

The Role Of The Consultant In Construction¹

1. **INTRODUCTION**

The role of the consultant on a construction project is often not fully understood by the other parties involved on the project, including the consultant's client, the owner. Consequently, the consultant may find itself under utilized. There are also instances where the consultant itself is not fully aware of its duties and obligations to the owner and others, thereby exposing itself to potential liability claims.

During construction, the role of a consultant is to administer the contract as described in the "Contract Documents". However, the Contract Documents do not reference the agreement between the owner and consultant which outlines the professional services to be provided to the project. As noted above, the impact of the services provided by the consultant can be significant. The contractor should make themselves aware of the arrangement in place between the owner and the consultant and understand the scope of that arrangement at the outset of the project.

With increased awareness and understanding, all parties can benefit from the advantages of having a consultant involved in the construction process. With a clearer understanding of its obligations, the consultant can better carry out their obligations to the owner and others.

The purpose of this paper is to provide an analysis of the role of the consultant as defined by the agreement between the consultant and the owner, the CCDC 2², applicable industry standards, and the law, during the various stages of construction.

¹ The writer specifically acknowledges the able assistance of Nafeesa Kara, articled student, in the update of this paper.

² CCDC 2 refers to Canadian Constructions Documents Committee standard form contract between the owner and the contractor, 2008 edition.

2. CCDC 2 (2008) – WHAT YOU NEED TO KNOW

In 2008, CCDC released a new version of CCDC 2 to replace the the 1994 version of the agreement. Most of the changes to CCDC 2 (2008) are related to formatting and were made with the intention to make the contract clearer and easier to read. There are, however, some substantive changes.

The following table outlines sections of the CCDC 2 regarding the role of the consultant which have undergone substantive changes from the 1994 version to the 2008 version, and discusses the scope of those revisions:

Role of the Consultant	GC 2.2.1	<p>The <i>Consultant</i> now provides administration of the <i>Contract</i> as described in the <i>Contract Documents</i> with no temporal or other restrictions on the provision of its services.</p> <p>The 1994 version contained temporal restrictions which limited the <i>Consultant's</i> administration of the <i>Contract</i> to the time period during construction until the issuance of the final certificate of payment and with the <i>Owner's</i> concurrence, from time to time until the correction of defects.</p>
	GC 2.2.4	<p>This is a new provision.</p> <p>The <i>Consultant</i> must promptly inform the <i>Owner</i> of the date of receipt of the <i>Contractor's</i> applications for payment. If the <i>Consultant</i> does not act promptly, then the <i>Contractor</i> can give notice of default to the <i>Owner</i> with warnings of suspension or termination of the work. This remedy remains unchanged from the 1994 version.</p>
	GC 2.2.7	<p>Except with respect to GC 5.1 – Financing Information Required of the <i>Owner</i>, the <i>Consultant</i> will be, in the first instance, the interpreter of the requirements of the <i>Contract Documents</i>.</p> <p>The <i>Consultant's</i> role as a judge of how requirements in the <i>Contract Documents</i> are performed has been deleted.</p>
	GC 2.2.11	<p>This is a new section.</p> <p>The <i>Consultant</i> will make findings pursuant to GC 6.6 in relation to claims for a change in <i>Contract Price</i>. The structure here is to lump together claims for extra payments claimed by the <i>Contractor</i> for any reason and to submit them to the <i>Consultant</i> for its finding.</p> <p>This procedure deals with claims and is distinct from the contract provisions which deal with the resolution of disputes. A claim may become a dispute when it is not recognized as a valid claim under the contract.</p>

	[Deleted – GC 2.2.9 (1994)]	GC 2.2.9 (1994) dealing with the <i>Consultant's</i> provision of <i>Supplemental Instructions</i> to the <i>Contractor</i> during the progress of the <i>Work</i> has been deleted.
Cost of Review and Inspection of the Work	GC 2.3.2	The wording of this section was subtly changed. Rather than the <i>Contractor</i> being obliged to give the <i>Consultant</i> “reasonable notice of when the work will be ready for review and inspection”, the <i>Contractor</i> is now required to provide “reasonable notification” of the same. This change can be interpreted to mean that notice should be communicated more formally than before, and that sufficient notice is required and that a record of notification should be retained by the <i>Contractor</i> to avoid subsequent debates about how and when notice was given.
	GC 2.3.6 GC 2.3.7	The <i>Contractor</i> must pay the cost of making any test or inspection, if designated in the <i>Contract Documents</i> to be performed by the <i>Contractor</i> or by the laws or ordinances applicable to the <i>Place of Work</i> ; and must pay the cost of samples required for any test or inspection to be performed by the <i>Consultant</i> or the <i>Owner</i> , if designated in the <i>Contract Documents</i> . There were no such provisions in the 1994 version.
Defective Work	GC 2.4.1	The <i>Contractor</i> is required to promptly correct any defective work that has been rejected by the <i>Consultant</i> as failing to conform to the <i>Contract Documents</i> . The requirement under the 1994 version for <i>Contractors</i> to remove defective work has been deleted.

3. THE STANDARD FORM CONSULTANT CONTRACTS

Typically, the responsibilities of the consultant on a construction project are set out in a standard form agreement between the consultant and the owner. The consultant may be an architect or an engineer. For the architect, the standard form contract most commonly used is the Canadian Standard Form of Contract for Architectural Services Document Six (“Document 6”). For the engineer, the typical standard form contract is the Association of Consulting Engineers of Canada Document 31 (“ACEC 31”).

Both Document 6 and ACEC 31 can be used in its prescribed standard form, or parties can tailor the agreement to fit the needs of different parties and projects by the use of

supplementary conditions. To the horror of legal counsel, there are projects on which no formal written agreement is actually executed between the owner and the consultant. While parties are not required to use the standard form contracts, it is prudent for the parties to execute *some* written agreement, whether it is a standard form agreement with or without supplementary conditions, or a unique agreement. In fact, I would go as far as to say that a written agreement is a bare minimum for risk management.

It is the writer's view that both Document 6 and ACEC 31 are "pro-consultant", with terms drafted by the consultant for the consultant. For example, both standard form contracts contain terms that protect the consultant by limiting the consultant's liability exposure both in terms of time and quantum. Owners may want to consider adding more protection to the consultant agreement by using supplementary conditions or a unique contract drafted for a specific project. If one subscribes to the view that a fair and equitable agreement is an effective deterrent of project strife, then supplementary conditions will be required to add balance to the standard form contracts.

4. THE ROLE OF THE CONSULTANT DURING THE DESIGN STAGE

Involving the consultant at an early stage of the construction project is often beneficial for the owner. In fact, a consultant may even be involved pre-design in order to assist an owner with tasks such as project budgeting and management, site selection, space relationships, and environmental studies.

During the design stage itself, the consultant determines the feasibility of the project from an artistic, technical, logistical and financial standpoint. The consultant creates project design concept and seeks approval for this design concept. It is also during this stage that the consultant obtains the required development permit for the project.

(a) Schematic Design

During the schematic design stage, the consultant determines the feasibility of the project. The consultant considers and proposes the preliminary concept and estimated cost of the

project. As with all tasks the consultant undertakes to do, in creating this proposal the consultant must exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence, measured by the professional standard applicable at the time the work is being carried out.³ The consultant should thus not propose or be involved with a project that he or she knows, or ought to know, cannot succeed. This is not to say that a consultant unequivocally guarantees the results of a project, but rather, that the consultant must be conscientious in performing its role.

In making its proposal regarding the concept and cost of a project, the consultant must review and consider the characteristics of the chosen site, various design approaches, the types of construction contracts, and structural, mechanical and electrical design concepts, amongst other things. Whether the consultant is an architect or an engineer, he or she will have to coordinate with his or her counterpart at all stages of the project's development (for example, an architect consultant will typically coordinate normal engineering services, and vice versa). The consultant will want to thoroughly review everything that may impact the cost of a project prior to giving its reasonable estimate of cost, as generally consultants are held to their estimate unless they can meet the rather stringent test of justifying an increase in costs. Consultants are bound to possess a reasonable amount of skill in their profession and to use a reasonable amount of care and diligence in the carrying out of work which they undertake, including the preparation of plans and specifications. If the cost of the project is not reasonably close to the consultant's estimate, it is the responsibility of the consultant to show how the discrepancy arose and why he or she cannot be blamed for it.⁴ Any changes to the cost estimate during the project caused by forces such as inflation or design changes must be accurately and promptly presented by the consultant for the consultant to avoid negligence.⁵ The Supreme Court has found almost a custom amongst engineers and architects, that parties relying on estimates should expect a 10% plus or minus variation.^{3***}

³ Beverley McLachlin *et al.*, *The Canadian Law of Architecture and Engineering* (2d ed. 1994) at 103; Architectural Institute of B.C. ("AIBC"), *Code of Ethics and Professional Conduct*, Bylaw 30.1.

⁴ *Mills v. Small* (1908), 11 O.W.R. 1041 (C.A.); *Savage v. Board of School Trustees of School District No. 60 (Alberni)*, [1951] 3 D.L.R. 39 (BCCA); *Simkin v. Osburn*, [1998] B.C.J. No. 1484 (BCSC).

⁵ McLachlin *et al.*, *supra* note 1 at 106.

³ *Cana Construction Company Ltd. v. Her Majesty the Queen*, [1974] S.C.R. 1159.

(b) Design Development

It is during this stage that the consultant moves forward with concept approval. It is likely that he or she will take a more in depth look at some of the items considered during the schematic design stage, and coordinate and develop the actual design of the project. If not already done during the schematic design stage, the consultant will review the building code, and make a development permit submission. In some cases, the consultant may be responsible for or involved with additional tasks like interior design development, promotional presentations, rezoning variance submissions, geotechnical and/or civil design development, and special studies reports (such as planning tenant or rental spaces).

It is the consultant's responsibility to determine which licences and permits must be obtained and advise the owner regarding the same. The consultant has a duty to ensure the owner is aware of the options available during this process. For example, in one case the architect made some inquiries with lower level employees at a planning department regarding whether a property zoning would allow multiple dwellings. He received favourable replies from these employees and reported this to the developer, who proceeded to file plans based on the architect's information. The plans were ultimately rejected by the decision-maker at the planning department. Because the architect had not advised the developer that the planning department decision-maker could be consulted at the pre-design stage of the project, the developer was able to successfully sue the architect in negligence.⁶

Typically the owner approves the consultant's design. To the extent the owner has the same or more experience with any particular aspect of the plan, the consultant may avoid liability regarding that design component, as the owner may be in a better position to determine whether the design should proceed with that component as is. Conversely, the owner will only be responsible for the technical aspects of a design on rare occasions; generally, the owner does not have the professional background necessary to be held accountable for these parts.⁷

⁶ *Ibid.* at 110. *Cohen v. Ostry*, [1994] B.C.J. No. 148 (BCCA).

⁷ *McLachlin et al.*, *supra* note 1 at 114.

(c) **Construction Documents**

The consultant is responsible for the specifications, plans and drawings related to a project. Unless timelines are specifically accounted for in a contract, the consultant is under an implied obligation to provide the owner with the specifications, plans and drawings within a reasonable time.⁸ The specifications are a detailed and precise written description of the project, while the plans and drawings are detailed images of the same. It is extremely important that the drawings provide ample detail because they are used by contractors to both estimate the cost of the work involved, and to construct the work as designed.⁹ If the drawings or specifications do not indicate unusual features or hazards on a site, for example, the consultant may be held liable for the increased cost of construction resulting from a contractor's encounter with these items.¹⁰ This liability is subject to the terms of the contract between the owner and the contractor. In addition, while detailed, it is unusual for drawings and specifications to provide information to the contractor regarding how the work should be constructed. Unless otherwise stipulated, contractors are at liberty to choose their own construction methods.¹¹

While typically the consultant has been hired before he or she creates the specifications, plans and drawings for a contract, at times, drawings are prepared by a consultant and given to an owner in the hope that the owner will hire the consultant for the project. In these circumstances, the consultant cannot expect to be paid for his or her efforts in preparing the drawings. Whether a consultant is entitled to remuneration in a situation where the owner has asked the consultant to prepare drawings, but makes them subject to the owner's approval, is less clear. While an early decision from England indicated that the consultant did not have to be paid in these circumstances, later decisions have gone in the opposite direction, holding the owner responsible for payment. For example, in one situation an architect was asked to design a home for a family similar to the family's existing house with a few changes. The architect produced schematic sketches and design development drawings, as well as working drawings which were submitted to the City of Vancouver to obtain a building permit. After seeing the schematic

⁸ *Ibid.* at 123.

⁹ *Ibid.* at 124.

¹⁰ *Ibid.* at 124-125; *Canadian Red Cross Society v. W.N. Dev. (Ottawa) Ltd.* (1983), 1 C.L.R. 49 (Ont. H.C.J.).

¹¹ *McLachlin et al.*, *supra* note 1 at 125.

sketches and design development drawings the owner expressed dissatisfaction with certain aspects of the drawings, claiming they did not reflect what the parties had initially discussed. The parties had other meetings, revisions were made to the drawings, but a firm decision was not made with regard to a few details. The owner left for Hawaii, the architect prepared the final drawings and, confident that the owner would accept them, submitted the drawings to the city. When the owner discovered the drawings did not reflect his intentions he hired another architect who completed the family's home. By the time the owner terminated his relationship with his initial architect, the architect had invoiced the owner for payment for the cost of preparing the plans for submission. The court found that the architect was entitled to this payment.¹² A general test to determine whether a consultant is entitled to payment is whether the circumstances gave rise to a presumption that the work was intended to be paid for.¹³

5. THE ROLE OF THE CONSULTANT DURING BIDDING AND NEGOTIATIONS

The consultant represents the owner and acts as the owner's agent in the preparation, issuance and supervision of tender documents. The consultant also prepares, or co-ordinates and issues the addenda to the tender documents, if needed. Once bids have been received, the consultant evaluates them and consults with the owner about them. While the consultant is responsible for a considerable amount of the tender process, the owner can have some involvement with it. ACEC 31, section 2.7, states that the owner is responsible for the incidental advertising related to obtaining tenders, and that the owner must "provide or reimburse the Engineer for obtaining necessary legal, accounting, insurance, bonding and other counselling services in connection with the Project".

The consultant owes a duty of care to protect owners, even if there is no contract between them. In one case, the structural engineer had no contract with the owner; rather, the architect had hired him. The engineer became concerned with the soil conditions and warned the architect. However, he failed to tell the owner and was found liable for failure in his duty of care.^{4***} It is the consultant's responsibility to ensure that the tender documents contain all of the information

¹² *Resanovic v. Rasman*, [1985] B.C.J. No. 1289.

¹³ *McLachlin et al.*, *supra* note 1 at 278-279.

⁴ *Surrey (District) v. Carroll Hatch and Associates*, (1979), 101 D.L.R. (3d) 218 (B.C.C.A.)

that the owner has pertaining to the project. If the tender documents omit or provide inaccurate information, the consultant must draw this to the contractor's attention. If new information or errors come to light after the tender documents have been issued, the consultant must ensure that all contractors interested in bidding receive an addendum correcting the deficiency. If the consultant does not comply with this process, the consultant or the owner may be liable to the contractor for any resulting harm.¹⁴ In one case, an engineering firm designed and stated the specifications for a road construction project. A construction firm successfully bid on the project based on the specifications and drawings that the engineering firm provided, and was awarded a contract with the province of British Columbia. After beginning construction, the contractor claimed that the documents the engineering firm prepared were inaccurate and that they suffered a loss as a result. The Supreme Court of Canada agreed with the contractor, and held that because the contractor was relying on the documents the engineering firm provided, the engineering firm was liable to the contractor.¹⁵ This conclusion was based in part on the fact that bidding period was too short to allow bidders to conduct a thorough review fo the accuracy of the engineering works; furthermore, duplication of the work would be costly. Thus, bidders must be able to rely on those who supply information to them.^{5***}

6. CONSTRUCTION CONTRACT ADMINISTRATION

During the construction contract administration, the consultant owes a duty to the owner to ensure that the contractor abides with the terms of its construction contract and that it follows the plans and specifications in constructing the project. The most common way for the consultant to ensure that the construction contract is being adhered to is through on site field reviews.

(a) Field Reviews

In Document 6, "General Review / Field Review" is defined as follows:

¹⁴ *Ibid.*, at 126.

¹⁵ *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206.

⁵ Brian M. Samuels and Doug R. Sanders, *Practical Law of Architecture, Engineering and Geoscience*, Canadian Edition, (Toronto: Pearson Pentice Hall, 2007) at 131.

review during visits to the *Place of the Work* (and where applicable, at locations where building components are fabricated for use at the *Project* site) at intervals appropriate to the stage of the construction that the *Architect*, in his or her professional discretion, considers necessary to become familiar with the progress and quality of the *Work* and to determine that the *Work* is in general conformity with the construction documents.

While the consultant is not expected to be at the project site every moment of construction, either the consultant, or a qualified person acting on his or her behalf, should be at the project site during all significant phases of the project. Before crucial elements of the project are concealed from inspection, the consultant is obligated to ensure they comply with the project drawings and specifications. In addition, the more complex the project is, and the greater the risk is if something with the project goes wrong, the more attention the consultant has to give it.¹⁶ In most cases, the consultant's responsibility to inspect the project goes beyond merely looking at it; rather the consultant has a positive obligation to ask the questions necessary to satisfy him or herself that the project drawings and specifications are being complied with.¹⁷

The contractor has a responsibility to ensure the consultant knows when the project is advancing from stage to stage. If the contractor does not do this, the consultant can require that the contractor reveal work that has already been covered so that it can be inspected, if this exposure is reasonably possible. If it is not possible for the contractor to reveal the covered work for inspection, and the contractor did not give the consultant reasonable notice of the stage the project had reached, then the consultant may inform the contractor that it did not abide by the terms of its contract. In this situation, the contractor may be held liable for any damage that results if an inspection could have avoided this damage.¹⁸

(b) Change Orders

GC 6.2 in the CCDC 2 provides:

6.2.1 When a change in the *Work* is proposed or required, the *Consultant* will provide the *Contractor* with a written

¹⁶ McLachlin *et al.*, *supra* note 1 at 128.

¹⁷ *Ibid.*, at 129.

¹⁸ *Ibid.*, at 128.

description of the proposed change in the *Work*. The *Contractor* shall promptly present, in a form acceptable to the *Consultant*, a method of adjustment or an amount of adjustment for the *Contract Price*, if any, and the adjustment in the *Contract Time*, if any, for the proposed change in the *Work*.

6.2.2 When the *Owner* and *Contractor* agree to the adjustments in the *Contract Price* and *Contract Time* or to the method to be used to determine the adjustments, such agreement shall be effective immediately and shall be recorded in a *Change Order*. The value of the work performed as the result of a *Change Order* shall be included in the application for progress payment.

At times, the project drawings and specifications the consultant created have to be amended after the actual construction of the project has begun. It is not uncommon for the consultant to have the contractual authority necessary to order changes or additions to the project. The necessity for a change order may be the result of changes made by the owner or the consultant, deficiencies in the drawings and specifications, and through unexpected difficulties in the physical conditions of the site or in obtaining necessary materials. If the change order is required because of a failing in the project drawings or specifications, the consultant may be responsible for the additional cost incurred.

As noted above, the consultant owes a duty of care to the owner, and this duty carries over when the consultant is considering any change orders. This means that the consultant must consider the interests of the owner in agreeing to any change orders.¹⁹

(c) Impartial Adjudicator

When dispute arises between the contractor and the owner which they are unable to resolve, the first stage in the dispute resolution process set out in the CCDC 2 is for the parties to involve the consultant. The particulars of the power of the consultant are set out in GC 2.2.7 to GC 2.2.9. The consultant has the authority to resolve all claims or disputes relating to the performance of the work or the interpretation of the contract documents, or any other matters where the parties have failed to agree, and agreement is required.

¹⁹ The above information on change orders is from: *ibid.*, at 131-132.

The consultant is required to determine disputes in a unbiased and fair manner. In such circumstances, the consultant must remove itself from its role as the owner's representative on the project to become the unbiased adjudicator of a dispute between its client, the owner and the contractor. The dual roles of the consultant on the project relies heavily on the professionalism of the consultant, and adds to the interesting and somewhat complex tripartite relationship between owner, contractor and consultant under the CCDC 2 paradigm.

Consultants may fear that their role as a decision-maker at first instance would be undermined if their decisions were exposed to a claim by a disappointed party. In some cases, consultants have requested that the contract include a supplementary condition which is a waiver of any claims arising from the consultant's interpretations and findings with respect to the intent of the contract documents. The parties will need to negotiate a balanced result amongst themselves, but it seems appropriate to include this waiver of claims so as to maintain the consultant's impartiality.

The one noted exception to the scope of the consultant's authority in GC 2.2.7 is set out in GC 5.1 - Financing Information Required of the Owner. On a dispute relating to financing information required of the owner, the consultant has no authority to make any finding. If a dispute arises in an area over which the consultant has no authority to make a finding, the procedures under GC 8.1.3 and GC 8.2.3 to GC 8.2.8 are to be followed.

To invoke the power of the consultant, either party can make a referral to the consultant in writing, and copy this to the other party. The consultant will then investigate, and make a finding. This finding will be forwarded in writing to both the contractor and the owner "within a reasonable time".

If either party disputes a finding made in writing by the consultant, it must provide *Notice in Writing* to the other party and to the consultant so stating (GC 8.2.2) within 15 *Working Days*. Failure to send such a notice results in the parties being "conclusively deemed" to have accepted the finding, and to have expressly waived and released the other party from any claims in respect to that particular matter set out in the finding.

The notice of dispute under GC 8.2.2 must contain sufficient particulars, including references to particular terms of the contract documents which support the position of the party disputing the finding. The responding party must provide, within 10 *Working Days*, *Notice in Writing* setting out the particulars of its position, again including reference to any specific contract documents.

The consultant also has the authority to give instructions to the contractor to ensure proper performance of the Contract, and to prevent delays. The parties shall carry out the instructions, without prejudice to their rights to maintain their positions in the dispute. If the ultimate conclusion is that the instructions of the consultant resulted in work outside the scope of the contract, the owner is liable to the contractor for the value of that work, including costs resulting from interruption of the work.

(d) Payment Certifier

Construction contracts differ from other contracts in the sense that under construction contracts, such as the CCDC 2, the contractor can receive partial payment for its work before the entire project has been completed. The construction contract will typically outline a number of phases or intervals at which the contractor is entitled to progress payments, and the amount the contractor is entitled to for each payment. Usually once a specific component of the project has been completed, the contractor can receive partial payment for finishing that particular part. It is the consultant's responsibility to determine when these phases have been successfully completed by the contractor, and thus when the contractor is entitled to payment. Without the consultant's certificate, the contractor cannot receive payment.

The contractor is responsible for applying for certificates of payment within a reasonable time. The contractor should include in its application any proof it has in support of its claim, such as bills of sale for materials. The consultant must deal with all claims for payment promptly. In determining whether the contractor should receive a progress payment, the consultant must decide not only whether the work has been completed and materials delivered, but also whether the quality of the work conforms with contract requirements, and whether

subcontractors and suppliers have been paid.²⁰ The consultant usually has the power to make deductions to the contractor's payment for holdbacks in accordance with the *Builders Lien Act*,²¹ and for incomplete work. Ultimately, the consultant is responsible for issuing the final certificate for payment, at which time he or she must consider whether any lien claimant remains unpaid, the cost of rectifying any defective work done by the contractor, and whether the final payment amount should be adjusted in accordance with the progress payments.

7. POST-COMPLETION INSPECTION

The consultant is responsible for inspecting the project once it has been completed. Like a field review, this post-completion inspection is not just confined to a visual inspection, but instead includes an obligation to make appropriate inquiries of the contractor. The post-completion inspection must be comprehensive, and include structural, mechanical, and electrical inspections. Once the consultant considers the work to be complete, he or she can issue the final certificate for payment for the contractor.

8. CONCLUSION

The consultant has a wide variety of roles to play during the construction process. Because the consultant plays a multifaceted part in the construction project, and is usually involved in the project from the project's inception to its completion, it is important to fully understand consultant and authority. Doing so ensures that the consultant can be fully maximized on each construction project.

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²⁰ *Ibid.* at 196-197.

²¹ [SBC 1997] c. 45