

Non-Standard Contract Clauses

CAN YOU AFFORD TO IGNORE THEM?

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Welcome

INTRODUCTIONS



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WHY: EDUCATE AND FOSTER DIALOGUE WITH STAKEHOLDERS

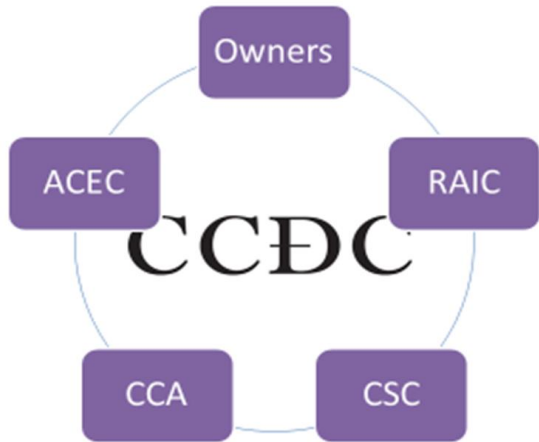
HOW: PARTICIPATION IS VITAL

WHAT: CAPTURE LEARNING

Outline for the Day

- OVERVIEW
- PREPARE PROJECT TENDER
- REVIEW CLAUSES
- WRAP UP

Value of Standard CCDC Contracts



- ✓ Jointly developed by owners/contractors
- ✓ Balanced agreements
- ✓ Allocates risk to appropriate parties
- ✓ Well understood
- ✓ Extensive use by private owners
- ✓ Limited use by public owners

Issues with NON- Standard Contracts

- ✗ Wide variety of formats
- ✗ Every owner (and their lawyer) has a favourite
- ✗ Creates confusion
- ✗ Inconsistent interpretations



Non-Standard Clauses – What Are They?



DEFINITION—

“burdensome, oppressive or troublesome; causing hardship: having obligations or responsibilities, especially legal ones, that outweigh the advantages”

Non-Standard Clauses – Why Do Owners Use Them?

- Most owners are unaware of their existence
- Typically written by non construction legal ‘experts’
- Based on a one off historical event
- Often involve procurement professionals



Non-Standard Clauses – Where Do We Find Them?

- Typically in division 1 or supplementary conditions
- Invitation to tender
- Can be anywhere in the documents
- Read the specs!



Non-Standard Clauses – Who Cares About Them?

- The entire contractor/subcontractor/supplier chain
- Bonding and insurance providers
- Owners
- Consultants



Non-Standard Clauses – If We All Care, Why Do We Ignore?

- Estimators dislike Division 0 & 1
- Project managers dislike Division 0 & 1
- Subcontractors dislike Division 0 & 1



Non-Standard Clauses – How Do We Deal With Them?



ONLY FOUR CHOICES

- ☐ Accept
- ☐ Eliminate
- ☐ Transfer
- ☐ Mitigate

NON-STANDARD CLAUSES EXERCISE

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1. DETERMINE WHAT THE CLAUSE MEANS
 2. RAMIFICATIONS/IMPACT
 3. RECOMMENDED SOLUTIONS/CHANGES
 4. MITIGATION STRATEGIES

INDEMNIFICATION

NON-STANDARD CLAUSE

“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.”

INDEMNIFICATION

WHAT IT MEANS

Indemnity is a contractual obligation of one party to compensate the loss occurred to the other party due to the act of the indemnitor or any other party.

INDEMNIFICATION

RAMIFICATIONS

- No reciprocity
- Limits and ties to insurance not in place
- No cap on liability
- Includes consultants and others

INDEMNIFICATION

RECOMMENDED SOLUTIONS/CHANGES

- ✓ Limit indemnity to contractors negligence or willful misconduct and to extent of contractor's fault
- ✓ Limit to third party claims
- ✓ Limit to insurable losses
- ✓ Address reciprocity
- ✓ Allocate appropriate limits

INDEMNIFICATION

MITIGATION STRATEGIES

- Accept (not recommended)
- Don't bid
- Discuss at pretender
- Increase fees and/or assign risk costs

INSURANCE

NON-STANDARD CLAUSES

“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...”

INSURANCE

WHAT IT MEANS

Insurance is placed as risk mitigation for the benefit of all insureds provided by the policies.

INSURANCE

RAMIFICATIONS

- Out of control of the contractor, but owner takes no responsibility for lack of coverage
- Policy wording not available so can't determine adequacy of coverage
- Unknown deductibles

INSURANCE

RECOMMENDED SOLUTIONS/CHANGES

- ✓ OK for owners to place insurance
- ✓ Must share coverage and deductible details
- ✓ Look at complete project policies

INSURANCE

MITIGATION STRATEGIES

- Accept (not recommended)
- Price and include additional insurance in bid (DIC policy)
- Review with owner and broker prebid

DESIGN

NON-STANDARD CLAUSE

“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.”

DESIGN

WHAT IT MEANS

Assigns risks to the contractor for errors, omissions, inaccuracies of the contract documents prepared by consultants retained by the owner.

DESIGN

RAMIFICATIONS

- You are doing the consultant's work
- You are taking liability for errors and omissions
- You are exposed to design risks
- You likely do not have proper insurance

DESIGN

RECOMMENDED SOLUTIONS/CHANGES

- ✓ Ensure Errors and Omissions Liability is with the consultants
- ✓ Ensure the Owner exercises its rights and remedies against the consultant

DESIGN

MITIGATION STRATEGIES

- Accept (not recommended)
- Don't bid
- Transfer the risk; carry costs in estimate
- Review with owner prebid; beware of consultants wrath

PAYMENT TERMS

NON-STANDARD CLAUSE

“...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.”

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

PAYMENT TERMS

WHAT IT MEANS

- Can't invoice for materials until installed; carrying costs
- The terms and conditions are unclear; what is an approved invoice?

PAYMENT TERMS

RAMIFICATIONS

- Carrying costs of materials ordered early
- Implications to schedule
- Increases material costs if they are not paid in timely manner
- Onerous payment terms
- May contradict with lien legislation
- Conflict In Case Of Default; Who Owns?
- Poorly defined dates
- Definition of approved invoice

PAYMENT TERMS

RECOMMENDED SOLUTIONS/CHANGES

- Early proactive discussion about payment terms
- Clear definition of installment
- Clear definition of payment
- Seek process for transferring ownership of materials to owner

PAYMENT TERMS

MITIGATION STRATEGIES

- Accept
- Ensure terms transferred to subcontractors and suppliers
- Review terms with your banker if a significant project
- Price the cost of financing and carry in bid

SITE CONDITIONS

NON-STANDARD CLAUSE

“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.”

SITE CONDITIONS

WHAT IT MEANS

The contractor is taking responsibility for all unforeseen site conditions.

SITE CONDITIONS

RAMIFICATIONS

- Risk!
- No limit to exposure

SITE CONDITIONS

RECOMMENDED SOLUTIONS/CHANGES

- The responsibility rests with the owner
- Discuss at a prebid meeting; seek assistance from Associations

SITE CONDITIONS

MITIGATION STRATEGIES

- ✓ Accept (not recommended)
- ✓ Don't bid
- ✓ Engage third party to review prebid
- ✓ Review with owner pretender

CONTRACT INTERPRETATION AND ASSIGNMENTS

NON-STANDARD CLAUSE

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

“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.”

CONTRACT INTERPRETATION AND ASSIGNMENTS

WHAT IT MEANS

- The owner interprets the contract unilaterally
- Unilateral assignment of subcontractor/supplier with no input

CONTRACT INTERPRETATION AND ASSIGNMENTS

RAMIFICATIONS

- Difficult to be objective
- Tough to be the defendant; judge and jury at the same time
- Assignment impossible to quantify

CONTRACT INTERPRETATION AND ASSIGNMENTS

RECOMMENDED SOLUTIONS/CHANGES

- Push back on the assignments
- Engage the consultant

CONTRACT INTERPRETATION AND ASSIGNMENTS

MITIGATION STRATEGIES

- Accept (not recommended)
- Don't bid
- Review with owner/consultant prebid
- Obtain assigned contractor terms and conditions
- Qualify tender
- Add costs for risk in bid

PROJECT TENDER EXERCISE

WRAP UP

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1. PLUS (WHAT WENT WELL)/DELTA (SUGGESTIONS FOR CHANGE)
 2. NEXT STEPS – OAEC AND LAWYER WORKSHOP – DISCUSS WHAT IT MEANS, WHY THEY WANT IT, HOW CONTRACTORS RESPOND, HOW TO CHANGE