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June 1, 2011 

Construction Law Update speaker gives advice on risk tolerance

GREG MECKBACH
digital media editor

Owners and construction contractors need to consider allocation of risk when designing contracts, according to lawyers who have represented parties involved in construction law disputes.

"The owner's tolerance for risk is very important," said Glenn Ackerley, a partner with WeirFoulds LLP who deals with consultant contracts and procurement issues.

"There are some public owners I have worked with who just simply want the contractor to bear every conceivable risk. The problem with that of course is the more rational contractors will realize that's just not possible and they will turn away from those kinds of opportunities.

"There are other contractors who will say, 'I will do that but here's the price' and of course the end result is the owner pays far, far more than the owner would have paid had the owner taken a more reasonable allocation of risk.' "

Ackerley made his remarks at a recent Construction Law Update conference, produced by MMPI Canada and held at the On the Park Conference Centre in Toronto.

Risks include design errors, site conditions that were not anticipated when the project was started, delays due to weather, costs of components and the requirement for components that were not specified in the scope of work.

Ackerley cited several construction contract templates published by the Canadian Construction Documents Committee (CCDC), designed to balance the interests of the parties involved in a construction project without assigning undue risk to either party.

He advised executives that before selecting a CCDC contract, they should ask whether the form actually suits the project.

The CCDC documents do not contain a scope of work. Sometimes, Ackerley said, the scope desired by the contracting party includes supplementary conditions, where the owners try to assign risks to the contractors.

He added the scope could contain clauses that conflict with the general conditions specified on the CCDC documents.

Before deciding which contract to use, the parties need to decide how risk is going to be allocated, said Howard Krupat, a lawyer with Heenan Blaikie LLP. Krupat said CCDC

Document 2, a stipulated price contract, puts the cost risk with the contractor and the design risk with the owner. However, CCDC document 3, which is a “cost plus contract,” places both cost and design risks with an owner.

The “cost plus” contract is one where a contractor is paid the actual costs, plus a fee for overhead and profit. Ackerley said this form is typical when the scope of work is not well defined. The owner will pay for any cost overruns, but will also benefit if there are cost savings, Ackerley said.

Another type of contract, known as “unit price,” can be used in cases where it is difficult to determine the actual quantity of an item, such as in roadworks, Ackerley said. In cases such as this, the contractor takes the risk that the cost per unit will increase but does not lose money if the total number of units is greater than originally predicted. The owner bears the risk of quantity variation.

Ackerley also cited two documents drafted by the CCDC, known as Document 14 and Document 15, that are aimed at design-build projects.

Neither of the those documents are considered CCDC documents because at the time, not all constituent organizations of the CCDC have endorsed them.

The CCDC started working on both documents 14 and 15 in 1997, but was unable to get the Association of Consulting Engineering Companies-Canada (ACEC) to endorse it.

As of March, they had been endorsed by the Canadian Construction Association, Construction Specifications Canada (CSC) and the Royal Architectural Institute of Canada. At the time, CCDC chairman Walter Strachan said CCDC was planning to release both 14 and 15 in the fall.