisticated and less understood clauses like indemnification had more variation in interpretation versus payment and soil condition clauses. Teams frequently understood their meaning and ramifications; therefore, it was easier to quantify a value for the bid. The payment clauses identified many ramifications and of particular note was the impact on schedule when contractors cannot invoice for product not installed e.g. glaziers are holding off on fabrication until really close to install because they cannot absorb the financing costs and thus the construction schedule is vulnerable.

The vagueness of some clauses lead to assumptions that varied by team. It was noted by legal representation that lawyers may not be aware of how these clauses are interpreted and financially assessed by the bidders, and it may not have been the intent they were trying to address. While the Project Owner may see the value of this vagueness represented in a large spread among the bids, they may have to address these issues while the project is under construction which is a less than ideal time to be addressing as it can have an impact on schedule and cost.

There were many times that General Contractors assumed that the Subcontractors addressed these non-standard clauses in their bids, but based on these exercises most did not even for the clauses that they better understood. This lack of addressing costs by the Subcontractors was evidenced when we adjusted the tender form for the last three of the four Workshops to include pricing of clauses by three Subcontractor scope packages. Possibly these clauses will be addressed at the General Contractor buyout stage which is too late for the Subcontractors to have covered in their bids.

Teams that were well rounded with legal, insurance/bonding, General Contractors and Subcontractors representation had the best dialogue to gain understanding of clauses. Even terms used often like deductible buy down, Course of Construction insurance and E&O Insurance had different interpretations based on the level of expertise at the table. While seeking expertise on areas outside of your wheelhouse is important, the differing EXPERIENCE in the expertise and the resulting decisions were noted. This reinforced the value of communication and collaboration among all partners to understand what these clauses mean and more importantly reinforced the need to collectively train together to understand what these clauses mean. This inclusive process will ultimately result in better written clauses.

The challenge, however, is that the traditional lump sum project delivery method is so highly competitive that there is a reluctance to share any understanding in the fear that they will not be the low bidder. This is because some Subcontractors will address and others will not and some General Contractors will address and others will not. Consequently those contractors with the least understanding will be the low bidder. This begs the question – is this the desired contract partner for a Project Owner to have a successful project?

In many instances, the clauses were qualified in the bid. This reinforces the challenge that many Project Owners face in having to disqualify bidders because they have modified the contract terms. This Workshop demonstrated that many bidders do not take into consideration the risk during tender in the hopes that it can be addressed post tender and before award which is not likely to be perceived as treating all bidders fairly. In addition, those that have not analyzed the risk and priced for it, may be those that are least able to absorb the risk in these clauses and then have to declare bankruptcy which is not good for the project or keeping people employed.

Ultimately this all boiled down to the value of Standard Contracts with standard language at all levels of the contract chain. Standard language helps us to communicate and collaborate for better understanding to address the risk. Construction and design Associations are poised to be the catalysts to advocate for standard language and create Workshops for understanding by all partners.

<u>Resonating Thoughts</u>

"Our fees are disproportionate to the risk we take. Reverse the trend; increase fees or reduce risk"

"Fantastic way to see contracts from a variety of industry opinions/standpoints"

"There are many contract clauses in the industry that create or transfer risk to parties that may not be aware or able to absorb them without costs"

"Very good presentation; all Owners of Subcontractor companies should take this Workshop"

"I now feel empowered to ask questions"

"Good communication and a collaborative approach are the way to go"

"A lot of risk can be mitigated prior to entering into a contract by actually reading and discussing the terms of the agreement"

"We all work towards a common goal…so this is why understanding non-standard contract clauses can improve the success rate"

"Reading up front will make a big difference on the back end"

"Despite the discussions and new knowledge gained, bidders won't change their bidding habits with fear their competitors won't change too"

"Good course, but attendance by all construction parties will be beneficial to delivery"

"Legally binding Invitations to Tender are too limiting; need negotiated RFP and Best and Final Offer formats"

"Hopeful there is a push for CCDC contracts"

Where Do We Go from Here?

It was recognized that discussion about the meaning, ramifications and mitigation strategies for Contract Clauses (whether standard or non-standard) should be continual by all partners. With the retirement of the workforce who developed or analyzed contract language, comes a knowledge gap and thus an opportunity to bring all industry partners together to learn. Construction and design related Associations are poised to collaboratively offer these Workshops for the industry.

The group also acknowledged that the opportunity to change non-standard contract clauses lies with all construction partners discussing the topic together otherwise it is a one-sided conversation. It will be imperative to engage Project Owners, Project Owner's legal counsel, Architects, Engineers and Lawyers with Contractors (OAEC) to understand each other's perspectives and find solutions for change. Understanding the **"why"** in what the Project Owner is looking to address, will enable us to find the **"how"** to address their needs.

Trust, Transparency and Fairness are three of the six core principles of ethical behaviour. By creating standard language that can be clearly understood (transparent) and thus trusted, and where the risk is best borne by the party able to fairly bear that risk, we will work towards creating project success.

Background

Alberta Construction Association (ACA) promotes adoption of standard "CCDC" forms of contract by Project Owners. These are widely utilized by the private sector Project Owners, but the public sector Project Owners have been reluctant to adopt them. This lack of adoption creates an issue **- *lack of true understanding of the terms and conditions of the non-standard contract!***

Many small to medium sized contractors don't have access to in-house or cost-effective legal expertise to help them price in their bids the risk they are obliged to absorb from non-standard commercial construction contracts. These contractors and their employees face significant risk to their continued operations due this lack of understanding.

ACA received funding from Alberta Economic Development for an initiative to support small to medium size contractors by improving their understanding of risks in commercial construction contracts. The funds will be used to contract with the expertise required to:

Step 1

- Collect, analyze, and publish the risk and cost implications of terms frequently found in commercial construction contracts in Alberta
- Publish and disseminate the findings of the analysis

Step 2

- Support workshops or other discussion forums to review findings of construction value chain stakeholders, including Project Owners, Consultants, and Contractors

Step 3

- Develop new or add to existing educational seminars for Alberta Contractors to educate Contractors

Step 4

- Develop an online repository of the preceding and recognize those who use standard contracts in order to sustain the initiative

As a first step, a committee of contractors led by Mike Nicolson, Vice President, EllisDon identified onerous clauses frequently present in commercial construction contracts issued by public Project Owners in Alberta. This report (see Appendix B) formed the basis for the second step: to gather information on what these clauses mean and to determine the impact these clauses have on tender prices.

To begin the second step, ACA held the first sold-out "Non-Standard Contract Clauses Workshop – Can You Afford to Ignore Them?" on June 20, 2018 in Calgary. This was followed by three additional Workshops. Two Workshops were held in Edmonton on October 4, 2018 and October 12, 2018 (the first one sold out and had a large waiting list so a second session was added). The final Workshop was held October 23, 2018 in Red Deer.

The Why and What of Non-Standard Contract Clauses

In the fall/winter of 2017, a committee of contractors led by Mike Nicolson, Vice President, EllisDon identified onerous clauses frequently present in construction contracts issued by public Project Owners in Alberta. Through a process of looking through past construction projects and getting input from other Contractors and internal and external legal expertise, a report was created titled "Non-Standard Commercial Contract Risk Allocation". The following is the introduction from this report. A copy of the full report is in Appendix B.

Introduction

In Alberta, the procurement of publicly funded construction projects is handled by many different entities. These entities include regional, local, district or other forms of municipal government, universities, school boards, as well as publicly-funded academic, health and social service organizations, and others. Although various types of project procurement and delivery methods are used, the most common is via the lump-sum tender and award process.

The vast majority of construction contracts used for these projects are different forms of non-standard contracts often separately developed by the issuing body. For example: the construction contract terms for a school in Calgary would be different from a similar school project in Edmonton, which would be different again for a school in Lethbridge. A contract for a $4.9 million hospital project (AHS) would have a different contract from a $5.1 million hospital project by Alberta Infrastructure.

CCDC standard forms of contracts, including CCDC 2, were developed jointly by Project Owners and contractors to present balanced agreements that do not assign undue risk to either of the parties. Industry standard documentation allocates risk to the party better placed to handle that risk. The CCDC 2 Stipulated Price Contract is probably the best understood construction agreement in the country. It is also widely understood by the 'consultants' who are often the delegated representatives of the Project Owner. However, the use of CCDC 2 on publicly funded projects in Alberta has greatly diminished with Project Owners instead opting to use their own forms of non-standard agreements.

Even when there is use of a standard CCDC form of contract, it is often modified with different sets of supplemental conditions which are often complex and lengthy. There is not a standardized set of supplemental conditions used across the industry. In other words, the supplemental conditions modifying contract terms for a school are often different than those issued for a university project. In one extreme case, the 30-page CCDC2 form of agreement has been modified by a 59-page set of supplemental conditions.

Whether a Project Owner is using its own form of contract, or supplemental conditions to modify a standard document, the tendency over the years has been for construction contracts to become more unbalanced (read as 'one-sided') in favour of the Project Owner. This is the result of the Project Owner's desire to transfer every conceivable risk to the contractor. This goes against the correct logic of assigning risk to the party best able to mitigate the risk. Often, the risk being transferred to the contractor is unquantifiable and/or uninsurable, or beyond the reasonable control of the contractor.

Project success involves teamwork among the participants and mutual consideration and respect for each party's interests. In the undertaking of a construction project, the goals of the Project Owner and the contractor are not mutually exclusive. The Project Owner wants a project done in accordance with his requirements and delivered on time for a specific price. The *contractor wants to complete a project expediently, leaving a satisfied client and to be paid the agreed contract amount.*

Agreements which are heavily biased towards a Project Owner can put the contractor in a defensive mode from day one as the contractor is compelled to focus on protecting its own interest. The use of the many and varying forms of non-standard contracts can result in unsatisfactory performance in the construction industry and harms the economy in several ways including:

- *If a lopsided risk is accommodated in bids by contractors building in contingency amounts for risks which may or may not materialize, the cost of projects is higher.*
- *If a risk is not fully understood or not accommodated by the contractor and the risk materializes, disputes can arise, increasing project costs and leading to delays. The contractor can default on its obligations placing the project success into jeopardy.*
- *If risk is fully understood and is too onerous, a contractor may decide not to bid thus reducing the competitive process.*
- *Public procurement entities spend taxpayer dollars internally and externally to develop their own 'nonstandard' contract documents, often without fully understanding the implications of all of the contract terms.*
- *When issues do arise, the differing individuals administering the construction agreements on behalf of the Project Owner (in some cases the prime design consultant, or external project manager) may offer and enforce differing interpretations of non-standard terms.*
- *There is an increased risk of litigation as there will often be no legal precedent for non-standard contractual terms. The interpretation of standard contract terms is generally a question of law alone, whereas, the interpretation of non-standard terms amounts to a question of mixed fact and law.*
- *Project Owners may accept bids that have not appropriately priced risk, leading to a distorted view of the true market price. Should one of the onerous clauses come into play, the low bidder may be unable to complete the project, leading to schedule and cost increases and Project Owner dissatisfaction. Subcontractors and suppliers may also bear costs and / or non-payment from unsatisfactory performance by the initial contractor.*

The Workshop

Structure

Four workshops were held in 2018: June 20th in Calgary, followed by Edmonton Oct 4th and Oct 12th and Red Deer Oct 23rd.

Led by Kees Cusveller, a seasoned construction professional, mixed sector participant groups (including General Contractors, Subcontractors, Insurance/Bonding Specialists and Lawyers) reviewed and presented their discussions on six common non-standard clauses. To determine financial implications of these types of clauses and other clauses, the groups were given a mock project that is typical of some of the projects being tendered in Alberta. This project's front-end specification only contained 15 clauses intentionally including a few that should have no bearing on costs. Groups were tasked to submit bids based on the information provided.

It was important to create an environment where the participants could discuss what they think contract clauses mean and then report out to the group and receive input back from an industry expert. This approach ensures better, more inclusive dialogue among small groups and diversity of opinion, but most importantly keeps the participants engaged and diminishes the traditional classroom approach of one person talking at the front of the room. As the results show, this proved to be a large part of the success of the Workshop.

Attendance

Discipline	**Number of Attendees**				
	June 20th - Calgary	Oct 4th – Edmonton	Oct 12th – Edmonton	Oct 23rd – Red Deer	**TOTALS**
Project Owners				1	**1**
Engineers				1	**1**
General Contractors	9	17	13	6	**45**
Subcontractors	13	9	4	6	**32**
Insurance/Bonding Specialists	5	5	5	4	**19**
Lawyer	1	2	1	1	**5**
TOTAL	28	33	23	19	**103**

Review of Six Non-Standard Clauses

During this part of the Workshop, participants were given the following clauses to review and comment on. Each team was provided one clause to report on the following:

1. What the clause means
2. Ramifications/Impact
3. Recommended changes
4. Mitigation strategies

THE FOLLOWING COMMENTS ARE THOSE DEVELOPED BY EACH TABLE OF PARTICIPANTS

1. Indemnification

"The contractor shall indemnify and hold harmless the owner, its officers, directors, personnel, agents and consultants, including the prime consultant from and against, all claims that arise out of, or result from the acts or omissions of the contractor, the subcontractors, and any person for whom the contractor is responsible at law, and without limiting the generality of the foregoing, arising by reason of any matter or thing done, permitted or omitted to be done by the contractor, the subcontractors, or any person for whom the contractor is responsible at law, whether occasioned or caused by negligence, breach of contract or otherwise."

1. **What the clause means** – The contractor is responsible for all actions of all parties without limitations.

   Protects the Project Owner and agents from any act by the Contractors or Subcontractors without restriction.

   The Contractor is "on the hook" for any claims brought against the Project Owner/Consultants.

   Does this really mean that the Contractor is indemnifying the Consultant against their own work?

2. **Ramifications/Impact** – It is unwise to indemnify the Architect and Prime Consultants as they designed the "work" and have duties to inspect the progress.

   Contractor is responsible for things out of their control.

   Unlimited and unquantifiable risk to Contractors.

Figure 1 - Reviewing Non-Standard Clauses

Broad contract terms equal potential high cost to the Contractor. Negative impact to the Contractors/Subcontractors business operations.

Delete reference to consultant as it is contrary to CCDC.

As these types of clauses are quite common, but rarely enforced, they are often ignored. The big General Contractors struggle with this as a catastrophic event could have serious financial implications to them. The smaller contractors ignore these clauses and, in the event of a serious incident, are more likely to declare bankruptcy and lose their business.

3. **Recommended changes** – Change: *“to the extent of its fault or negligence* the Contractor shall indemnify” and cap the risk exposure at a dollar value no higher than insurance purchased or buy more insurance.

   Remove “officers, directors, personnel, agents, and consultants including the prime consultant”. Remove “and without limiting the generality of the foregoing arising by reason of any matter or thing done”. Add “within scope of working contract documents”.

   Add a limit of liability of applicable insurance. Address consequential damage limit.

   Transfer to Subcontractors. Seek legal advice; do not close project without addressing this clause.

4. **Mitigation strategies** – Negotiate change to clause; purchase additional insurance; put a cap on the risk exposure.

   During the tender process, request an addendum for clause changes.

   Allocate risk among parties.

   Advocate for changes through the industry. Careful selection of Subcontractors.

2. Insurance

“The owner will provide the insurance policies referenced in section 11.1 above, but makes no representation or warranty with respect to the extent or adequacy of the insurance coverage referred to above and the contractor and Subcontractors shall satisfy themselves as to the adequacy of the scope, limits, duration, and coverage afforded by such insurance coverage.”

“…Copies of the policies of insurance may be obtained after contract award by arrangement from…"

1. **What the clause means** – The Contractor is at the mercy of the Project Owner’s insurance policy.

   The Project Owner provides the insurance, but it may not cover suitable risk or limits (potential large deductible).

   The Project Owner provides the insurance, but it is not clear what it covers.

   The Project Owner may or may not have insurance.

2. **Ramifications/Impact** – The insurance may not be adequate for the Contractor's exposure. i.e. hot work (roofing) and underground (subsurface conditions).

   Policy **MAY** be provided after contract award and **CANNOT** confirm until after award. The Contractor may not be covered/at risk in event of a loss.

3. **Recommended changes** – Submit an RFI or request a copy of the policy prior to tender.

   Remove responsibility to confirm "adequacy" of coverage by Contractors.

   Set minimum requirements as needed; ask to see Section 11.1 of insurance policy.

4. **Mitigation strategies** – Walk away; buy own coverage; clarify your bid; weigh the risk appetite of your company against the exposure based on experience/skill sets.

   Discuss with insurance provider.

   Qualify that Course of Construction insurance is by Project Owner.

3. Design

"The contractor represents that, prior to entering into the contract, it has identified and has notified the consultant of all errors, inconsistencies or omissions in or between any drawings, specifications, schedules, or other contract documents. The contractor confirms and warrants that there are no errors, inconsistencies, or omissions in the contract documents that will affect the contract price or the contract time. In the event of any remaining error, inconsistency or omission, the contract documents shall, unless otherwise directed in writing by the consultant, be deemed to include the highest quality or standard specified, the more onerous obligation or the more stringent interpretation, and the contractor shall not be entitled to any adjustment in the contract price or the contract time as a result of such interpretation."

1. **What the clause means** – The Contractor guarantees the drawings are error and omission free. The Contractor is liable for any remaining errors and omissions.

   Contractor at risk of taking on design issues.

   Implies no extra costs for change in design/specifications.

   Contractor takes on responsibility of Consultant errors and omissions in the tender documents.

   Has the Consultant written this to transfer their risk?

2. **Ramifications/Impact** – If there are any errors/omissions, they are the Contractor's responsibility to correct to "the highest quality".

   Financial impact to either Project Owner or Contractor.

   Relationship risks and disputes; additional costs; delay responsibility leads to termination rights.

3. **Recommended changes** – Eliminate entirely; understand and acknowledge, transfer if possible; acknowledge after a review period; allocate contingency amount.

   Add "makes reasonably commercial efforts to identify…..". Limit to constructability.

Limit to extent reasonably discoverable.

4. **Mitigation strategies** – Detailed review session with Project Owner and Consultant; make Subcontractors aware.

   Have conversation with Design Consultant; include contingency.

   Clarify during the bidding process.

   Eliminate or don't bid.

4. Payment Terms

"…the cost of any material must not be included in a construction period invoice until the material is incorporated into the work and installed in its final location."

1. **What the clause means** – Will not be paid until the work is completed and installed on site.

2. **Ramifications/Impact** - Long lead items have carrying costs to the Subcontractors and General Contractors.

   Contractor has financial risk of carrying material and installation cost.

   Cash flow is affected.

   Biggest impact to Subcontractors. Subcontractors and General Contractors are financing the project. Negative impact to cash flow puts pressure on the companies.

   Could hold off purchasing from Suppliers until last minute which can affect schedule and impact the cost of the material. Fabricating is now NOT being done in advance because of the payment issue and this will impact schedule.

   A lot of companies will not realize the clause exists. Can cause Subcontractors to go out of business and default on the contract. Who takes the risk of materials sitting on the site?

3. **Recommended changes** – Negotiate individual release of funds e.g. progress draws; make sure onsite materials and equipment are insured even if not installed; have bonded storage; Builders Risk policy needs to cover offsite and onsite storage.

   Remove "installed in final location"; change to material on site and/or proof of receiving (offsite storage).

   Request clarification on incorporated into work; installed in final location (including commissioning?); who adjudicates? Highlight the clause to the Subcontractors so they are aware of the risk. At tender, see if Project Owner is open to certain scopes being considered for payment exceptions.

4. **Mitigation strategies** – RFI clarification before tender to cover specific long lead equipment payment terms; just in time delivery for schedule compliance; determine who approves the invoice: Architect or Quantity Surveyor.

   Conversations about what evidence is needed to demonstrate material is on site; adequate insurance; shipping details needed (FOB).

Establish rules for payment.

Transfer risk from General Contractor to Subcontractor, or share risk with Subcontractor. Seek Performance bond. Allow for financing cost in the bid. Negotiate Project Owner to supply certain items but this can impact warranty and schedule. Qualify the bid to say materials to be paid when delivered to site.

"...The owner shall pay all invoices under this agreement within 30 days following receipt of an approved invoice."

1. **What the clause means** – Project Owner able to delay payment.

   Project Owner pays when wants because the Project Owner approves invoices when they want.

   How long does the Consultant have to process and issue certificate for payment? Invoicing and payment get delayed.

2. **Ramifications/Impact** – Payment schedule risk (when are invoices due?).

   Invoice held for ransom.

3. **Recommended changes** – Clearly define "approved invoice".

   Need additional parameters on payment terms.

4. **Mitigation strategies** – Remove disputed item; pay non-disputed items. Deal with disputed items after.

   Define the payment terms.

   Agree on Certificate of Payment processing time.

5. Site Conditions

"The contractor also declares that in tendering for the work and in entering into this contract, the contractor did not and does not rely upon information furnished by the owner or any of its agents or servants respecting the nature or confirmation of the ground at the site of the work, or the location, character, quality or quantity of the materials to be removed or to be employed in the construction of work, or the character of the construction machinery and equipment or facilities needed to perform the work, or the general and local performance of the work under the contract and expressly waives and releases the owner from all claims with respect to the said information with respect to the work."

1. **What the clause means** – The Project Owner and their design team are taking no responsibility.

   The Contractor waives/releases Project Owner from all claims with regards to said information with regards to the work.

   Contractor and Subcontractors are taking full responsibility of using supplied information i.e. Exempt Project Owner from any incorrect or unprovided information.

   Contractor assumes responsibility/cost for all ground conditions (quantity, quality, character, etc.) despite information given whether accurate or not.

2. **Ramifications/Impact** – Potentially high risk; financial impact; no ownership/clarity.

   Increase cost to cover unknowns.

   Complete risk and cost transfer to the General Contractor and Subcontractors. Potential schedule impacts. Will create huge bid spreads.

   Many impacts: cost overruns, schedule impact, environmental risks, safety issues, legal, reputation.

3. **Recommended changes** – Disregard the entire clause; comment/clarify separate components.

   Need basic site info – locates, soil conditions; use standard CCDC verbiage.

   Share risk. Risk should be transferred to the appropriate party i.e. consultants.

   DELETE THE CLAUSE IN ITS ENTIRETY.

   Negotiate/modify the clause to reflect information provided.

4. **Mitigation strategies** - Qualify bid; walk away from the bid; RFI to clarify.

   Better communications between Project Owner, Engineer, Site Super; raise any issues with them especially the Site Super. Execute standard operating protocol to ensure site safety.

   Purchase additional insurance (e.g.. E&O Insurance) <u>Post Note: It will not be available unless the Contractor has a design role.</u>

   Spend money upfront to verify provided info prior to closing. Carry additional cost for risk mitigation.

   Transfer to the Subcontractor.

6. Contract Interpretation and Assignments

"The owner, in the first instance, shall decide on questions arising under the contract documents, interpret requirements therein, and judge performance in accordance therewith."

1. **What the clause means** – The Project Owner is interpreting the contract without the consultant; there is no third party. The Project Owner is judge, jury and executioner.

   The Project Owner has the final say when there is an issue or disagreement.

2. **Ramifications/Impact** – Schedule; cost for safety; labour/union.

   Information may not be properly analyzed.

   Unless there is arbitration or mediation, the Project Owner's ruling stands.

   Creates bottleneck. Relies on Project Owners expertise or lack thereof. Project Owners can interpret how they like.

3. **Recommended changes** – Add the following clause: "Subject to Review" of Project Owner procured contracts; Add: "Mutually agreeable terms". Reword "The Consultant" in the first instance. Remove: "The Project Owner in the first instance". Remove: "And upon such assignment".

Project Owner and Prime Consultant work together.

Add arbitration/mediation dispute resolution. Have another party review i.e. Prime Consultant or third party if technical issue.

4. **Mitigation strategies** – Assign dollar value to the risk to include in tender; flow down the clause to the Subcontractors; review any existing contracts; participate in negotiating/drafting contracts that will be assigned.

   Amend the contract.

   Issue RFIs to get clarity and clear direction prior to bidding.

   Don't bid; transfer risk; increase price.

"Where provided in the contract, the owner may assign to the contractor, and the contractor agrees to accept, any contract procured by the owner for work or services required on the project that has been pre-tendered or pre-negotiated by the owner, and upon such assignment, the owner shall have no further liability to any party for such contract."

1. **What the clause means –** Project Owner picks prime contractor and Subcontractors but has no liability.

   Contractors are responsible for any and all contracts signed by the Project Owner.

   Project Owner passing off all risk of in-house procurement.

2. **Ramifications/Impact** – Prime Contractor responsible for things beyond their control.

   No control of Project Owner's contract which can affect schedule and costs.

3. **Recommended changes –** Pre-tender requirements should be disclosed to Prime Contractor.

   Add additional fee to manage contract. Add insurance/bonding to manage risks.

4. **Mitigation strategies** – The Project Owner takes full liability.

   Include management fee and insurance/bonding requirements in Supplementary Conditions.

Mock Tender

Figure 2 - Kees Cusveller reviewing bids after closing

In order to get a sense of how bidders price the risk of non-standard contract terms, the Workshop included a mock tender exercise. The purpose of this exercise was to bid on a mock tender containing 15 Supplementary General Conditions; intentionally including a few that should have no bearing on costs. This project included examples of clauses for projects throughout Alberta.

All participants discussed in their groups what the clause meant, if there were any costs associated with that clause and asked to share the rationale of their decision. All tenders submitted had costs added to their bids based on risks assessed for these non-standard clauses.

In previous sessions, the Subcontractors felt the exercise did not focus enough on their interpretation and ramifications of the clauses. Consequently for the last two Workshops on Oct 12th and Oct 23rd, the mock tender exercise added: "*You have also been advised that several key Subcontractors, including the glazing, mechanical, and electrical, although good Subcontractors, are worrisome low. Your team suspects these particular Subcontractors have not seen the General Conditions and only priced their respective drawings and appropriate specification sections."* Three columns were added to the spreadsheet for the Subcontractors to consider a price for the risk.

This exercise was important for the participants to apply their understanding of contract clauses in a tender process where they have to determine if a risk exists and how they want to address such risks.

The Project Details

<u>Pre-Developed Estimate</u>:

- Division 2-16 (old master format) totaling approximately $14,400,000.
- General Conditions totaling approximately $1,800,000
- Subtotal before overhead and profit $16,200,000
- The President of each General Contractor bidding team was looking for overhead and profit of $500,000. The teams had the ability to change this based on their individual analysis of the project.

<u>Supplementary Conditions:</u>

1) **<u>Advertising</u>** - The contractor shall obtain the owner's prior written approval for any public advertising, written sales promotion, press release or any other general publicity manner, in which the name or trademark of the owner are mentioned or used or in which words are used from which any connection with the owner's name or trademark may be inferred. The contractor shall not allow or permit any public ceremony in connection with the work, without the prior, written permission of the owner. The contractor shall not erect, or permit the erection of any sign or advertising, without prior written approval of the owner.

2) **Insurance** - The owner will maintain a course of construction insurance policy covering certain risks arising from the construction of the project. The owner will pay all premiums and consequently contractors should not carry the premiums in their costs. The owner shall not be responsible for the accuracy of the descriptions of the risks nor does it represent or warrant that any policy contains insurance to any particular coverage or extent of coverage. It is the contractor's responsibility to ascertain the nature and extent of the coverage within the described policies, i.e., to ascertain what risks are covered and to otherwise obtain insurance for those risks which are not covered by the described insurance. Copies of the policies of insurance may be obtained after contract award by arrangement from the owner.

3) **Insurance Deductible** - The contractor is solely responsible for the payment of every deductible amount for every policy of insurance provided under the agreement.

4) **Indemnification** - The contractor shall indemnify and hold harmless the owner, its officers, directors, personnel, clients, agents and consultants, including the prime consultant, from any and all claims arising out of or as a result of the contractor's failure, or the failure of any person for whom the contractor is responsible at law, to comply with the requirement of this condition.

5) **Construction documents** - The owner will furnish, without charge, up to 25 sets of specifications and drawings of the project. Additional copies of the specifications and drawings will be furnished to the contractor for the cost of reproduction.

6) **Contract Documents** - Architectural drawings shall have precedence over structural, plumbing, mechanical, electrical and landscape drawings insofar as outlining, determining and interpreting conflicts over the required design intent of all architectural layouts and architectural elements of construction, it being understood that the integrity and installation of systems designed by the consultant or its sub consultants are to remain with each of the applicable drawing disciplines. Subject to the foregoing, if any drawings or specifications conflict with any other drawings or specifications, then the more stringent requirements shall govern.

7) **Contract Documents**- The contractor shall study and compare the contract documents with each other and shall verify the dimensions, quantities and details described in them. The contractor shall notify the Consultant of all errors, omissions, conflicts and discrepancies found. Failure to discover or correct errors, omissions, conflicts or discrepancies which ought to have been discovered by such a study, shall not relieve the contractor from full responsibility for unsatisfactory work, faulty construction or improper operations resulting there from, nor from rectifying such conditions at the contractor's expense.

8) **Payments** - The consultant shall be the payment certifier for the purposes of the Builders' Lien Act. The consultant is responsible for determinations in respect of the contract and all lien holdback funds released pursuant to the contract.

9) **Payments** - Products delivered to the place of work must be incorporated into the work before applications for payment for such products are made by the contractor. No amount claimed for payment with respect to any products shall include amounts for products incorporated into the work unless such products are free and clear of all security interests, liens, and other claims of third parties.

10) **Records to be kept** - The contractor shall for a period of at least seven years from the date of the final certificate of completion, maintain and keep full records, vouchers, other writing and information in respect of his estimates and actual cost of the work, and, shall make available a copy, audit or inspection by any as being required to be maintained by the owner. The records stipulated in this

contract as being required to maintain by the contractor may be subject to the protection and access provisions of the Freedom of Information and Protection of Privacy Act. Should the owner receive a request for any of these records, the contractor, at the contractor's expense, will provide these records to the FOIP coordinator and the owner within 15 business days from official notification by the FOIP coordinator.

11) **Site Conditions** - The contractor also declares that in tendering for the work and entering into this contract, the contractor did not and does not rely upon information furnished by the owner or any of its agents or servants respecting the nature or confirmation of the ground at the site of the work, or the location, character, quality or quantity of the materials to be removed or to be employed in the construction of the work, or the character of the construction machinery and equipment or facilities needed to perform the work, or the general and local performance of the work under the contract and expressly waives and releases the owner from all claims with respect to the said information with respect to the work.

12) **Supervision** - The appointed representative of the contractor shall not be changed except for valid reason. The appointed representative shall not be changed without consultation with and written acceptance of the owner. This acceptance shall not be unreasonably withheld.

13) **Weather** - Any inclement or unfavorable weather condition shall not entitle the contractor to an extension or any increase in compensation, nor relieve the contractor from any obligation hereunder, including in particular from any term related to the work schedule or compensation.

14) **Defective Work** - The contractor shall prioritize and expedite the correction of any defective work which in the sole determination of the owner, adversely affects the day-to-day operation of the owner.

15) **Warranty** - Except for the extended warranties as described in other sections, the contractor warrants that the work, including all products, shall be of merchantable quality and fit for their intended purpose, as described and specified in the contract documents, and free of defects in material and workmanship for a period of one year from the date of substantial performance of the work and, further, such warranty shall apply to all warranty work and to products repaired or replaced under warranty for a period of one year from the date of acceptance of such warranty work or repair of or replacement of products.

Bidding Results

(See Appendix A for a spreadsheet of the results)

- All 21 teams submitted a tender. Not submitting a tender was not an option for the exercise although a number of teams felt that not bidding would have been the prudent and right decision.
- All but one bidder included additional costs in their bid based on their review of the 15 Supplementary General Conditions clauses.
- 19 of the 21 teams added costs ranging from $1,800 to $70,000 for clauses 2 & 3 on Insurance and Insurance Deductible. The average add was $25,000.
- Clause 4 regarding indemnification should have been a red flag, but most groups ignored it. Five teams did add costs ranging from $10,000 to $110,000 and two teams noted they would discuss with the Project Owner. One group indicated the clause was poorly written and would not stand up in a legal dispute.
- Clauses 6 and 7 regarding contract documents were intended to be a no cost item yet 13 teams added cost for the perceived risks. Two other teams believed they could clarify these clauses either pre or post tender. These clauses are obviously not well understood.
- Clause 9 regarding “payment for material installed” had costs applied by 12 teams ranging from $5,000 to $80,000. The other nine teams believed they could have clarified the clause pretender or passed it down to the trades.
- Clause 11 regarding responsibility for site conditions had costs added by 11 of the teams, ranging from $10,000 to $285,000. Three of the other teams did not add costs, but indicated that they would not bid the project unless the clause was changed pre-tender. Two other teams believed they could force the earthworks subcontractor to accept this risk. One team felt they could convince the Project Owner post award to modify this clause and the remainder of the groups had no comment.

Figure 3 - Revised bid form starting Oct 12th

- Clause 13 regarding weather conditions had costs added by 13 of the teams, ranging from $19,000 to $250,000. One team indicated they would negotiate the clause pretender and the remaining teams accepted the clause.
- In addition to Clauses 6 and 7 above, there were several clauses (Clause 1 advertising, 5 documents, 8 payments, 10 record keeping, 12 supervision, 14 defective work, and 15 warranty) that should have had minimal or no impact and that was in fact the case. One creative group actually applied a $4,000 credit to their bid for Clause 5 regarding providing of documents as they normally carry printing costs in their bids.
- Of the 20 teams that added costs for the Supplementary Conditions, the range was a low of $20,000 to a high of $923,000, with the average being $277,000.
- Most bidders kept the original desired overhead and profit of $500,000 in their bids in addition to Supplementary Condition costs. Several teams felt this was too low and added additional overhead and profit based on the perceived risks of the project, in addition to the Supplementary Conditions. This would be a business decision

Bidding Rationale/Comments

- Often one of the mitigation strategies is to pass down the risk to the Subcontractors and Suppliers.
- Those at the bottom of the contract chain are the least prepared to take on risk and especially unknowingly take it on.
- No one likes reading and especially reading the legalese in the front end documents
- The private sector relies on standard contracts more than the public sector.
- What can the Subcontractors do to mitigate their risk when it is passed to them? When do they discover this risk is passed to them?
- The reduced quality of plans and specifications, and the expertise to create them, have risk implications to the contractors.
- What is the Project Owner's intent by adding clauses? Do they really understand what happens with that risk?
- There was recognition that some of the clauses could be addressed by insurance products: deductible buy down, extra Course of Construction (CoC) coverage.
- Negotiate out terms during contract award, but there is no guarantee that the Project Owner will agree.
- Concern that all bidders will not price the risk and thus those that do may be too high.
- Some bidders applied a pure math approach by adding percentages of the estimated costs.
- Contractors pay attention to the RFIs during the bidding phase to see what types of questions are being asked and answered.
- Price less risk when economy is poor and more risk when economy is good.
- Payment terms - Biggest risk is Subcontractor bankruptcy which is riskier when the economy rebounds and they priced low, because the costs to purchase materials and labour go up.
- With site conditions, General Contractors look to see how the Subcontractors price and if there is a big spread it gives an indication of uncertainty in the Subcontractors' prices.
- Project Owners are adding clauses that will apply a fee to the General Contractor to switch out their Superintendent to another team member to discourage such action.
- When it is brought to the Subcontractor's attention that there are major risk implications? During tender or in buy-down discussions after tender is awarded to the General Contractor? There is a concern that sharing during the Stipulated Sum bidding stage is doing the Subcontractor's job, too much of a time investment when in competitive bid stage, and possibly positions one General Contractor at a disadvantage to another.
- The new employment standards for overtime will have an impact on scheduling the work week.
- Be cautious of warranties that start over when warranty work is done.
- There have been litigated cases on "fit for use" warranty clauses; beware!
- The value of a large spread to the Project Owner looks good initially, but they may have to address these issues while the project is under construction.
- The importance of the soft skills of communication and collaboration was re-emphasized many times as a positive result of the exercise. However, this is not a standard approach to a lump sum highly competitive tender process.
- When a team did NOT have an insurance specialist, their costs were not as accurate as those who did.
- When a Subcontractor was not represented in a team, there was no consideration given to the costs they may incur.

- Interpretation of the clauses varied by team; this reinforces the need for all to train to standard language so interpretations do not vary.
- Always the concern that others will not address risk and thus will not be competitive.
- Expertise influences interpretation.
- When there are different insurance policies that may overlap, it can cause problems with resolving claims.
- New energy codes and sustainability requirements in design impose an increased risk to contractors when agreeing to comply with "intent" of design.
- Start-up agendas to discuss payment process is very important.
- Assumptions are made that Subcontractors will cover the costs; Subcontractors don't even realize this until too late.
- Qualification of bids will lead to more non-compliant bids and fewer open to acceptance.

Oct 12th – added columns for Subcontractor pricing

- Lawyer commented that they create some of this language and were not aware of their interpretations so will be going back to review what they have written.
- The value of good insurance expertise was reinforced by the mixed understanding of different insurance products - Difference in Deductible, Difference in Conditions and Difference in Coverage
- Purchasing E&O Insurance was thought to be a solution to covering risk for design transfer clauses, but if the contractor is not responsible for design, there is no E&O coverage available
- When the General Contractors knew the Subcontractors had addressed the risk in their bids (addressed in the Subcontractor columns), they did not have to add any price for the risk to their tender. This approach can only be taken through good communications.
- One team addressed the cost of LEED that had not been taken into consideration during the bidding by the Subcontractors.
- Where there was no General Contractor on the team, the group applied costs to the Subcontractors column only.
- Even in this small tender situation, errors were made in the adding of all the components to determine final price.
- The need to qualify bids was quite high versus taking a guess and adding money.
- The collaborative process for discussing clauses and their impact is a very powerful method to create understanding.
- True understanding of flow down concept is not always clear that it will apply to all.
- Many times the General Contractors stated that they thought the Subcontractors addressed in their prices, but based on these exercises most do not. Subcontractors will be held responsible and depending on the clause it may be addressed at buyout stage – an ethical situation especially if the General Contractor allowed for it yet at buyout gets the Subcontractor to cover the cost.
- Always build in costs and then decide to remove before submitting bid; otherwise there is no training platform for the future.
- Pretender questions help your competition but is that bad? Keep prices similar versus wide discrepancies.
- Use Associations to help change clauses.
- Insurance premiums assessed by well-balanced teams.
- Trade scope is so complicated that Consultants are not experts to interpret let alone Project Owners.
- Lots of decisions around these kinds of issues are arbitrated and thus not recorded so not public about results of dispute.

- Financing costs are NOT part of overhead and thus not covered unless addressed specifically.
- If meaning unclear, we still assume we know what it means.

Workshop Plus/Delta (Strengths/Areas for Improvement)

Plus

<u>Structure</u>

- Group discussions, interactions and collaboration
- Timing and flow of Workshop
- Strategic pre-assigned seating
- Presenter knowledge and experience with the topic
- Right sized groups
- Real examples of clauses being used today
- Group exercise are a good way to collaborate and meet people
- Course length for information was good
- Session was more interactive than anticipated
- Great the way the teams were created with GCs, Subcontractors, bonding/insurance so could hear the various opinions
- Session was focused on communication and shared experiences
- Working with a team to create bid was positive
- Information retention is higher when interactive
- Open and honest dialogue amongst competitors
- Team oriented reason to draw conclusions
- The use of real clauses and how to address them
- Excellent opportunity to see opposing views
- Made me more interested in the subject

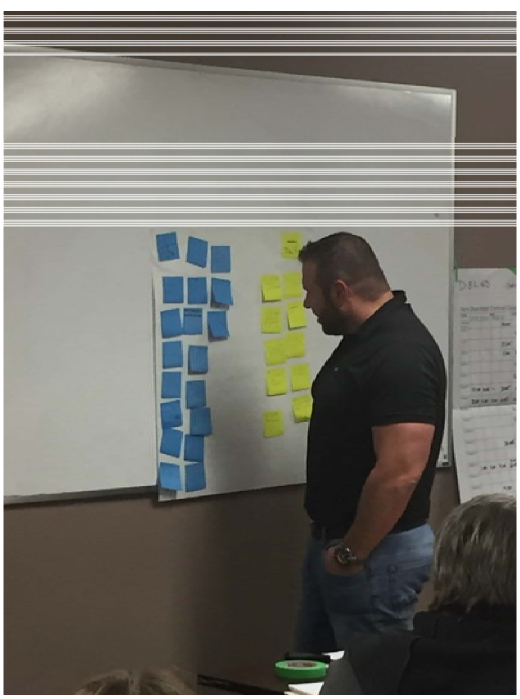

Figure 3 - Sharing Delta/Plus Comments

<u>Participants</u>

- Diversification of attendees (General Contractors, Subcontractors, Insurance/Bonding and Lawyers) – CONSISTENT COMMENT

<u>Learning</u>

- Insight and viewpoints of others
- Learning about what may hit us in the future
- Learned about available insurance policies to mitigate risk that I did not know about before
- Gave a better understanding of how certain clauses can drastically affect a project
- As a Subcontractor, it was informative to see how the General Contractors thinks
- Exposing killer clauses is good for the industry
- Good to see the perspectives on which clause are important/affect relationships between parties
- I liked all the different perspectives I got from lawyers and insurance brokers because I had never realized how important their role was
- Educational, interactive, mind opening

- Sharing insight into the thought process of bidding
- Great debates
- General awareness on issues that cause contractual problems
- Helped me to understand the General Contractor way of thinking
- More comfortable with the process of reviewing
- Good to see how Subcontractors view the clauses differently

Value

- High value particularly considering attendance cost
- Best most important seminar in a long time

Next Steps

- Associations are our voice; take part in them and support them
- Keep pushing for standard clauses

Delta

Structure

- Review of other non-standard clauses
- Mix groups up between the 1st and 2nd exercises for more exposure to ideas (this was addressed after the first session for the remainder of the sessions)
- Provide a bit more information regarding the objectives or outcomes of the day prior to the day so we can better prepare
- Working through lunch does not give an opportunity to manage business affairs
- Need more specifics on what to do or how to handle. Geared too much for General Contractors; not much talk on how Subcontractor are at risk
- Apparent bias for/against industry professionals
- Would like to see Lawyer commentary as to how/why such contract language is acceptable/legal
- Limited to non-standard clauses; would be nice to see this for standard clauses in specifications
- A chance to bring contract clauses that have been incurred in addition to those discussed
- An additional case study outside of commercial
- Go deeper into contract clauses
- More details and examples for indemnification
- Knowing which clients are related to each clause would be helpful on future opportunities
- Maybe more examples of other clauses and risks associated
- Provide an outline the day beforehand
- Screen and instructor in the middle of the room for better attendance
- An agenda for the day
- The vagueness of the details created interpretations which varied the results of the bid making some higher or lower than others
- More interactive exercises/less duration
- There is a lot to go through; almost needs to be a week long course

Participants

- Was the group a good representation of the industry; aware vs unaware
- No Project Owners in the room
- Would be good to have other Lawyer and Project Owner comments

- Have participation from Designers and Project Owners (comment repeated MANY times)
- Have more mechanical and electrical contractors who are a large portion of a contract
- More Subcontractor participation

Learning

- Learned about inclusion of these clauses by our government bodies
- The General Contractors are part of the problem
- Even though the group can agree certain clauses are not good for anyone other than the Project Owner, there seems no way around them
- Not all General Contractors operate the same
- Lack of common language and understanding of legal and insurance aspects

Next Steps

- Knowing the problem and doing nothing to change results is bad for the industry
- Steps to stop these clauses are not all reasonable.
- Industry meets, but does it change
- I feel change in the industry will be slow
- There is a real disconnect between Project Owner, General Contractor and Subcontractors

Resonating Thoughts

Structure

- Well thought out exercises with an engaged audience equaled many opportunities to learn
- Fantastic way to see contracts from a variety of industry opinions/viewpoints; well done!
- Good topic to review in a Workshop with the variety of insurance/bonding and legal professionals
- The exercises were well done with real world relevance; easy to follow and thus promoted good discussion
- Very practical examples of contract language and well thought out exercises for application

Learning

- Great stuff from a highly experienced group
- Was great to get other General Contractors and Subcontractor views on clauses
- There are many contract clauses in the industry that create or transfer risk to parties that may not be aware of them or able to absorb them without cost
- Overall a good day and lots of group input of the various ideas was an insight
- Very good presentation; all Owners of Subcontractor companies should take this Workshop
- Events like this are important to our industry
- Fantastic Workshop with a lot of insight into contract clauses and interpretations
- Appreciated the sharing of knowledge; very educational
- Our fees are disproportionate to the risk we take. Reverse the trend; increase fees or reduce risk
- Different perspectives from the various players (General Contractors, Subcontractors, Associations and Professional Advisors) on this topic is invaluable to drive change

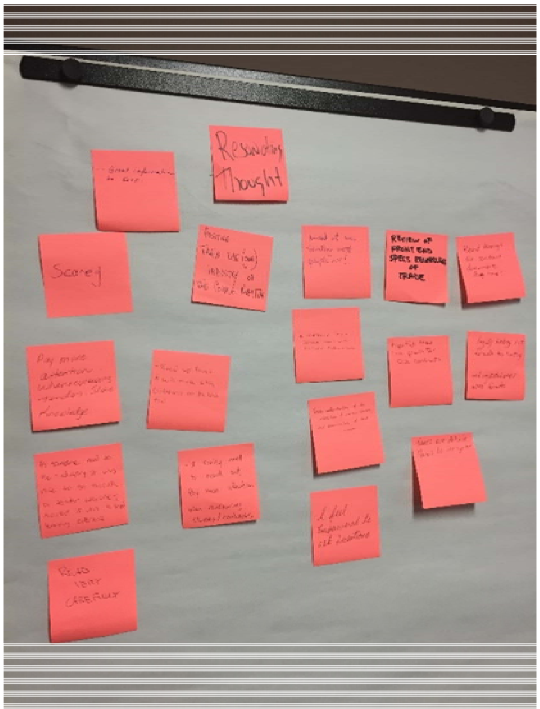

Figure 4- Resonating Thoughts

- Good communication and a collaborative approach are the way to go
- Gained perspective from other's views on clauses
- A lot of risk can be mitigated prior to entering into a contract by actually reading and discussing the terms of the agreement
- We all work towards a common goal…so this is why understanding non-standard contract clauses can improve a success rate
- Enlightening experience, will definitely be reading Division 00 and 01 more often
- Realize that we do a lot things we shouldn't and vice versa
- Very informative
- Train our industry on this course matter
- Pay more attention when reviewing tenders; share knowledge
- Review the front end specifications every time
- Amazed at how trusting most people are
- I feel empowered to ask questions
- There are definite flaws in the system
- Reading up front will make a big difference on the back end

<u>Next Steps</u>

- Create an industry standard for non-standard clauses:
  1) List of Killer clauses
  2) Note changes we can live with; similar to the structure of the ACA trade definitions
- Raise awareness of importance to all parties; opportunity to broaden this presentation
- Appreciate the work ACA, CCA and volunteers are doing for our industry on these Valuable understanding of various stakeholder views
- Despite the discussions and new knowledge gained, bidders won't change their bidding habits with fear their competitors won't change too
- Look forward to next step with ALL industry participation
- Good course, but attendance by all construction parties will be beneficial to delivery
- Legally binding Invitations to Tender are too limiting; need negotiated RFP and Best and Final Offer formats
- Hopeful there is a push for CCDC contracts

Next Steps

It was recognized that discussion about the meaning, ramifications and mitigation strategies for Contract Clauses (whether standard or non-standard) should be continual by all partners. With the retirement of the workforce who developed or analyzed contract language, comes a knowledge gap and thus an opportunity to bring all industry partners together to learn. Construction and design related Associations are poised to collaboratively offer these Workshops for their members.

For the smaller Subcontractors, the task of reviewing the front end is often left to administrative staff who have not been trained on what to look for and ask questions about. Thus continued training on this subject will be important given the turnover in administrative staff.

The group also acknowledged that the opportunity to change non-standard contract clauses lies with all construction partners discussing the topic together otherwise it is a one-sided conversation. It will be imperative to engage Project Owners, Project Owner's legal counsel, Architects, Engineers and Lawyers with Contractors (OAEC) to understand each other's perspectives and find solutions for change. Understanding the **"why"** in what the Project Owner is looking to address, will enable us to find the **"how"** to address their needs.

APPENDIX A

June 20, 2018

CLAUSE	Team 1	Rationale 1	Team 2	Rationale 2	Team 3	Rationale 3	Team 4	Rationale 4	Team 5	Rationale 5	Team 6	Rationale 6
Overhead and Profit	$500,000.00		$500,000.00		$500,000.00		$500,000.00		$500,000.00		$500,000.00	
Clause 1	$0.00		$0.00		$0.00		$0.00		$0.00		$0.00	
Clause 2	$10,000.00	Insurance	$20,000.00	GAP, DID, DIC Insurances	$45,000.00		$70,000.00	Includes Wrap up, deductible buy down for CoC, LEG 3 coverage for CoC	$12,000.00	Insurance	$25,000.00	Insurance for DIC and DID
Clause 3	$5,000.00	Deductible	$0.00		included above		included above		$3,000.00		$10,000.00	
Clause 4	$0.00		$10,000.00	Wrap up	$0.00		$0.00		$0.00		$0.00	
Clause 5	$0.00		$0.00	Duplication costs borne by Subcontractors	-$4,000.00		$0.00		$0.00		$0.00	
Clause 6	$320,000.00	2% contingency	$0.00		$0.00		$0.00		$0.00		$0.00	
Clause 7	included above		$560,000.00	5% incomplete drawings	$80,000.00		$150,000.00	risk cost $300,000	$0.00		$0.00	
Clause 8	$0.00		$0.00		$0.00		$0.00		$0.00		$0.00	
Clause 9	$12,500.00	work not incorporated; $500K @5%	$48,000.00	$1.6M of long lead items carried for 3 mths	$60,000.00		$0.00		$0.00		$11,500.00	Financing Carrying Costs
Clause 10	$2,000.00	Records	$0.00		$21,000.00		$0.00		$0.00		$0.00	
Clause 11	$10,000.00	Site conditions	$285,000.00	$35K Geotech report; $250K design upgrade	$0.00		$15,000.00	Contractor's pollution liability	$0.00		$0.00	
Clause 12	$0.00		$0.00		$0.00		$0.00		$0.00		$0.00	
Clause 13	$0.00		$0.00		$40,000.00		$0.00		$100,000.00	Winter weather conditions	$0.00	
Clause 14	$0.00		$0.00		$0.00		$0.00		$0.00		$0.00	
Clause 15	$0.00				$0.00		$0.00		$0.00		$2,500.00	Warranty
Clause Total Price	$359,500.00		$923,000.00		$242,000.00		$235,000.00		$115,000.00		$49,000.00	
win optics	-$50,000.00											
Sub Total	**$309,500.00**		**$923,000.00**		**$242,000.00**		**$235,000.00**		**$115,000.00**		**$49,000.00**	
Total Bid	$809,500.00		$1,423,000.00		$742,000.00		$735,000.00		$615,000.00		$549,000.00	

CLAUSE	Team 1	Rationale 1	Team 2	Rationale 2	Team 3	Rationale 3	Team 4	Rationale 4	Team 5	Rationale 5	Team 6	Rationale 6
Overhead and Profit	$500,000.00		$500,000.00		$500,000.00	We were told; mandatory	$500,000.00		$500,000.00	Pres approval; risk adverse	$500,000.00	
Clause 1	$0.00	No relevance	$0.00	No risk	$0.00	Low/acceptable risk	$0.00	No issues	$0.00	Covered in GCs	$0.00	Acceptable
Clause 2	$50,000.00	Funds to mitigate; added risk	$16,000.00	Wrap up policy	$5,000.00	Difference in condition insurance policy	$0.00	Assume the Owner has engaged a reputable insurance provider	$0.00	Addressed below	$0.00	Acceptable
Clause 3	$2,000.00	Deductible buy down	$2,500.00	Course of construction buy down	$5,000.00	Deductible buy down policy	$10,000.00	Add deductible buy down insurance	$15,000.00	Buy limits/conditions/ deductible coverage	$7,500.00	Insurance $
Clause 4	$0.00	No relevance; lawyer advised to discuss as verbiage poor	$0.00	Limited exposure; "for how contractor is responsible at law"	$110,000.00	Bond Subcontractors over $200,000	$0.00	We plan to succeed	$30,000.00	Legal fees for 80 hours	$25,000.00	Insurance $
Clause 5	$0.00	Cost of business		Digital documents	$0.00	Low cost electronic document distribution	-$5,000.00	We included $5000	$0.00		-$2,500.00	Discount to Owner of 5 sets
Clause 6	$0.00	Works with Clause #7	$0.00	Included in Subcontractor pricing; risk with Subcontractors	$0.00	Risk deferred to Subcontractors	$0.00	Expectation for all disciplines to review all project documentation	$150,000.00	Add 10% to all subcontractors	$0.00	Acceptable
Clause 7	$500,000.00		$25,000.00	Risk of design error on self-perform work	$0.00	Qualify bid - study post tender; Subs confirmed full inspection of docs	$0.00	No added costs. RFI any conflicts.	$80,000.00	Hire BIM person and submit for changes	$0.00	Acceptable
Clause 8	$0.00		$0.00	Acceptable	$0.00	Qualify timelines for certification process	$0.00	Clarify prime consultant is responsible	$0.00	Standard practice	$0.00	Acceptable
Clause 9	$10,000.00	Financing for late pay	$46,500.00	10% on elevator; paid up front to subcontractor	$0.00	Qualify payment terms as per CCDC-2; products invoiced as arrive on site	$15,000.00	Finance cost for mechanical equipment and curtain wall	$70,000.00	Cost to finance = costs minus $400,000 at 5%	$0.00	Acceptable
Clause 10	$0.00	Standard procedure	$2,500.00	Storage costs; travel, etc.	$0.00	Qualify no records of actual costs	$0.00	Internal practice; no added cost	$0.00	Included in GCs	$0.00	Acceptable
Clause 11	$150,000.00		$239,000.00	*Large risk for unknowns; soils and existing facilities?	$0.00	Delete or modify terms (Qualify Bid)	$0.00	Debate the clause if awarded	$70,000.00	25% add to excavating and site work	$50,000.00	% of site work; $ identified

CLAUSE	Team 1	Rationale 1	Team 2	Rationale 2	Team 3	Rationale 3	Team 4	Rationale 4	Team 5	Rationale 5	Team 6	Rationale 6
Clause 12	$0.00	Cost of business	$0.00	Acceptable	$0.00	Acceptable terms (define valid reason)	$0.00	Non-issue; we're organized	$0.00	Acceptance shall not be unreasonably withheld	$0.00	Acceptable
Clause 13	$100,000.00	Cash allowance; lack of productivity	$0.00	Accounted for in schedule	$0.00	Delete or modify terms (Qualify bid)- inclement weather entitles to…	$0.00	Accounted for in base bid	$35,000.00	Allow two weeks delay, cost of GCs	$0.00	Acceptable
Clause 14	$0.00	Standard expectation to make client happy	$2,000.00	Contingency for minimal risk	$0.00	Acceptable terms (define valid reason)	$0.00	We will address/prioritiz e defective work	$0.00	Push to subcontractors	$0.00	Acceptable
Clause 15	$0.00	Standard procedure	$0.00	Covered by Subcontractors	$0.00	Modify terms on warranty reset and phased substantial performance	$0.00	Take the risk; push it to the Subcontractors	$0.00	Cost in GCs; push to subcontractors	$0.00	Acceptable
							-$70,000.00	Subcontractor buy-out/value engineering				
Sub Total	**$812,000.00**		**$333,500.00**		**$120,000.00**		**-$50,000.00**		**$450,000.00**			
Total Bid	$1,312,000.00		$833,500.00		$620,000.00		$450,000.00		$950,000.00		$500,000.00	

CLAUSE	Team 1	Rationale 1	Team 2	Rationale 2	Team 3	Rationale 3	Team 4	Rationale 4	Team 5	Rationale 5
Overhead and Profit	$500,000.00	Boss said so	$500,000.00		$500,000.00		$500,000.00	Minimum requirement from President	$500,000.00	
Clause 1	$0.00		$0.00		$0.00	No cost impact	$0.00	No risk	$0.00	
Clause 2	-$70,000.00	Deduct from insurance carried	$12,000.00	Wrap-Up	$12,000.00	Owner has CoC; don't know if there is Wrap-Up	$0.00	Insurance cost for additional coverage if required. Reimbursable/not GC cost	$20,000.00	Difference in deductible
Clause 3	$100,000.00	Assume $25,000 deductible X 4	$25,000.00	Course of Construction Deductible	$0.00	Due to assuming not big deductible	$0.00	Accepted risk/transfer	$0.00	
Clause 4	$60,000.00	(not bid); upgrade to Wrap-Up	$0.00		$0.00	Fair assumption there will be no future issues that will come up to indemnify	$0.00	Two way	$0.00	
Clause 5	-$5,000.00	Credit back for electronic documents	$0.00		$0.00	Should be sufficient	$0.00	No risk	$0.00	
Clause 6			$0.00		$0.00	Only coordination; staffing included	$0.00	Accepted risk/transfer	$0.00	
Clause 7	$700,000.00	Assume delta to low divided by 2	$7,500.00	E&O Insurance	$0.00	Fair	$0.00	Accepted risk/transfer	$30,000.00	E&O Insurance
Clause 8	$0.00		$0.00		$0.00	No issues	$0.00	Accepted	$0.00	
Clause 9	$0.00		$0.00		$0.00	Assume all Subcontractors carried financing as they are all "good Subcontractors"	$0.00	Accepted	$0.00	
Clause 10	$25,000.00	(not bid); iron mountain costs	$0.00		$0.00	Very small audit cost	$0.00	Accepted	$0.00	
Clause 11	$0.00	Transfer to earthworks subcontractor	$50,000.00	Unforeseen conditions	$12,500.00	Only impact site servicing; 5% risk = $12,500(assume civil work under control); download to Mech	$0.00	Strike out clause or transfer or do not bid	$0.00	
Clause 12	$0.00		$0.00		$0.00	Fair	$0.00	Accepted	$0.00	
Clause 13	$80,000.00	0.5% acceleration	$0.00		$0.00	We don't typically carry the anticipated cost	$0.00	Proper bid inlcudes this (assumed in General Expense line)	$130,000.00	4 days per month; 12 month schedule
Clause 14	$0.00		$0.00		$0.00	No liquidated damages in contract	$0.00	Accepted risk/transfer	$0.00	
Clause 15	$0.00		$0.00		$0.00	Fair	$0.00	Same as 13	$0.00	
Sub Total	**$890,000.00**		**$94,500.00**		**$24,500.00**		**$0.00**		**$180,000.00**	

Total Bid	$1,390,000.00		$594,500.00		$524,500.00		$500,000.00		$680,000.00	

CLAUSE	Team 1	Rationale 1	Team 2	Rationale 2	Team 3	Rationale 3	Team 4	Rationale 4
	3 GCs, 1 Consultant, 1 Sub		2 Subs and 2 Insurance		1 each - GC, Lawyer, Sub, Bonding		1 GC, 1 Insurance, 3 Subs	
Overhead and Profit	$500,000.00		$2,625,000.00	LEED Costs; mechanical add sprinkler system	$1,000,000.00	Complex project: work outside of business hours, LEED Gold	$ 591,000.00	OHP $500,000, Subs $41,000 = $50,000 LEED
Clause 1	$0.00	No Cost	$0.00		$0.00		$0.00	Doesn't affect base bid
Clause 2	$25,000.00	Cover unknowns	$0.00	CGL in place for each but no Wrap Up. CoC covered by Owner	$0.00		$0.00	Corporate insurance within our OHP is sufficient to supplement Subcontractors
Clause 3	$5,000.00	Buy down deductible	$1,800.00	Buy down deductible	$0.00	Qualify bid - impose a limit of $50,000 and propose the Owner share	$25,000.00	Based on project size and industry standards deductible
Clause 4	$0.00	No Cost	$0.00	Reword during prebid	$0.00	Qualify bid - "to perform obligations under this agreement"	$0.00	Pass risk to subs; be responsible for own work
Clause 5	$0.00	No Cost	$2,400.00	Produce documents	$1,500.00	Plans/drawings	$0.00	Dropbox for plans; subs responsible for own drawings
Clause 6	$40,000.00	Unknowns; originally additional $10,000 by GC, but removed before submission	$0.00		$0.00	Get clarity on meaning of stringent	$0.00	No cost implication
Clause 7	$33,000.00	Unforeseens	$7,500.00	Have Engineer compare drawings arch to mech and elec	$0.00	Qualify - remove "nor from rectifying such conditions at contractor's expense"	$40,000.00	BIM for clash detection
Clause 8	$0.00	No Cost	$0.00		$0.00		$0.00	
Clause 9	$0.00	No Cost	$80,000.00	Carrying credit interest	$0.00	Qualify - Once materials on site and secure, can apply for payment	$5,000.00	For contractor's only; interest
Clause 10	$0.00	No Cost	$0.00			Qualify - not a public job so not privy to info	$0.00	
Clause 11	$0.00	RFId at tender stage with no response so set up $100,000 contingency but removed before submission	$0.00		$120,000.00	Site Work contingency; 10% of site work	$15,000.00	Independent soil testing
Clause 12	$0.00	No Cost	$0.00		$0.00		$0.00	
Clause 13	$19,000.00	Inclement weather	$0.00		$0.00	Qualify - Revert to standard CCDC wording with respect to changes due to weather	$250,000.00	Contingency for winter conditions
Clause 14		No Cost	$800,000.00	10% in case there is defective work	$0.00		$0.00	
Clause 15	$4,000.00	Access	$0.00		$0.00	Qualify - Strike out last part of clause	$2,500.00	Site visits and inspections
					$1,100,000.00			
Sub Total	**$126,000.00**		**$891,700.00**		**$1,221,500.00**		**$337,500.00**	
otal Bid	$626,000.00		$3,516,700.00		$2,221,500.00		$928,500.00	

APPENDIX B

A Report Prepared for Alberta Construction Association

By Lead Author and Editor Mike Nicolson

October 2017

In Alberta, the procurement of publicly funded construction projects is handled by many different entities.

These entities include regional, local, district or other forms of municipal government, universities, school boards, as well as publicly-funded academic, health and social service organizations, and others.

Although various types of project procurement and delivery methods are used, the most common is via the lump-sum tender and award process.

The vast majority of construction contracts used for these projects are different forms of non-standard contracts often separately developed by the issuing body. For example: the construction contract terms for a school in Calgary would be different from a similar school project in Edmonton, which would be different again for a school in Lethbridge. A contract for a $4.9 million hospital project (AHS) would have a different contract from a $5.1 million hospital project by Alberta Infrastructure.

CCDC standard forms of contracts, including CCDC 2, were developed jointly by owners and contractors to present balanced agreements that do not assign undue risk to either of the parties. Industry standard documentation allocates risk to the party better placed to handle that risk. The CCDC 2 Stipulated Price Contract is probably the best understood construction agreement in the country. It is also widely understood by the 'consultants' who are often the delegated representatives of the owner. However, the use of CCDC 2 on publicly funded projects in Alberta has greatly diminished with owners instead opting to use their own forms of non-standard agreements.

Even when there is use of a standard CCDC form of contract, it is often modified with different sets of supplemental conditions which are often complex and lengthy. There is not a standardized set of supplemental conditions used across the industry. In other words, the supplemental conditions modifying contract terms for a school are often different than those issued for a university project. In one extreme case, the 30-page CCDC2 form of agreement has been modified by a 59-page set of supplemental conditions.

Whether an owner is using its own form of contract, or supplemental conditions to modify a standard document, the tendency over the years has been for construction contracts to become more unbalanced (read as 'one-sided') in favour of the owner. This is the result of the owner's desire to transfer every conceivable risk to the contractor. This goes against the correct logic of assigning risk to the party best able to mitigate the risk. Often, the risk being transferred to the contractor is unquantifiable and/or uninsurable, or beyond the reasonable control of the contractor.

Project success involves teamwork among the participants and mutual consideration and respect for each party's interests. In the undertaking of a construction project, the goals of the owner and the contractor are not mutually exclusive. The owner wants a project done in accordance with his requirements and delivered on time for a specific price. The contractor wants to complete a project expediently, leaving a satisfied client and to be paid the agreed contract amount.

Agreements which are heavily biased towards an owner can put the contractor in a defensive mode from day one as the contractor is compelled to focus on protecting its own interest.

The use of the many and varying forms of non-standard contracts can result in unsatisfactory performance in the construction industry and harms the economy in several ways including:

- If a lopsided risk is accommodated in bids by contractors building in contingency amounts for risks which may or may not materialize, the cost of projects is higher.
- If a risk is not fully understood or not accommodated by the contractor and the risk materializes, disputes can arise, increasing project costs and leading to delays. The contractor can default on its obligations placing the project success into jeopardy.

- If risk is fully understood and is too onerous, a contractor may decide not to bid thus reducing the competitive process.

- Public procurement entities spend taxpayer dollars internally and externally to develop their own 'non-standard' contract documents, often without fully understanding the implications of all of the contract terms.

- When issues do arise, the differing individuals administering the construction agreements on behalf of the owner (in some cases the prime design consultant, or external project manager) may offer and enforce differing interpretations of non-standard terms.

- There is an increased risk of litigation as there will often be no legal precedent for non-standard contractual terms. The interpretation of standard contract terms is generally a question of law alone, whereas, the interpretation of non-standard terms amounts to a question of mixed fact and law.

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The following are several issues of industry concern. While the samples below are individual clauses extracted from several non-standard contracts in use today, one must read the entire non-standard agreement in order to grasp the full implications of the variance from industry standard contracts.

1) Broadly worded, no limit, non-reciprocal indemnity terms.

The indemnification terms in CCDC 2 2008 are balanced and have limits on liability, and are generally accepted by the industry. The provisions in CCDC 2 are considered 'balanced' as the indemnity is reciprocal, establishes limits on liability where appropriate, and ties into the insurance provisions of the contract.

(insert: CCDC2 Indemnity provision GC 12.1.1 & GC 12.1.2)

GC 12.1 INDEMNIFICATION

12.1.1 Without restricting the parties' obligation to indemnify as described in paragraphs 12.1.4 and 12.1.5, the *Owner* and the *Contractor* shall each indemnify and hold harmless the other from and against all claims, demands, losses, costs, damages, actions, suits, or proceedings whether in respect to losses suffered by them or in respect to claims by third parties that arise out of, or are attributable in any respect to their involvement as parties to this *Contract*, provided such claims are:

.1 caused by:

(1) the negligent acts or omissions of the party from whom indemnification is sought or anyone for whose acts or omissions that party is liable, or

(2) a failure of the party to the *Contract* from whom indemnification is sought to fulfill its terms or conditions; and

.2 made by *Notice in Writing* within a period of 6 years from the date of *Substantial Performance of the Work* as set out in the certificate of *Substantial Performance of the Work* issued pursuant to paragraph 5.4.2.2 of GC 5.4 – SUBSTANTIAL PERFORMANCE OF THE WORK or within such shorter period as may be prescribed by any limitation statute of the province or territory of the *Place of the Work*.

The parties expressly waive the right to indemnity for claims other than those provided for in this *Contract*.

12.1.2 The obligation of either party to indemnify as set forth in paragraph 12.1.1 shall be limited as follows:

.1 In respect to losses suffered by the *Owner* and the *Contractor* for which insurance is to be provided by either party pursuant to GC 11.1 – INSURANCE, the general liability insurance limit for one occurrence as referred to in CCDC 41 in effect at the time of bid closing.

.2 In respect to losses suffered by the *Owner* and the *Contractor* for which insurance is not required to be provided by either party in accordance with GC 11.1 – INSURANCE, the greater of the *Contract Price* as recorded in Article A-4 – CONTRACT PRICE or $2,000,000, but in no event shall the sum be greater than $20,000,000.

.3 In respect to claims by third parties for direct loss resulting from bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, the obligation to indemnify is without limit. In respect to all other claims for indemnity as a result of claims advanced by third parties, the limits of indemnity set forth in paragraphs 12.1.2.1 and 12.1.2.2 shall apply.

There is logic to an owner wanting to be indemnified for losses caused by a contractor. However, too often the indemnification provisions provided in non-standard contracts do not include a cap on the indemnifying party's liability and the scope of the indemnity is extensive requiring indemnification regardless of fault of the contractor. This is all commercially unreasonable.

Below are samples of indemnity provisions from non-standard contracts currently in use in Alberta

Sample ….a) (highlights added)

General Condition 12.1 - INDEMNIFICATION is deleted in its entirety and the following substituted therefor:

12.1.1 (a) The *Contractor* shall indemnify and hold harmless the *Owner Indemnitees* from and against any and all Losses, whether in respect of Losses suffered by any *Owner Indemnitees* or by third parties, that directly or indirectly arise out of or are attributable to, the acts or omissions under and in respect of the *Contract Documents* and the *Work* of the *Contractor*, *Subcontractors*, *Suppliers* and/or *Personnel* or any other persons for whom they are in law responsible (including, without limitation, claims that directly or indirectly arise out of, or are attributable to, loss of use or damage to the *Work*, the *Owner's* property or equipment, the *Contractor's* property or equipment or equipment or property adjacent to the *Place of the Work* or death or injury to the *Contractor's* personnel or those of its third party contractors).

(b) Unless otherwise expressly provided for in the *Contract Documents* and subject to the limitations and conditions thereof, the *Owner* or any other *Owner Indemnitees* shall not be liable or responsible in any manner whatsoever for any personal injury, death or property damage or loss of any nature that may be suffered or sustained by the *Contractor*, *Subcontractor*s, *Supplier*s, and/or *Personnel* or any other person or entity engaged, employed or contracted by them that arise out of or are related to the *Work*, this *Contract* or the *Project*.

12.1.2 The provisions of GC 12.1 - INDEMNIFICATION shall survive the termination of the *Contract,* howsoever caused, and no payment or partial payment, no issuance of a final certificate of payment or certificate of *Substantial Performance of the Work* and no occupancy in whole or in part of the *Work* shall constitute a waiver or release of any of the provisions of GC 12.1.

Sample …..b) (highlights added)

Delete GC 12.1 INDEMNIFICATION in its entirety and replace it with the following:

"12.1.1 In addition to any other obligations that the *Contractor* may have under this *Contract* or at law, the *Contractor* shall indemnify, defend and save harmless the *Owner*, its affiliates and all of its and their respective directors, officers, employees, consultants, agents and authorized representatives from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, liens, interest, legal fees, costs and expenses of whatsoever kind or nature, including legal fees on a solicitor-and-own-client basis, whether arising before or after completion of the *Work* and in any manner directly or indirectly caused, occasioned or related to, in whole or in part, any act, omission or fault (whether active or passive) of the *Contractor*, its *Subcontractors*, *Suppliers* or of anyone acting under any of their respective direction or control or on their respective behalf.

Sample …..c) (highlights added , < edited to delete direct reference to owner>)

The *Contractor* shall indemnify and hold harmless <owner*>, its officers, directors, personnel, <xxxxxxxx>, agents and consultants, including the *Prime Consultant* from and against, all *Claims* that arise out of, or result from the acts or omissions of the *Contractor,* the *Subcontractors,* and any *Person* for whom the *Contractor* is responsible at *Law,* and without limiting the generality of the foregoing, arising by reason of any matter or thing done, permitted or omitted to be done by the *Contractor,* the *Subcontractors,* or any *Person* for whom the *Contractor* is responsible at *Law,* whether occasioned or caused by negligence, breach of contract or otherwise.

Sample …..d) (highlights added , < edited to delete direct reference to owner>)

The Contractor shall indemnify, defend and hold harmless the <owner> Indemnitees from and against any and all claims, demands, losses, damages, actions, causes of action, suits, proceedings, interest, costs (including legal fees on a solicitor and his own client basis) and expenses, of any kind whatsoever, arising at any time either before or after the expiration or termination of the Contract, in any manner directly or indirectly caused, occasioned or contributed to, in whole or in part, by reason of any act, error, omission, negligence or other fault whether active or passive of the Contractor, a Subcontractor, or anyone acting under the direction or control or on behalf of the Contractor in connection with or incidental to the performance of the Contract or the Work.

The above samples are commercially unreasonable as they are overly broad and do not provide a reciprocal indemnity provision. The limits and ties to insurance are removed. The language of each is much broader, encompassing far more than third party claims and place extensive risks on the contractor.

A contractor that fully understands the additional risks involved in these non-standard indemnity provisions may decline to bid, or may increase fees to accommodate the additional risk. It should also be recognized that a prime contract's indemnity provision will normally flow down to all subcontractors and suppliers on the project and impact their pricing or willingness to participate in the project.

Indemnification commentary:

- The contractor's indemnification should be limited to the contractor's and its subcontractor's negligence or wilful misconduct and to the extent the contractor is at fault.

- Indemnification should be limited to indemnifying the owner from third party claims for which the contactor is responsible. For a large part, this is what can be insured. Incorporating broad language that requires the contractor to indemnify for any loss whatsoever and regardless of fault, for anything and everything an owner can contemplate, transfers risks that are not entirely manageable.

- When indemnification terms are not fault based, the contractor may be liable for risks outside of, or well in excess of, insurance coverage available.

- For balance in contracts, there must be a reciprocal indemnity should the contractor suffer a loss for which the owner is partially or entirely responsible.

- The indemnification should have appropriate limits such that the contractor is not exposed to a catastrophic loss for which he may not even be at fault.

- Indemnification should be balanced to what can be insured. In the end, to have an overly broad indemnity without the provision of adequate or available insurance may not prove to be of any value.

- **The 'unfairness' of a broadly worded, one-sided indemnity provision amplifies when an owner takes control of procuring project insurance dictating coverage and limits**. (see below)

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2) Insurance terms.

Project insurance typically is placed for the benefit (risk mitigation) of the owner, the contractor, and other project participants. Often an owner decides to take the procurement project insurance out of the hands and control of the contractor, stipulating that, while the owner is placing the insurance, the owner takes no responsibility for any deficiency in the insurance provided. Further to this situation, often the actual policy wordings are not made available to the contractor during the tendering period, as the insurance is usually placed by the owner after contract award.

In other words, the owner insures some of the contractor's risk, to an extent that the owner and its insurer decide, including the setting of deductible amounts. There is no chance for the contractor to balance the scope and risk of a one-sided indemnity to the insurance scope and limit set by the owner.

Sample …..e) (highlights added, < edited to delete direct reference to owner>

> The <owner> will maintain a Course of Construction insurance policy covering certain risks arising from the <project>. The <owner> will pay all premiums for the Course of Construction insurance and consequently Contractors should not include the premiums for such insurance in their costs. The risks for which this insurance will cover are described below in a general way only. The <owner> shall not be responsible for the accuracy of the descriptions of these risks nor does it represent or warrant that any policy contains insurance to any particular coverage or extent of coverage. It is the Contractors responsibility to ascertain the nature and extent of the coverage of the within described policies, i.e., to ascertain what risks are covered and to otherwise obtain insurance for those risks which are not covered by the within described insurance. Copies of the policies of insurance may be obtained **after award** by arrangement from the <XXXXXXX>

Sample …..f) (highlights added)

> Without restricting the generality of GC 12.1 – INDEMNIFICATION, **the *Owner*** will procure and maintain, at its own expense, the following insurance coverage……….
>
> ……Notwithstanding the fact that the *Owner* will provide the insurance referred in 11.1.1 above, the *Contractor* and not the *Owner* shall be responsible for performing the *Work* in accordance with the requirements of the Insurers, and any cost or liabilities incurred by the *Owner* as a result of the *Contractor's* failure to adhere to the requirements of the Insurers shall be borne by the *Contractor*.

Sample …..g) (highlights added, < edited to delete direct reference to owner>)

> *<the owner>* makes no representation or warranty with respect to the extent or adequacy of the insurance coverage referred to above and the *Contractor* and the *Subcontractors* shall satisfy themselves as to the adequacy of the scope, limits, duration, and coverage afforded by such insurance coverage.

Sample …..h) (highlights added, < edited to delete direct reference to owner>)

> The furnishing of any insurance shall not limit any of the obligations or liabilities of any of the *Contractor* or the *Subcontractors*, or waive, limit or constitute a forfeiture of any of the rights or limitations of liability of *<owner>*, as expressed elsewhere in this *Agreement*.

There are also non-standard contracts that include terms on the contractor being responsible paying for all deductibles, regardless of fault. This does not fairly respect the interests of the contractor where even if not at fault, the contractor is held responsible for a deductible and that deductible amount is determined solely by the owner.

Sample …..i) (highlights added, < edited to delete direct reference to owner>)

> The *Contractor* is solely responsible for the payment of every deductible amount for every policy of insurance provided under the *Agreement*

Commentary: Insurance:

Insurance is placed as risk mitigation for the benefit of all insureds provided by the policies. It is both unfair and one-sided for an owner to solely take control of project insurance and at the same time deny responsibility for the adequacy of the insurance being placed.

If the insurance is inadequate the contractor may be obliged to obtain additional project insurance, if available, and likely without compensation for the extra premium costs incurred.

****

3) Indemnification beyond the parties to the contract

In most of the non-standard contracts the various indemnification clauses used require the contractor to indemnify other entities that are not parties to the contract. For example, requiring the contractor to indemnify the consultant in the same way the contractor indemnifies the owner …..*The Contractor shall indemnify the Owner, the consultant,……*

Sample …..j) (highlights added, < edited to delete direct reference to owner>)

> The *Contractor* shall indemnify and hold harmless <*Owner*>, its officers, directors, personnel, patients, agents and consultants, including the *Prime Consultant*, from any and all *Claims* arising out of or as a result of the *Contractor's* failure, or the failure of any *Person* for whom the *Contractor* is responsible at *Law*, to comply with the requirements of this GC #__

Sample …..k) (highlights added, < edited to delete direct reference to owner>)

> *Owner Indemnitees* means *Owner*, *Consultant*, and their respective trustees, directors, officers, superintendents, employees, agents, consultants, representatives, third party contractors and, in the case of *Owner*, also its students. …. The *Contractor* shall indemnify and hold harmless the *Owner Indemnitees* from and against any and all Losses, whether in respect of Losses suffered by any *Owner Indemnitees* or by third parties, that directly or indirectly arise out of or are attributable to, the acts or omissions under and in respect of the *Contract Documents* and the *Work* of the *Contractor*, *Subcontractors*, *Suppliers* and/or *Personnel* or any other persons for whom they are in law responsible (including, without limitation, claims that directly or indirectly arise out of, or are attributable to, loss of use or damage to the *Work*, the *Owner's* property or equipment, the *Contractor's* property or equipment or equipment or property adjacent to the *Place of the Work* or death or injury to the *Contractor's* personnel or those of its third party contractors).

Commentary:

Indemnity provisions in a contract are not meant to incorporate an obligation to a non-party to the contract. Although there are some exceptions, it is a general rule of Canadian contract law that non-parties to a contract cannot enforce or otherwise make claims on a contract.

CCDC 2 specifically states that nothing in the contract creates any contractual relationship between the Consultant and the contractor.

> CCDC 2 GC 1.1.2 Nothing contained in the *Contract Documents* shall create any contractual relationship between:
> .1 the *Owner* and a *Subcontractor*, a *Supplier*, or their agent, employee, or other person performing any portion of the *Work*.
> .2 the *Consultant* and the *Contractor*, a *Subcontractor*, a *Supplier*, or their agent, employee, or other person performing any portion of the *Work*.

- quote,…. *Chitty on Contracts (2004) states "[t]he common law doctrine of privity of contract means that a contract cannot (as a general rule), confer rights or impose obligations arising under it on any person except the parties to it."*

It is inappropriate to have "patients" and/or "students" indemnified directly by the contractor. The contractor's indemnity should be to the owner alone, and indemnify the owner of claims made by the patient(s) or student(s).

****

4) Risk for design errors - Improper allocation of risk on the accuracy and correctness of contract drawings/specifications

There is a growing trend to assign risks to the contractor for errors, omissions, inaccuracies of the contract documents prepared by consultants retained by the owner.

Onerous clauses exist in non-standard contracts relating to drawing/specification reviews and responsibility for compliance to codes, regulations, and standards.

Sample …..l) (highlights added)

> The *Contractor* represents that, prior to entering into the *Contract*, it has identified and has notified the *Consultant* of all errors, inconsistencies or omissions in or between any *Drawings*, *Specifications*, schedules or other *Contract Documents*. The *Contractor* confirms and warrants that there are no errors, inconsistencies or omissions in the *Contract Documents* that will affect the *Contract Price* or the *Contract Times*. In the event of any remaining error, inconsistency or omission, the *Contract Documents* shall, unless otherwise directed in writing by the *Consultant*, be deemed to include the highest quality or standard specified, the more onerous obligation or the more stringent interpretation, and the *Contractor* shall not be entitled to any adjustment in the *Contract Price* or the *Contract Times* as a result of such interpretation.

Sample …..m) (highlights added)

> The *Contractor* shall review the *Contract Documents* and shall report promptly to the *Consultant* any error, inconsistency, or omission that the *Contractor* may discover. Such review by the *Contractor* shall be undertaken in compliance with the standard of care described in paragraph 3.15.1. Except for its obligation to make such review and report as aforesaid, the *Contractor* does not assume responsibility to the *Owner* or to the *Consultant* for the accuracy of the *Contract Documents*. **Provided** it has exercised the degree of care and skill described in this paragraph 3.4.1, the *Contractor* shall not be liable for damages, losses or costs resulting from such errors, inconsistencies, or omissions in the *Contract Documents* which the *Contractor* could not reasonably have discovered through the exercise of the required standard of care.

Sample …..n) (highlights added)

> The Contractor shall study and compare the Contract Documents with each other and shall verify the dimensions, quantities and details described in them. The Contractor shall notify the Engineer of all errors, omissions, conflicts and discrepancies found. Failure to discover or correct errors, omissions, conflicts or discrepancies which **ought** to have been discovered by such a study, shall not relieve the Contractor from full responsibility for unsatisfactory Work, faulty construction or improper operations resulting there from, nor from rectifying such conditions at the Contractor's expense.

Sample …..o) (highlights added, < edited to delete direct reference to owner>)

> Subject to GC 2.3.5, the *Contractor* shall review the *Scope Documents* provided by <*owner*> or the *Prime Consultant* and shall promptly provide *Notice* to <*owner*> and the *Prime Consultant* of any of the following that the *Contractor* discovers or becomes aware of or should discover or become aware of:
> (a) any errors, inconsistencies, omissions or ambiguities in the *Scope Documents*;
> (b) doubt as to the meaning or intent of any part of the *Scope Documents*;
> (c) any variance between the content of the *Scope Documents* and the *Law*, or
> (d) if, subsequent to the initial review of the *Scope Documents*, changes are made to the *Law* which require modification to the *Scope Documents*.
>
> 2.3.5 The review by the *Contractor* described in GC 2.3.4 shall be to the best of the *Contractor's* knowledge, information and belief and shall be at or above the level of the industry standard of contractors performing similar work in Alberta. The *Contractor* shall not be liable for costs, expenses or damages resulting from any conditions described in GC 2.3.4 which the *Contractor* did not discover or become aware of or should not have discovered or become aware of, provided the *Contractor* conducts such review to the best of *Contractor's* knowledge, information and belief and at the level of the industry standard of contractors performing similar work in Alberta.

Commentary:

These clauses become subjective when considering the use of terms as 'ought to have discovered' or 'should discover'. Samples n & o read that the contractor does <u>not</u> become liable for costs 'only' when it is determined that the contractor should <u>not</u> have discovered the error or omission. This places risk on the contractor when considering that it is the owner or its consultant that will be interpreting what the contractor ought to have known.

In other words, clauses of this nature place some liability on the contractor for errors and omissions in the contract documents. However, this liability is more properly placed with the design consultant and the E & O insurer. Whether a contractor finds an error/omission or not does not alter the fact that there was an error or omission made by the design consultants.

The contractor's liability in this regard should only arise if the contractor knowingly proceeds with work after having been aware of the error or omission made by the consultant.

Accepting liability for errors and omissions in the Contract Documents exposes the contractor to design risk (for example, claims arising out of non-compliance with applicable building codes or construction of works not fit for their intended purposes etc.) Contractors should not be expected to assume this risk; contractors are not in the business of document review; they are in the business of constructing buildings as per the drawings and specifications provided to them by or on behalf of an owner.

Why should contractors be avoiding design risk?

- Contractors have limited ability to hold the consultant accountable for design errors. The contractors will not have a contract with the consultant, and depending on the circumstances, the consultant may not owe the contractor a duty of care. This means that if the consultant makes an error in the contract documents, and the contractor suffers a loss, the contractor will not have a direct cause of action against the consultant in contract and may not have a cause for action in negligence. On the other hand, the owner will have a contract with the consultant and the consultant will owe the owner a duty of care. If the consultant makes a mistake, the owner can sue the consultant in contract and negligence. Therefore, as between the owner and the contractor, the owner should take the risk of errors in the contract documents because the owner can transfer that risk, and the associated liability, squarely onto the consultant – where it belongs. The contractor has limited ability to transfer that risk to subcontractors and insurers, and should not be expected to simply absorb it. It is also likely to be an uninsured risk for contractors.

- If the contractor must assume the liability for errors etc. in the contract documents, it needs to ensure it is transferring the risk somewhere. There are a number of options here e.g. contractor can engage a professional engineering or architectural form to conduct a peer review of the contract documents, but this will obviously have cost implications for the owner as the contractor would seek to recoup that cost as part of its bid.

The simplest and most cost-effective approach is to leave the liability associated with errors in the contract documents with the consultant (and its liability insurer) and for the owner to exercise its rights and remedies against the consultant should an issue arise.

****

5) Non-payment for materials delivered to site until incorporated into the work

Non-standard contracts are incorporating non-standard payment provisions that affect the contractor's monthly payments. One example appearing in contracts specifically addresses materials or products delivered to the project site:

Sample …..p) (highlights added)

> "….the cost of any *Material* must not be included in a *Construction Period Invoice* until the *Material* is incorporated into the *Work* and installed in its final location."

Sample …..q) (highlights added)

> *Products* delivered to the *Place of the Work* must be incorporated into the *Work* before applications for payment for such *Products* are made by the *Contractor*. No amount claimed for payment with respect to any *Products* shall include amounts for *Products* incorporated into the *Work* unless such *Products* are free and clear of all security interests, liens and other claims of third parties."

Commentary:

The above examples are contrary to industry standard practices and have significant implications.

The Alberta Lien Act provides rights for suppliers of products, whether they be for light fixtures, wire, pipe, equipment, or construction materials of any kind. Irrespective of whether products have been "incorporated into the work" or not, a supplier's lien rights arise as soon as material is delivered to the site and expire 45 days after the date of last delivery to site.

It is typical that, for a construction project to be efficient, materials are delivered in a manner and timing that suits the contractor (subcontractor) schedule requirements. Often, materials, products, and equipment have to be delivered and stored at the project site in advance of their "incorporation" into the work.

The overall owner's cost for a project will increase as a result of these clauses. This will occur when the contractor or subcontractor is obliged to pay for materials/products without the ability to progress claim the costs to the owner. Or, if a supplier is told that he will not be paid until his products are installed and that payment will be after his lien rights expire, the supplier will inflate his cost when quoting.

In addition, the non-payment for materials on site will create an imbalance between the contractor's progress billings and the actual cost of work performed. There is potential for bonding complications that may arise in the event default of a contractor or subcontractor.

As well, the incorporation of this non-standard term on payment for delivered materials is in direct conflict with the prompt payment initiatives raised by the industry and recognized by some of the public entities.

****

6) Unfair termination/suspension of work clauses

Non-standard contracts incorporate temporary suspension of work and termination of work clauses in various ways. In most cases, the clauses are written to limit owners costs and do not recognize or allow the true cost impact to a contractor should an owner suspend work or terminate.

Sample …..r) (highlights added, < edited to delete direct reference to owner>)

> **TERMINATION**
> 1) <owner> may, by giving a written notice of termination to Contractor, terminate the Contract at any time.

Sample …..s) (highlights added, < edited to delete direct reference to owner>)

> **Termination for Convenience**
> <*Owner*>, in its sole discretion, shall have the right, which may be exercised at any time, to terminate all or a portion of the *Work* or this *Agreement*, without reason or cause, by giving not less than 10 *Business Days' Notice* to the *Contractor*.
>
> If the *Work* or this *Agreement* is terminated by <*Owner*>, pursuant to this GC xx:
> (a) the *Contractor* shall be entitled to:
> (i) the portion of the *Contract Price* owed but unpaid to the date of termination, computed in accordance with this *Agreement*; and
>
> (ii) reasonable costs incurred by the *Contractor* in terminating the *Work* or this *Agreement*, provided such costs are approved in writing by <*Owner*>, prior to being incurred by the *Contractor*.
> If the *Work* or this *Agreement* is terminated by <*Owner*>, pursuant to this GC xx, <*Owner*>, shall not be liable to the *Contractor* for any amounts other than as stated in this GC xx, as applicable, including any *Claims* or *Consequential Losses*, except as expressly provided for herein, and the *Contractor* shall indemnify and hold harmless <*Owner*>,, its officers, directors, personnel, patients, agents and consultants from any such for any amounts other than as stated in this GC 8.3. This indemnity shall survive expiration or earlier termination of this *Agreement*."

Commentary:

Termination for convenience clauses appear in most non-standard contracts and then deal with compensation or non-compensation to the contractor in differing methods.

Including an Owner's "termination for convenience" clause without any or complete consideration of the actual overall cost to contractor is unfair as the contractor has no way to quantify its risk.

In Sample s) above, requiring an additional indemnity from the contractor in the case of a termination for the owner's convenience is unfair and commercially unreasonable.

At the very least, contractors should be entitled to recover the direct costs associated with the termination, including all costs of demobilization, protection of the work and losses sustained on products and equipment, all costs reasonably incurred by the contractor to terminate any contracts with subcontractors and suppliers, and any other reasonable costs directly incurred by the contractor in connection with such termination.

QUOTE – web clip 'Mullun"…. "*In conclusion, it is clear that government authorities usually incorporate the "termination for convenience" clause into construction contracts as they may need protection against the risk of running out of money, such as that provided by a termination for convenience clause that expressly limits or precludes recovery of anticipated but unearned profits. However, such policy reduces the number of potential bidders and reduced competition usually leads to a higher price as many contractors may refuse to bid for a contract that is so uncertain in scope; and also, such a policy introduces additional risks from the contractor's prospective and prudent contractors will likely price that risk into their bid price."*

****

7) Owner as sole 'interpreter of the contract'

In non-standard contracts there is often a diminished role of the consultant, whose role in CCDC is the "interpreter" of the requirements of the contract documents. Contractors could rely on the impartiality of the consultant in determining matters involved with the contract documents prepared by the consultant.

CCDC2 includes: *"Interpretations and findings of the Consultant shall be consistent with the intent of the Contract Documents. In making such interpretations and findings the Consultant will not show partiality to either the Owner or the Contractor."*

Some non-standard contracts need to be read in their entirety to demonstrate the one-sidedness of the contract where the owner inserts itself as the sole interpreter of the agreement. In one case, a set of contract terms uses the phrase *"the owner, in its sole discretion, may……"* over 20 times in different sections of the agreement.

Sample …..t) (highlights added, < edited to delete direct reference to owner>)

> Any errors, omissions, discrepancies or matters requiring clarification shall be reported in writing to the <owner> at least five (5) working days prior to the tender Closing Date. The <owner> shall, if necessary, send written instructions or explanations to all Bidders. If a Bidder fails to report any such errors, omissions, discrepancies or matters requiring clarification within the time period stipulated, the <owner> shall be the sole judge as to the intent of the Tender Documents.

Sample …..u) (highlights added, < edited to delete direct reference to owner>)

> <owner>, in the first instance, shall decide on questions arising under the Contract Documents, interpret requirements therein, and judge performance in accordance therewith.

Commentary:

This type of modification of industry standard roles can lead to unnecessary disputes which will have cost and timing implications. In standard contracts, the impartial consultant's decision is less likely to be challenged as unreasonable.

In most traditional contracts, the consultant, at first instance, is appointed to rule on contractual interpretation between the Owner and contractor. It is cold comfort to the contractor if the owner becomes the sole judge of an interpretation or dispute between the contractor and owner. The owner has an obvious bias to find in its own interest.

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8) Onerous Audit provisions

Sample …..v) (highlights added)

> **RECORDS TO BE KEPT**
> 1) The Contractor shall for a period of at least seven (7) years from the date of the Final Certificate of Completion, maintain and keep full records, vouchers, other writing and information in respect of his estimates and actual cost of the work, and, shall make available a copy, audit or inspection by any as being required to be maintained by the Owner. The records stipulated in this contract as being required to maintain by the Contractor may be subject to the protection and access provisions of the *Freedom of Information and Protection of Privacy Act*. Should the Owner receive a request for any of these records, at the Contractors' expense, to the FOIP Coordinator and the Owner within 15 of business days from official notification by the FOIP Coordinator.

Sample …..w) (highlights added)

> The *Contractor* shall keep and maintain in accordance with Canadian generally accepted accounting principles during the Term and for a minimum of seven (7) years following the completion of the *Work* or expiry or termination of the *Contract*, whichever is later, complete and accurate books, records and accounts relating to the *Contract*. The *Contractor* shall, on demand, provide to the *Owner* access to such books, records and accounts for the purpose of auditing the *Contractor's* performance of the *Contract* and amounts charged thereunder, and for such purpose shall allow the *Owner* to examine, make copies of and take extracts from such books, records and accounts. This paragraph 5.1.3 shall survive the expiry or termination of the *Contract*, howsoever caused.

Sample …..x) (highlights added < edited to delete direct reference to owner>)

> **21.1 Records and Audit**
> (1) The *Contractor* must, at its sole expense, following execution of the *Agreement* and for a period of seven years following the termination or expiry of the *Agreement:*

(a) keep and maintain in an original form, or in an electronic form that preserves the integrity of the original (as applicable) without alteration, deletion or addition, all accounting and all other *Records;*
(b) keep and maintain all *Records* in accordance with generally accepted accounting principles and *International Financial Reporting Standards,* as applicable;
(c) keep and maintain all *Records* in accordance with the *Technical Specifications;* and
(d) make reasonable efforts to protect the *Records* from both physical damage and unauthorized access.
(2) If any *Records* kept and maintained by the *Contractor* in electronic form in accordance with Subsection 21.1 (1)(a) require special equipment or specialized knowledge to convert the data contained in them into readily readable form, all assistance and facilities reasonably required for such purpose will be provided by the *Contractor* at its sole expense.
(3) *The <owner>* will have the right to inspect, examine, make copies of, and audit all of the *Contractor's Records* maintained by the *Contractor* under Subsection 21.1 (1) at all reasonable times, without prior *Notice,* for the purpose of auditing and monitoring compliance with the requirements of the *Agreement* or the *Procurement Documents,* including any payments made by or to *The <owner>*. On request by *The <owner>,* the *Contractor* will make available and provide access to, or provide copies of (or do both, at the discretion of *The <owner>)* any *Records* requested by *The <owner>* at the *Contractor's* sole expense and within the timeframe provided at the time of the request.
(4) Subject to Subsections 21.1 (1), 21.1 (2) and 21.1 (3), the costs of any audit conducted by *The <owner>* under authority of Subsection 21.1 (3) will be the responsibility of *The <owner>* unless the audit identifies materially inaccurate, materially misleading, or materially incomplete *Records.* If the audit identifies materially inaccurate, materially misleading, or materially incomplete *Records,* the *Contractor* must reimburse *The <owner>* for the total costs of the audit.
(5) This Section 21.1 will not be interpreted to limit, revoke, or abridge any other rights, powers, or obligations relating to audit that *The <owner>* may have under *Applicable Law,* whether those rights, powers, or obligations are express or implied.
(6) If the *Contractor* subcontracts all or a portion of its obligations under the *Agreement,* any agreements formed between the *Contractor* and any *Subcontractors* will expressly include provisions that extend the audit rights contained in this Section 21.1 to *The <owner>*. *The <owner>* will have the right to request copies of original invoices from *Subcontractors* relating to completed *Work.*

Commentary:

Audits of a lump sum contract should not occur beyond verification that the contractor has invoiced the contract price and that subcontractors and suppliers have been paid. This latter item is covered by statutory declarations submitted.

Extending contract obligations for 7 years and extending the audit obligations to subcontractors for the same duration is not at all practical.

An audit of the contractor's estimate versus actual costs is not appropriate for stipulated price contracts, as the contractor's profitability (or lack of) on a project is the contractor's private information.

****

9) Risk for unanticipated site conditions / unkown conditions

Non-standard contracts are often including clauses that transfer unknown and unquantifiable risks to the contractor regarding reliance on soils reports or other "information" documents.

Sample …..y) (highlights added)

> The *Contractor* also declares that in tendering for the *Work* and in entering into this *Contract*, the *Contractor* did not and does not rely upon information furnished by the *Owner* or any of its agents or servants respecting the nature or confirmation of the ground at the *Site* of the *Work*, or the location, character, quality or quantity of the materials to be removed or to be employed in the construction of *Work*, or the character of the construction machinery and equipment or facilities needed to perform the *Work*, or the general and local performance of the *Work* under the *Contract* and expressly waives and releases the *Owner* from all claims with respect to the said information with respect to the *Work.*

Commentary:

This is another example of inappropriate allocation of risk to the contractor. In the case of soil reports, the owner typically selects the consultant and obtains the report. The owner also decides how comprehensive the soil investigation might be. There is no expectation by any of the parties that the contractor would do its own soil investigation, and if it did during a tendering phase, the owner would not pay for it.

Contractors should be entitled to rely on information provided by the owner. Otherwise this will lead to a duplication of costs as contractors will pay for investigations etc. to be done and pass this cost onto the owner who may already have commissioned such a report.

****

10) Limiting risk by modification to industry standard Force Majeure terms

Some non-standard contracts are changing force majeure provisions such that the contractor becomes at risk for items beyond its control, going so far as to place the risk of major weather events on the contractor.

Sample …..z) (highlights added)

> In no event will adverse weather be considered to be a cause of delay beyond the Contractor's or any Subcontractor's control or not reasonably foreseeable at the time the Contract was entered into.

Sample …..aa) (highlights added)

> Weather - Any inclement or unfavorable weather conditions shall not entitle the Contractor to an extension an increase in compensation, nor relieve the Contractor from any obligation hereunder, including in particular from any term related to the Work Schedule or Compensation.

Commentary:

The contractor should not be assigned risks for unforeseeable events or any issue beyond its reasonable control. The risk of a major weather event is best placed with the owner who best knows its direct impact, and is in a position to mitigate such a risk with insurance or other contingencies if desired.

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11) Modification of industry standard warranty terms

CCDC 2 12.3.2 states that "The *Contractor* shall be responsible for the proper performance of the *Work* to the extent that the design and *Contract Documents* permit such performance."

Owners are often deleting the entire clause or the wording underlined above so that the contractor is responsible for warranting the proper performance of the work even if the contract documents did not permit such performance, or making such provision subject to unreasonable document review provisions. This is commercially unreasonable. Contractors should only be responsible for warranting the proper performance of the work to the extent the contract documents permit such performance.

Sample …..bb) from supplemental conditions to a CCDC 2 agreement

> Delete paragraphs 12.3.2 and 12.3.4 in their entirety.

Sample …..cc) from supplemental conditions to a CCDC 2 agreement

> Except for the extended warranties as described in paragraph 12.3.6, the *Contractor* warrants that the *Work,* including all *Products,* shall be of merchantable quality and fit for their intended purpose, as described and specified in the *Contract Documents,* and free of defects in materials and workmanship for a period of 1 year from the date of *Substantial Performance of the Work* and, further, such warranty shall apply to all warranty work and to *Products* repaired or replaced under warranty or a period of 1 year from the date of acceptance of such warranty work or repair of or replacement of *Products.*

Commentary:

Non-standard contracts are modifying warranty provisions beyond industry standard terms to incorporate terms of "fit for their intended purpose." As all (or at least most) 'products' for a project are selected and specified by the design consultant, the obligation for ensuring their fitness for purpose should remain with the party that selected the product, namely the design consultant.

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12) Other one-sided unworkable or impractical examples

Assignment:

Sample …..dd) (highlights added)

> Where provided in the *Contract*, the *Owner* may assign to the *Contractor*, and the *Contractor* agrees to accept, any contract procured by the *Owner* for *Work* or services required on the *Project* that has been pre-tendered or pre-negotiated by the *Owner*, and upon such assignment, the *Owner* shall have no further liability to any party for such contract.

Commentary:

In conventional lump sum contracts the contractor controls which subcontractors it chooses to work with. The above provision allows an owner to unilaterally assign a subcontractor which may not be capable or may not agree to the contractor's terms. It is also unreasonable that, after the unilateral assignment, the owner claims no further responsibility.

****

Conflict of Interest:

Sample …..ee) (highlights added)

> The *Contractor* shall disclose to the *Owner*, by *Notice in Writing*, without delay, any actual or potential situation that may be reasonably interpreted as either a conflict of interest or a potential conflict of interest, including the retention of any *Subcontractor* or *Supplier* that is directly or indirectly affiliated with or related to the *Contractor*. Upon such disclosure, the *Contractor* shall suspend the *Work* until it receives written authorization to proceed from the *Owner*, which authorization may be granted or withheld at the *Owner*'s discretion. If such authorization by the *Owner* is not granted within five (5) business days of the date of the *Notice in Writing*, then and the *Owner* shall be deemed to have terminated the *Contract Documents* pursuant to GC xx without further liability to the *Owner*.

Commentary:

This sample presents a clause that is unworkable. It makes the contractor responsible for attempting to determine what the owner may perceive as a potential conflict of interest which is vague and subject to individual opinion. It is unreasonable that a project would have to be shut down and unacceptable that an owner would terminate a project with no further liability.

****

Notice:

Sample …..ff) (highlights added)

> "Failure to give such *Notice in Writing* of intent to claim to the other party and the *Consultant* in strict compliance with any express time period stipulated in the *Contract Documents* shall constitute a waiver of the right to make such a claim."

Commentary:

Non-standard contracts and supplemental conditions often modify "notice" provisions extensively in various locations of the contracts setting time limitations for written notice. The time limits are sometimes as little as 24 or 48 hours which, depending on the situation, can be unreasonable and have significant implications for the contractor.

****

Prime Contractor:

Owners are increasingly allergic to 'prime contractor' responsibilities and liabilities and often seek to transfer such responsibilities onto the contractor so that the contractor (rather than the owner) is responsible for coordinating the safety of other contractors on the shared worksite. This raises several issues: (i) often there is no end date for these prime contractor responsibilities; (ii) the contract does not address phased turnover issues (where the contractor is turning over a construction site to the owner in phases e.g. mixed use tower), or if it does, it provides that such turnover is within the owner's control; and (iii) despite being responsible for other contractor's safety, the contracts do not include an obligation on the owner to ensure that the other contractors follow the contractor's safety instructions. These factors can all result in the contractor being responsible for the safety of other contractors and subcontractors over whom it has no control, and no means to exercise control.

Sample …..gg) (highlights added)

> <*Owner*>delegates and the *Contractor* accepts the role and responsibilities of the *Prime Contractor for Safety* for the entire *Project Site* until the *Facility Takeover Date* of the entire *Work*. A partial takeover of the *Project* by <*Owner*>shall not affect this delegation, unless *Notice* of a change in the designation of the *Contractor* as *Prime Contractor for Safety* is provided by <*Owner*> to the *Contractor*, in which case, the *Contractor* shall follow the directions of <*Owner*>as set out in the *Notice*.

Commentary:

Contractors need the ability to extricate themselves from the prime contractor role when they are no longer in control of what happens on the work site, or a certain portion thereof.

If contractors are assuming this responsibility, the contract needs to clearly reflect how and when the prime contractor role will be transferred to the owner, or its designate. This should not be left to the owner's discretion.