



Issue Update

Amended Indemnification Clause 12.1 of Great Concern

Although the 12.1 Indemnification clauses that amend those of CCDC 2 have existed on Education, Healthcare, BCBC, BC Housing Management and other public projects for many years in BC, the risks imposed on contractors because of the current insurance market are almost unmanageable for General Contractors and Trade Contractors. BCCA is working to change this clause amendment. However, in the interim you should be aware of the risks.

CCDC 2 has limitations on the dollar value for claims and time limitations on claims. Both of these have been removed with this amended clause. This indemnity clause creates risks for the contractor and its insurer over which they have no real control and the risks cannot be reasonably evaluated if at all. Insurers will be unlikely to accept the risk under such broad indemnity provision or will dramatically increase premiums, which will ultimately affect the cost of construction.

What are the risks?

In addition to the no time or dollar limitations, the clause can provide the owner with a defence to claims by the contractor that is not limited to third party claims. The owner may have agreements with tenants, equipment suppliers, future key employees, consultants, etc. which are not known to the contractor and in many cases, claims which could arise under those contracts with third parties would not be foreseeable to the contractor. Should the contractor bear the risk of those claims? Are these risks that can be evaluated by the contractor even if they are made aware of these other agreements? The clause may also exempt the owner from notice and dispute resolution provisions of the contract in connection with all owner claims against the contractor.

What should contractors do?

Here are a few options:

- Analyze the risk against the value of the work. In a busy construction market, as we currently have, are your risks greater on one project than they may be on another, perhaps leading you to choose the one with the lesser risk?
- Consider adding to the cost of your bid to offset the cost of the risk. Of course you may run the possibility of over pricing yourself, as your competitors may not do this!
- Qualify your bid, although you may run the risk of disqualification.
- Look at your corporate structure to limit your exposure.

Remember: If you are considering signing a contract that includes this amended indemnity clause,--BEWARE of the risks!

Building BC's Future!

The mission of the BCCA is to provide leadership and excellence in the representation of, and service to, British Columbia's construction industry.