**CONTRACT LANGUAGE MANAGEMENT PLAN**

The purpose of the Contract Language Management Plan is to provide CEA members with a guide for developing the appropriate contractual agreement between the Client and the Consultant.

The reason for this Management Plan is CEA is becoming increasingly concerned with the unbalanced nature of agreements being presented to, and accepted by, the consulting engineering community in this Province. Current agreements unfairly shift risks associated with construction projects onto engineers without due regard for their role and responsibilities in relation to these projects. Therefore, negotiating the proper agreement is essential to reducing liabilities.

Negotiating the proper agreement is essential not just for reducing liability exposure but also because "standard" errors and omissions insurance may not provide any or complete coverage for some of the sorts of provisions which are becoming more common. Maintaining contract language which is commensurate with the proper role of the professional engineer and their relationship with their client is part of providing competent professional services and engineers should be highly valued by their client for pointing out the importance of maintaining the contractual obligations properly within the scope of the respective best interests of the parties.

This position paper has been prepared with the awareness that CEA assigns the highest priority to full compliance with both the letter and the spirit of the Competition Act. This position paper is specifically not intended to promote any discussion of anti-competitive activity.

GENERAL USE OF STANDARD DOCUMENTS

The following standard contract agreement documents have been broadly supported by the industry and clients.

- ACEC Document 31 Engineering Agreement between Client and Engineer (Association of Consulting Engineering Companies Agreement);
- ACEC Document 32 Agreement between Engineer and Sub-consultant.

CEA encourages clients to use ACEC Document 31 and cautions the use of customized agreements from clients, if one of the approved standard documents is appropriate.
Where there is good reason for clients to use a customized agreement, the client and the consultant should work together to ensure that the customized agreement has appropriate provisions, and that this document could be considered industry approved and appropriate for most consulting contracts. Prior to reviewing customized agreements from clients, members should ask the client to clearly set forth what the client's concern with a standard term is and what objective the client has in mind for altering a standard term.

An October 10, 2014 “Final Report” of the Agreement Task Force published to the members of ACEC BC stated that there were then considered to be three primary types of problems with standards contract documents:

1. problematic clauses and wording give rise to liability, business and financial concerns;
2. a multitude of different forms of agreement means that excessive management and legal time is required for review and negotiation; and
3. terms of requests for proposals often discourage or preclude negotiation of appropriate terms.

These issues remain the top business concerns of CEA member firms.

The proper agreement between Client and Consultant is governed by the size, complexity, duration and other aspects of the assignment. For simple projects with well-defined parameters and requirements, a “simple” agreement may suffice, appended with a mutually accepted set of standards, terms and conditions. On the other hand, a mega or more complex project may require documentation drafted by Legal Counsel. This is particularly so in the recent advent of the use of Qualifications Based Selection (“QBS”) processes being pursued by clients for complex or other projects deemed appropriate for the QBS approach.

If there are significant situations with a particular project which demand that something “out of the ordinary” be covered by a unique term or set of terms, these terms can be covered by schedules to the standard base agreement. The use of such schedules (“General Conditions” or “Special Conditions”) should result in exceptions to the basic agreement being true exceptions.

The 2014 ACEC BC Final Report of the Agreement Task Force report then went on to outline in detail certain “Key Agreement Concerns” as follows:

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| Indemnification | Many agreements do not follow reasonable indemnification principles. Professional liability insurance covers errors, omissions and negligent acts. In order for insurance to be trigged, indemnification should be limited to errors, omissions and negligent acts. Indemnification should also be mutual between the parties. Indemnification should also be limited “to the extent that” the consultant was responsible. Another analogous word is “guarantee”. |

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| Duty to Defend | Some agreements include a duty to defend which requires a consultant to pay a client's legal bills in the event of an action. This results in an uninsurable risk akin to writing the client a blank cheque to cover legal fees and expert costs. The wording in these clauses often includes defending even if the consultant has not made an error, or if the issue is not directly related to the work that the consultant performs. |
| Limit of Liability | Many agreements do not include reasonable liability limits. There are two ways to limit liability: for a certain time period, and to some monetary limit. The current ultimate liability period under Alberta legislation is 10 years. The monetary limitation can be limited to a specific dollar amount, to a fraction or multiple of the total engineering fees, or to the amount of insurance available at the time a claim is brought (possibly up to the maximum of the amount of insurance required for the project). In the absence of a monetary liability limit, liability is unlimited, and may exceed the amount of insurance coverage. |
| Consequential Damages | Some project problems may lead to a loss in revenue or some other consequential or indirect damages. In the absence of a monetary liability limit, the only limit on a professional engineer's liability is that any loss must be proven to arise from the engineer's negligence. That quantum may exceed not just the amount of insurance coverage typically carried but also the "net worth" of the consultant. Where this is a possibility, liability from consequential or indirect damages should either be negated, or special insurance coverage should be obtained (and paid for by the client) in agreement language. Consequential damages are not insurable, and they are impossible to quantify, especially in advance. |
| Claims Against Individuals | It is appropriate and reasonable for agreements to specify that the financial implications related to claims, suits or damages are corporate, not personal. |
| Standard of Care | Agreements should not require a professional engineer to meet a higher standard of care than that required under the Engineers and Geoscientists Act. This is defined as the standard that would be met by another qualified engineer acting reasonably under similar circumstances. Some agreements require an extraordinary standard of care (state-of-the-art, etc.) that exceeds professional responsibilities, and may give rise to unreasonable liability |

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| Warranty | Agreements should not stipulate that consultants provide a guarantee or warranty for their work. Consultants do not carry insurance that would cover warranty issues in the same way as a contractor would. Rather, consultants have professional liability insurance, and project problems are best dealt with through a 'claims' process. |
| Site Safety | Safety regulations now often specify that some party take the prime responsibility for site safety. Consultants are seldom able to reasonably take this on. In most cases, agreements should not burden consultants with prime responsibility for site safety. |
| Intellectual Property and Ownership of Documents | Many agreements include provisions that overly vest intellectual property rights and ownership of documents with the client. ACEC BC, EGBC and AIBC have adopted Intellectual Property Guidelines that, if followed, reasonably protects an engineer or architect's intellectual property and ownership of work product. It is important that agreements for professional engineers have similar reasonable provisions, including provision that the client only acquires rights that the consultant is prepared to sell and have been appropriately paid for. |
| Disclaimers and Limitations | Some agreements restrict or prohibit a consultant's ability to incorporate appropriate disclaimers or limitations on work products. One particular concern is refusal to limit consultant liability in the event that the work is used in an unintended manner, such as on a different project or site. |
| Payment Terms | Some agreements provide wide scope for a client to hold back funds due to a consultant for a specified time or until a final deliverable is approved. This may financially penalize the consultant for things beyond its control. In addition, agreements seldom include explicit provision for interest charge payments for delayed payment by a client. |
| Termination | Some agreements provide for immediate termination by the client without fair compensation for a consultant's work to that point. Agreements are often silent on a consultant's right to terminate an agreement. |
| Dispute Resolution | Agreements provide for many different dispute resolution mechanisms, including negotiation, mediation, arbitration, court action. These are not always appropriate to the situation. Arbitration is generally not favored by the providers of professional liability insurance as it is generally final and binding without ability to appeal. |

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| Insurance Claims | Agreements sometimes seek to have a consultant disclose its history of professional liability insurance claims and provide notice to clients if a new claim is made (whether or not it is valid). From a consultant's perspective, this is an unjustified intrusion on business practices, may conflict with confidentiality provisions, and would be problematic to manage. |
| Disclosure of Legal Action | Sometimes agreements also seek to have a consultant disclose any past or ongoing legal action that the firm may be involved in. As noted above for insurance claims, from a consultant's perspective, this is an unjustified intrusion on business practices, and may conflict with confidentiality provisions. |
| Confidentiality | On occasion, a client may want a strict contract provision that requires the design professional to keep confidential the nature of any information developed as well as data related to a project. This may be for the protection of a marketing advantage or trade secrets, for security or political reasons or for other legitimate client concerns. Such provision may be acceptable and reasonable if the terms are not so broad as to restrict the normal rights and obligations of the consultant in providing his or her professional services. |
| Certifications, Guarantees and Warranties | Engineers are often asked to certify, guarantee or warrant that something has been accomplished or that certain condition exist. Although certifications, guarantees and warranties are commonplace in constructor's contracts, they have no place in a design consultant's agreement. The issues is that *certify, warrant and guarantee* (these words are virtually synonymous) legally means guaranteeing that something is unequivocally true or correct or perfect. |

The 2014 ACEC BC Final Report of the Agreement Task Force concluded with the following:
*"The above list is not intended to be comprehensive or complete. Many other issues could be added."*

Position papers under current consideration are included in the Appendix.

# APPENDIX

# Indemnities and Claims Against Individual Engineers

## Indemnities

An indemnity clause is a contractual provision that can operate to extend a consulting engineer's liability beyond the scope generally recognized by law and beyond the scope of professional liability coverage.

Indemnity provisions are a common source of dispute during contractual negotiations, often due to a lack of understanding of their legal implications. Clients, particularly large project owners, will typically seek to have consultants provide a contractual indemnity similar in nature to the indemnities given by contractors. Contractors, however, are in a much different position from consulting engineers on a construction project. Contractors assume control of an owner's property, and occupy it for the purpose of constructing the project. It is often therefore reasonable for the owner to ask the contractor to indemnify the owner for all damage or injury that arises on the site. The same logic does not apply to consulting engineers. Consulting engineers do not occupy or exercise control over the site. Consulting engineers also do not control the workers or the manner in which the work is carried out. Consulting Engineers should not be prepared to accept indemnity clauses which cause them to assume liability greater than what would otherwise be imposed by law.

Indemnity clauses are often easy to identify in a contract. They use terms such as:

*"The Consultant shall defend, indemnify and hold harmless…"*

*"The Consultant assumes the responsibility and liability for…"*

If one identifies this language in a contract, the clause should be reviewed carefully to assess its potential for unnecessarily expanding the consulting engineer's exposure to liability.

Our courts have identified three elements which define an engineer's liability to its client. First, the damages suffered by the client must be reasonably foreseeable. Second, the engineer must have been negligent in carrying out its services. Third, the engineer's negligence must have "caused" the damage. Many indemnity provisions seek to expand liability well beyond this scope. For example, a recent standard form agreement included an indemnity provision with language similar to the following:

*"The Consultant hereby assumes the entire responsibility and liability for all damage and injury of any kind and nature whatsoever, caused by, resulting from, arising out of, incidental to, or accruing in connection with the Contract or the Services, …"*

An engineer who agrees to such a term does so at significant risk. Such a clause has no limits on the type of damage recoverable (the damages need not be foreseeable or even expected or anticipated by the parties at the time the contract was entered into). Further, liability falls upon the engineer without a need to establish negligence or fault. Instead the engineer has simply assumed responsibility for the client's losses.

Lastly, and perhaps most significant for many consulting engineers, the liability assumed under an indemnity may not be insurable. Most, if not all, professional errors and omissions policies specifically exclude coverage for any claim arising as a result of liability assumed by the insured under a hold harmless or indemnity clause. It is therefore important that prior to agreeing to any indemnity clause, an engineer seek advice from an insurance broker, insurer or lawyer regarding potential uninsured exposure.

A standard indemnification clause developed by ACEC British Columbia and adopted for use by all provincial ministries and ENCON Insurance Managers Inc. reads as follows:

*"Notwithstanding the provision of insurance coverage by the Client, the Engineer hereby agrees to indemnify and save harmless the Client, its successor(s), assign(s) and authorizes representative(s) and each of them from and against losses, claims, damages, actions, and causes of action, (collectively referred to as "Claims") that the Client may sustain, incur, suffer or be put to at any time either before or after the expiration or termination of this Agreement, that arise out of errors, omissions or negligent acts of the Engineer or their Subconsultant(s), servant(s), agent(s) or employee(s) under this Agreement, excepting always that this indemnity does not apply to the extent, if any, to which the Claims are caused by errors, omissions or the negligent acts of the Client, its other consultant(s), assign(s) and authorized representative(s) or any other persons."*

ACEC 31, GC 14.10 also is an acceptable indemnification clause for use.

## Claims Against Individuals

While a client contracts with a consulting engineering firm, the courts in British Columbia have determined that employee engineers who actually carry out the services may individually owe a duty of care to the client and may be personally liable if those services are negligently performed. The British Columbia Supreme Court described its view on this issue as follows:

*"It cannot be plausibly argued that a limited company purporting to offer professional services of "consulting engineers" and indicating that its employees have special skill and experience is not inducing its clients to rely on those individuals' expertise."*

As a result of the current state of the law, steps should be taken to protect the personal interest of the engineers employed with consulting engineering firms. It is recommended that all members incorporate a term in Client-Consultant Agreements that specifically excludes employees (and others providing services for the company) from liability to the client.

ACEC 31, Clause GC 14.7 limits claims against individuals:

*GC 14.7 Where the Engineer is a corporation or partnership, the Client and Consultants of the Client will limit any claim they may have to the corporation or partnership, without liability on the part of any officer, director, member, employee, or agent of such corporation or partnership.*

# Limitations of Liability

## Purpose

Limitation of liability clauses are included in a Client-Consultant Agreement in order to limit a consulting engineer's exposure to liability for certain types of claims that may be brought by the client in the event of a dispute. It is important that consulting engineers be aware of limitation of liability clauses and seek to include them as a standard part of every Client-Consultant Agreement. In general terms, limitation of liability clauses can accomplish three things:

1. limit a consultant's liability to a monetary amount;

2. limit a consultant's liability in time (i.e. prevent claims from being brought after expiry of a certain period of time); or

3. limit a consultant's liability to certain types of claims (i.e. claims for breach of contract or for certain kinds of damages only).

## An Illustrative Example

There are many examples of standard-form limitation of liability clauses. Clauses GC 14.5 and GC 14.8 of the ACEC 31 are useful to review as they address all three areas of limitations of liability (time, amount, and type). Clause GC 14.5 and GC 14.8 read in relevant part:

***GC 14.5*** *The Engineer's liability for claims which the Client has or may have against the Engineer or the Engineer's employees, agents, representatives and Sub-Consultants under this Agreement, whether these claims arise in contract, tort, negligence or under any other theory of liability, will be limited, notwithstanding any other provision of this Engineering Agreement:*

***(a)*** *to claims brought within the limitation period prescribed by law in the jurisdiction in which the Project is located or, where permitted by law, within 2 years of completion or termination of the Services, whichever occurs first; and*

***(b)*** *to re-performance of defective Services by the Engineer, plus:*

***(i)*** *where claims are covered by insurance under section GC 14.1, and, if applicable, by any additional insurance under section GC 14.2 – to the amount of such insurance; or*

***(ii)*** *where claims are not covered by insurance under section GC 14.1, and, if applicable, by any additional insurance under section GC 14.2 – to the amount of $250,000.*

***GC 14.8*** *The liability of each party with respect to a claim against each other is limited to direct damages only and neither party will have any liability whatsoever for consequential or indirect loss or damage (such as, but not limited to, claims for loss of profit, revenue, production, business, contracts or opportunity and increased cost of capital, financing or overhead) incurred by the other party.*

Each key aspect of Clause GC 14.5 in the ACEC 31 is discussed in detail below.

## Time-Based Limitation of Liability

The ACEC 31 limits a consulting engineers liability "in time" through Clause GC 14.5(a) which provides that no claims may be brought by the client two years after either "completion or termination of the engineer's services" (whichever occurs first).

The importance of incorporating a contractual time limit on claims is highlighted by the liberal interpretation the courts in this jurisdiction have given to the Limitation Act. Generally speaking, unless a contractual time limit exists, construction-related claims for defects in engineering work can be brought, in some circumstances, as late as 30 years after substantial completion of a project. As has been stated by our courts, engineers are particularly vulnerable to stale claims:

*"A professional advisor drafts a document or designs a structure and finds himself attacked when, generations later, damage flows from his act. The attack may come at a time when mind and memory have faded or even failed altogether. He may not be able to recall or may have an imperfect memory of instructions or discussions which excluded liability or which redefined in some limiting fashion the duty he undertook."* [1]

Potential prejudice to engineers as a result of the passage of time highlights the importance of including a clause in every client agreement that provides a date-certain within which claims against the consultant must be brought. A limitation clause such as the one found in Clause GC 14.5 of the ACEC 31 accomplishes this objective.

A client may not want to limit the time within which a claim must be brought. In fact, consultants are sometimes required to contract out of a limitation period. A consultant should do its best to avoid this long-tail exposure unless it has specifically considered the risk, obtained the appropriate insurance, and charged an appropriate premium. From the client's perspective, there should be reasons why the consultant is being asked to assume greater liability than would otherwise be imposed by law, and should be made to appreciate the increased cost associated with increased assumption of risk.

1 *Costigan v. Ruzicka* (1985), 13 D.L.R. (4th) 368 (Alta. C.A.) at 377

## Monetary Limits

ACEC 31 limits the amount of a consulting engineer's liability to its client to "the amount of such insurance, or … to the amount of $250,000" through Clause GC 14.5(b).

The purpose behind limiting the consultant's liability in monetary terms is simple: if the consultant obtains a small economic benefit (profit) while helping the client achieve a much larger one, the risk the consultant must bear should be commensurate with the financial return. The ACEC 31 limits the quantum of any claim by the client against the consultant to the limits of available insurance. This can be a reasonable way to allocate the risk of loss on a project between the parties and, it can also be beneficial by causing both sides to turn their minds to insurance coverage issues at the front end of the project.

In some circumstances (such as small fee retainers), it may be appropriate for a consulting engineer to contractually limit its liability to a set amount such as $25,000, $100,000, or some other amount, such as the value of the engineering fees for the project.

It is in the consultant's best interests to limit its exposure to liability to the extent possible. Where a client requires a consultant to assume greater liability than that which the consultant is insured for, it is important that both parties understand the implications of such an arrangement. The consultant essentially has three choices: (1) decline the project on the basis that the risk assumed is too great; (2) take on additional insurance over and above the minimum amount prescribed by the contract and reflect that cost in the bid; or (3) assume the risk and accept that in the event of a significant claim, the survival of the firm may be jeopardized.

Clients have to realize that it is not in their interests for there to be uninsured risk. In the event that something goes wrong on a project, it is in the client's interest for there to be access to a pool of insurance. Professional liability insurance is a risk allocation tool that should be discussed with the client at the outset of the project to ensure the client's interests are reasonably protected and the financial future of the engineering firm is not put at risk by a particular project. Discussing and resolving these allocation of risk issues at the front-end of the project (rather than after a dispute has arisen) avoids the conflict and damage to the ongoing working relationship between client and engineer that can occur when an engineering firm's financial future is unexpectedly put at risk by a client's claim.

On a larger project, a consultant may not be able to obtain sufficient insurance to completely cover its exposure, or at least not at a reasonable cost, particularly if the client-consultant agreement does not include a limitation of liability clause. In that situation, it may be in the interests of both the client and the consultant to take out a project specific professional liability policy. While that may increase the initial cost of the project to the client, the consultants and contractors will all be able to offer their services at lower cost because they are not burdened with accepting uninsured risk or obtaining their own insurance.

## Types of Liability

Consultants can greatly reduce their exposure to liability by including in the client-consultant agreement a clause limiting their liability to claims arising directly out of their performance of the agreement. ACEC 31, Clause GC 14.8 (transcribed above) limits the types of claims that may be advanced against a consulting engineer to "direct damages" arising from the engineers services. A client's lost opportunities or reduction/loss of profit are not recoverable when this clause is implemented.

Consultants should always seek to limit their exposure to certain types of damage. The ACEC 31 accomplishes this objective. There are, however, other types of damages that consultants may want to exclude based on the specific nature of the project.

The Engineers Joint Contract Documents Committee ("EJCDC") E-500 contains a useful clause for this purpose:

*To the fullest extent permitted by law, and notwithstanding any other provision in the Agreement … the Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, or any of them, shall not be liable to Owner or anyone claiming by, through, or under Owner for any special, incidental, indirect, or consequential damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to any such damages caused by the negligence, professional errors or omissions, strict liability, breach of contract, or warranties, express or implied, of Engineer or Engineer's officers, directors, partners, employees, agents, or Engineer's Consultants, or any of them, and including but not limited to:*
*[list particular types of damages].*

These clauses are very broad in that they limit the consultant's liability to the client to direct damages. Special, incidental, indirect, or consequential damages of any kind in any way related to the project are excluded. These clauses would be particularly useful to a consultant engaged on a large project where there is potential for business interruption losses which may be significant and not capable of being defined at the front for which the consultant should not be responsible even in the event of the consultant's negligence.

## Enforceability

A common question by many in the construction industry, including consulting engineers, is whether limitation of liability clauses have been found by the courts to be enforceable. The Supreme Court of Canada has held that these clauses are enforceable provided they are not unconscionable, unfair, unreasonable, or otherwise contrary to public policy[2]. This determination is highly fact driven and as such, a comprehensive review of the law is beyond the scope of this discussion. As a general rule though,

where parties are of equal bargaining power, and they are aware of what they are agreeing to, the courts will permit them to make their own bargain and hold them to the terms of that bargain. Recent court decisions have upheld limitation of liability clauses in client-consultant agreements[3].

There are steps a consultant can take to increase the likelihood that a limitation of liability clause will be upheld. First, it is important that a limitation of liability clause be incorporated into every contract, so it becomes a matter of standard practice. Second, the limitation must be brought to the client's attention. This can be done by way of a cover letter or obtaining the client's initials next to the clause or at the bottom of every page of the agreement. Third, if the client is unsophisticated, explain the clause and document that explanation by way of a letter.

*2 Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423 at ¶64*
*3 Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd. (1989) 21 C.L.R. (2d) 128 (B.C.S.C.) and Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects and Planners Inc. 2007 BCSC 28*

# Disclaimer Clauses

## Preventing Unauthorized Third Party Reliance

Consulting engineers that prepare and provide reports, designs or other documents (written or electronic) to clients face potential for exposure to liability to third parties as a result or the redistribution of the engineer's work product. These claims might arise quite apart from the project for which the report or designs were intended. In order to protect a consulting engineer from this type of liability exposure, a number of steps can be taken. First, an appropriate clause should be included in the consultant's contract with the client providing that the consultant's work is to be used for its intended purpose only and that the client will not share the work with any other party without the express consent of the consultant. As an example, clause 7.2.3 of the MMCD Agreement, a standard document widely used in British Columbia, provides as follows:

*"In no event shall the Client copy or use any of the [concepts, plans, drawings, specifi cations, designs, models, reports, photographs, computer software, surveys, calculations, construction and other data, documents, and processes produced by the Consultant in connection with the Project (the "Instruments of Service")] for any purpose other than those noted above or in relation to any project other than the Project without the prior written permission of the Consultant. The Consultant shall not unreasonably withhold or deny such consent but shall be entitled to receive additional equitable remuneration in connection with its grant of consent."*

If it is contemplated that a report, drawings or designs may be provided to a third party, steps should be taken to ensure that the third party understands it is not entitled to use or rely upon the work product or is aware of and accepts any limitations the engineer has placed upon the work. This objective can be accomplished by including a clearly worded disclaimer of liability on every report, drawing or document that may fall into the hands of a third party. The importance of an appropriately worded disclaimer is highlighted in ***Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.***, [1993] 3 S.C.R. 206, a decision of the Supreme Court of Canada. Edgeworth Construction was in the business of building roads in British Columbia. In 1977 it bid on a contract to build a section of highway near Revelstoke. Its bid was successful and it entered into a contract with the province. Edgeworth alleged that it lost money on the project due to errors in the specifi cations and construction drawings, which had been prepared by N.D. Lea & Associates ("N.D. Lea") for the province. Edgeworth's contract with the province provided that any representations in the tender documents were "furnished merely for the general information of bidders and [were] not in anyway warranted or guaranteed by or on behalf of the Minister…" This clause was seen to be suffi cient to absolve the province from any liability for the plans. As a result, Edgeworth commenced an action in negligent misrepresentation against N.D. Lea. In allowing the appeal on the basis that the facts pleaded by Edgeworth disclosed a cause of action against N.D. Lea, the court specifically noted that N.D. Lea had failed to disclaim any responsibility for the accuracy of its specifications and drawings.

The following are two examples of disclaimers that will serve to protect an engineering firm from liability arising from unauthorized use of work product by a third party:

*"The drawings, plans, models, designs, specifi cations, reports, photographs, computer software, surveys, calculations and other data, including computer print-outs, contained in the Contract Documents are the property of the engineer. The Contract Documents are made available for your review for informational purposes only in relation to [a specifi c project]. The Contract Documents may not be copied, reproduced, or distributed in any way or for any purpose whatsoever. The Contract Documents are provided "as is" without any guarantee, representation, condition or warranty of any kind, either express, implied, or statutory. The engineer assumes no liability with respect to any reliance you place on the Contract Documents. If you rely on the Contract Documents in any way, you assume the entire risk as to the truth, accuracy, currency, or completeness of the information contained in the Contract Documents."*

Further, each page of a consultant's drawings or designs should be stamped with a disclaimer of liability, which might read as follows:

*"This work is intended solely for the Client(s) named. The scope of work and related responsibilities are defined in the Conditions of Assignment. Any use which a third party makes of the work, or any reliance on or decisions to be made based on it, are the responsibility of such third parties. Decisions made or actions taken as a result of our work shall be the responsibility of the parties directly involved in the decisions or actions."*

# Ownership of Work Product

Copyright law protects the expression of original works by authors once such expression is manifested in permanent form. The protection provided by copyright law is automatic and need not be registered or otherwise formalized.[1] There is a federal statute, the ***Copyright Act,*** which governs this area of the law.

The *Copyright Act* defines "copyright" as follows:

*"copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever…*[2]

The ***Copyright Act*** provides that copyright may subsist "in every original … artistic work".[3] Artistic work "includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilation of artistic works".[4] An architectural work is defined as "any building or structure or any model of a building or structure".[5] Therefore engineers' drawings, as well as the structures embodying the drawings, are protected by copyright provided that the ideas they express are original.

Ownership of drawings, specifications, and other documents used in the construction of a project is often confused with ownership of copyright. The ownership of drawings and related documents refers to ownership of the drawings themselves and is governed by the contract between the consultant and the client. The ownership of copyright refers to the three-dimensional expression of the design embodied in the drawings as well as the right to reproduce that expression.

The ***Copyright Act*** provides that the author of a work shall be the first owner of the copyright therein.[6] However, if the author of the work is not an independent contractor but rather creates the work in the course of employment, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright.[7] Typically, although not always, consulting engineers provide their services as independent contractors.

The ownership of a consulting engineer's work product can be a controversial issue that arises in many contract negotiations. The typical view of the client is that the party who pays for the work product owns it. However, what clients are generally looking for is an exclusive right to use the drawings and specifications they have paid for. Consultants are generally of the view that they are selling their ideas and not the tangible manifestations of those ideas, i.e. drawings and specifications. The solution to bridging this gap will often depend on the nature of the project and what future use both the client and the consultant intend to make of the work product.

One of the consultant's primary concerns with giving up ownership to the work product is the potential exposure to liability that stems from the unauthorized use of the consultant's work product. This concern arises primarily from the possibility that the work product may be used for an addition to the project, or a new project, for which it may not be suitable. The consultant may also have incorporated a patented design into the work product and will therefore be concerned with its unauthorized re-use on another project. The consultant may also want to retain ownership in order to receive credit and recognition; consultants who have worked on a project may wish to make copies of the work product to show prospective employers and clients.

Clients will typically want ownership of the work product if the project is intended to be unique. Clients may also be concerned that they have paid for a design which the consultant can then re-use on another project. Clients want to have the flexibility to modify the design or make changes to the project down the road. The Supreme Court of Canada has held that a client who has retained a consultant to prepare plans has an implied licence to make necessary changes in the plans not affecting the artistic character of the design.[8]

Generally, the competing views can be resolved by determining to whom ownership of the work product is more valuable. It is unlikely that the client requires more than the right to use the work product for the useful life of the project. Any concerns that the engineer may use the work product on another project can be addressed in the contract and in the contract price.

Most standard-form, client-consultant contracts contain provisions dealing specifically with ownership of work product. Portions of Part 11 of the ACEC 31 provides for this as follows:

***GC 11.1*** *The Engineering Documents are the property of the Engineer, whether the Work is executed or not. The Engineer reserves the copyright therein and in the Work executed therefrom. The Client is entitled to keep a copy of the Engineering Documents for its records.*

***GC 11.3*** *Provided the Fees and Reimbursable Expenses of the Engineer are paid, the Client will have a non-exclusive license to use any proprietary concept, product or process of the Engineer which relates to or results from the Services for the life of the Project and solely for purposes of its maintenance and repair.*

***GC 11.6*** *Should the Client use the Engineering Documents or provide them to third parties for purposes other than in connection with the Project without notifying the Engineer and without the Engineer's prior written consent, the Engineer will be entitled either to compensation for such improper use or to prevent such improper use, or to both. The Client will indemnify the Engineer against claims and costs (including legal costs) associated with such improper use. In no event will the Engineer be responsible for the consequences of any such improper use.*

***GC 11.7*** *Should the Client alter the Engineering Documents without notifying the Engineer and without the Engineer's prior written consent, the Client will indemnify the Engineer against claims and costs (including legal costs) associated with such improper alteration. In no event will the Engineer be responsible for the consequences of any such improper alteration.*

***CG 11.9*** *The Engineering Documents are not to be used on any other project without the prior written consent and compensation of the Engineer.*

These clauses are effective because they provide that (1) the consultant retains ownership of and copyright in the work product; (2) the work product is not to be used for any other project without the prior consent and remuneration of the consultant; (3) the client is entitled to a copy of the work product for records and maintenance purposes, but only in connection with the project; (4) if the work product is used for purposes other than in connection with the project or otherwise altered without the consent of the consultant, the consultant does not warrant the fitness of the work product for that use; and (5) the client agrees to indemnify the consultant for any unauthorized use of the work product.

1 B.M. McLachlin, W.J. Wallace & A.M. Grant, ***The Canadian Law of Architecture and Engineering***, 2d ed. (Vancouver: Butterworths, 1994) at 264. [McLachlin et al.]
2 ***Copyright Act***, R.S.C. 1985, c. C-42, s. 3(1). [***Copyright Act***]
3 ***Copyright Act***, supra note 2, s. 5(1).
4 ***Copyright Act***, supra note 2, s. 2.
5 ***Copyright Act***, supra note 2, s. 2.
6 ***Copyright Act***, supra note 2, s. 13(1)
7 ***Copyright Act***, supra note 2, s. 13(3).

8 ***Netupsky v. Dominion Bridge Co.,*** [1972] S.C.R. 368.

# Standard Form Agreements

There are a number of well researched and vetted standard form agreements available to the consulting engineering industry to use directly or as a guide to appropriate contractual language. These include:

1. **ACEC Document 31 - Engineering Agreement between Client and Engineer**:
This document ("ACEC 31") was revised in 2010 by the Association of Consulting Engineering Companies – Canada (ACEC).

2. **MMCD Client/Consultant Agreement**: This document was created by the Master Municipal Construction Documents Association which began in 1989 as a joint effort of ACEC British Columbia, BC Road Builders and Heavy Construction Association (BCRHCA), and the Association of Professional Engineers and Geoscientists of BC (APEGBC). A Joint Municipal Committee comprised of representatives of municipalities, contractors and the engineering profession had a mandate to create, standardize and improve tender and contract documents being used in the province of British Columbia.

**3. EJCDC E-500 Standard Form of Agreement between Owner and Engineer for Professional Services**: This document was issued jointly in 2002 by the American Council of Engineering Companies; Professional Engineers in Private Practice, a practice division of the National Society of Professional Engineers; and the American Society of Civil Engineers (ASCE). Each EJCDC Contract Document is prepared by experienced engineering design and construction professionals, owners, contractors, professional liability and risk management experts, and legal counsel.

It is recommended that every CEA member responsible for negotiating contracts on behalf of his/her firm be familiar with these standard form documents to use as a base line in determining appropriate contract language.

CEA Position Paper

# Termination of a Client-Consultant Contract

In the normal course a contract is terminated when all parties have performed all obligations under it. A contract between a client and a consultant is typically concluded when the project is completed and the consultant has been paid. Additionally, a contract can be terminated at any time by the mutual assent of all parties. However, there are times when either the client or the consultant will want to terminate the contract but the other party will not agree. If there are no provisions in the Client- Consultant Agreement that identify how and in what circumstance unilateral termination can occur, there is unnecessary uncertainty for both the client and engineer. Further, the party seeking to get out of the contract may be put in a very difficult situation as there can be serious consequences for terminating without proper cause.

Contracts drafted by clients typically give explicit termination rights only to the client. Contracts published by professional engineering associations provide a more balanced approach that allows either client or consultant to terminate for certain designated defaults by the other. For example, Part 10 of the ACEC 31 provides as follows:

***GC 10.3*** *If the Engineer is in material default in the performance of any of the Engineer's obligations under this Engineering Agreement, the Client will notify the Engineer that the default must be corrected. If the Engineer does not correct the default within 30 days after receipt of such Notice or if the Engineer does not take reasonable steps to correct the default if the default is not susceptible of immediate correction, the Client may terminate this Engineering Agreement upon further Notice to the Engineer, without prejudice to any other rights or recourses of the Client. Such termination will not release the Client from its obligation to pay all Fees and Reimbursable Expenses incurred by the Engineer up to the date of termination in the manner provided in this Engineering Agreement.*

***GC 10.4*** *If the Client is in material default in the performance of any of the Client's obligations set forth in this Engineering Agreement, including but not limited to the non-payment of Fees and Reimbursable Expenses of the Engineer in the manner specified in this Engineering Agreement, the Engineer will notify the Client that the default must be corrected. If the Client does not correct the default within 30 days after receipt of such Notice, the Engineer may terminate this Engineering Agreement upon further Notice to the Client. In such event, the Client will promptly pay the Fees and Reimbursable Expenses of the Engineer that are incurred and unpaid as of the date of such termination, plus the Termination Expenses, without prejudice to any other rights or recourses of the Engineer.*

***GC 10.5*** *If the Client is unwilling or unable to proceed with the Project, the Client may suspend or terminate this Engineering Agreement by Notice of 30 days to the Engineer. Upon receipt of such Notice, the Engineer will perform no further Services other than those reasonably necessary to suspend or terminate that portion of the Project for which the Engineer is responsible. In such event, the Client will pay all of the Fees and Reimbursable Expenses incurred by the Engineer up to the date of suspension or termination, plus the Suspension Expenses or Termination Expenses, as the case may be, in the manner provided for in this Engineering Agreement.*

Insofar as the consultant's right to terminate the agreement, Part 10 of the ACEC 31 provides that if, within 30 days of being put on written notice of a default, the client has not corrected, or taken steps towards correcting, the default, the consultant may terminate the agreement. The client is then obliged to pay the consultant for services rendered and disbursements incurred in addition to a termination fee which is set out in the agreement. Part 10 also provides the consultant with the right to terminate the agreement if the consultant's services have been suspended by the client for more than 30 days. The client is obliged to pay the consultant for services rendered and disbursements incurred in addition to a termination fee which is set out in the agreement.

A common dilemma that engineering consultants find themselves in is being well into a project when a dispute arises over fees. The engineer contemplates withdrawing its services, but without a contractual provision setting out the process for how this can occur, there is uncertainty (particularly in circumstances where the client is

threatening a lawsuit for any delays that may arise due to the withdrawal of services). A provision such as Part 10 in ACEC 31 sets out clear guidance to the engineer and client in these circumstances which can often lead to an orderly resolution of the fee dispute or timely withdrawal from the project.