



MILLER THOMSON
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Sensitive Contract Provisions

Presentation to BC Ground Water Association

Charles Bois



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Contracting Parties
Contract Documents
Key Contract Provisions
Builders Liens
Questions

Contracting Parties

- **Owner Contracts Directly with Driller**
 - Driller has contractual relationship with Owner
 - Driller has opportunity to negotiate terms of contract
 - Driller often responsible for site conditions, issues on site
 - Driller often expected to know subsurface ground conditions
 - Driller expected to drill clean boreholes in accordance with Owner's requirements
 - Payment terms can be less onerous for driller
 - Driller liable for delays and damages
- **Owner's Consultant Contracts with Driller**
 - Driller has no contractual relationship with Owner
 - Driller has contractual relationship with Consultant
 - Driller may have less opportunity to negotiate terms of contract
 - Driller may still be responsible for site conditions, issues on site
 - Driller may still be expected to know subsurface ground conditions
 - Driller expected to drill clean boreholes in accordance with Owner AND Consultant Requirements
 - Payment terms can be onerous for driller
 - Driller liable for delays and damages – could extend to Owner

Contract Documents

- Depends on contractual relationship
- Owner and Driller
 - Driller has single contract
 - Terms and documents known to both parties
- Owner-Consultant-Driller
 - Driller has single contract; but it may incorporate terms of prime contract by reference
 - Terms and documents may not be known to driller
 - Changes made to prime contract could impact driller contract
 - Priority of contract documents in a conflict – which terms govern?
 - Payment terms may be more onerous – including pay when paid or pay if paid provisions
 - Termination of prime contract will impact driller
 - Changes made to driller contract may not be recoverable by Consultant without Owner's consent
 - Claims of driller often passed-through to Owner – risk of non-payment
 - Notice provisions of prime contract should be understood



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Contract Provisions

- Site Access
 - Owner/Consultant to Provide
 - Exclusive or non-exclusive access
 - Other contractors on site
 - Cooperation with other contractors
 - Delays caused by other contractors
 - Driller deemed to have inspected and examined Site
 - To what level
 - Desk audit of subsurface conditions
 - Risk re change in subsurface

Contract Provisions

- **Payment**

- Frequency of invoicing – weekly/monthly
- When is Payment due: – 15 days/30 days after invoice
 - Effect of Pay when paid/Pay if paid
- Be aware of Builders Lien Act time limits – 45 days after completion
- Interest – payable and at what rate – set out monthly/annual rate, compounding

- **Schedule**

- Is it reasonable
- Be aware of and comply with notice provisions to extend schedule

- **Delays**

- Be aware of and comply with notice provisions – if no notice provision, give timely written notice anyway
 - Owner/Consultant – What gets paid -- labour, equipment, increased material prices, lost opportunities
 - Driller caused – likely have to pay damages – are they liquidated
- Be aware of whether contract contains provision of no payment for delay – only a time extension

Contract Provisions

- Changes

- Owner/Consultant typically reserve right to make changes, revisions to the work
- Valuation of changes, deletions or additions to scope
 - Time and materials
 - Force account rates
 - Documentation
- Driller Requested Changes
 - Notice requirements
 - Pricing
- Impact of Changes – Time extension, costs, lost opportunities

Contract Provisions



- Indemnification
 - Look for mutual indemnity
 - Typically requires indemnifying party to cover all costs incurred by injured party
 - Damages could extend to Owner/Consultant because of contractual chain
 - Limit indemnity to limits of insurance – do you have enough insurance
 - Exclude all consequential damages

Builders Lien



- Section 2 –

2(1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

- (a) performs or provides work,
- (b) supplies material, or
- (c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

- (d) the interest of the owner in the improvement;
- (e) the improvement itself;
- (f) the land in, on or under which the improvement is located;
- (g) the material delivered to or placed on the land.

(2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.

Builders Lien Act

"improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;

Section 20

(1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of

- (a) the contractor or subcontractor, and
- (b) any persons engaged by or under the contractor or subcontractor

may be filed no later than 45 days after the date on which the certificate of completion was issued.

(2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after

- (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
- (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

(3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if

- (a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or
- (b) time had started to run under subsection (2).

(4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

Builders Lien Act

- Lien Against Land/Mineral Tenure
 - Must be registered in land title office
 - If lien against mineral title – Gold Commissioner’s Office
- Lien Against Statutory Holdback
 - Section 4 creates lien against statutory holdback
 - Lien not registered in land title
 - Lien perfected by commencing court action
- Limitations
 - 1 year to file court action to enforce claim of lien
 - 21 days to file a court action to enforce if served with notice by Owner pursuant to s.33(2)
 - If court action not commenced in time, lien is extinguished



Charles Bois
Miller Thomson LLP
1000-840 Howe Street
Vancouver, BC V6Z 2M1
604-643-1224
cbois@millerthomson.com

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