Schoolboard issues unreasonable set of supplementary general conditions.

Some 10 years ago, the OGCA sat down with both the public and separate school boards to iron out fair and reasonable contract conditions.

It is only through such reasonable contracts that we can all attain that which we seek: a well-built project that is on time and on budget.

It has recently been brought to our attention that a schoolboard issued a contract with 34 pages of changes to the 30 page CCDC 2 contract. Unfortunately, we were not asked to review this prior to the tender and it moved forward. It was only later, as is often the case, that the contractor found there were some very serious flaws in the supplementary conditions.

One of the most egregious clauses was to deny any markup on labour for a change order or change directive. The member sought our support and a review of the entire contract. In doing so, we noted that there were several highly risky conditions contained in this contract of which contractors and subtrades should be aware.

We wrote to the owner requesting a meeting and asked respectfully that they consider changing the supplementaries. To date, there has been no response from the school board. Regardless of the response, the real problem is that once the contract has been signed, you are bound by the conditions contained in it. By thoroughly reading and understanding your contracts, you can avoid any unpleasant surprises in the future.

As we all know, that practice has spread, and when one owner uses something, another owner might think it's a good idea. Therefore, we are issuing this report to all members, particularly those of you who bid on schools, to be aware that changes are being made and to make sure you read the contract fully so as to avoid any potential problems and risk going forward.

We have highlighted the following clauses and our comments for your benefit.

SC.1 A5
1.1.3 amending 5.3.1 (1)
Review language adding "ten" to blank lines.
Owner proposes to delete 2% interest and replace it with 0%, and in subclause two, 4% to be replaced by 2%.
In the opinion of our organization, interest is fair and should be paid on late payments. The Construction Act, under section 1.1 Prompt Payment, recognizes this in clause 6.9. No organization doing business today would eliminate such interest on payments owed, nor should the owner of a construction project.

As with many of the clauses contained in the CCDC-2, these were arrived at after much discussion across the country by experts representing owners, contractors, trades and consultants. These interest rates were achieved and are fair and should not be changed.

Amend 6.1 “or other forms of electronic communication”
We fail to understand the need. It is very common in today’s world to use electronic communication. Even the OAA recognize this, and in partnership with the OGCA, created a simpler clause and agree-to supplementary condition. That clause is spelled out here:

New clause 6.1, notices in writing between the parties or between them and the consultant, shall be considered to have been received by the addressee on the date of receipt if delivered by hand or by commercial courier or if sent during normal business hours by fax and address as set out below. Such notices in writing will be deemed to be received by the addressee on the next day if sent by fax after normal business hours or if sent by overnight commercial courier. Such notices in writing will be deemed to be received by the addressee on the fifth working day following the date of mailing, if sent by pre-paid registered post, and addressed as set out below and address for a party may be changed by notice in writing to the other party setting out the new address in accordance with this article.

We recommend using the agreed-to language common in the industry today and recognizing that electronic signatures and such are now legal and in common use throughout the province.

S.C. 3.1 GC 1.1 Construction Documents
3.1.1 Amend 1.1.1 to make any instructions or directives to the contractor be interpreted as the “contractor shall”
While the words here may seem to be simple, they carry a tremendous amount of weight by indicating that any such directives or instructions require the contractor to follow them without question. This is a dangerous clause for everyone and should be deleted.

3.1.3 Amend 1.1.7 and add new paragraph. Where there is an issue between the drawings and the specifications, the contractor will be required to comply with one, or the other, or both?
We find this paragraph very confusing and would appreciate clarification. You cannot have it both ways: either the drawings rule or the specifications. Requiring the contractor to follow one or the other or both does not make any sense. There needs to be a clear order of documents as to which rules and whether it is a discrepancy. That is the role of the consultant to resolve.

SC. 3.2 GC 2.2 Role of the Consultant
3.2.3 New Paragraph Indemnify Consultants
It is disturbing to continue to find attempts by the consultant to indemnify themselves from mistakes for which they are responsible. It is even more disturbing that an owner feels that such clauses should be inserted in the contract between themselves and the general contractor. We believe it to be highly unlikely that you, in your own contract with the consultant, would agree to hold them harmless and indemnify them against any mistakes.
We have continued to have this discussion with the OAA for some years and we have not changed our position. We will not indemnify the architect or any consultant for mistakes they may make. That would do a disservice not only to ourselves but to you, the owner, making it necessary for us to file claims directly against you for mistakes made by the consultant, rather than holding the consultant responsible for their errors.

There is enough wording that protects everybody from mistakes made by the general poor people under the employment and control of the general, so this is an unnecessary clause. We notice it reappears later and we believe it should be deleted.

SC 3.6 GC 3.2 Construction by Owner or others

Makes the general contractor responsible to coordinate and schedule activities of owners or other trades without any protection regarding health and safety

This is becoming a quite common practice in the industry, and we do not generally oppose it. However, there must be balance and there must be protection for the general contractor if they take on this risk. Language was developed many years ago that has been used by many owners and is quite practical. It has not been challenged by the Ministry of Labour or WSIB. We suggest that you rework this contract in the very much simpler wording and make use of the accepted wording that has been in use for so many years. That wording is as follows:

Recommended language for Constructor

3.6.4 The Owner undertakes to include in its contracts with other contractors and/or in its instructions to its own forces the requirement that the other contractor or own forces, as the case may be, will comply with directions and instructions from the Contractor with respect to occupational health and safety and related matters. The text of such instruction is attached to these Supplementary Conditions and Amendments as Schedule 1."

SCHEDULE 1 LANGUAGE FOR THIRD PARTY CONTRACTORS ENTERING A PROJECT SITE WHERE THE CONTRACTOR HAS ASSUMED OVERALL RESPONSIBILITY – IN CONTRACT – FOR OCCUPATIONAL HEALTH AND SAFETY

"The (trade or employee) acknowledges that the work it will perform on behalf of the (Owner) requires it to enter a job site which is under the total control of a general contractor which has a contract with the (owner). The (trade or employee) acknowledges that [name of contractor] has assumed overall responsibility for compliance with all aspects of the health and safety legislation of Ontario, including all the responsibilities of the "constructor" under the Occupational Health and Safety Act (Ontario).

Further, (trade or employee) acknowledges that [name of contractor] is also responsible to the (owner) to co-ordinate and schedule the activities of our work with the work of the general contractor.

We agree to comply with [name of contractor] directions and instructions with respect to occupational health and safety and coordination. We acknowledge that it will be cause for termination under our contract with the (owner) should (I/we) fail or refuse to accept the direction and instruction of the general contractor with respect to matters of occupational health and safety or matters related to coordination of work."

SC 3.9 G.C 3.6 Supervision

3.9.2 New paragraph 3.6.3 Right of the owner to remove workers, refer to 3.11.5. New paragraph 3.8.4 same issue.

Clauses like this give us great concern but with the greatest respect, neither the owner nor the consultant are experts in the quality, training, and workmanship of our employees and our subtrades.

It is the role of the general contractor, without question, to ensure that they are of the highest quality and can perform the work. In some cases, contractors will be under labour agreements, in which case there are spelled-out ways in which workers can be sent home and it does not include the owner or the consultant having that authority. If the owner or consultant interferes in the work employment rules, it could lead to major problems and legal challenges by the workers or their unions. While we agree that the owner and consultant can reasonably raise concerns and speak to the general contractor requesting the removal of workers, at no time can an owner or consultant be given the supreme authority to make that decision, as it will lead to greater problems, not just for the general contractor, but for the owner. We suggest that this clause be rewritten, adopting our suggestion of a more reasonable clause.

SC.3.10 GC 3.7 Subcontractors and Suppliers

3.10.2 New paragraph 3.7.7 Contractor will take on responsibility for any pre-negotiated or purchases made by the owner.

Experience has shown us that this is an extremely dangerous clause for the general to agree to. Pre-negotiated purchases made by the owner should be disclosed prior to the tender process being finalized. Contractors cannot take on the risk for something that they were not involved in and have no information about at the time they bid. In the past, we have seen many claims and legal actions taken, which is not in the best interest of anyone where these clauses exist. Our same objections apply to the following clauses under labour and products. How can we possibly take on all responsibility for materials considering we may not even know what those materials are if not made clear at the time of bid?

Following past discussions with owners and the OAA, an agreement was reached that this is not a fair clause, unless it clearly spells out a fair and reasonable way to deal with the problem, should it turn out that that pre-negotiated purchase, or workers brought on by the owner, failed to live up to their responsibility, and in fact, caused delay to the project or provided substandard materials.

SC 3.11 GC 3.8 Labour and Products

3.11.1 Amend 3.8.1 Contractor will represent and warrant that all products and supplies, etc., meet proper standards and in 3.8.2, contractor will take on all responsibility for materials considering the previous clause. How is this possible?

3.11.5 New clause 3.8.4 – Owner and Consultant having authority over tradesmen and the qualifications of such.

See above comments.

3.8.13 Maximum of 15 days to fix any deficiencies
We question why a fixed date has been set here. Under normal wording contained in the CCDC 2 under delays, in such deficiencies, processes are provided for which the consultant and the contractor can work out what needs to be done, and in some cases, 15 days may not be sufficient.

We suggest referring to the CCDC 2 for original language and how to deal with these issues and set timelines for correcting such deficiencies. We also believe that this does not belong under 3.8 Labour and Products, but rather under GC 6.5 Delays

3.20, 15.4.4 and 5.4.5 while 5.4.4 seems to be okay. We take issue with 5.4.5
General Contractors do not provide Record Drawings, only As Built Drawings. This is a repeated mistake appearing again later in the contract. The clauses should be changed to reflect the fact that the general contractor provides As Built Drawings, not Records Drawings. If necessary, this can be confirmed by checking with the OAA.

SC 3.22 GC 5.7 Payment
3.22.1 – 5.7.4 Changing 5 days to 15
According to the new Construction Act, the owner is entitled to set up a schedule of payment prior to the agreement and the terms of the new Construction Act kicking in. But regardless, any changes to dates and times, and we notice that there have been several changes to time periods, as long as the owner recognizes that they are required to abide by the new Construction Act and its timelines, that should not be a problem. Many owners are now including underpayment, or in the preamble to the contract, that the project is being carried out under the terms of the new Construction Act.

SC.3.24 GC. 9.4 Changes in the Work
3.24.2 new 6.1.3 does not allow for coordination costs
When an owner brings new workers on site, trades or otherwise for whatever purpose, there is a cost for coordinating the health and safety and this should be compensated to the general. As suggested before, incorporate the language developed to deal with this.

SC. 3.25 GC 6.2 Change Order
Regarding this clause, we have previously raised the concern over a lack of mark-up for labour in earlier correspondence and those concerns should be discussed at this time.

SC. 3.26 GC 6.3 Change Directive
3.26.4 New Paragraph excluding items for work performed under a Change Directive

6.3.14.1 Excludes any compensation for head office staff who may be required to be involved in a Change Directive.

6.3.14.1 Excludes wages to be paid to a supervisor for supervising subtrades due to a Change Directive.

While we can understand the owner's concern that head office overhead might be charged to a change directive that was not directly involved, the fact is that there are often times the necessity for the head office to become involved. The first clause 6.3.7 allows for such costs to be included and was unamended, so in response, the previous clause denying compensation does not make sense. If one looks at subsections one through four, they include for costs for personnel stationed at the contractor's field office in whatever capacity employed. That is a supervisor and he would directly be involved in any change directive involving subtrades and would and might be required to do additional supervision.

The clause allows for those "engaged in expediting the production or transportation of material or equipment at shops or on the road and those engaged in the processing of changes in the work" - that could very likely involve head office staff.

What you are really seeking here is simple and easily verified. All costs that make up a Change Directive are fully auditable as are Change Orders. Therefore, the owner only needs to ask for a complete breakdown of costs for a Change Order or a Change Directive to ensure that charges were not made that were not required as part of the Change Directive. But to create a blanket exemption to any charges is simply incorrect.

SC 3.29 GC 7.1 Owner's Right To Perform the Work, etc.

7.1.5A The owner's right to terminate without cause or reason as well as denying any consequential or other costs or claims due to the termination by the owner.

This is an extremely one-sided and unfair clause which has led to challenges in the courts which are still ongoing. We recognize that an owner has the right to terminate a project, but we take issue that that termination can take place without cause or reason and then go on to deny any consequential or other costs that will be suffered by the general contractor. While recognizing the owner's right, we believe that reasons should be provided as to the cause of the termination, and no reasonable causes or reasons will be challenged. To provide you with the unfettered right to terminate the contract without cause or reason is neither fair nor reasonable under the justice system of Ontario as we interpret it.

SC 3.30 GC 7.2 Contractors Right to Suspend the Work

3.301 amend 7.2 .2, 20 days to 45 days review.

We would take issue with this: 45 days is an exceptionally long time and could incur a lot of cost. For example, in another 25 days, you have another month of Progress, which is usually several hundred thousand dollars of additional expenditures for which the contractor may not get paid. By the time the contractor and suppliers and trades figure out that they are not getting paid, the first month has already slipped by. By that time, the GC, his trades and suppliers could be out of pocket easily half a million dollars.

This should be checked against the timelines as mandated under the Construction Act. Regardless, we believe that a clause creating a longer period of time will lead to trades and suppliers filing for adjudication and the general having no choice but to follow and file for adjudication against the owner.

SC 3.34 GC 9.4 Safety

9.4.1 delete wording in line 1 up to and including "contractors, the"

As noted, before, we take issue with changes to the sections despite what an owner may think, ultimately, you are responsible for the project, particularly if you bring other workers on the site. That is a risk we can manage but should be fairly compensated for. Prior to beginning of the project or even Tendering the project, it is important to know who you plan to bring on site where these overlaps may occur. We are fully aware that often fit-out happens while we are still working and we can accommodate that, but we do not take the risk that these trades or workers that are brought on site have proper skills and safety knowledge. That is why we are recommending you adopt our language as provided in our response to S.C. 3.6 so that such Trades and Suppliers are held to the same high standard to which we are held.

SC 3.35 GC 9.5 Mould

Does not allow for consequential or additional damages that may have occurred.

We believe that fair compensation should be provided where reasonable. It is unfair to burden the general contractor with the entire risk should mould become a problem.

With any contract we strongly recommended to our members that they should review the Insurance and Bonding clauses with their respective agents.

SC 3.42 GC 12.1 Indemnification

12.1.2 Attempts to have the general contractor indemnify consultants

We mentioned before that general contractors do not indemnify consultants. They are not part of this contract and that is a disservice to both you and to us. There is no reason why consultants should not be held to the same high standards to which we are held, and be responsible should they be in error or make a mistake.

SC 3.44 GC 12.3 Warranty - Warranties will restart after being used.

We fully understand why an owner would want such a clause, however, let us be realistic here. It is rare when you purchase anything, from a car to a washing machine, that if you have it repaired under warranty that the entire warranty time re-starts. The same is true with construction. While the warranty on a part may restart, it does not restart the entire warranty.

Many suppliers and trades, who will be working on your project and who do provide the warranties which we then pass on to you, will not agree to this and their contracts generally specifically state that warranties do not restart, making it impossible for the general contractor to undertake the risk involved here as they do not have the resources to provide warranties for products that are not theirs.

It would be fair to say that, where possible, warranties will restart on repaired or replaced equipment and materials, etc., as provided for by the suppliers.

GC 13.3 Record Drawings

As previously stated, General Contractors are not responsible for record drawings, only for As Built.

As with all contracts, members are advised to ensure that someone is assigned the responsibility to read through the documents in full to ensure that you find any potential issues with the supplementary general conditions.

Within a year, the new CCDC 2 will be issued, along with a completely new Division I. It will be more important than ever when this happens, that every member ensure they have a knowledgeable person reviewing not just the contract, but the complete Division I. We will have more to say on that in the future.