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AMENDING THE STANDARD FORM OF PROFESSIONAL SERVICES CONTRACTS

How will Courts interpret amendments to limitation of liability clauses in standard professional services contracts?

BACKGROUND

The Workers' Compensation Board of British Columbia ("WCB") sought damages from its consultant architect Neale Staniszkis Doll Adams Architects ("NSDA") and from the engineering firm retained by NSDA, Stantec Consulting Ltd., a continuation of I.D. Group - Duncan & Associates Engineering Ltd. ("Stantec") arising out of alleged structural inadequacies discovered during renovations to a building in Nanaimo, B.C. owned by WCB.

NSDA sought an order dismissing the claim against it and relied on certain amendments that had been made to the Canadian Standard Form of Agreement Between Client and Architect (1987 Edition) between WCB and NSDA. The standard form of the agreement provided that any and all claims which the Client had against the Architect would be limited to \$250,000 for each claim and \$500,000 for all claims during each coverage period as provided by the Architect's professional liability insurance or the extent of indemnity against errors and omissions in effect at the date of the Agreement. The standard form of agreement in this case was amended by deleting the figures "\$250,000" and "\$500,000". The amended Agreement read as follows:

"...the Client agrees that any and all claims which he has or hereafter may have against the Architect in any way arising out of or related to the Architect's duties and responsibilities pursuant to this agreement...whether such claims sound in contract or in tort, shall be limited to the amount of (deleted) each claim and (deleted) for all claims during each period of coverage as provided by the Architect's professional liability insurance or indemnity against errors or omissions in effect at the date of execution of this agreement... Such limitation shall apply to the extent only that such insurance or indemnity is available to the Architect to satisfy such claims".

"The insurance coverage per claim and for all claims will be as determined by the Client (WCB) and as stipulated in a project specific professional liability insurance policy to be obtained by the Client..."

WCB did not obtain a project specific policy as contemplated by the amended Agreement. NSDA argued that its liability was limited to the amount of insurance provided by the project specific policy and since WCB had failed to obtain such a policy, NSDA's liability was limited to zero.

Stantec advanced the same argument but added that it was entitled to the benefit of the amendments notwithstanding that it was not a party to the Agreement. WCB, on the other hand, argued that since WCB had not obtained a project specific policy the liability of NSDA and Stantec was *unlimited*.

THE RULING

The Court held as follows:

1. Even though Stantec was not a party to the Agreement it is entitled to the benefit of the limitation provision so that to the extent that there is a limitation on liability, that limitation applies equally to NSDA and Stantec; and
2. The potential liability of NSDA and Stantec is not unlimited as a result of WCB's failure to obtain a project specific policy but neither is it limited to zero. Rather, the limit of liability is what was available to NSDA pursuant to its general practice professional liability policy at the time the agreement was executed.

The Court went on to say that if no insurance or indemnity is now (at the time of judgment) available to NSDA pursuant to that general practice policy then the liability of NSDA is limited to what is currently available.

PRACTICAL IMPACT FOR THE INSURANCE INDUSTRY

The case suggests that in some circumstances a subconsultant may be able to obtain the benefit of the Prime Consultant's limitation of liability notwithstanding that the subconsultant is not a party to the agreement. It also stands as a reminder that one must pay careful attention to the effect of any limitation of liability provision, and any amendments thereto.

POSSIBLE APPEAL

Although NSDA and Stantec were awarded costs of the application they have sought leave to appeal. If granted leave they will argue that the combined effect of the amended contractual provision and WCB's failure to obtain a project specific policy is to limit their liability to zero. They will argue that since the revisions to the standard form of agreement were introduced at the request of and drafted by WCB, any ambiguity should be resolved in their favour.

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