



## ADVISORY TO MEMBERS:

### City of Hamilton Indemnification Clause

No. 18/002 – February 6, 2018

#### ISSUE:

Consulting Engineers of Ontario (CEO) is advising members to use caution and consult their insurance and legal counsel before submitting project proposals to the City of Hamilton, specifically with regards to their standard indemnification clause. CEO has discussed the issue of indemnification in the past through a number of meetings with procurement, risk management and legal staff at the City with some acknowledgement on their side that they would entertain some modifications to the clause. Recently through our Rapid Response Service, we enquired about the indemnification clause for RFP No. C3-10-17 – *Consultant Required for Twenty Road East and Upper Red Hill Valley Parkway Extensions Municipal Class Environmental Assessment Phases 3 and 4 – Section 37. Indemnification*. We were informed by the City that they will not be amending the referenced clause. City staff indicated that *“Future considerations may (City emphasis) be made at a later date to amend this clause in some way ...”*. **CEO is notifying member firms considering submitting proposals to the City of Hamilton to ensure that they carefully review the RFP documents for this clause and to be advised that Section 37. Indemnification is very problematic for our industry insurance providers to fully insure.**

#### CEO POSITION:

CEO is of the strong opinion that fair and insurable agreements attract greater and more positive interest from the consulting engineering industry and result in better project results for clients.

The clause in this RFP creates four substantial problems for consultants. It:

**1. Imposes an obligation for the consultant to defend the client.**

Professional liability insurance carriers will not defend an entity other than the insured engineering firm.

**2. Creates an expectation that the consultant will assume “fines”, “penalties” and other sanctions.**

Consultant professional liability insurance policies serve to cover compensatory damages arising from the consultant’s negligence; this does not include fines, penalties and fees etc.

**3. Demands that “damages (including indirect, special, remote, and/or consequential damages)” be assumed by the consultant.**



This is not reasonable as such damages cannot be accurately quantified and are often disproportionate to the liability of the consultant, if they are at all attributable. Due to these factors professional liability insurance coverage may not apply.

**4. Requires coverage for questionable parties, namely “affiliates”, a term more appropriately applied to commercial entities, and “representatives”, an undefined term.**

It is CEO’s position that for a consultant to be held accountable under any agreement, sound negligence-based criteria must exist. Our members’ professional liability policies exclude claims arising out of liability assumed under contract **unless** the liability would have existed in the absence of the contract, e.g. negligence. Acceptance of liability beyond that required by law is the acceptance of liability beyond that for which members are insured.

We remind members that our recommended industry standard indemnification clause, as developed with MEA, can be found in the current version of the *MEA/CEO/Client/Engineer Agreement for Professional Consulting Services, 2017* that is located on our website [here](#).

**CONCLUSION:**

CEO encourages members to make project decisions on a case-by-case basis based on the merits of the individual assignments. Consult with your insurance and legal counsel before accepting any questionable agreement terms; and should you run into client resistance, contact CEO and make use of our contract Rapid Response Service. CEO staff will work with you to assess the problem and where possible develop an industry position addressing your concerns that we will use to advocate on your behalf to try and achieve necessary change.

Should you have any questions about this advisory, our Rapid Response Service or any other industry issue, please contact David Zurawel at [dzurawel@ceo.on.ca](mailto:dzurawel@ceo.on.ca) or 416.620.1400 ext. 222.