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.

****

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)

****

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 not become liable for costs 'only' when it is determined that the contractor should not 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.

****

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.

****

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.

****

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.