

BULLETIN 25

STANDARD INDEMNIFICATION CLAUSE

January 2005

Beware that changes to the standard indemnification clause of CCDC Contracts may pose uninsured risks for both the Owners and Contractors. In CCDC Contracts the liability insurance and indemnification provisions are designed to complement each other. The Indemnification clause is intended to mirror the insurance clause for both the Owner and the Contractor related to “claims” from third parties.

The Indemnification clause GC 12.1 in CCDC 2 - 1994 in part reads as follows:

GC 12.1 INDEMNIFICATION

12.1.1 *The Contractor shall indemnify and hold harmless the Owner and the Consultant, their agents and employees from and against claims, demands, losses, costs, damages, actions, suits, or proceedings (hereinafter called "claims"), by third parties that arise out of, or are attributable to, the Contractor's performance of the Contract provided such claims are:*

- .1 attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, and*
- .2 caused by negligent acts or omissions of the Contractor or anyone for whose acts the Contractor may be liable, and*
- .3 made in writing within a period of 6 years from the date of Substantial Performance of the Work as set out in the certificate of Substantial Performance of the Work, or within such shorter period as may be prescribed by any limitation statute of the province or territory of the Place of the Work.*

The Owner expressly waives the right to indemnity for claims other than those stated above.

The risks imposed upon a contractor by the indemnification clause are typically passed on to the insurance companies (subject to the policy's terms) through the purchase of insurance policies specified in the insurance provision. The net result is not an absolute transfer to the insurance companies because “bodily injury” or “property damage” arising out of risks such as mould or pollution that may arise out of the Work are generally excluded, at least in part, by virtually all commercial general liability policies. There are also deductibles and other aspects that may exclude coverage such as:

- personal property in the contractor's care, custody or control; or
- damage to the part of the property that the contractor is working on.

Any change to the indemnification clause or amendments imposing such terms as “however caused” and “all damages” into the contract should be avoided. This would mean the Contractor may be liable for acts beyond its control, including acts of God. An insurance professional should be consulted by the Contractor to determine if their insurance programs cover the additional risks and whether it is possible to purchase additional insurance to cover all or part of the additional exposure.

Owners should appreciate that when the intent of the Indemnification clause is changed, the number of bidders on a project may be reduced, as Contractors may choose not to bid based upon the additional uninsured risk incurred. Contractors may also increase their bid pricing to pay for the additional insurance costs or to fund potential uninsured losses. The net result to the Owner is increased costs to the Project.

When the indemnification clause is changed, deleted or a unique indemnification clause is created, the Owner is transferring additional and often substantial uninsurable risk to the Contractor. The result may be uninsurable payouts potentially causing insolvency of the Contractor, resulting in serious financial losses to both parties. All parties need to be aware of the impacts and consequences of revising the Indemnification requirements of the Contract and should consult with their insurance professionals to review any potential changes to the Indemnification Clause.

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