



## ADVISORY TO MEMBERS:

### Norfolk County RFP No. PW-E-17-78 – Inter-Urban Water Supply – Section 4.3 Indemnity

No. 18/001 – January 19, 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 Norfolk County. Despite making efforts to engage county officials to amend the indemnity clause in the above referenced RFP, staff have issued CEO a blunt refusal. **Member firms considering submitting responses to the County's call for proposals for RFP No. PW-E-17-78 are advised that Section 4.3 - Indemnity is uninsurable through our industry's insurance providers.**

#### CEO POSITION:

CEO strongly believes that having fair, insurable agreements attracts more positive interest from the consulting engineering industry and leads to better project outcomes for clients.

The clause in this RFP creates three significant problems for our members. The clause:

1. **Imposes an obligation for the consultant to provide coverage for questionable parties, namely "...agents and other representatives..."**

As these are undefined terms, such individuals are not subject to any sort of indemnification by the engineering firm's insurance.

2. **Creates an obligation for the consultant to assume costs including "expenses (including legal, expert and consultants fees..." and other sanctions.**

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

3. **Requires that the consultant assume "demands ... in any way based upon, occasioned by or attributable to anything done or omitted to be done by the Proponent, ... or otherwise in connection with, the Contract. The Proponent further agrees to indemnify and hold harmless the Indemnified Parties for any incidental, indirect, special or consequential damages, or any loss of use, revenue or profit, by any person, entity or organization, including, without limitation, Norfolk County, claimed or resulting from such Claims. The obligations contained in this paragraph shall survive the termination or expiry of the Contract".**



Such obligations are not reasonable as they are overly broad, not limited to negligence and expressly include consequential damages. 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, our members' professional liability insurance coverage would not apply.

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.

## BACKGROUND:

This situation arose when Norfolk County issued a request for proposals seeking bids from qualified firms to provide Consulting Engineering Services for the completion of a Municipal Class Environmental Assessment and Preliminary Design for an Inter-Urban Water Supply System.

The Indemnity Clause contained in the RFP raised concern with a number of CEO's member firms. It detailed terms that stated:

### 4.3 Indemnity

*The Proponent hereby agrees to indemnify and hold harmless the County, its employees, agents and other representatives (collectively, the "Indemnified Parties") from and against any and all liability, loss, costs, damages and expenses (including legal, expert and consultant fees), causes of action, actions, claims, demands, lawsuits or other proceedings, (collectively, "Claims"), by whomever made, sustained, incurred, brought or prosecuted, including Claims for third party bodily injury (including death), personal injury and property damage, in any way based upon, occasioned by or attributable to anything done or omitted to be done by the Proponent, its subcontractors or their respective directors, officers, agents, employees, partners, affiliates, volunteers or independent contractors in the course of performance of the Proponent's obligations under, or otherwise in connection with, the Contract. The Proponent further agrees to indemnify and hold harmless the Indemnified Parties for any incidental, indirect, special or consequential damages, or any loss of use, revenue or profit, by any person, entity or organization, including, without limitation, Norfolk County, claimed or resulting from such Claims. The obligations contained in this paragraph shall survive the termination or expiry of the Contract.*

County staff were asked by at least one member firm to consider replacing this clause with the indemnification clause contained in the *MEA/CEO/Client/Engineer Agreement for Professional Consulting Services, 2017*. This clause, jointly developed and endorsed by CEO, the Ontario Municipal



Engineers Association (MEA) and their insurance industry partners, contains balanced and reciprocal indemnity conditions that benefit both the Client and their Proponents. The terms of this clause state:

*The Engineer shall indemnify and save harmless the Client from and against all claims, actions, losses, expenses, costs or damages of every nature and kind whatsoever which the Client, his employees, officers or agents may suffer, to the extent the Engineer is legally liable as a result of the negligent acts of the Engineer, his employees, officers or agents in the performance of this Agreement.*

*The Client agrees to hold harmless, indemnify and defend the Engineer from and against any and all claims, actions, losses, expenses, costs or damages of every nature including liability and costs of defense arising out of or in any way connected with the presence, discharge, release or escape of contaminants of any kind, excluding only such liability as may arise out of the negligent acts of the Engineer in the performance of consulting services to the Client within this project.*

The blunt response from county officials was, “No”. CEO through its Rapid Response Subcommittee, again approached county staff making the same request. CEO also offered to work more closely with the County to develop more mutually agreeable terms. The response from Norfolk County staff again was “No”. It is the county’s refusal to work collaboratively with CEO and the consulting engineering industry that has prompted this advisory.

## **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.