



Alberta Construction Association

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Mr. Brian Fedor
ADM, Learning Facilities
Alberta Infrastructure

Transmitted via email: brian.fedor@gov.ab.ca

Dear Brian:

Re: Alberta Construction Association comments on AB Infrastructure Liquidated Damages Contract terms

ACA appreciates the opportunity to provide comment on the introduction of liquidated damages clauses to AI contracts.

ACA understands the objective of introducing liquidated damage clauses is to act as a catalyst to improve completion times, particularly for school projects. ACA believes there are complexities and unintended consequences in attempting to achieve the objective, as illustrated in Annex A.

ACA urgently requests a follow-up meeting to discuss how the industry can better meet the needs of Alberta Infrastructure, while minimizing unintended consequences.

Sincerely,

Ken Gibson
Executive Director

Annex A

Alberta Construction Association comments on AB Infrastructure Liquidated Damages Contract terms

Our comments can be grouped under three subjects:

- Potential causes of delays
- Consequences of liquidated damage clauses, and
- ACA recommendations for Infrastructure's consideration

ACA's points are illustrated by comments received from our members.

Potential causes of delays

- Changes to design post-tender
- Lengthy owner approval process including resolution of disputes
- Design bid build procurement can sometimes select general contractor that lacks sufficient capability / capacity
- With many schools scheduled for same time of completion, there may be capacity issues for certain specialized subs that all the projects are relying on

"Our biggest loss of time and as well our biggest frustration is getting answers to RFI's and getting submittals approved in a timely fashion. On all of our current school problems this has been a major problem. Has resulted in significant time loss, and then the owner and consultants don't want to adjust the completion date or add time to the schedule to overcome these losses. If the drawings were not such poor quality this would not be such an issue. Alberta Infrastructure has totally failed at managing their design teams and their own internal resources and processes, and now think they can overcome it by carrying a bigger stick.

As well the system is setting up the contractors to fail. They set completion dates for large bundles of schools all to finish at the same time. The design in some instances single sources products for which there are finite companies available to supply or install, so all 10 or 20 or 30 schools all need the same companies on site at the same time and there is not sufficient capacity available in the system to handle the load."

"Mainly the slow downs on site were due to the architects having to do multiple change orders for things that were deviated from in the original spec. For the [district] schools, the [district] provided a spec, and the final draft that came out from the architect was something completely different. It took months to get the change orders going, and at one point we were supposed to be starting a school in a week, and had no idea what we were installing"

"I understand that the timelines were agreed to by the general contractors, but they knew they would be unattainable, they just couldn't pass up the work. To place the blame on the general contractors, and subcontractors or architects is not correct, we all have to work as a team from the bottom to the top."

“It appears that the contractor is having to pick up the pieces of consultants and owners who have dragged their feet in getting the tender package together in the first place. Where is their accountability? They all knew that the school needed to be up and running for September 2018 and should have ensured that everything was completed (tender, review, award) for a construction start on site of July 1, 2017.

In our experience AI takes the full 60 days (or more) to issue their Notice to Proceed. Based on this project that puts approval at the end of July. Where is their accountability to speed up their review process? Has this review time been properly reflected in the overall project schedule? I don't think so.

From the time a Notice to Proceed is received, it takes approximately one month to start work onsite as we need to issue contracts to our subs, review and approve submittals, mobilize, etc. Has this been factored into the overall project schedule? I don't think so.”

“There can be abatement work that needs to be done at the beginning of the contract. A lot of abatement contractors, especially the good ones, would already be booked for the summer months resulting in likely delays.”

“We have no problem with being held accountable but the timelines that we are being held to must be realistic to start with and everyone involved in the project must be held to the same standard set for the GC.”

“Another issue we have come across is the length of time required for Change Order approval. We have had changes requested by Alberta Infrastructure that we price within 10-15 working day that then sit for upwards of 4/5 months without approval. If AI is going to be enforcing a penalty for delay, then a better system may be needed to ensure that any changes are dealt with in a more quick and efficient manner.” “

“There is no mention of the design community and the lack of timely answers, or answers from the owners that would cause delay. The amount of work for the Prime goes way up in terms of tracking hold ups, and covering their rear ends.”

*“If AB Infrastructure chooses the appropriate contractors to bid on the right projects than they will not have to bring out the "stick" in the Conditions related to Liquidated damages and schedule default. **Prequalify**”*

“The Prime will definitely push this risk down to the subs and 90% of the subs won't know what hit them.”

Currently the biggest issues we are finding in projects we are bidding are:

- 1. The tender documents are poorly done and many changes have to be made to finish the work on the project causing delays.*
- 2. The Owner decides at the last minute that he wants changes and delays the work for extended periods without any culpability.*
- 3. The Consultants don't meet any timelines for review and return of submittals and make changes on items well after that portion of the work is already complete.*

Every one of these items cause major delays in construction completion but are not considered by the Owner to be reasonable issues to extend contract deadlines. The only way this system works is if there is accountability for the Owner, Consultant and Contractor. The changes made

to this document put the responsibility squarely on the Contractor with the Owner deciding if the issues warrant any time extension. This is completely unreasonable.”

“This is not a fair and equitably document. In my opinion the root cause of the problem is not the contractors but the way the projects are tendered. As it is government work everyone “QUALIFIED” is entitled to bid the projects. In order to ensure that “Qualified” contractors are bidding a pre-qualification system needs to be incorporated to eliminate contractor that cannot live up to the expectations of the documents. This however would increase the overall cost of the project because they would be bid by competent and qualified contractors ensuring that they have included for all costs to complete the projects on time and to the appropriate quality. Putting these kinds of penalties on a project are going to make sure any competent contractor won’t even bid the project. The only ones that will bid are the ones that don’t read the front end of the specification. Those are not the contractors the Province is looking for.”

“What I would suggest is that A.I. work backwards from a completion date with realistic schedule times and allowing enough time for them to commission a design team and complete a design for tender.”

Consequences of liquidated damages clauses

- General contractor may download damages to subs and therefore may not lead to desired outcome of timely completion
- Fewer GCs and subs bid, leading to higher prices

“The continued efforts to download all of the risks onto the contractor, is going to drive up the prices on the schools as well as reduce the number of bidders, which in turn can mean higher pricing. Applying liquidated damages always means some contractors and subcontractors will bow out, especially based on the outcomes of the new build program over the past few years.”

“If the government wants to put liquidated damages on projects, this will result in higher costs, and less bidders.”

“ I would not even entertain the prospect of bidding a project with these one sided penalties to the contractor and no accountability to the Owner or Consultants.”

“The Province needs to wake up and get the proper contractors doing these projects and quit trying to squeeze a high quality project out of a contractor that submitted the lowest price and hasn't allowed for the contingencies to ensure that they can complete the project to the appropriate quality and on schedule. Threatening the contractors with severe penalties only eliminates prospective bidders.”

“As per section 00 72 00 the Contractor is even limited as to the damages he is entitled to pursue.

Section 00 72 00 6.2 Delays

Revised .1

has the Province deciding what a reasonable extension is to the contract for Force Majeure delays with no discussion required with the Contractor

Revised .2

eliminates any option for delays due to weather (which can in some years be significant) and states “No claim for delay shall be made ...arising from the Contractor's efforts to maintain the schedule”. I am not sure exactly what they are getting at but unless I am misinterpreting this statement no matter what efforts the Contractor makes it does not excuse him from extenuating circumstances that delay the schedule.

Original .2

has been deleted in its entirety. This was the Contractor's only option for getting a schedule extension for circumstances beyond the Contractor's control.

They have deleted all possible bonus provisions to the Contractor, Sections 00 73 03 Payment of Bonus and Bonus Provisions. So the Contractor gets penalized for any late completion but has no incentive to complete early.

Section 00 73 80 Payment Conditions (just one example)

6. Withholdings and Deductions

States in:

6.1.1 “in the opinion of the Province”

6.1.1.3 “ time agreed by the Province”

There is no place where the Contractor has an option for dispute.

6.5 states that “the Contractor irrevocably grants to the Province the right to claim against or ... without limitation”. Who would agree to this?”

“If infrastructure implement a penalty clause the trades and contractors will allow for damages in their quotes. The costs of building for A.I. will definitely increase.

The other side to this is the contractor may allow for a delay claim specialist to monitor project and work towards a delay claim against A.I. at the end of the project.

I’m not sure Infrastructure want to deal with these claims which I believe would be frequent.”

“As a Tier one General contractor, we would not consider bidding these projects, the risk profile/sharing on this contract does not make any sense. I would assume that the other tier one general contractors will feel the same. The result of this risk download is that the contractors that are best suited to manage this risk will not partake in the tender process.

AI will now be in the same position that they are in now, having late school deliveries, with the ability to penalize contractors for events likely out of their control. After AI starts the process of imparting LDs on contractors even more General Contractors will abandon the AI format contract.”

ACA Recommendations

- Consult with industry about preferred method of procurement, given expected industry capacity at time of tender and project execution
- Promote more collaborative forms of project delivery; and incent innovation and lean execution
- Efforts to improve quality of tender documents to minimize changes to design post-tender. For example, Owner quality assurance processes and specific deliverables and consequences for non-performance in owner’s contracts with consultants
- Pre-qualify GCs (based on proven track record to deliver multiple school projects at same time) and key subs that have most impact on schedule
- Develop with ACA new dispute resolution processes
- Conduct post completion project review including owner project manager performance for lessons learned and share with industry