



ACEC British Columbia Position Paper

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 of 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 provides as follows:

"In no event shall the Client copy or use any of the [concepts, plans, drawings, specifications, 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 specifications 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 sufficient 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, specifications, 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 specific 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.”

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