ACEC
BRITISH COLUMBIA

Limiting Liability

in Professional Consulting Contracts is in the Public Interest

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Background

Design consultants – both architectural and consulting engineering companies – regularly seek to negotiate terms in agreements with public sector clients with the intention of seeking fair and balanced language that supports the public interest and is reasonable for both the consulting team and the client.

Often, public sector agencies request that design consultants accept contracts that do not limit liability for the design consultant. The risk associated with acceptance of unlimited liability is high and generally not aligned with the risk associated with the design assignment.

While design consultants mitigate their risk through the purchase of insurance, unlimited liability contracts have the potential to result in claims that are in excess of insurance coverage. This uncertainty in many cases will or should be priced into the design consultant's fees and introduces risk to the client, such as loss of market capacity and limited innovation.

This paper addresses conditions related to limitation of liability, where public sector agencies have taken a position that placing limits on liability is not in the public interest and the design consulting community have taken the position that limiting liability creates conditions that are in the public interest.

Protecting the Public Interest

Protection of the public interest is the primary mandate both of public agencies and regulated professionals. Design consultants are all regulated professionals who – like their public sector clients – are bound to protect the public interest. In this paper we focus on protection of public values through transparency and fairness of process, and reasonable conditions to assure the public's financial interest. From this perspective, the paper addresses how procurement and contracting practices employed by public sector agencies are in the public interest when liability for consultants is reasonably limited.

In considering the public interest in procurement and contracting, a competitive market is imperative to support and assure:

- Access to qualified proponents, including speciality practitioners.
- Sufficient local market capacity to deliver programs.
- Responsible use of public funds (value for money).
- Local economic benefit from invested funds.

Market Competition

In selecting a consultant to support design and construction of infrastructure, owners look to the market to identify appropriately qualified professionals and validate budget assumptions. Owners seek multiple responses – typically a minimum of three – from qualified professionals to understand market capacity to support the project. Owners that follow fair and reasonable procurement processes and are known to reasonably share risk with consultants are likely to have interest from many qualified consultants. However, an owner that insists on a risk imbalance favouring themself is less likely to receive the same level of interest from qualified consultants.

A healthy, competitive market requires sufficient capacity and diversity to achieve infrastructure needs and to support meeting the public interest for procurement and contracting.

Capacity: *Assuring performance leads to responsible use of public funds*

Public sector procurement seeks multiple, qualified proponents for each project to protect the public interest through assurance that an appropriately qualified proponent will complete the project for a reasonable fee, and that when scope, schedule, and price are agreed upon, the contract is a responsible use of public funds.

Over the last decade owners have faced loss of competition as qualified proponents decline to participate or resign prior to final selection. Recent examples like the Pattullo Bridge Replacement, Royal Columbia Hospital Replacement, Highway 99 Tunnel Program, the New St. Paul's Hospital, and the Broadway Subway Project risked insufficient competition as few bidders were identified or shortlisted bidders exited during the competition.

While the examples cited are all major projects, similar challenges arise on all projects; the public sector's continued use of unlimited liability is considered a significant contributor to declining participation by consultant teams. This position is reinforced by the BC provincial government's adoption of alternative project delivery – for example, Alliance contracting – which limits liability for project partners. The shift toward Alliance and other risk limiting project delivery strategies was in response to insufficient competition for programs and the need to investigate proponent risk as the primary contributing factor to the recorded decline in competition.

In its 2023/24 – 2024/25 Service Plan[1] Infrastructure BC recognizes the relationship between effective procurement and risk allocation:

[1] 2023/24 – 2025/26 Service Plan. February 2023. Page 6. https://www.infrastructurebc.com/wp2/wp-content/uploads/2023/03/Infrastructure-BC-Service-Plan-2023-24-2025-26-published.pdf

"Infrastructure BC is committed to supporting the provincial government's historic investments in capital infrastructure. While the flow of projects consisting of existing and planned future projects are substantial, B.C. continues to experience market constraints with a trend towards large infrastructure projects where fewer bids per project are submitted than in the past, and those proponents that do bid are more risk averse.

Infrastructure BC remains committed to examining and implementing innovative procurement models to deal with the challenge of fewer bidders and related market dynamics."

Under the heading ***"Objective 1.2: Successful procurement of complex infrastructure projects"*** the report goes on to state, *"Current market conditions are defined by a plethora of large, complex projects in the public and private sectors combined with a growing risk aversion by contractors."*

Considering that many public sector owners require consultants to accept unlimited liability on all projects – regardless of scope – regulated professionals are choosing not to participate as a result of the unacceptable risk to their employees, owners, organization, and client should a failure occur. A decision not to participate impacts the public's access to qualified proponents, and the local economic benefit associated with a healthy and diverse industry employing high-skilled professionals in communities across the province.

Diversity of proponent: *Equitable access to opportunity supports economic growth and innovation*

Equitable access to public sector opportunities by a diverse industry, including sole-practitioners, small and medium sized organizations, and large, global organizations supports the public interest through access to the most qualified proponents, at a fair price, who operate locally and contribute to their community.

The use of unlimited liability by public sector owners in consulting agreements is particularly damaging for sole-practitioners and small, regional firms who do not benefit from a global portfolio of projects that support management of this risk.

Local knowledge, including relationships with local people and community leaders, supports efficient project delivery. Without a diverse sector, we lose access to pathways to practice for new professionals and the direct economic benefit these opportunities provide in communities across the province.

The consulting industry in BC has experienced significant consolidation as larger, multi-national firms acquire smaller, often regional firms. While there are many drivers for consolidation, pushing limits of liability beyond reasonable risk or excluding limits of liability are likely to continue to drive the industry toward greater consolidation as only firms with significant access to capital, a global portfolio balancing risk across their entire network, and sophisticated internal risk management procedures are capable of reasonably managing risk imbalance. This consolidation reduces market diversity, impacts competition, and diminishes local presence (professionals and support staff) as firms centralise operations. Consolidation may adversely affect the public interest associated with competition, and the local economic impact often sought through investment in infrastructure.

Innovation

Innovation is critical to sustaining a competitive and growing consulting industry in BC. Innovation in design is in the public interest as a contributor to growth and resilience in the consulting industry and our economy. Evolving practices and introducing other innovations support key public interest imperatives like project cost management, climate resilience, sustainability, and a competitive advantage for consultants who provide services to clients around the world.

Innovation in design and construction requires a healthy, robust industry with sufficient risk appetite to pursue new, inspired design and construction methods, implement emerging technology, push the limits of available materials, reconsider designs to address climate change, and support principles of equity, diversity, and inclusion.

Unlimited liability embedded in contracts diminishes innovation by creating an environment of untenable risk that promotes risk intolerant design practices. When faced with this situation – and consistent with the perception reinforced by contract terms that demonstrate an owner is risk intolerant – firms eschew innovation and rely on traditional tried and tested approaches to their work. While acceptable for some projects, BC's public sector owners will be challenged to meet objectives like climate sustainability and resilience.

The consequences of the public sector signalling intolerance to risk may result in broad losses, including individual practitioners selecting out of BC in favour of clients or practice in regions considered more dynamic and innovative. The potential loss of talent impacts the health of a growing economy including difficulty attracting and retaining talented practitioners to BC, and the ability of BC based consulting firms to compete outside the province.

How industry manages risk: management, mitigation, avoidance, and transfer

Like all organizations, consulting firms look to identify and manage risks to their team, their firm, and their clients. A risk review is a component of assessing which project opportunities a consultant will pursue, and both internal and external factors influence the consultant's decision to pursue business and accept contract terms. Strong risk management practices are in the public interest as they provide assurance that consultants have sufficient capacity to perform.

Risk Management

Many professional services firms have formalized their internal go / no-go opportunity assessment process, to emphasize careful selection of clients and project opportunities. This not only protects the sustainability of the firm but also protects the public interest, as firms retained by public sector owners will be capable of successfully completing the contracted services. Through go / no-go opportunity assessment, qualified consultants will choose to either not respond to specific clients and project opportunities that are deemed to be commercially unattractive, or to include a risk premium in their fees, diminishing competition and adversely affecting the public interest.

It is not in the public interest for any client to retain a financially unsustainable firm, or to place a firm in the position of accepting an untenable degree of risk to which they cannot respond.

Mitigation and Avoidance

Apart from considering their ability to win business, consultants mitigate business risk by pursuing only opportunities for which they are qualified, can reasonably access sub-consultants or advisors, and where the client's reputation, practices, and contracts are considered reasonable or negotiable. Additionally, consultants look to have a variety of projects and clients such that the failure of any single project (failure to win, or termination of project) will not result in immediate threat to the viability of the firm.

Clients known to impose unfair or unbalanced contract terms are likely to be avoided, and at best treated with caution by qualified firms. Both outcomes are not in the public interest and can result in lost capacity, competition, higher rates, and the potential for protracted or risky negotiations as the consultant works to mitigate the risk posed by the contract.

Risk Transfer:

To manage financial risk most practitioners access insurance to mitigate their exposure in the event of a loss. Insurance markets are global, reducing or eliminating the possibility for local performance to influence rates or market capacity. This is particularly true for small and medium sized firms, who are especially vulnerable to hard markets. Higher rates, smaller limits, and changing market appetite for certain risks (i.e., mine tailings work or structural engineering) limit access to risk transfer and capacity to manage performance of critical professional, technical work.

Professional firms unable to access limits they consider sufficient to mitigate their risk considering the services offered and their primary mandate to protect the public interest, will not compete for projects where liability applied to the contract holder is not reasonably limited. The outcome is limited competition and limited access to specialist practitioners, many of whom work independently or for small or medium sized firms.

While proportional transfer of risk to design consultants is acceptable, in some circumstances it may be appropriate for the owner to work with the consultant to obtain project coverage. This coverage may be difficult or costly to obtain and is therefore not the preferred course of action for every project. The expense associated with project coverage should not be borne by the design consultant alone.

Market Scan

A market scan was performed to understand how different agencies and sectors approach risk management by limiting (or not limiting) liability. These references are cited to reinforce the importance of ensuring all partners to a project hold appropriate risk, which is easily achieved through use of consistent language.

Standard Form Contracts

Standard form contracts have been created by industry associations and regulatory agencies to support efficiency and fairness in contracting. Typically, consulting firms prioritise opportunities with agencies that use standard form contracts as they reduce the risk associated with difficult negotiations or adoption of terms that disproportionately allocate risk to the consultant.

Nearly 40 years ago, the Royal Architectural Institute of Canada (RAIC) developed limitations of liability with the assistance of BC lawyers[2] that continue to be accepted by the public and private sector even today. Three fundamental elements of this contractual limitation of liability include:

1. The amount of professional liability insurance the architect was required to carry,
2. Limits of liability to either a fixed amount or that amount of insurance available to respond to the claim, and
3. A reasonable discovery period in which a claim could be brought by the client against the Architect.

Standard contracts have been written with the clear objective to be fair, balanced, and consistent with other standard contracts related to the development of a project (*Sub-consultants, Constructors etc.*). In addition, recent updates reflect the state of the industry, the most effective approaches to project issues, and fair allocation of responsibilities and liability. Standard contracts include limits of liability to address issues related to efficiency, partnership, and protection of the public interest.

Three standard form contracts are provided for consideration:

i. RAIC 6 – 2022: Canadian Standard Form of Contract for Architectural Services
ii. CCDC 31 – 2020: Service Contract Between Owner and Consultant
iii. MMCD Client/Consultant Agreement[3]

Excerpts from the standard form contracts are included in the Appendix; the following discussion will reference relevant language regarding limitation of liability.

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[2] Bryan Shapiro, Founding Principal of SHK

[3] The current for MMCD Client/Consultant Agreement is not dated but was established prior to 2000. An update is expected in 2023.

RAIC 6 – 2022: Canadian Standard Form of Contract for Architectural Services

The Royal Architectural Institute of Canada (RAIC) standard form contract for architectural services, GC9 – Limitations of Liability, limits liability to:

"the lesser of: (1) the amount of insurance coverage… available at the time the claim is made, or (2) the amount stated in… the agreement".

RAIC 6 is in use for most procurement of Architectural services by governments across Canada. Architects are required to use an approved standard contract, or one based on an approved standard contract such as RAIC 6.

The relevant language is included in the Appendix (***Figure 1***).

CCDC 31 – 2020: Service Contract Between Owner and Consultant

The Canadian Construction Documents Committee (CCDC) seeks consensus from contributors including the Association of Consulting Engineering Companies – Canada, Canadian Construction Association, Construction Specifications Canada, the Royal Architectural Institute of Canada, the Canadian Bar Association, and owners like Brookfield Global Integrated Solutions (BGIS) (representing Public Works and Government Services Canada), and Defence Construction Canada. The CCDC standard form service contract between owner and consultant, GC6.2 – Indemnification and Limitation of Liability, defines the conditions under which liability exists and restricts liability to:

"*(1) a period of 6 years after completion of the contract, (2)* [where insurance limits are defined in the contract] *the limits of insurance,* (and) *(3)* [where insurance limits are not defined in the contract] *limited to the total amount of the Consultant's fee and reimbursable expenses, or $250,000, which ever is greater".*

CCDC 31, released in late 2020, replaced the Association of Consulting Engineering Companies (ACEC) 31. Given the release date, CCDC 31 is not presently known to be in use by any agency. ACEC 31 is the base agreement used by BGIS in their dealings with consultants to manage assets owned by Public Services and Procurement Canada including renovation of iconic buildings like the House of Commons.

The relevant language is included in the Appendix (***Figure 2***).

MMCD Client/Consultant Agreement

The Master Municipal Construction Documents Association (MMCD) includes representatives from municipalities, the Province of BC, and municipal construction service sectors (consulting engineering, construction). The MMCD standard form agreement contract between client and consultant, Section 8.3-1, Limits of Liability, limits liability to:

"…absolutely limited to the amount of the insurance available at the date such claim is brought, including any deductible portion".

The MMCD Client/Consultant Agreement is the basis for many standard municipal consulting agreements.

The relevant language is included in the Appendix (***Figure 3***).

Public Sector approach to limiting liability

Government of Canada:

The Government of Canada's engagement of consultants is governed by the Standard Acquisition Clauses and Conditions (SACC) Manual. The federal approach is to limit liability based on perceived or defined risk of the contract. Essentially, a schedule of limits is used to determine the appropriate limit for each project based on factors like contract value, project value, and the nature of the work performed. The contract language does not limit each party's liability for damages to third parties.

BC Crown Agencies:

All BC provincial agencies have standard contracts/agreements. In some cases, these been developed in consultation with ACEC-BC and AIBC. In the Agreement for consulting services utilized by BC Hydro, Article 32, limits liability to the *minimum insurance prescribed by the agreement,* and for uninsured claims, the *amount equal to the maximum fees or the Fixed Price*. The relevant language is included in the Appendix (**Figure 4**).

Province of BC:

The Province of BC routinely limit liability for contractors through use of recently approved Supplementary General Conditions to standard form contract CCDC 5A/CCDC 5B, which limits liability to *the limit of the… coverage* [insurance], and for claims where the contract does not require insurance, *the greater of the … compensation … or Two Million Dollars, but in no event shall the sum be greater than Twenty Million Dollars.*

The Province's current practice to require unlimited liability in consulting contracts is not consistent with the standard applied to construction partners.

The relevant language is included in the Appendix (**Figure 5**).

Limiting liability for other professional consultants

The Province of BC routinely engages professional consultants including regulated professionals like accountants (CPA), lawyers, and health practitioners. Regulated public practice accountants (auditors) are – like Architects and Engineers – subject to liability risks that could result in significant business losses that could result in closure of their business. However, it is accepted that CPAs universally use contractual terms

in their engagement letter contracts to eliminate that exposure. Like Architects and Engineers involved in major projects, auditors for large public companies would otherwise be subject to huge risks in the tens of millions of dollars (*Livent v. Deloitte & Touche, 2017 SCC 63*) were it not for their now widespread use of contractual limitations upon their potential liability.

In 2007, the Institute of Chartered Accountants of BC (now CPABC) began to provide to its Chartered Accountant (CA) members limitation of liability language modelled upon RAIC 6. Today, nearly every CPA firm in British Columbia use limitation of liability language in their engagement letters; CPABC strongly encourages its members to limit their liability for every engagement.

It is also worth noting that the Province permitted professions who enter into contracts with their clients (*with the exception of lawyers owing to the fiduciary obligations that supersede the contractual*) to bargain with and contractually limit their liability in the performance of their services. The Province has not required statutory regulators of professions charged with the protection of the public to deny such protections, nor has it prevented occupiers of land or retailers to limit their liability to the public. This is because the concept of limiting liability, first introduced with incorporation of businesses, is a widespread and accepted norm in our society.

Conclusions

Successful projects are the result of strong partnership between the owner and their consultants and contractors. Partnership begins in procurement and is reinforced by the owner's willingness to reasonably negotiate contract terms that support fairness and balanced risks and rewards between parties.

Use of standard contracts – like those referenced in this paper – increase fairness, transparency, consistency, and efficiency in procurement. Further, standard contracts that are viewed by the industry as fair and balanced reduce the occurrence of individual parties seeking to negotiate terms perceived by the other party as unfavourable. Design consultants will seek the use of standard contracts that are endorsed by industry associations.

In negotiation each party works in good faith to recognize and accommodate the other party's important requirements. This paper's intention is to set out the genuine concerns of professional design consultants regarding continued application of unlimited liability and how use of this term conflicts with the public interest mandate.

To this end, the following recommendations are offered:

1. To attract the best and most qualified consultant team to a project, the opportunity partners and project must be viewed favourably by potential proponents.
2. To gain industry acceptance and endorsement, the use of standard form contract templates which include fair and reasonable limitation of liability is strongly advised and benefits both parties by reducing the duration of contract review and negotiation.
3. If client or project-specific contracts are proffered, then the use of fair and balanced limitation of liability terms, consistent with the size and risk profile of the project, are strongly advised.

However:

4. If public sector owners seek to protect the public funds through transfer of liability to their consultants, they should expect a commensurate increase in the cost to engage a qualified consultant. The owner should work with the consultant to set in place appropriate insurance coverage to address this liability.

While fair and reasonable (proportional) limitation of liability is preferred by the design consulting industry, use of project coverage – while sometimes difficult or costly to obtain – will assure significantly more capacity to respond to a claim.

Ultimately, liability is limited through various mechanisms and in the end by the total liquidity of a firm following exhaustion of insurance. A judgement against a firm – in excess of their insurance – is likely to result in closure of the firm, which harms the individuals employed by the firm, their communities, and their partners. This harm extends to the public for those reasons set out in this paper – loss of competition, reduced capacity, and limiting the diversity of proponents for future work.

Refusal to limit liability will in many cases result in the client or project being deemed commercially unattractive, reduced market competition, which limits public sector owners from accessing sufficient capacity of qualified consultants, offering services at a fair price, and contributing to the local economy across BC.

APPENDIX – STANDARD FORM CONTRACTS

RAIC 6 – 2022: Canadian Standard Form of Contract for Architectural Services

Link to full contract

GC9 Limitations of Liability

9.1 Any and all claims, whether in contract or tort, which the *Client* has or may have against the *Architect* in any way arising out of, or related to, the *Architect's* duties and responsibilities, including those arising from GC 8 Indemnification, shall be limited in amount to the lesser of:

.1 the amount of insurance coverage provided under Article A20 or A21 of the agreement that is available at the time the claim is made, or

.2 the amount stated in Article A22 of the agreement.

9.2 The *Architect* shall not be liable, in contract or tort, for:

.1 any alterations to the *Architect's* design or to the *Construction Documents* made by the *Client*, the *Constructor*, or other third parties without the *Architect's* written approval,

.2 acts, omissions, or errors of the *Client,* of *Consultants* or other third parties retained by the *Client*, or of the *Constructor,* nor

.3 for the result of any interpretation or finding of the *Architect* rendered in good faith in accordance with the *Construction Documents*.

9.3 The liability of the *Architect* and the *Client* with respect to any claims against each other, in contract or in tort, shall be limited to direct damages only and neither party shall have any liability whatsoever for consequential or indirect loss or damage incurred by the other party.

Figure 1: RAIC 6 – 2018: GC 9 Limitations of Liability

CCDC 31 – 2020: Service Contract Between Owner and Consultant

Link to full contract

GC 6.2 INDEMNIFICATION AND LIMITATION OF LIABILITY

6.2.1 Subject to the limitations of liability set out in the *Contract*, each party will indemnify the other party, to the extent of the fault or negligence of the indemnifying party, for damages and costs resulting from:
- .1 a breach of contractual obligations under the *Contract* by the indemnifying party or anyone for whom that party is responsible; or
- .2 negligent or faulty acts or omissions of the indemnifying party or anyone for whom that party is responsible.

6.2.2 The *Consultant's* liability for claims which the *Owner* has or may have against the *Consultant* or the *Consultant's* employees, agents, representatives and *Subconsultants* under the *Contract*, whether these claims arise in contract, tort, negligence or under any other theory of liability, will be limited, notwithstanding any other provision of the *Contract*:
- .1 to claims made by *Notice in Writing* within a period of 6 years after completion of the *Professional Services* or within such shorter period as may be prescribed by any limitation or statute in the jurisdiction in which the *Project* is located;
- .2 in respect to losses of the type for which insurance is to be provided pursuant to GC 6.1 - INSURANCE, limited to the insurance proceeds recovered under the applicable policy of insurance required in the *Contract*, or that which would have been recovered but for the *Consultant's* failure to maintain such insurance, in no event to exceed the minimum insurance limits of the applicable policies of insurance defined in this *Contract*.
- .3 In respect to losses of the type for which insurance is not required to be provided in accordance with GC 6.1 – INSURANCE, limited to the total amount of the *Consultant*'s fee and reimbursable expenses, or $250,000, whichever is greater.

6.2.3 Notwithstanding the foregoing, the limitation of liability shall not apply to third parties asserting claims, for bodily injury, sickness, or disease (including death) or destruction of tangible property, against either of the parties.

6.2.4 Neither party is liable to the other party in relation to this Agreement, whether due to breach of contract, tort, negligence, warranty, strict liability or otherwise, for consequential or indirect loss or damages, including without limitation, loss of profits, loss of revenue or loss of anticipated business incurred by other party.

New subsection – The obligation of either party to indemnify the other as set forth in 6.2.1 and 6.2.2 above shall be inclusive of interest and all legal costs.

6.2.5 The *Consultant* will not be liable for the failure of any manufactured product or any manufactured or factory assembled system of components to perform in accordance with the manufacturer's specifications, product literature or written documentation.

6.2.6 Where the *Consultant* is a corporation or partnership, the *Owner* and *Other Consultants* 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.

6.2.7 The *Consultant* is not responsible for the identification, reporting, analysis, evaluation, presence, handling, removal or disposal of Hazardous Substances at or adjacent to the Place of the *Work*, unless specified in Schedule A – CONSULTANT'S SCOPE OF PROFESSIONAL SERVICES, or for the exposure of persons, property or the environment to hazardous substances at or adjacent to the *Place of the Work*.

6.2.8 This indemnification and limitation of liability shall survive the *Contract*.

6.2.9 The *Consultant* will not be liable, in contract nor in tort, for:
- .1 any changes made by the *Owner*, the *Contractor*, or other third parties to the *Consultant*'s design or to the *Construction Documents*;
- .2 acts, omissions, or errors of *Other Consultant*s, nor
- .3 for the result of any interpretation made by *Other Consultants* or finding rendered in good faith in accordance with the *Construction Documents*.

Figure 2: CCDC 31 – 2020: GC 6.2 Indemnification and Limitation of Liability

Master Municipal Construction Documents Association – Client/Consultant Agreement

Link to full contract

Limits of Liability 8.3

8.3.1 In consideration of the provision of the *Services* by the *Consultant* to the *Client* under this *Agreement*, the *Client* agrees that any and all claims which the *Client* may have against the *Consultant*, its employees, officers, agents, representatives and *Sub-Consultants* in respect of the *Services*, howsoever arising, whether in contract or in tort, save and except for claims arising out of or in connection

with any malicious act or malicious omission under paragraph 9.1.1, shall be absolutely limited to the amount of the insurance available at the date such claim is brought, including any deductible portion therein, provided that neither the *Consultant* nor any of its employees, officers, agents, representatives nor *Sub-Consultants* has done anything to prejudice or impair the availability of such insurance.

8.3.2 In no event shall the *Consultant* be liable for any loss or damage occasioned by delays or other causes or circumstances beyond the *Consultant*'s reasonable control.

Figure 3: MMCD Client/Consultant Agreement, Section 8.3 – Limits of Liability

BC Hydro Consulting Agreement:

31. Liability Exclusions

(a) Neither party is liable to the other for special, punitive, contingent, indirect or consequential loss or damage. Notwithstanding the preceding sentence, nothing in this clause 31(a) shall apply to or be interpreted so as to, preclude, or otherwise limit, recovery of any of the types of loss or damage described in the preceding sentence, if such loss or damage would be recoverable or claimable under any insurance coverage required to be obtained pursuant to the Agreement or the relevant Work Order, up to the amount, or minimum amount, as the case may be, of insurance coverage required to be obtained pursuant to the Agreement or the relevant Work Order.

(b) BC Hydro releases Consultant from any Claims or Claim Costs that arise as a result of BC Hydro's use of the Work Product in a manner or for purposes inconsistent with BC Hydro's intended use of the Work Product as contemplated in Appendix B or the relevant Work Order, as applicable.

32. Maximum Liability

The maximum aggregate liability of Consultant to BC Hydro for Claims under or relating to a Work Order, whether or not terminated, and whether arising in contract, tort, including negligence, by statute or as matters of strict or absolute liability, is limited:

(a) for Claims, or portions thereof, insured under a policy of insurance required to be maintained under the Agreement or the relevant Work Order, as applicable, to the amount of Claims payments to which Consultant is entitled under those policies, but not exceeding the minimum insurance amount prescribed in the Agreement or the relevant Work Order, as applicable, for those policies; and

(b) for all other Claims, including deductibles and excluded risks and Claims, or portions thereof, not insured under the policies or in excess of the minimum insurance amount prescribed in the Agreement or the relevant Work Order, as applicable, for those policies, referenced in (a) above, to an amount equal to the aggregate maximum for fees or the fixed price, as the case may be, set out in the relevant Work Order and each related Work Order, as amended from time to time by Change Directive or agreed Change Orders. For the purposes of this clause 32(b), Work Orders are related if issued in respect of the same Project, including, without limitation, different phases or aspects of the same Project.

33. Exceptions to Maximum Liability

Notwithstanding anything in the Agreement to the contrary, the limits on Consultant's liability under the Work Orders shall not apply to:

(a) Claims or Claim Costs arising out of the willful, fraudulent or criminal misconduct of Consultant, its subconsultants and subcontractors, or their respective directors, officers, employees or agents; or

(b) Third Party Claims or Claim Costs.

Figure 4: BC Hydro Consulting Agreement, Sections 31 – 33

Province of BC: Supplementary General Conditions to CCDC 5A – 2010 Construction Management Contract – for Services and CCDC 5B – 2010 Construction Management Contract – for Services and Construction:

Link to full CCDC 5A contract

Link to full CCDC 5B contract

Link to Province of BC Supplementary Conditions for Construction Management Contracts

1. Supplementary General Conditions for CCDC 5A

9.1.2 The obligation of either party to indemnify as set forth in paragraph 9.1.1 shall be limited as follows:

.1 In respect to losses suffered by the Owner and the Construction Manager for which insurance is to be provided by the owner pursuant to GC 8.1 – INSURANCE, the limit of the GENERAL LIABILITY COVERAGE – GC 8.1.1(a) or the limit of the PROPERTY COVERAGE – GC 8.1.2(b) whichever is pertinent to the loss.

.2 In respect to losses suffered by the Owner and the Construction Manager for which insurance is not required to be provided by either party in accordance with GC 8.1 – INSURANCE, the greater of the Construction Manager's compensation as recorded in Article A-5 – COMPENSATION FOR SERVICES or Two Million Dollars ($2,000,000.00), but in no event shall the sum be greater than Twenty Million Dollars ($20,000,000.00).

.3 In respect to claims by third parties for direct loss resulting from bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, the obligation to indemnify is without limit. In respect to all other claims for indemnity as a result of claims advanced by third parties, the limits of indemnity set forth in paragraphs 9.1.2.1 and 9.1.2.2 shall apply.

2. Supplementary General Conditions for CCDC 5B/17

12.1.2 The obligation of either party to indemnify as set forth in paragraph

12.1.1 shall be limited as follows:

.1 In respect to losses suffered by the Owner and the Trade Contractor for which insurance is to be provided by the owner pursuant to GC 11.1 – INSURANCE, the limit of the GENERAL LIABILITY COVERAGE – GC 11.1.1(a) or the limit of the PROPERTY COVERAGE – GC 11.1.1(b) whichever is pertinent to the loss.

.2 In respect to losses suffered by the Owner and the Trade Contractor for which insurance is not required to be provided by either party in accordance with GC

11.1 – INSURANCE, the greater of the Contract Price as recorded in Article A-4

– CONTRACT PRICE or Two Million Dollars ($2,000,000.00), but in no event shall the sum be greater than Twenty Million Dollars ($20,000,000.00).

.3 In respect to claims by third parties for direct loss resulting from bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, the obligation to indemnify is without limit. In respect to all other claims for indemnity as a result of claims advanced by third parties, the limits of indemnity set forth in paragraphs 12.1.2.1 and 12.1.2.2 shall apply.

Figure 5: Province of BC Supplementary General Conditions to CCDC 5A, CCDC 5B