

# Non-Standard Contract Clauses

“Building Trust for a Successful



Project”

## REPORT

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for:



*Alberta Construction Association*

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## Executive Summary

**Trust, Transparency and Fairness are three principles of ethical behaviour. By creating standard language that can be clearly understood and 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.**

Alberta Construction Association (ACA) promotes adoption of standard "CCDC" forms of contract by Project Owners. These CCDC contracts 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 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. One of the outcomes was to create workshops and discussion forums to review contract clauses with Project Owners, Consultants and Contractors.

As a follow up to the Phase I June and October 2018 Workshops that were structured primarily for Contractors, Phase II was structured to target ALL construction partners (Project Owners, Consultants, Contractors, Lawyers, Bonding and Insurance specialists). There were 73 participants between the two Workshops with Project Owners representing one-third of the participants.

The Workshops had two components:

1. Risk Analysis of Supplementary Conditions Exercise
2. Collaborative Solutions Exercise

The Risk Analysis Exercise engaged mixed teams with representation from all construction partners in discussing the 15 Supplementary Conditions from Phase I.

The Collaborative Solutions Exercise used five of the six Non-Standard Clauses from Phase I with the addition of a clause on "Conflict of Interest".

### Results

The most noticeable difference in the Phase II Workshops was the quality of the conversation when all construction partners are discussing the clauses together. Without all partners being able to express their concerns and observations, complete and collaborative dialogue cannot occur.

The legal profession was particularly noticeable in Edmonton with five legal counsel participants providing legal perspective to every table except one. This expertise gave additional insight about whether clauses were even legal.

However, despite all the expertise in the room, the wording of some clauses still created different interpretations from one team to the next.

There was reinforcement from Project Owners and Consultants that most clauses are passed on to them for their use and thus not created by those currently administering contracts. Thus, there is only a general understanding of what the clause is trying to resolve, but not an in-depth opportunity to truly understand what it really says.

As was also demonstrated in Phase I, not all expertise is equal. Many times, we get guidance or insight from others that is not totally accurate. When the conversation involves insurance, bonding and the law, knowledge and experience can play a dramatic role in the outcome. Similarly, including General and Subcontractor expertise, that brings the operational implications for successful completion of a construction project, is fundamental to sound decision making in the drafting and selection of contract terms. Without all perspectives contributing, it is difficult to have balanced dialogue.

The amount of learning that occurred from hearing each partner's perspective cannot be overstated. Many of the resonating thoughts focused on the value of the mixed partner dialogue in an open and safe manner.

We are reminded that the project delivery method has a great deal of influence in the opportunity to have open and transparent dialogue about contract terms. Collaborative delivery methods help drive transparent conversation.

Many participants left the Workshop with an objective to make these changes:

- Read clauses more carefully
- RFI the question
- Provide more clarity in the tender documents
- Engage in respectful conversation
- Seek a review of their own contract (Note: only multi-discipline dialogue is effective for a proper review. Simply asking for a written response is doing what we have been in the past i.e. one partner providing a response without an opportunity for in-depth discussion. Effective change can only occur if everyone is heard and has the opportunity to seek understanding.)

While there will always be the need to create supplementary conditions or unique non-standard clauses, the downside of doing so is unless they are created or vetted by diverse perspectives, it is VERY difficult to ensure that the intention is being met or to understand their implications to the bid price.

One of the values of industry standard clauses, is the ability to educate everyone on what the clause means. With the creation of different clauses on the same topic (e.g. indemnification), a few words or the sentence structure can have completely different interpretations. The result is that Contractors don't read them because they think it says the normal language or MOST importantly, they really don't understand what it means and its implications. And while we can say "the Contractor" signed the contract, if action is taken on the clause that

causes project disputes, delays, and even the Contractor(s) to go out of business, no one wins. From the employees who lose their jobs and the loss of tax revenue for the government, to the Project Owner having to complete the project through another process, the result is not positive.

*As one participant concluded, “Everyone is really reasonable behind it all, but the contract wording creates conflict and caution that gets everyone’s backs up.”* Contracts that shift the balance of fairness to parties that have no ability to bear that risk miss that basic premise of “good” contracts. *As so eloquently pointed out by one participant, “If we were to imagine ourselves standing in front of a judge, can we defend a non-standard clause based on true merit due to the Project Owner's particular circumstance or is there really intent to delegate risk and responsibility?”*

So, the real question is can changes be made to onerous non-standard clauses? Change can only happen if there is a recognition that change may be needed. What is strongly evidenced by these Workshops is that discussion on clauses needs to involve all partners in a safe environment when there is no pressure of a contract closing time. Through collaborative dialogue with expertise from all partners, clauses can be created that address the Project Owners concerns in a fair and transparent manner. *As noted by a participant, “There was great discussion around us having the ability to change!”*

## Background

**Trust, Transparency and Fairness are three principles of ethical behaviour. By creating standard language that can be clearly understood and 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.**

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 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. One of the outcomes was to create Workshops and discussion forums to review contract clauses with Project Owners, Consultants and Contractors.

### **Phase I Workshops**

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

Led by Kees Cusveller, a seasoned construction professional, mixed sector participant teams (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 teams 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. Teams were tasked to submit bids based on the information provided.

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.

**See Appendix B for Phase I Bidding Results**

## The Workshop

### Structure

As a follow up to the Phase I Workshops that were structured primarily for Contractors, Phase II was structured to target ALL construction partners (Project Owners, Consultants, Contractors, Lawyers, Bonding and Insurance specialists).

The Workshops had two components:

1. Risk Analysis of Supplementary Conditions Exercise
2. Collaborative Solutions Exercise

Led by Kees Cusveller, the Risk Analysis Exercise engaged mixed teams with representation from all construction partners in discussing the 15 Supplementary Conditions from Phase I (see [Phase I Final Report](#) pages 21-24). Their task was to determine how to address the risk: accept, eliminate, Transfer (To Who), Mitigate (How).

In the afternoon, the Collaborative Solutions Exercise used five of the six Non-Standard Clauses from Phase I ([pages 11-17 of Report](#)) with the addition of a clause on “Conflict of Interest”. In newly structured teams, they answered the following questions:

- i. Determine what the clause means
- ii. What is the Project Owner trying to resolve?
- iii. What is the impact to the construction Team?
- iv. Mitigation strategies
- v. Changes you would recommend

With the exception of question ii., all the questions were the same from Phase I.

### Attendance

<b>Discipline</b>			
	Calgary May 30/19	Edmonton May 31/19	<b>TOTALS</b>
Project Owners	11	13 (2 internal lawyers)	<b>24</b>
Architects	4	2	<b>6</b>
Engineers	3	3	<b>6</b>
General Contractors	8	8 (2 internal lawyers)	<b>16</b>
Subcontractors	9	5	<b>14</b>
Insurance/Bonding Specialists	2	3	<b>5</b>
Lawyer (external)	1	1	<b>2</b>
<b>TOTAL</b>	<b>38</b>	<b>35</b>	<b>73</b>

## Risk Analysis of Supplementary Conditions Exercise

Mixed teams with representation from all construction partners discussed the 15 Supplementary Conditions. Their task was to determine how to address the risk: accept, eliminate, Transfer (To Who), Mitigate (How). The results are similar to those recorded in Phase I (see [Phase I Final Report](#) pages 21-24) with a few additions as noted below.

1) **Advertising** - 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.

- Project Owners want to control communications about their projects
- Get sign off sheets by Project Owner to show permission given
- Get clarification of "any sign" e.g. site signs and permission in future marketing, proposals

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.

- Until the contract is awarded, the insurance policy will not be available; however, it would be possible to share the quotation that the Project Owner has received for insurance by redacting confidential information e.g. premiums, project cost. This would provide deductibles and limits.
- Clarify Project Owner's insurance capacity assumptions – risk identification and deductibles
- For both insurance clauses, the Contractor may pay as well so double coverage

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

- Contractor needs to know what these deductibles will be so they can mitigate their risk with Deductible Buy Down Insurance

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.



- There was lack of clarity on what this clause means
- The clause has no teeth and wouldn't likely be enforced
- Best route is insurance; get to insurer early
- RFI to all bidders to bring awareness to the clause
- Risk is one-way and unlimited

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.

- The issue today is over electronic use of models and waiver for use of models

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.

- Unclear about what takes precedence
- Does this mean the Architect is the most important and can override structural engineer?
- What is the RFI process?
- Transfer to Subcontractors
- General Contractor expects the Subcontractors to carry money as per drawings and specifications in their entirety

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.

- This would likely not stand up in court; not "in good faith" clause
- Many issues go away with non-Stipulated Sum delivery method
- Large General Contractors see this as a big problem because it can be argued they should have known
- Breach of failure to review and notify
- Hard for Project Owners to claim on E&O Insurance
- Get an independent review
- RFIs at pre-tender
- The clause is being pushed too far

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.

- Doesn't address number of days for approval (Note: likely in other clauses as this was an extrapolated clause from a 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.

- Long lead times make this a bigger issue
- Suppliers implementing just-in-time delivery to avoid financing costs has potential schedule impact
- Subcontractors are billed for goods in transit
- Bonds help protect
- Make sure product is secured and protected for the Project Owner

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.

- May contradict legislation
- Just for the General Contractor and doesn't flow to the Subcontractors; cannot search documents outside of the Project Owner's control
- Why being asked for on a CCDC2 contract?
- Reimbursable cost to comply with request should be given to the Contractor

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.

- Try to get cost reimbursable so the Project Owner only pays for what it costs
- Project Owners struggle to go back to authorizing body for more money after the project is tendered
- Exposes the Project Owner to complications

- Contractor may have to conduct their own geotechnical study prior to tender to consider the risks, costs and likelihood of a successful bid

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.

- Historical weather should be considered
- Weather temperatures can adversely affect product installation
- Additional insurance
- Doesn't address force majeure

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.

- Only addresses prioritization of the work
- The Project Owner may not have the expertise to be the sole determiner

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.

- Issue is to address labour costs beyond the one year which is the reoccurring cost
- Fit for purpose is a key consideration as the design is completed by others and inherited by the Contractor and Subcontractors
- Add money for two-year warranty

## Collaborative Solutions Exercise

In mixed teams, the participants answered the following questions per clause:

- i. Determine what the clause means
- ii. What is the Project Owner trying to resolve?
- iii. What is the impact to the construction Team?
- iv. Mitigation strategies
- v. Changes you would recommend

The results of this exercise are similarly recorded in the [Phase I Final Report](#) on pages 11-17 with the exception of the question, “What is the Project Owner trying to resolve?”. The following is a recap of comments from Project Owners as well as some unique comments from the value of having mixed discipline teams:

### 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.”*

- **What is the Project Owner trying to resolve?**
  - Project Owner trying to resolve/mitigate responsibility for something they are not responsible for e.g. Subcontractors, unknown conditions
  - Project Owner does not want to be responsible for construction as that is the Contractor’s expertise
  - Protect Consultant team
  - Define where the risk should go

Note: If this clause was absent, the Owner would sue

- **Changes you would recommend**
  - Mutual indemnification
  - Cap on liability
  - Add “additional insured”
  - Wrap-up insurance helps as it makes all insured

### 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.”*

- **What is the Project Owner trying to resolve?**
  - Lower rates for insurance
  - Ensure sufficient coverage
  - No doubling up of coverage and no gaps
  - Mandated by organization policy
  - Not wanting to disclose the value of the project in the insurance policy
- **Mitigation Strategies**
  - Include a summary/statement of coverage being provided by the Project Owner as part of the tender documents
- **Changes you would recommend**
  - General Contractor should be named as additional insured on policies

*"...Copies of the policies of insurance may be obtained after contract award by arrangement from..."*

- **Mitigation Strategies**
  - May not be enforceable due to condition precedent

### 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."*

- **What is the Project Owner trying to resolve?**
  - To avoid having Contractors exploit errors and ambiguities i.e. Change Orders
  - Bad design risk and fight with consultants
  - Don't trust quality
  - Avoid cost overruns and schedule delays
- **Mitigation Strategies**
  - Third party reviews
  - Avoid issuing projects out to tender too early when design not complete and coordinated
  - Divide design and construction over two budget years
  - Spend more time on planning

#### 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.”*

- **What is the Project Owner trying to resolve?**
  - Avoid the risk of paying for material that isn't installed and could be damaged, stolen, etc.
  - Trying to manage cash flow and risk
  - Wants to pay for working final product
- **Changes you would recommend**
  - Add these materials to the schedule of values

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

- **What is the Project Owner trying to resolve?**
  - Need time to review invoice, arrange financing (if necessary), complete transaction
  - Project Owners have cash flow pressures as well
- **Mitigation strategies**
  - Clarify Project Owner's “short pay” policy on disputed invoice amounts
  - Define what is an “approved invoice”
  - Don't be afraid to talk about money
  - Have revision and dispute guidelines

#### 5. Conflict of Interest

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 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 business days of the date of the notice in writing, then the owner shall be deemed to have terminated the contract pursuant to GC XX without further liability to the owner.

- **Determine what the clause means?**
  - Identify any potential conflict of interest to the Project Owner who will assess whether it is acceptable or terminate contract

Note: Really more an issue for the Project Owner's conflict of interest

- **What is the Project Owner trying to resolve?**
  - Misappropriation of public funds
  - Accountability to the taxpayers' money
  - Avoid conflicts of interest

- Legal battles for loss of profits by the Subcontractors
- Public perception
- Transparency
- Avoid favouritism
- **What is the impact to the construction team?**
  - Loss of jobs/profit
  - Corporate image
  - Future bidding privileges
  - Costs of schedule delay
  - Cost risk
  - Won't disclose as outcomes too harsh
- **Mitigation strategies**
  - Be upfront with disclosure pre-tender or immediately post tender
  - Provide more in-depth conflict of interest policy and description
  - Seek disclosure by Subcontractors
  - Keep working through until ruling made
  - Come with a solution to the conflict
- **Changes you would recommend**
  - Clarify what constitutes “conflict of interest”
  - Do not suspend work
  - Response necessary
  - Clarify the mechanism to cancel the contract
  - Provide a mechanism to settle interruptions/Subcontractor liabilities/budgets/schedule
  - Define “immediately”
  - Add “disclose in writing”

## 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.”

- **What is the Project Owner trying to resolve?**
  - Contract uncertainty – control of clarifications and first opportunity to address
  - Project Owner wants control
- **Changes you would recommend**
  - “The owner, in consultation with the consultant.....”

“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.”

- **What is the Project Owner trying to resolve?**
  - Control of procurement without risk – use their purchasing power, national agreements
  - Resolve accountability/responsibility for coordination of multiple contracts and risk associated with multiple contracts
- **Changes you would recommend**
  - “the Contractor agree to review Owner assigned contracts and provide impact to project within X days for any contract.....”
  - Address in a cash allowance



## Workshop Plus/Delta (Strengths/Areas for Improvement)

CALGARY MAY 30<sup>TH</sup>

### **Plus (Strengths)**

- Great feedback from Project Owners and Consultants; having them at each table (2)
- Diversity of teams (10)
- Good collaborative dialogue (9)
- Content very good with stories, examples, experiences (2)
- Understanding different perspectives and putting them on paper for discussion
- Gaining different perspective views from various parties (2)
- Well facilitated (2)
- Gave me a great opportunity to obtain perspectives from all contractual levels and better understand the effects of the contractual clauses on a greater scale (2)
- Keep up education and collaboration on construction related issues
- Right people in the room
- A unique opportunity to have open discussions with industry professionals from various perspectives (3)
- Started a great and open dialogue
- Great number of attendees (2)
- Great to have spec writers attend
- Safe and respectful environment for discussions and interaction (2)
- Open to further discussions
- Will change some of our operating strategies
- Will look for revisions to our processes
- Venue
- Pace
- Discussion around us **having** the ability to change
- Understanding Project Owners and General Contractors
- Being able to see how documents are interpreted

### **Delta (Areas for Improvements)**

- More Owner based input; they seemed quiet today; reserved in what discussion took place
- Rational provided by organizations that authored the reviewed clauses
- More time for deeper dive (2)
- Actionable follow-up (2)
- More often
- Have different clauses from morning and afternoon Workshop; a lot of repeat conversation (2)
- Stick better to schedule
- More focus on issues affecting Subcontractors; review some Subcontract clauses (2)

- Don't spend as much time on the morning project review as the information was provided ahead of time
- Day could have been shortened
- There are parts of the business I am not fully versed in. I'd like to be able to prepare for these meetings with perhaps more info on details of the discussion
- More legal implications
- Case studies with actual judgements (2)
- Hard to know extent of impact of clause in isolation
- Provide CCDC2 as a reference
- More time for networking

## EDMONTON MAY 31<sup>ST</sup>

### **Plus (Strengths)**

- Good discussion with many participants throughout the contract pyramid
- As an Owner, I like to attend to hear about the Contractor experience. How do the contracts I issue impact project delivery?
- Good participation, well-structured agenda, thoughtful discussion, fun and good interactions, learned a lot
- Great workshop, best CCA/ACA event I have attended
- The collaboration with so many stakeholders was VERY valuable (12)
- Better understanding of non-standard contract clauses (2)
- Three-way conversation with Project Owners, Consultants and Contractors
- Great dialogue amongst the teams (2)
- Great facilitation (2)
- Lots of Project Owners (3)
- Good collaboration of thought across the ideas presented (6)
- Just great all-around informative seminar
- Greater understanding of how each partner views non-standard clauses (2)
- Enough time was allocated to adequately discuss issues (2)
- Great structure, outline, activities, discussion
- Felt like an open and inviting forum to discuss observations
- Everyone is really reasonable behind it all but the contract wording creates conflict and caution that gets everyone's backs up
- Focused workshop
- Splitting the participants by role to provide different views was excellent

### **Delta (Areas for Improvements)**

- Could continue to emphasize the respect aspect, including for those not in the room e.g. lawyers. It should be less about building thicker skin and more about being respectful
- Bring more legal people that understand construction contracts
- Review examples of good contract clauses to compare to bad clauses
- One full day is too much; maybe a half day would be better (2)
- Big topics – overwhelming conversation

- Accepting special non-standard clauses rather than working with standards
- Could be more talk about actionable opportunities that we can do right now as follow-up to this Workshop
- Provide legal case studies to justify why the use of non-standard clauses negatively impact projects and the industry (3)
- No specific answers; more questions raised
- Round tables
- Keep large sheets up on the walls
- More real-life solutions to past problems; what has resolved these in the past
- Greater discussion on the reality of the ramifications of these clauses
- Perceived to be a lot of negative attention focused at the Project Owners. We need them to continue to engage and we also need them to change!
- Seemed a bit compressed for time; started some great conversation but still so much to cover (2)
- Show standard clause for comparison (3)
- Room temperature (2)
- Discussion missing on true value achieved in a clause change i.e. a tough clause with a contractor worth \$1 versus one with \$1,000,000
- Review of clauses and stipulations are often not frequent enough as they are sometime dated, overzealous or not even understood at times.
- More Subcontractor representation (submitted by Owner)
- Moderate side travel stories to maximize effectiveness
- A few folks dominated the discussion
- Surety attendance would be nice to have
- These clauses are used and accepted by parties
- Bring construction lawyers (3)
- State objectives
- Add clauses on schedule, change orders and more/separate insurance discussions
- Same Workshops but individuals bring their own examples of problem clauses
- Same workshop with Subcontractors
- Bring insurance litigation specialists
- Summary report for reflection
- Drive the same Workshop but focusing on exercise between Contractor and Subcontractors
- More Project Owners to participate (2)
- Address cash flow/payment
- General tone of presenters was that Project Owners are the “bad guys” e.g. clauses were Owner as unreasonable

## Resonating Thoughts and Wish Lists for Change

### CALGARY MAY 30<sup>TH</sup>

- More open discussion centered around ideas for how collaboration could be fostered
- Two-way indemnification would be mutually beneficial
- Collaborative dialogue between all stakeholders to mitigate some unnecessary clause and situations
- Prompt payment
- Conversation on contract terms prior to award not seen as negative
- Building trust through a common understanding of values of respect, accountability, integrity; consistent practice of these values
- A recognition of shared vision of success: “That everyone wants a great building delivered on time and on budget and Contractors and Consultants make reasonable profit
- More open dialogue at the start, the middle and end of the contract between all parties would lead to more transparency and understanding on how mutual goals can be achieved
- Solutions in process: standard contract = common interpretations; open and fair communication/relationships; ethics; new collaborative contract methods
- More respect amongst the industry and understanding of each participants’ role
- Contracts to be less vague and more transparent
- In the ideal world, all non-standard clauses would have an explanation of why the clause was added and what it hopes to accomplish
- In the ideal world all non-standard clauses would get a value assigned to them to let the Project Owners know what they add to costs
- No supplementary conditions
- Preview with Project Owner to explain supplementary conditions
- Create best practices clauses to share
- General Contractor and Subcontractors to more closely and not at the last minute before bid submission
- Project Owner and designer to accept ownership and not push everything down to the General; Project Owners will pay one way or another
- Lean toward CCDC 5B versus CCDC 2 for more collaboration (2)
- More open discussion with the whole industry; this is healthy and refreshing!

### EDMONTON MAY 31<sup>ST</sup>

- Put contracts on google for all to respond
- Limit supplementary conditions to standard contracts
- Reference resources and them being directly relatable to CCDC
- More standard CCDC application by Project Owners
- More accessibility to contract by Subcontractors
- Will further discuss inhouse with all PMs on changes to process
- Wording shouldn’t always push the potential risks downhill ending at the Subcontractors who are the least able to bear the risk

- Have standard clauses in contracts that reasonably cover the risks of all parties
- More educational opportunities with cross functional groups
- Have a feedback loop for contract clause revision, track outcomes, performance
- Have these conversations more to re-instill trust between parties i.e. Owner/Contractor contracts
- Input on public Owner templates from the Contractors
- Ongoing dialogue on different aspects/differences of contract interpretation
- Stop using CCDC 2 and use more collaborative contract models
- Prompt payment – when money isn't an issue, great things can happen (2)
- Standardized contracts with clearly worded terms and conditions (5)
- No charge for CCDC contracts
- More input on CCDC and less supplementary conditions
- Look at MMCD for Alberta – a body for government agencies that manages base type contracts with municipalities controlling supplementary conditions (3)
- Increase collaboration throughout the industry (i.e. next time have 50 new people in attendance)
- Standardization of specifications and better communication amongst groups
- Larger/broader CCDC groups
- Immediate integration of teams at beginning of design process (including Owner, Consultants, General and Subcontractors)
- Go back to standardized form of contract; create a consortium for Canadian construction just like banking, finance and insurance; implement a regulatory committee
- More communication between Owner and Contractors
- Non-disclosure so we can all speak freely without consequence
- Greater understanding of end goals of all project participants and ways to help make that happen with greater collaboration
- Ability to charge a fee for each tender to avoid wasting time/resources. It would create the ability to remove some clauses when writing contracts
- In an ideal world, do not need supplementary conditions
- Necessitate collaboration between all parties including Insurance, Contractors, Consultants, Project Owners, and Lawyers
- All players in the industry understand the delivery methods and appropriate standard contracts for each.

## Next Steps

Collaborative dialogue cannot stop and in fact it is the only way forward. Most education will benefit dramatically from mixed discipline participation. The resonating thoughts from participants demonstrate that when we hear from each other about the “why”, we can collaboratively address the “how”.

It will be imperative for construction related Associations to seize opportunities to bring all disciplines together to discuss the myriad of challenges in the construction industry.

Some specific strategies:

- Volunteer to have your contract reviewed with mixed discipline teams (Post Workshop note: ACA received a few contracts for review and sent to them to CCDC for comment. In many situations, the Project Owner’s response was we cannot change.)
- Create specific Workshops on topics that drive non-standard clauses:
  - Schedule
  - Changes
  - Payment
- Hold more of these Workshop with some changes:
  - Add legal cases
- Find creative and news ways to get involved with the creation of CCDC clauses
  - E.g. form local CCDC review teams to provide feedback to CCDC

As one participant commented: “A positive was the discussion around us having the ability to change”. Collectively we have the ability to change or we live the definition of insanity: “Doing the same thing over and over again and expecting different results”.



- 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



## Appendix B - Attendees

### Calgary Attendees - May 30, 2019

First Name	Last Name	Email	Company
Blain	Denholm	blain.d@albertaglass.com	Alberta Glass Company Inc.
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Colleen	Barabonoff	colleen@bookspec.com	Book Spec Inc
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Morgan	Tingle	morgan.tingle@brookfieldrp.com	Brookfield Residential
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Bill	Black	billblack@cgyc.ca	Calgary Construction Association
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Erin	Bird	erin.bird@calgary.ca	City of Calgary
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Stephen	Bugbee	sbugbee@zeidler.com	Zeidler
Kurtis	Nishiyama	Knishiyama@zeidler.com	Zeidler Architecture

## Edmonton Attendees - May 31, 2019

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