

Construction Alert

A Publication for the Buyers of Construction Services

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SICA At-A-Glance - Regional News

Green Construction Site Training - The Site Superintendent Can Make or Break Your LEED Points!

First time this two-day practical training program will be offered in Kelowna. Previous course participants had the following to say:

"It's a good introductory course to the aspects related to green building."

"This course motivates individuals to adopt GBIs in their everyday construction lives."

The implications of not reaching LEED status are being challenged in court....don't let that happen to you!!

June 1 & 2, 2009 Kelowna To register: www.sica.bc.ca/greenke.pdf

This course is brought to you in partnership with light house and SICA.

Keep Or Assign Risks, For Each To Be Well-Managed

Many risks have to be faced on projects, even after uncertainties and potential problems have been identified and reduced through good design, planning and organization. The pay-off is successful results – including profit and reputation for a private sector company, and financial viability for a public sector owner. Buyers and sellers are risk-takers and many conditions in the contracts they sign are included in order to assign risk – either fairly or unfairly; ("which is which?" is a matter of much debate, one that had been substantially resolved by standard contract conditions).

The construction associations are vocal in promoting fair contracting, including assigning risks to those who are able to estimate the possible costs, to manage the risks, and to bear the consequences. BCCA's report "Quality Begins at the Top" warns against the assigning of risks to contractors that they are not in a position to manage, by an owner who may be seeking cost certainty through awarding a contract that is "risk-free" to itself as buyer; the list starts with hidden site conditions. (The report is available at www.bccasn.com/reports.html.)

It is possible to write contracts, or supplemental conditions to firm or maximum price standard contracts, so that all of the consequences of uncertainties and problems will apparently fall on the design or building contractor. Some custom-written contracts even place the responsibility on the designer or builder to manage problems caused by the owner (or other buyer), or to indemnify the buyer from a range of consequences. The intended cost and perhaps schedule "certainty" has drawbacks.

- Prices are generally higher, especially in a seller's market, so the buyer pays for consequences that may not happen.
- The best companies (who do not have to seek high-risk work) may decide not to bid, especially in a seller's market. Added insurance is not the main problem, it is

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Completing Tender Forms for Listing of Named Trades

The requirement of which trades are to be listed should be determined by the Tendering Authority. The creation of the list ensures that all bidders are responding the same and creating contracts

the risks that are not insurable or bondable – a good test of whether a risk is reasonably assigned

- If the bid invitation is to a wide audience, and if award is to the low bidder, it is likely that the “successful” bidder will have given insufficient attention to what is being agreed, and will not be ready or able to deal with the uncertainties and manage the problems.
- For serious problems that the building designer or contractor cannot or does not control, the actual consequences will probably greatly exceed the agreed pricing, and will likely “rebound” to the owner.

When serious problems occur, the owner/ buyer will receive a claim, and will likely reject it on contractual grounds. The affected designer or builder may cease to perform fully, or may in extreme circumstances go out of business. It is a near-certainty that the co-operative relationship, which is a catalyst for the success of each contracting party, will be lost causing a damaging ripple effect on the project and its results.

In spite of what contracts may say, consequences will fall at least partly on the project owner, in terms of reduced quality and late completion, and hence loss of building function and revenue, and probably substantial project and legal costs. Also, a court judgement may “write down” unreasonable contract conditions, to the disadvantage of the buyer.

A good contract is the basis of a good relationship and good results. The opposite is equally true. A company “buying” cost certainty (with the price hidden in a bid or proposal), may not get what it pays for. Why risk the difficulties outlined above, instead of following established good practice in assigning risk so that problems will be contained? Hiding risks under a “contractual carpet” is risky, and an “out-of-sight-out-of-mind” situation increases the disruptive surprise element when problems appear.

Inappropriate assignment of risk tends to:

1. limit bidding competition by discouraging qualified bidders, and lead to award contracts to designers or builders who are either inexperienced or will not fulfill all the contract requirements;
2. increase the cost and duration of the work; and
3. have limited effect if the designer or builder is unable or unwilling to deal with all of the consequences.

published by the BC Building Projects Committee

Fixed Price Construction Contracts: Who pays for "EXTRAS"?

Author: Allan Elliott, Pushor Mitchell LLP; Research assistance from Deanna M. Stone

The courts have often approached this question with the view that a contractor will be required to pay for any costs the contractor knew or ought to have known about when tendering its bid on a construction project. In the event that a contractor is required to perform extra work and incur additional expenses (the “Extras”) that were not expressly included in the fixed price contract, the Extra that should have been anticipated by the contractor will be viewed as being within the scope of the contract. As such, the contractor is deemed to have included the cost of that work in its tender and will be required to pay for it.

Where the Extras are outside the scope of the contract, the contractor will be entitled to be paid for the Extras, so long as the owner of the project owner has given the contractor permission to incur the extra expense. In that sense, an Extra is work which is substantially different from or collateral to the work contemplated by the contract. In order to determine whether a particular item of work is an extra the courts will often look to the terms of the contract, the nature of the work, and the surrounding

with the same trade contractors. If you see a tender form that is not filled out with the trades to be named, please contact the Tendering Authority or SICA.

In Memoriam
Hans Saenger, of Saenger Enterprises Ltd., passed away on January 31, 2009. SICA will be making a donation to BC Cancer in Hans’ name.

It is with sympathy that we announce the passing of **Roger Hill**, formerly of the Thompson-Nicola Engineering Company, who passed away on April 5, 2009. Read more: <http://www.legacy.com/can-edmonton/Obituaries.asp?Page=Lifestory&PersonId=126024216>

It is with sympathy that we announce the passing of **Art Suke**, formerly of Maple Reinders, who passed away on May 6, 2009. Art was active on the SICA Board as a Director in 1998 and 1999, and as an alternate in 1997 and again in 2000.

Improving CoC Fire Safety

The Office of the Fire Commissioner (OFC) produced statistics indicating that the incidence of construction fires in multi-unit wood frame buildings has averaged a little more than 2 a year over the

circumstances.

The burden of proving that work done was in fact an Extra and not included in the contract lies on the contractor, and unless able to discharge this burden, the contractor is not entitled to receive more than the price fixed by the contract. The contractor must show that the changes were of so radical a nature that they, in effect, caused a new contract to be created between the parties.

To avoid incurring additional expenses, it is prudent for a contractor to meticulously review all calls for tenders and to clarify any ambiguities at the outset.

An example of where the Supreme Court of British Columbia has ordered that a contractor pay for extra work was where a room expansion was required to accommodate a large hot tub. The owner of the property had requested that an 8 to 10 person hot tub be installed in one of the rooms in their hotel; however, the size of the room in the building plans would not accommodate such a large hot tub.

The Court held that, in those circumstances, the contractor should have foreseen that the room would have to be expanded to accommodate the hot tub and so the contractor was required to pay for the costs of the expansion.

Where project owners rely on the expertise of a contractor to determine what work will be required in order to complete a project and how much that work will cost, additional costs arising from the contractor's miscalculation, will be born by the contractor.

Conversely, where the miscalculation is in the area of expertise of the owner or a third party contracted by the owner, e.g. an engineer or architect, the additional costs arising from that mistake will either be treated as an extra to be paid for by the owner, or the court may determine that the engineer or architect is liable for the additional costs because of its mistake.

Only where the additional work is radically different from the type of work required by the contract and was not contemplated by the parties as being within the scope of the contract, the project owner or the experts hired by the project owner to determine the scope of the project (e.g. engineers or architects), will be required to compensate the contractor for the additional work.

[Greyback Construction Wins National Award](#)

The Canadian Construction Association presented its national awards at the recent Annual Conference in Arizona. The 2009 **Excellence in Innovation Award** recipient was **Greyback Construction Limited**, from Penticton, BC for the use of snow-making machines on the William R. Bennett Floating Bridge. Greyback used snow-making machines to cool the ambient air, instead of the concrete, to allow them to build pontoon structures where temperatures in the mid 30's are not uncommon to the Okanagan Valley. The results were impressive, Greyback's innovative thinking greatly enhanced worker safety and working conditions, was very predictable, improved the quality of the concrete cure at minimal additional cost, and was environmentally "friendly" – using water that was already being pumped. Congratulations Greyback!

To view the CCA award presentation, you may go to the following link: www.sica.bc.ca/PresentationCD/Innovation.ppt

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BCCA At-a-Glance - Provincial News



[Interesting Update on Tercon Case](#)

On March 27, 2006 the Supreme Court of British Columbia found in favour of Tercon Contractors Ltd in a tendering case against the BC Ministry of Transportation and Highways.

Tercon had been one of six contractors eligible to bid on a highway project and their bid had come in second lowest. The lowest bid had been submitted by a joint venture

past decade. While OFC's stats may not be complete, nor do they capture fire incidents that were dealt with by workers on site without calling the fire department, there has been some concern expressed that fire safety planning requirements of the Fire Code were routinely being misunderstood or ignored.

In light of this, the OFC has produced a bulletin to clarify fire safety planning. To read the [Fire Safety Planning for Construction](#) Bulletin, please link to: www.sica.bc.ca/firesafet y.pdf

Construction Sector Council (CSC) Symposium

The CSC invites you to join them for a BC Construction Labour Market Symposium on May 26, 2009 in Vancouver. This symposium provides a venue for the construction industry and its stakeholders to discuss the Construction Sector Council's 2009 – 2017 forecast scenario for BC and explore the solutions to managing the construction workforce requirements through economic downturns and upturns. For more info or to register, link to:

www.sica.bc.ca/lmi.pdf

consisting of one contractor that was eligible to bid and one that was not. The Ministry disguised the bid of the joint venture to appear to be a bid only from the eligible contractor and awarded them the contract. The trial judge found that the award had been to a non-compliant bidder and that the Ministry had breached their duty of fairness.

The Ministry appealed this decision relying on the following clause found in the Instructions:

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.

The Appeal Court agreed with the Ministry and on December 3, 2007 the BC Court of Appeal allowed the Ministry's appeal. The Court of Appeal felt that this clause could indeed act as a complete bar to Tercon's claim. Tercon was sophisticated enough to understand that they would have no redress against the Ministry even in the face of potential mistreatment in the tendering process.

Fortunately for the industry, this was not the end. On July 10th of 2008, the Supreme Court of Canada granted Tercon's application of leave to appeal.

The Supreme Court will be able to consider the following questions:

- Does the law permit a person calling for tenders to use a "no claims" clause as a licence to breach the duty of fairness - even when that person is knowingly and egregiously unfair?
- Is there an implied term in Contract A that a person calling for tenders (particularly government) is required to evaluate tenders not only fairly, but in good faith? If so, can this requirement be breached with impunity by resort to a "no claims" clause?
- Does the law permit government, by private law of contract, to use a "no claims" clause as a licence to make decisions unfairly and contrary to the provisions and policy of governing legislation - even if its officials have concealed their unfair actions?

The hearing date is set for March 23 of this year.

There is one final twist. The Province of Ontario stood up and requested the right to intervene in this case, citing the fact that they are one of the biggest public procurers in the country. The Court agreed and they were granted intervener status. At first glance it would appear that one provincial government was jumping in to support another provincial government. Not so, however. The Province of Ontario seeks to support Tercon! They noted that Ontario strives for fairness, certainty and efficiencies in its procurement practices. In their view, where Contract A is formed a duty of fairness is indeed owed to compliant bidders and it cannot be contracted out of in the terms of a tender call, nor can liability for breaches of it be limited by exclusion clauses.

So the stage is now set for March with a decision likely to be handed down within 3 – 6 months. The results will be of critical interest to the industry and could well shift the Contract A/ Contract B world of construction tendering.

Stay On Top of Environmental Requirements

Environmental requirements are starting to appear in public construction contracts. A recent contract with the Ministry of Transportation included an entire section devoted to the protection of the environment. Are you ready for contracts with environmental terms? I bet you're not. Unlike the decision for all new government owned buildings to be LEED gold certified, these provisions apply to the builder, not the building. Although there is a lot of talk and ever increasing awareness of environmental concerns we're only just ankle deep when it comes to addressing these concerns. The provisions seen to date are the shallow end of the pool but the sea levels are rising.

In anticipation of new requirements and regulations BCCA has been working hard to

Mid-Rise Wood-Frame Residential Construction

Premier Gordon Campbell has announced new BC Building Code provisions which increase the maximum building height for mid-rise wood-frame residential construction from four to six storeys.

These new code provisions were approved in early January 2009 and took effect on April 6. Additionally, an analysis by structural engineers in BC has led to an amendment to the seismic design requirements. For details on this amendment, link to: <http://www.bccassn.com/documents/IssueUpdate217.pdf>

The new BC Building Code provisions can be viewed on this website: http://www.housing.gov.bc.ca/building/wood_frame/

New Gold Seal Website

It is with great pride that the Gold Seal program is launching its new Web site which now features among other things digital and fill-able application forms. We invite you to visit this much improved site at: www.goldsealcertification.com. Please give us your feedback so that we can continue to improve upon our services.

develop information, resources and tools for members.

Read more, link to: <http://www.bccassn.com/documents/bullet163.pdf>

Green Initiatives

Green building is no longer a small segment of the construction industry; it's rapidly becoming common place and standard practice. Green building isn't just the project you're working on; it's the way you impact the community you're working in and the people you work with. Client demands and public expectations are shifting toward greener and more efficient buildings and companies. Demonstrating that you can address these concerns will give you a real advantage over those who can't. BCCA offers some resources to help you get there, such as:

- A carbon calculator and idle reduction calculator
- Overview on carbon credits, cap and trade, and carbon footprint
- Introduction to LEED, BuiltGreen BC, BOMA BEST, and Green Globes green rating systems.
- Corporate Social Responsibility
- Greening Your Business – information and resources
- Online Green Resources

Check out BCCA's webpage to access the above:
www.bccassn.com/greeninitiatives.html

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CCA At-A-Glance - Federal News



New Government of Canada Economic Action

Website

The Government of Canada has launched a new website to allow Canadians to track the government's progress in implementing the stimulus announced in Budget 2009. Check it out at: www.ActionPlan.gc.ca

"Canadians want governments and public officials at all levels to work together to stimulate the economy," Minister Flaherty said. "They want to see us taking action on the economy in an accountable and transparent manner."

[ActionPlan.gc.ca](http://www.ActionPlan.gc.ca) includes details of Canada's Economic Action Plan, with links to specifics of initiatives and projects as they are announced. It also explains the roots of the global financial crisis and Canada's relative performance. The website will help Canadians to assess how well parliamentarians, provincial and territorial governments, businesses and others are contributing to positive action on the economy.

Do You Have Your Gold Seal Professional Designation?

The Professional, Gold Seal Certified designation (P.GSC) is reaching new heights! Since January 1st, CCA has received 78 applications for the designation, compared to 74 applications it received for all of 2008.

As a reminder, please note that individuals receiving their Gold Seal certification (via examination only) will have 90 days to automatically receive their P.GSC at no charge for the first year. CCA encourages these individuals to take this next step in certification and visit www.goldsealcertification.com for more information or contact Isabelle Marais, Gold Seal Administrative Assistant at misabelle@cca-acc.com.

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Be A Gold Seal Champion

Gold Seal Champions can be certified construction managers or non-certified individuals, contractors, suppliers, owners and related construction professionals who support Gold Seal as the only management certification program run by industry for industry. These people are "Champions" of the Gold Seal ideals and objectives - in their businesses and communities they demonstrate support for the program by posting marketing material, providing information and mentoring program applicants. If you would like to participate contact the Gold Seal office at goldseal@cca-acc.com.

National Design-Build Conference 09

"Perfect Partnerships To Weather The Storm" is the theme of CDBI's 11th annual Design-Build conference.

This year's conference will take place in beautiful downtown CHICAGO SEPT. 17 & 18, 2009 with a full day pre-conference fundamentals of Design-Build tutorial on the 16th. The Conference Brochure is posted on the CDBI web site: <http://cdbi.org/events/index.html>