



Canadian
Construction
Association

AN ASSOCIATION GUIDE TO DEALING WITH ONEROUS CONTRACT CONDITIONS

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AN ASSOCIATION GUIDE TO DEALING WITH ONEROUS CONTRACT CONDITIONS

The purpose of this guide is to assist CCA partner associations in dealing with onerous contract conditions during the bidding process. It is adapted from the Ontario General Contractors Association's publication 'Guide to Dealing with Onerous Supplementary General Conditions'. This guide does not constitute legal advice, and any questions pertaining to the law should be addressed towards a legal professional.

COMMON CAUSES OF ONEROUS CONTRACT CONDITIONS

- An owner is looking to address a specific issue previously encountered.
- An owner is dissatisfied with industry standards (regarding balance of risk or otherwise) without fully understanding their purpose or the implications of defying them.
- An owner's lack of qualified and knowledgeable staff results in assistance being solicited from improper sources.
- An owner (particularly publicly funded ones) relies more on their purchasing department than their construction staff, resulting in a focus on minimizing the initial contract price and shifting risks above all else.

CONTRACTOR ACTIONS

1. Review all contract provisions carefully to determine any clauses that may place undue risk or burden on the contractor and discuss any questionable provisions with professional advisors (insurance, surety or legal professionals).
2. Inform your association of any such provisions and provide them with as much information as possible attaching a copy of relevant documents, including a list of onerous clauses, all addenda or closing extensions, a list of contacts (owners, consultants and other bidders), and any other important materials (*See Appendix A for a sample Request for Bidder Assistance form*).
3. Reply to all Bidder Alerts issued by the association in a timely manner.
4. Decide whether you want to:
 - 1) Accept the risks and submit a bid;
 - 2) Refuse to take the risks and not submit a bid; or
 - 3) Qualify the onerous clauses in the bid, running the risk of disqualification. It is important to know that most governments and quasi-government agencies have strict policies to disqualify non-compliant bids.
5. As time is of the essence in all of these situations, take care to review these provisions as early as possible. The sooner these types of clauses are identified, the better the chance there is to resolve it.

ASSOCIATION ACTIONS

1. Review the contract documents, making note of any onerous or unbalanced clauses and ignoring non-material issues. Ensure risks are allocated fairly, particularly in the following key sections:
 - Financing information from owner.
 - Payment provisions (holdback, conditions, schedule).
 - Indemnification (conditions, limit).



- Schedule (milestone dates, liquidated damages, delay).
 - Role of the consultant.
 - Changes.
 - Concealed or unknown conditions.
 - Insurance.
 - Dispute resolution.
 - Health and safety responsibilities.
 - Toxic and hazardous substances.
 - Warranty.
2. Notify all bidders that you are reviewing the documents and seek their input (*See Appendix B for Bidder Alert #1 – Seeking Input*).
 3. Based on the initial review and the feedback from bidders, prepare a list of the issues at hand and suggested remedies (be it an alternative, a compromise, or reverting to CCDC/CCA standard contracts).
 4. Notify trade associations that you take issue with a particular bid call. As much of the prime contract will have an effect on subcontractors, they will likely wish to inform their membership of the issues, and the trade associations will be able to help put pressure on the owner to remedy the situation.
 5. Contact the consultant to discuss the issues at hand and seek their support on the matter. Determine the justification for any onerous clauses and who was responsible for their inclusion. A call to the owner or their advisor may be necessary.
 6. Follow-up any discussions with a formal letter that lists the issues and the proposed remedies (*See Appendix C – Letter to Owner*).

The above actions will resolve most small disputes. In extreme cases, the additional steps below may be utilized, although caution should be taken:

7. Issue a clear warning to all bidders of the risks they face by bidding and note that they have the choice of qualifying their bid (should the other bidders agree), although it should be mentioned that this comes with the possibility of their bids being declared non-compliant (*See Appendix B for Bidder Alert #2 – Survey re: Qualification of Bids*). An association should not make a recommendation one way or another, only provide the options.
8. Propose shared language bidders can use in their qualifications so that the bids remain equal in all ways except in price. In some situations, it may be appropriate to use a standard set of clarifications (*See Appendix D for an example*).
9. Provide the owner with a notice that all or some of the bidders will be qualifying their bids, including the qualifications that are being made (*see Appendix E for Notice to Owner*).
10. If all bidders decide to qualify their bids, a notice should be issued to all bidders stating this (*See Appendix B for Bidder Alert # 3 – Confirmation re: Qualification of Bids*).

NOTE: While contractors are free to not bid on any project they please, associations must not make a recommendation to their members that they all not bid on a project with onerous contract conditions. Where such an agreement is made (whether encouraged by an association or the contractors themselves), it is akin to a group boycott and there may well be



a substantial risk that such action will result in an undue lessening or even outright elimination of competition. Such group boycott action is likely to attract the attention of the Competition Bureau. This does not mean that you cannot release information provided by individual bidders that they are not bidding. To protect yourself as an association, you MUST avoid being the advocates or instigators of any such action.

ADDRESSING THE PROBLEM'S SOURCE

To prevent onerous conditions in future bid calls, associations must build and maintain the trust of owners and consultants, establishing lines of communication and helping educate on these matters. To do this, associations should:

- Conduct educational presentations, courses, and forums on best practices in bidding and contracting issues, based on standard CCA/CCDC documents. This will help engage owners and consultants and provide them with the proper guidance to prevent future issues.
- Establish ties with other stakeholder groups (architects, engineers, insurance, surety, etc.) to address these types of issues together. Owners and consultants are more receptive when approached by several organizations instead of one. Notifying other associations of issues helps build support for your efforts and may help provide insight to the source of the onerous provisions.
- Develop a business case-style fact sheet that owners can access which outlines how onerous contract clauses will end up costing them more than a fair and balanced one. Some examples of these added costs include:
 - Additional time worked by the consultant to prepare, supervise, administer, and enforce these clauses.
 - Contractors issuing numerous Request for Information's and claims to ensure they are compliant with unfamiliar terms as they seek to protect themselves.
 - Fewer contractors and subcontractors will bid on these projects, decreasing the competitiveness of bids.
 - Especially onerous contracts may result in no bids being submitted, forcing the owner to incur additional costs and delays to retender.
- There may be some parties or sectors that have particularly bad reputations regarding onerous conditions. They may require a more direct targeted approach.

ADDITIONAL RESOURCES

- CCDC 23 'A Guide to Calling Bids and Awarding Construction Contracts'
- CCDC 2 'Stipulated Price Contract'
- CCA 1 'Stipulated Price Subcontract'
- CCA 50 'A Prime Contractor's Guide to Project Financing and Payment Security'
- Ontario General Contractors Association's publication 'Guide to Dealing with Onerous Supplementary General Conditions'



APPENDIX A – REQUEST FOR BIDDER ASSISTANCE

Please print all information in Part 1.

PART 1

Date:

Project:

From: [Company, contact, phone, and email]

(Please attach a copy of project information from your association plansroom documents or fill in the information below.)

Architect: [Company, contact, phone, and email]

Owner: [Company, contact, phone, and email]

Closing Date and Time:

List of Bidders:

(Please make sure YOUR contact numbers are accurate to avoid the chance that you may miss a Bidder Alert.)

PART 2 – BIDDING AND CONTRACTING ISSUES

Either highlight the particular issues on the documents or provide a list of clauses to which you have an objection.

For issues other than onerous conditions (e.g. award problems), please provide as much information as possible.

Please send this form and the complete documents to [Association] at [Contact Method] to ensure we can review the issues in the full context of the requirements.



APPENDIX B – BIDDER ALERT #1

(SEEKING INPUT)

MEMORANDUM

To: [All bidders]

From: [Association]

Date:

Subject: [Project Title]

We have been made aware of a number of issues dealing with the contract provisions for this project. We are currently reviewing them and hope to have further information for you prior to closing.

All bidders should take time now to review these conditions and notify us of any particular clauses you may have a problem with.

As time is of the essence, expediency is appreciated.

We are concerned with the following clauses:

We are not concerned with any of the clauses.

We are not bidding this project.

Name:

Date:

Company:

Please send this page to [Association] at [Contact Method] as soon as possible.



APPENDIX B – BIDDER ALERT #2**(SURVEY RE: QUALIFICATION OF BIDS)****URGENT****MEMORANDUM****To:** [All bidders]**From:** [Association]**Date:****Subject:** [Project Title]

After reviewing the bid documents put out by [Owner], we strongly recommend the following:

If all bidders agree, qualify bids as follows:

“Our bid is subject to the satisfactory resolution of the items contained in the [Association]’s letter to [Owner] dated [Date].”

- We agree to qualify our bid using the above wording, if all others agree to do the same, despite the risk of being disqualified.
- We will not qualify our bid.
- We are not bidding.

Name:**Date:****Company:**

Please send this page to [Association] at [Contact Method] as soon as possible.



APPENDIX B – BIDDER ALERT #3

(CONFIRMATION RE: QUALIFICATION OF BIDS)

URGENT

MEMORANDUM

To: [All bidders]

From: [Association]

Date:

Subject: [Project Title]

Please be advised that all bidders have agreed to the qualification recommended by [Association], despite the risk of being disqualified.

Please add the following statement to your bid.

“Our bid is subject to the use of a standard CCDC 2 document with a minimal amount of changes, AND RESOLUTION OF SUCH OTHER CLAUSES WITHIN THE BID DOCUMENTS AS REQUIRED, to be agreed between [Owner], [Association] and the successful compliant bidder.”

We will continue to lobby the owner to make changes prior to the extended closing date of [Closing Date]. Further, we are aware of problems with the upfront documents that are not directly part of the contract. It will be made clear to the owner that all issues will be on the table for review, not just the onerous contract conditions.

Thank you for your support. We will keep you advised of any progress.

Please sign and return this notice to [Association] at [Contact Method] to confirm receipt of this notice, and your participation.

Name:

Date:

Company:



APPENDIX C – LETTER TO OWNER

When writing to an owner or consultant, be mindful. Responses should be firm, fair, and without emotion. The following list contains some helpful guidance in drafting a letter to the owner:

- Make your points concise.
- Offer alternatives or compromises.
- Refer to industry practice and CCA/CCDC documents.
- Point out the possible ramifications of not addressing these issues.
 - Higher prices.
 - Qualified bids.
 - Loss of bidders.
 - Higher risk to the owner.
 - No bidders.
- Offer to meet and discuss the issues.
- Discuss a win-win scenario.
- Follow up with a telephone call.
- Keep all the bidders informed of your actions.

SAMPLE WORDING

Dear owner/consultant:

We are writing to you with a more detailed description of the onerous contract conditions that are of concern to the contractors interested in submitting a bid. In the past, we have asked the consultants and owners to change articles, which we view as unfair. When this has not been successful, it has resulted in “qualified bids”, a refusal by the contractors to accept these conditions, and/or the withdrawal of some bidders.

Our intention is to seek fair solutions, so that bids will not be qualified and will be competitive. In that respect, we again seek your assistance. The major items of concern include the following:

S.C. 13 G.C. 3.2 Construction by Owner or Other Contractor

The revisions attempt to make the contractor assume the role of “constructor” when the owner uses own forces or other contractors to perform part of the work. Under provincial Occupational Health and Safety Act and Regulations, the owner cannot contract out of the responsibility. (see enclosed news article)

There are other articles of concern, including S.C. 12, 16, 21, 29, 34 and 51. We have requested a meeting with you to discuss and resolve these issues so that changes can be made prior to the November 14 closing date.

Yours truly,

Association COO



APPENDIX D – EXAMPLE OF OGCA'S STANDARD CLARIFICATIONS

ONTARIO GENERAL CONTRACTORS ASSOCIATION

STANDARD CLARIFICATIONS

In an effort to maintain fairness and consistency with industry standards, the members of the Ontario General Contractors Association attach the following conditions to tenders where deemed appropriate:

1. *Concealed or Unknown Conditions, Subsurface Conditions. The standard provisions of CCDC 2, Article GC 6.4 shall govern irrespective of any provisions to the contrary in the tender documents.*
2. *There shall be no holdbacks, other than that required under the Construction Lien Act.*
3. *The warranty period shall be for one year commencing on the earlier of the date of Substantial Performance of the Work or Completion of the Work. Any warranties for longer periods shall be as per CCDC 2, Article GC 12.3.*
4. *The provisions of CCDC 2, Article GC 9.3 without amendment shall apply with regards to Toxic and Hazardous Substances and Materials, irrespective of any provisions to the contrary.*
5. *Bid Bonds, Consent of Surety, Performance Bonds, and Labour and Material Payment Bonds shall be on the standard forms recommended by the Canadian Construction Documents Committee and Surety Association of Canada.*
6. *All change orders and change directives shall be subject to markup for overhead and profit as recommended in CCA Document 16, irrespective of any other provisions in tender documents, unless otherwise agreed by the owner and the contractor.*
7. *All terms and conditions regarding payment shall be as per CCDC 2 Part 5 without amendment.*
8. *If the Owner / Consultant pre-purchase or pre-tender, or subsequently tender under a cash allowance any portion(s) of the work, such tenders shall provide for bid and contract security (bonds).*
9. *Use of proposed subcontractors named in the tender may change subject to verification of finances, ability to meet schedule, quality, or other valid reason.*
10. *All disputes arising from the contract shall be subject to the provisions of CCDC 2, Part 8 without amendment (except those in Ontario Association of Architects Practice Bulletin D.1b) regarding Alternate Dispute Resolution.*
11. *Alternative and Separate Prices are open to acceptance until the same time as acceptance of the tender, unless there is specific agreement between the parties to longer periods.*

* * * * *

Revised: September 12, 2001

Approved by OGCA Board of Directors, February 18, 2000



APPENDIX E – NOTICE TO OWNER

URGENT

MEMORANDUM

To: [Owner]

From: [Association]

Date:

Subject: [Project Title]

While we have attempted to work together to see changes, the results have rendered the contractors unable to accept the conditions as stated. Therefore, please be advised that all bidders will qualify their bids for the above project. The following wording will appear on all submitted bidders:

[Wording agreed by all bidders, See Bidder Alert #2 and #3]

