



Buildex

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Reminder: Don't Forget To "Seal The Deal"

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2009 CITY OF EXCELLENCE AWARD

BC Common Ground Alliance announces the first annual City of Excellence Award, designed to recognize local governments for activities that improve ground disturbance, safe excavation techniques and best practice at or around underground infrastructure, in the year previous to the award.

Deadline for applications is **February 28, 2010**. To apply, please click this link - [Application form](#). Please send an email or Fax titled "City of Excellence Award Nomination" to hhildebrandt@bcmsa.ca / Fax 778 278-0029 including the Application form, supporting letters and other required documents.



Up and coming



BCCA—NORTH & PGCA are pleased to welcome back Angela Thomson as our accountant



When calling or dropping into the Construction Centre, make sure you stop in welcome her on back!

Need an Employee Benefit Package

Small company or Large, BCCA has a package for you! Find out more about the BCCA Employee Benefit Program at



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BCCA Bulletin





Planroom Online

Have you experienced problems logging in to the Online Planroom? Are you aware that you have to “log off” the Online Planroom? Occasionally, members don’t log off the Online Planroom when they have finished their session; instead they just click on the “X” in the top right corner. Unfortunately, if a user does not log off correctly, the system may not register the fact that they have closed their session. Then, when the user tries to log in again, the system will not let them in, as it thinks there is a session already open. So, to avoid being locked out of the Online Planroom, be sure to always click on “log off” (located on the black toolbar) when you want to end your Online Planroom session.

DIG SAFE BC!

Terasen Gas, WorksafeBC and the BC Safety Authority invite you to attend a free education session on underground utility safety:

Friday, April 13, 2010
2 Sessions 1:00 - 3:00 pm / 4:00 - 6:00 pm
Esters Inn- Orchid Room Prince George.

The sessions are intended for owners, employers and workers who work with or around underground utilities. The agenda includes:



- ◆ Underground utility hazards
- ◆ Identification and location protocols
- ◆ What to do in the event of a gas-line strike

For further information please call: 250.561.3700 or email coral.smith@worksafebc.com

There is no cost to register. Coffee service will be provided.



Don't forget to spring those clocks ahead on
March 14, 2010.



EDUCATION

Last Call for RFPs Workshop!

When: March 12, 2010
Where: Construction Association, Classroom-3851-18th Avenue, Prince George
Time: 8:30am—4:00pm
Cost: \$170 Member
\$220 Non-Member

Registration Link: <http://www.nbcca.bc.ca/Education%20&%20Training.html>

Green Construction Site Training Program – An Introduction to LEED.

When: Wednesday, March 31, 2010
Time: 8:30 am – 4:30 pm
Location: BCCA-North Classroom
3851-18th Avenue
Prince George, B.C.

This is a practical course which will equip Project Coordinators, Site Safety Officers, Superintendents and Trades with the skills and tools necessary to coordinate a **GREEN** Construction Site.

If you are not working on or about to work on a LEED Project now, you will be in the future. This Course is for you!

Moving forward with Asset Management

Presented by: Asset Management BC
Sponsored by: BC Ministry of Community & rural Development
When: Thursday, March 18, 2010
Where: Prince George Coast Inn of the North

More Information: http://mmcd.net/Downloads/Asset_Management_Program.pdf

Registration Link: http://mmcd.net/Downloads/Asset_Mgmt_Registration.pdf

MY TAKE ON TERCON

Some Editorial Comments from Manley McLachlan—BCCA President

“Egregious behaviour”. Behaviour seen as “an affront to the integrity and business efficacy of the tendering process”. Those were the words used by the Supreme Court of Canada in its reasons for judgment in the recent Tercon Contractors Ltd. Appeal. They were referring to the actions of a public owner, in this case the BC Ministry of Transportation and Highways, during the tendering phase of a public construction project. The case involved an RFP for the construction of a highway and only six, previously qualified, bidders were allowed to submit a bid. Despite having clearly laid out the rules of engagement, the Ministry allowed and ultimately awarded the contract to a bidder that was not one of those qualified six. This was clearly a pretty big transgression in the tendering process, however the Ministry planned to rely on its cleverly drafted exclusion clause to escape liability. It almost worked. Fortunately it did not. In a five to four decision the Supreme Court gave the win to Tercon.

The case was clearly an important one for the construction industry. Lawyers, active in construction litigation, are already busy “commenting” and no doubt forming their arguments for and against the future use of exclusion clauses. There will be those who will focus on the majority decision and others who will find reasons to support the dissent and I have little doubt that there will be a significant amount of billable hours put in on creating the next great, bullet-proof, exclusion clause for use by any with the deep pockets to pay. They are all too brilliant for me. I am not a lawyer and I would not presume to try to interpret the finer points of law discoursed upon by the very capable and intelligent Supreme Court Justices. What I do know, however, is there are some

fundamental truths to the public construction tendering process that we would all be wise to pay attention to if we want to promote the economy of this province and protect the tax-payers of British Columbia. As a prairie boy, raised on common sense, here is my take on it.

We all know that the construction industry is full of risk. Recognizing and managing that risk is part of doing business. The contractor ignores risk at his or her peril, or rather at the peril of expected profits. The public agency ignores it at the risk of ballooning costs. Finding the right balance of liability, from start to finish, provides the best opportunity to complete a construction project properly, on time, on budget, and with the parties left standing at the end of the day. It is quite clearly in the best interests of the public owner, the consultant, the prime contractor and the trade contractors to accomplish this end. The tendering process is the beginning of this contractual relationship and it sets the tone for the entire project.

When the two parties do not have equal bargaining powers the potential for liability to be unfairly skewed rises considerably. In the public construction arena this is pretty much guaranteed. No matter how sophisticated a contractor might be, they will never be equal to the power wielded by the government. Government quite simply holds all the cards and it is really not surprising that they would be tempted to develop contractual language and create a playing field that reduces their exposure to liability. It sounds like a sensible approach, but is it fair? And, perhaps more importantly, does it really work in the world of construction? There is no question that Government can

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hire lawyers to draft amazingly clear and concise exclusion clauses that might save them from losing a few lawsuits when they act egregiously—although a failsafe one hasn't been discovered yet—but should they? Why is it important to have a public procurement process that is fair, open and transparent? I suggest that there are at least three answers to that question and they involve the following: A healthy competitive marketplace; taxpayer dollars and; squeaky clean elected officials.

One only has to look at the power of the Competition Bureau of Canada to recognize the high value that we, as a nation, place on maintaining a competitive marketplace. The construction industry, in particular, thrives on competition. An unfair procurement process will sour relations in areas where competition is sought as a means to partnership. Without a clean and fair tendering process contractors will not feel comfortable bidding on public work, especially the smaller contractors (about 90% of our industry in BC) who likely don't have access to sophisticated legal advice. Fewer bidders mean higher prices. Lack of opportunity to compete leads to a contraction in the industry and the potential loss of small to medium sized companies who, quite frankly, are huge contributors to employment and training in this province. The construction industry is one of the cornerstones of our economy. Ultimately, running a robust and fair tendering process is the key to maintaining a strong sector.

Public agencies operate on taxpayers' dollars, so we all have a vested interest in achieving the best price through healthy competition. It is also in the public's best interest that unnecessary litigation be avoided, and that risk is dealt with in such a manner as will best protect the public. In effect, the public agency must accept that, while it may be in a position of power, it should not use that power to create an imbalance of risk that ultimately protects no one. There is a need to be transparent about the

tendering, evaluation and awarding processes and to stick to fair dealing so that no one can shout 'foul' post-contract award. Litigation is disruptive and expensive for all concerned, and it is worth remembering that people only challenge if they are unhappy, not only with the outcome, but with the process itself. If a procurement phase is well run, fair, clean and efficient, then most bidders will be satisfied and content with walking away without challenge. Keep in mind, at the end of the day, when things go wrong it will ultimately be Mr. Deep Pockets who will pay and who has deeper pockets than the taxpayer?

Finally, politicians would do well to remember the old adage that those who ignore history are doomed to repeat it. Capital expenditure by governments presents a source of fertile ground for corruption. There are countless examples around the world of governments losing the support of the electorate due to even perceived, never mind real, back-room dealing in the tendering process. Having a truly open and transparent process is essential to ensuring that such a taint will not stain their reputation. Indeed, all parties must be honest and transparent and work to create mutual trust.

Balancing rights and obligations is vital for mutual cooperation and productivity in the construction industry. Sadly, the fact that there is an entire series of Construction Law Reports available to legal practitioners and published on a regular basis is evidence that such a balance is not always achieved. Construction litigation is not going to disappear any time soon but, at the very least, we should insist that our public officials do their very best to avoid expensive lawsuits and support a competitive marketplace on behalf of the taxpaying industry and the taxpaying consumers. Fair and open deals—it is not too much to ask for.

My final comment—learn the lesson provided by the Tercon case, which is, in my humble opinion: Place not your faith in lawyers' drafting abilities, just do the right thing.



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The mission of the BCCA is to provide leadership and excellence in the representation of and service to British Columbia's construction industry