

## NEW INDEMNITY PROVISIONS FOR PUBLIC PROJECTS

(Articles provided courtesy of Jenkins Marzban Logan LLP)

The Risk Management Branch of the BC Government (the “RMB”) has recently introduced new indemnification language to be used on public construction projects in conjunction with the CCDC2 – 2008 Supplemental Conditions. This new language has been influenced by the language found in the standard CCDC2 – 2008 indemnity provisions, but contains some important differences of which contractors must be mindful.

Like the CCDC2 – 2008 indemnity provisions, RMB’s new indemnity provisions now include mirror indemnity obligations between the owner and the contractor. These indemnity obligations are in respect of both direct claims between the owner and the contractor as well as third party claims against them. Under RMB’s old indemnity provisions, the indemnity obligation of a contractor was not capped. The new provisions provide a cap on the indemnity obligation that is generally tied to either the insurance limits found in the contract or to the contract price. There is, however, one very significant exception: the obligation to indemnify against third party claims relating to bodily injury or property damage is without limit. Again, this mirrors the new provision found in GC12.1.2.3 of CCDC2 - 2008. While the standard CCDC 2 – 2008 indemnity obligations are limited to claims arising from the negligence of one of the parties or a failure to fulfill the terms and conditions of the contract, the new RMB provisions purport to be “no-fault.” That is, you need not be either negligent nor in breach of your contract before being called upon to indemnify the public owner under RMB’s interpretation of its new indemnity provision. Although this language has not yet been tested in court, the public owner will take the position that the contractor is obliged to provide an indemnity even where that contractor was not negligent nor at fault in any way. The potentially harmful consequences of such an argument are reduced somewhat by an exception for losses arising out of the independent acts of the other party. This exception may provide one party with a potential argument against indemnification in the event the claim also involves the other party.

RMB’s new language further differs from the standard CCDC 2

– 2008 indemnity provisions with respect to indemnification time limits. While the time limit for making a claim for indemnification under CCDC 2 – 2008 is six years from the date of substantial performance, the time limit in the RMB’s new indemnity provision refers to British Columbia’s *Limitation Act*. This will likely cause uncertainty for contractors. While the applicable period proscribed under the *Limitation Act* is two years for “injury to person or property” or six years for most other claims, the *Limitation Act* contains discoverability provisions that make it difficult in many circumstances to determine when the applicable period begins to run. As problems may not manifest themselves for many years, contractors face the possibility that they may be called upon to provide an indemnification up to 30 years after completion of a project, as this is the ultimate limitation period under the *Limitation Act*.

Whether you are dealing with the un-amended CCDC 2 - 2008 document or RMB’s new supplementary conditions, you must be aware of the waiver of claims provisions found in GC 12.2. While these provisions may seem difficult to read and understand, they essentially provide that if an owner or contractor has a claim against the other which arises before substantial performance, it is deemed to have waived that claim unless it provides *Notice in Writing* (as defined in the CCDC 2 document) no later than six days before the expiry of the lien period. This will likely result in heated disputes about when the lien period expired on any given project, even where payment of holdbacks are not an issue. Claims that arise after substantial performance are deemed waived unless *Notice in Writing* is given 395 days following substantial performance of the work. These time limits do not apply to the indemnity provisions related to third party claims, or in relation to certain other exempted claims as set out in GC 12.2. As noted, while GC 12.2 may not be easy to read or understand, it is critical to be aware of the time limits for giving notice because the right to pursue an otherwise valid claim may very well be lost if you fail to comply with that GC.

### NEW RMB AND CCDC 2 INDEMNITY and WAIVER PROVISIONS

In February of this year the Canadian Construction Documents Committee (CCDC) published its newest version of the CCDC 2 stipulated price contract. The new version contained significant changes to the indemnity and waiver of claims sections, GC 12.1 and 12.2, of which contractors should be mindful. Subsequently, the Risk Management Branch of the British Columbia Government (the “RMB”) introduced new indemnification language to be used on public construction projects in conjunction with the CCDC 2 – 2008 Supplemental Conditions. This new language was influenced by the new provisions found in the standard CCDC 2 – 2008 contract, but contains some important differences of which contractors must also be mindful. The following table notes some of the more significant changes to these provisions and provides a comparison between how those are dealt with in both the CCDC 2 – 2008 and RMB forms of contract.

<b>INDEMNITY PROVISIONS</b>	
<b>CCDC 2 - 2008</b>	<b>RMB</b>
Mirror indemnity obligations for contractor and owner for both direct claims between them and third party claims	Same
No obligation by either party to indemnify consultant for claims arising out of acts of either party	Same
The indemnity obligation is capped for most claims in an amount tied to insurance limits or contract price. <b>HOWEVER</b> , the indemnity obligation in respect of third party claims related to bodily injury or property damage is <u>without any monetary limit</u>	Same
Indemnity obligation restricted to claims arising out of contractor’s negligence or breach of contract	Purports to be ‘no fault’ based, so Contractor may be called on to indemnify owner for claims even where Contractor acted properly and in accordance with the contract terms.
Time limit for indemnity obligation is six years from the date of substantial performance	Time limit for indemnity obligation is that specified under <i>Limitation Act</i> , which may be either two or six years, but could potentially be thirty years where problems fail to manifest themselves for many years. No certainty as to when the limitation period begins to run under many circumstances.
<b>WAIVER PROVISIONS</b>	
<b>CCDC 2 - 2008</b>	<b>RMB</b>
Claims that arise prior to <i>Substantial Performance</i> are waived unless <i>Notice in Writing</i> (as defined in the contract document) is provided no later than six days before the expiry of the lien period.	Same
Claims that arise after <i>Substantial Performance</i> are waived unless <i>Notice in Writing</i> is provided within 395 days following <i>Substantial Performance</i> .	Same
Indemnity claims under GC 12.1 and 12.4 are not deemed to waived.	Same
“Claim jumper” provisions give a limited time extension to deliver a <i>Notice in Writing</i> if the other party to the contract gave such a notice on the sixth or seventh day before the lien period expired.	Same

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