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QUALITY CONTRUCTION REQUIRES QUALITY CONSTRUCTION DOCUMENTS

The construction industry is full of risk. Recognizing and managing that risk is part of doing business. The contractor ignores risk at his or her peril, or rather at the peril of expected profits. It is not an easy matter to gain control of the many risks facing contractors. The industry is rife with liability. It is impossible to escape it, but it is not impossible to lessen the burden by the proper allocation of risk. The sharing of liabilities results in the best opportunity to complete a construction project properly, on time, and on budget, and with the parties left standing at the end of the day. It is quite clearly in the best interests of the owner, the consultant, the prime contractor and the trade contractors to accomplish this end. The use of industry accepted standard documents promotes a fair allocation of risk in a construction project, which in turn provides quality construction.

THE FAIR ALLOCATION OF RISK IN A COMMERCIAL TRANSACTION, EQUALS THE BEST POSSIBLE END RESULT

Fair allocation of risk sounds reasonable, it is reasonable, and yet over and over again we are faced with construction documents issued by a public tendering authority that contain unfair and unreasonable conditions requiring the contractor to accept risks that should lie elsewhere. These days the risks are many, yet the profits are few. Quality construction depends on quality contracts, so we must work together to ensure that the proper standards are adhered to by all—not just in the construction of the project, but also in the construction of the project documents.

WHAT ARE THE RISKS?

The following is a list of some of the risks that may arise and must be dealt with on a construction project:

- Physical condition of the property such as: different or changed site conditions; ground instability; groundwater; ground contamination
- Obstructions such as: underground services; shafts, wells, etc; debris
- Adverse weather including: natural disasters, which will affect site conditions; flooding; erosion; earthquake etc.
- Delays which may result in: late possession of the site; late working drawings; shortages of staff, labour, materials etc; consequential losses, liquidated damages
- Supervision and Direction, or lack thereof, which may result from: incompetence, inefficiency, lack of communication, omissions or misleading descriptions in the schedule, acceleration or suspension of the work
- Damage to Property either through negligence of the contractor, or the trade contractor, or the supplier, or the design consultant; consequential loss arising from the negligence;
- Government Policies such as: change in taxes, labour laws, or other regulation; delays in receiving approvals, permits, etc.;
- Labour issues such as strikes or stoppages
- Payment issues such as delays in settling claims or certifying payments; bankruptcy of one of the parties; cash flow concerns
- Disputes which may cause delay and create uncertainty

WHO SHOULDERS THE RISK?

To answer that question it should first be determined which party can best control, foresee, and bear the risk. Also, attention should be paid to which party benefits or suffers the most if the risk occurs during the project. As a starting point, all risk should fall at the feet of the owner. From there it should be transferred, in return for **fair compensation** to the various parties involved. The party to whom risk is being transferred should be in a position to fairly assess what that risk is worth,

and be able to competently minimize the chance of it occurring—and of course be able to accept the financial burden of paying damages if the worst happens. You need to be in control of a situation in order to minimize the risk. Therefore, the prime contractor should take responsibility only for those elements of risk on the project that are directly within his or her ability to either change or get insurance for. Anything on top of that means you are simply crossing your fingers and hoping that nothing happens.

Standard construction document conditions generally limit the risks of the contractor to those, which can be reasonably foreseen by an experienced and competent contractor. Such risks would include: compliance with regulations; construction defects; sub-contractor/supplier mistakes; completion dates; and labour and materials issues. Often the contractor is asked to take on additional risks, and the tender price should be inflated to reflect these risks. Unfortunately, there are some risks that are either unknown or perhaps too new (i.e. changes in technology or building science), to enable the contractor to accurately assess the cost of accepting the risk. Care must be taken not to accept or impose such risks indiscriminately. Owners should be aware that inappropriate allocation might simply result in no allocation at all. Conditions, which go beyond the industry standard, are subject to close scrutiny by the courts, which often construe the meaning of the clause against the writer in favour of a more reasonable outcome.

INDEMNITIES, WAIVERS, EXCULPATORY CLAUSES, WARRANTIES

Clauses that create, transfer, or attempt to avoid risk, must be drafted by the owner and accepted (or not) by the contractor after careful consideration of the following:

- What is the risk?
- Who is the best party to shoulder the risk?
- What is it worth?
- Can the risk be further insured? And if not…
- Should you walk away?

There are industry accepted standard contracts such as the CCDC-2 that provide a balanced approach to risk allocation. We recommend the use of such standard documents. They have been expertly developed by industry in consultation with other stakeholders, including public owners, and their provisions for risk management are appropriate and equitable. Efforts by public owners to contract out of their liabilities by altering such standard documents, means a loss of that balanced and fair approach. Contractors seeking to bid on a project are faced with trying to assess the cost of taking on additional risks that normally would not be theirs to deal with. In many instances the risk will not be in the control of the contractor. In some cases warranties, or insurance, is required by the Owner that is over and above industry standards, and may not even be available.

Here are two examples of inequitable clauses, taken from actual public construction documents:

(The public agency) reserves the right to cancel, at any time, for any reason, and without notice, any contract awarded as a result of this tender, and the supplier will have no right of action against (The public agency) for damages. Such cancellation would not in any manner whatsoever limit (The public agency's) right to bring legal action against the supplier for damages or breach of contract.

The Contractor shall indemnify and save harmless the Owner and the Consultant and their successors, assigns, agents, directors, officers, authorized representatives and employees from and against all claims, demands, losses, costs, damages, actions, suits, proceedings and expenses including legal fees on a solicitor client basis, whether directly or indirectly caused or incurred, by whomsoever made, brought or prosecuted in any manner based upon, arising out of, related to, occasioned by or attributable to performance of the Work under the Contract.

In both cases there is risk being allocated which is beyond the control of the party who will end up being liable. A sensible contractor with the means to adequately assess the risk should walk away from such conditions. A sensible owner would not try to impose such conditions as they provide a false sense of security if accepted. Unreasonable and inequitable conditions will only result in trouble if the risk actually materializes. If the party with the risk cannot cope with the liability imposed they will either go to court and fight about it, or in the alternative find themselves bankrupted,

at which point the ultimate responsibility is back on the doorstep of the owner. If the owner ensures that risk has been properly allocated, there is a much higher probability that problems of liability can be dealt with effectively down the road to the satisfaction of the party seeking compensation.

QUALITY BEGINS AT THE TOP

Proper allocation of risk is essential in all contractual relations. In the private sector, it is primarily the business of those parties who are signatory to the contract documents. It is assumed that such parties are operating on an even playing field, and therefore must accept or refuse risk as they see fit. With public construction, however, there is more at stake. Public agencies operate on taxpayers' dollars. They are expected to operate in a fair, accountable and transparent manner. It is in the public's best interests that unnecessary litigation be avoided, and that risk is dealt with in such a manner as will best protect the public. This means that the public agency must accept that while it may be in a position of power, it should not use that power to create an imbalance of risk that ultimately protects no one. Public agencies should look to well-established industry standards when preparing their construction documents. To do otherwise, is simply to introduce one more risk to the equation—that quality contractors will refuse to do business with them any more.