



## ADVISORY TO MEMBERS:

### Town of Bradford West Gwillimbury RFP contains problematic Terms and Conditions

No. 19/006 – November 11, 2019

#### 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 Town of Bradford West Gwillimbury. CEO recently proposed amendments for the Town's Request for Proposal No. P-19-64- Professional Engineering Consulting Services for the Bradford Water Pollution Control Plant Reviews and Upgrades Project. The Town has yet to respond to our concerns. **Consequently, member firms considering future RFP submissions are advised that some terms and conditions will be very difficult, if not impossible, to adequately insure 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.

#### Provisions in the Town's RFP create five significant areas of caution for Consultants:

- ***Section 4.02 Deliverables Warranty appears to be applicable to an equipment/material supply contract, as such its inclusion in a Professional Services contract is not appropriate as it contains language that exceeds a reasonable Standard of Care.***

CEO informed the Town that provisions such as "shall be free from defects in material, workmanship and design" go beyond a Consultant's standard of care. CEO also noted that this language, and the inclusion of "Warranty" in the title of the clause imply an unattainable standard of perfection and recommended it be removed. CEO also informed the town that clauses addressing deliverables for professional services should not be subject to revision of work based on a broad "opinion". CEO recommended that the following alternative language be used to address deliverables: "Any rectification notice must have reasonable request for corrections referencing the original scope of work, the Contract, Industry Standards, and/or Requirements of Law".

- ***Section 6.05 Injunctive and Other Relief allows the Town to arbitrability obtain injunctive relief***

CEO believes strongly that the requirement for the Consultant to abide by the ability for the Town to arbitrarily "obtain" injunctive relief without any substantial evidence of damage is unreasonable and unacceptable. CEO recommended that the clause be

amended to state that owners are **entitled** to seek injunctive relief upon the basis of proven damage.

- **Section 8.01 Consultant Indemnity establishes a one-sided indemnity and is not limited to a Consultant's negligence acts, errors, and omissions.**

As written, this indemnification clause does not require the Town to provide any obligation of indemnification for any acts that would cause harm/damage to the Consultant. CEO also informed the Town that requiring Consultants to indemnify and hold harmless the "*Indemnified parties from and against any and all [Claims]*" is a problematic requirement when not expressly tied to a Consultant's negligence.

- **Section 8.01 Consultant Indemnity requires Consultants to indemnify vaguely defined parties who may not be under the care and control of Consultants.**

CEO informed that Town that the inclusion of indemnified parties such as "*independent contractors*" is not reasonable as Consultants cannot be expected to assume any liability for any damages or delays caused by parties outside of their control or responsibility. CEO also noted that the provision "*or otherwise in connection with, the Contract*" further aggravates this condition by creating a vaguely defined liability that would include parties that are outside of the Consultant's control or responsibility. CEO proposed that the Town omit both of the aforementioned terms so as to establish a reasonable limitation of liability for the Consultant.

- **Section 8.01 Consultant Indemnity subjects Consultants to undue penalties for unreasonable damages.**

The clause creates an expectation that Consultants "*...indemnify and hold harmless the Indemnified Parties for any incidental, indirect, special or consequential damages...*". CEO advised the Town that these types of damages are very often difficult to accurately quantify, and as such are prone to create a liability to be borne by the Consultant that is disproportionate to the risk inherent to the services they are contracted to provide.

## CONCLUSION:

CEO encourages members to make project decisions on a case-by-case basis, having carefully reviewed the terms and conditions and considered the merits of individual assignments. Consult with your insurance and legal counsel before accepting any questionable agreement terms; and should you experience difficulty, 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 or Catherine Morrison at [cmorrison@ceo.on.ca](mailto:cmorrison@ceo.on.ca) or (416) 620-1400 ext. 226.