



The Risk Management Committee is pleased to provide this risk management article for the members of CDBI. The following article addresses the importance of contract reviews, with particular attention to the warranty clauses that may pass along serious obligation onto the design-builder, or any contractor for that matter.

The Risk Management Committee of the Canadian Design-Build Institute will continue to circulate articles of this nature to members as they become available. We trust this will be found to be of interest and beneficial to the members.

Contract Warranties

By Norm Streu and Christopher Hirst

Buried near the end of most construction contracts are contractual warranties. These clauses rarely receive much attention or comment but, a recent court decision has highlighted the risks inherent in these common clauses.

In *Greater Vancouver Water District v. North American Steel and Pipe Ltd.*, the GVWD contracted with North American to supply steel pipe for a waterworks project. The GVWD and its consultants had prepared the design and specifications for the steel pipe that was to be supplied by North American. In the contract, North American gave two relevant warranties to the GVWD with respect to the steel pipes. First, North American warranted that the steel pipes would conform to the specifications; and second, that they would be “free from all defects arising at any time from faulty design in any part of the Goods.” Unusual wording one would think given that the design had not been undertaken by North American. Even more troubling was that the design was deficient and, accordingly, while North American supplied pipes that met the design, the pipes were defective.

The court found that on a plain reading of the contract, North American had contracted with GVWD to deliver pipes that not only met GVWD’s design but had also “warranted and guaranteed that if it so supplied the pipe, it would be free of defects arising from faulty design.” The Court found that these clauses were not mutually exclusive and held that they were separate contractual obligations which reflected an agreed distribution of risk. Accordingly, in the Court’s view, North American was liable for any damages that resulted from the design defect and it simply did not matter whose design gave rise to the defects.

The Court further found that while such a clause could be considered to distribute risk unfairly, such unfairness was a matter for the marketplace, not for the courts to adjudicate on. The Court went on to comment that such a distribution of risk in a contract can be “dangerous” as contractors may refuse to bid or, if they do so, may build in costly contingencies. The Court also advised that those who do not protect themselves from the potential risk posed by such a warranty “may pay dearly”. In conclusion, the Court stated that owners were unlikely to benefit from a transfer of risk where contractors would be faced with the prospect of potentially disastrous consequences and that the parties to construction contracts should more practically address the assumption of design risk as the failure to do so creates the potential for protracted and costly litigation.



What makes this case particularly interesting or, perhaps alarming depending on your point of view, is that North American was found liable for supplying a pipe that had been constructed in accordance with the design supplied by GVWD even though that design was defective. In essence, North American agreed, perhaps unknowingly, in the warranty provisions to assume the design risk associated with the GVWD's design.

As demonstrated in this case, warranty clauses can distribute substantial risk in a construction contract. The fact that they sometimes distribute that risk unfairly will normally not matter. Accordingly, giving careful attention to what warranties you may be providing with respect to a particular project is an effective tool in managing your risk, as is defining and limiting the remedies available under the contract for a breach of the warranty. To paraphrase the Court of Appeal in the *North American* case, those who do not spend the time to protect themselves from the potential risks posed by a contractual warranty, may end up paying dearly.

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