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ADVISORY TO MEMBERS:

Infrastructure Ontario Real Estate Vendor of Record Renewal – RFP No. 18-013 Indemnification Terms and Conditions

No. 18/005 – May 29, 2018

ISSUE:

Consulting Engineers of Ontario (CEO) is advising members to use caution and consult with their insurance partners and legal counsel before submitting an application to ***Infrastructure Ontario's (IO) Request for Proposals RFP No. 18-013: Vendor of Record (VoR) for Engineering (Civil; Mechanical; Electrical; Structural) and Technical (Environmental and Building Sciences) Services Annual Refresh***.

Members need to be aware that ***enrollment in the VoR involves two different sets of indemnification terms and conditions***. This raises problems for member's ability to obtain adequate professional liability insurance for assignments that will come from being on this roster.

The first set of terms and conditions are part of the Master Agreement between the Agency and the "Qualified Engineer". Under Article 7 – Indemnity and Insurance – the clause reads as follows:

> **7.1 Indemnification**
>
> The Qualified Engineer shall indemnify and hold harmless IO, HMQ, any PMSP or other Requestor, and their respective agents, appointees, directors, officers and employees from and against claims, demands, losses, expenses, costs, damages, actions, suits or proceedings that arise out of or are attributable to the Qualified Engineer's performance of the Services. Nothing in this section shall limit any claim that IO, HMQ, PMSP or other Requestor may have under the insurance coverage provided pursuant to section 7.2.

This clause is not ideal given that it does not specifically refer to a negligence-based indemnity. However, the language does provide enough flexibility to enable firms to obtain adequate insurance coverage to participate on the VoR because it can be reasonably inferred that anything, *"attributable to the Qualified Engineer's performance of the Services"* would be referring to negligence, error or omission as that is what they are legally liable for when performing professional services.

However, the real problem for members resides in the Agency's Supplementary Conditions to ACEC Document 31-2010. These terms are part of the second stage agreement applied to specific assignments awarded under the VoR. Under General Condition 14 – Insurance and Liability – Section 14.5 states that:

> 14.5 The Prime Consultant shall indemnify and hold harmless the Client, IO, Her Majesty the Queen in right of Ontario, and their respective agents,

> appointees, directors, officers and employees, from and against all claims, demands, losses, expenses, costs, damages, actions, suits or proceeding, (including legal costs as agreed to by the Parties or as deemed legally recoverable), that are attributable to the Prime Consultant's negligence or performance of the Contract, including without limitation, claims brought by third parties, whether such claims arise from breach of contract, negligence or any other legal theory of recovery. Nothing in this paragraph 14.4, shall limit any claim that IO, Her Majesty the Queen in right of Ontario, or the Client may have under the insurance coverage to be provided under General Condition 14.1 - INSURANCE.

This clause is problematic because it is only is partially insurable. Positively speaking, Clause 14.5 will not negate a Prime Consultant's professional liability insurance in the instance of negligence, error, or omission. The problem lies in liability arising out of the Prime Consultant not fulfilling their obligation continuing after *"negligence"* stating, *"or performance of the Contract"*. This means that a Prime Consultant responsible for causing a project delay by failing to provide agreed services according to the project schedule that results in additional costs and /or loss of revenue to the owner will be in breach of contract. Further, such a breach will likely not be covered by the Prime Consultant's professional liability policy. It is for this reason that ***CEO strongly recommends that members contemplating responding to this RFP review both the Master Agreement and the Supplementary Conditions with their insurance partners and legal counsel.***

CEO Position:

CEO firmly maintains that sound and insurable agreements serve the best interest of both the Consultant and the Client.

The conditions contained in GC 14.5 do not satisfy this standard. They require Consultants assume an unreasonable degree of risk by failing to recognize and respect that insurance available to consulting engineering firms in Ontario is limited to providing a negligence-based indemnification.

These terms are the product of provincial procurement policy as defined by the *Financial Administration Act*. Section 28 of the *Act* prohibits the government from incurring costs arising from its infrastructure projects. Changing the *Act* to properly apportion project risk to those parties most suited to bear it and establishing recognition and respect for the negligence-based indemnity consulting engineers require remains a key objective for CEO. It is hoped that progress can be made to achieve these changes with the election of a new government at Queen's Park.

Until such time, we remind members that CEO's 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 at www.ceo.on.ca.

CONCLUSION:

CEO encourages members to assess and make project decisions on a case-by-case basis. Be sure to consult with your insurance partners and legal counsel before accepting any questionable agreement terms. Should you encounter difficulties, contact CEO and make use of our Rapid Response Service. We will work with you where possible develop a position addressing your concerns to advocate on your behalf.

Should you have any questions about this advisory or any other industry issue, please contact David Zurawel at dzurawel@ceo.on.ca or 416.620.1400 ext. 222.