



Communiqué to Members:

The Regional Municipality of York issues Addendum for RFP P-17-69 in response to CEO's Letter

No. 17/001 - June 05th, 2017

Issue:

The Regional Municipality of York issued RFP P-17-69 on May 18, 2017 for *Consulting Services for the inspection and appraisal of Bridges, large Culverts, Structural retaining walls, and large Overhead sign supports owned by the Regional Municipality of York.*

Under the provision of the Region of York's agreement, the Consultant is responsible to the owner for delay and/or under-performance of the Project.

The Liquidated Damages clause (Schedule B, VII), presents problems for member firms obtaining professional liability insurance coverage members' firms. When liquidated damages clause is not related to negligence in the performance of professional services (not meeting the standard of care), this becomes non-insurable because professional liability insurance policies only provide coverage for damages caused by the negligence of the insured Consultant. Most professional liability policies specifically exclude coverage for liquidated damages.

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CEO's position:

1. The Courts have consistently held that a liquidated damages provision cannot be used to impose a penalty; therefore, if the amount set for liquidated damages is a penalty imposed for breach of contract, or a coercive measure for deterring a potential breach, liquidated damages may not be enforceable. For the liquidated damages provision to be enforceable, it must provide some clear or readily ascertainable amount accruing because of a breach of contract.

2. Also, damages must be exclusive. If the contract provides the Owner with an alternate way to measure or seek damages, the liquidated damages may not be enforceable.

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Schedule F Contract Terms and Conditions, 9.1 Damages and Section 12 - Right to Set-Off and Holdbacks, both include provisions for the Region to remedy delayed services; therefore, Schedule B VII. Liquidated Damages would be nonexclusive.

The Regional Municipality of York's Addendum:

On May 30th, CEO issued a formal letter to The Regional Municipality of York on behalf of our Members, regarding RFP P-17-69 Consulting Services for the inspection and appraisal, in particular, the Liquidated Damages clause.

On June 1st, 2017, the Region of York responded to CEO's communication detailing the fact the addendum had been issued, removing the LD clause as requested.

This RFP is set to close on June 8th, 2017.

Should you have any questions or concerns regarding this communiqué or this particular RFP please contact Chaslene Pilgrim, (416) 620.1400 Ext. 226 or via email cpilgrim@ceo.on.ca