CONSTRUCTION CONTRACTS FOR PROJECTS IN CANADA

AIA DOCUMENTS AND CCDC COMPARISON

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U.S. STANDARD DOCUMENTS OR CANADIAN – WHICH WAY TO GO?

As a Canadian law firm with an extensive construction law practice, we are often asked to review or prepare construction contracts for U.S. clients engaged in construction projects in Canada. A frequent choice has to be made as to whether to use U.S. forms of standard documents (and adapt them as needed for the Canadian context) or use the Canadian standard industry documents (and adapt them as needed in the other direction). This article touches on some of the pros and cons and related consideration for this decision.

THE LEADING SOURCES – AIA AND CCDC

The American Institute of Architects (AIA) is responsible for the "AIA Contract Documents® THE INDUSTRY STANDARD." The slogan says it all – these contract documents are the industry standard in the U.S.

In Canada, the leading source is the Canadian Construction Documents Committee (CCDC). The CCDC is a national joint committee formed in 1974. The CCDC is comprised of volunteer members of the Association of Consulting Engineering Companies-Canada, the Canadian Construction Association, Construction Specifications Canada, and the Royal Architectural Institute of Canada, and includes owner representatives from the public and private sectors.

DIFFERENCES IN SCALE

The AIA appears to have vast resources. They produce a broad array of documents. This is evident from their "Document Families" framework. The AIA Contract Documents are divided into nine families based on project type or delivery method. Documents in each family provide a consistent structure and text to support the major contracts needed. The "Document

Families" framework makes it easy to select the most appropriate standard forms for the project. Drafting work for syntax and terminology is minimized.

The CCDC documents do a good job of covering the bases, but do so less extensively and, by comparison, in some areas are more rudimentary. This is to be expected, given that the CCDC is not able to leverage the economies of scale available to U.S. counterparts.

CUSTOMIZATION AND SUPPLEMENTARY CONDITIONS

The AIA documents appear to be reasonably balanced. For a project in the U.S., the AIA documents would require some customization to suit the preferences and specific requirements for the project and the client. They are otherwise pretty much "ready to go."

Significant supplementary conditions are indispensable, I would say, for the CCDC documents. Not surprisingly, use of such supplementary conditions is pervasive. In my experience this is particularly important for the owner/client wishing to engage a contractor. For a project in Canada for a U.S. client, the usual supplementary conditions would be needed if CCDC is followed, and in addition the preferences and specific requirements for the project and the client would have to be incorporated.

AIA – A USER-FRIENDLY FOUNDATION

The AIA documents are geared to be user-friendly. A user can make edits in the body of the text. When the final version is generated for execution, the software program demands that all edits will be conspicuously identified (as, of course, they should be).

In contrast, the CCDC documents prohibit such edits in the body of the documents. This is enforced by asserting copyright. Users are constrained to making changes through supplementary conditions. This requires cross-referencing the applicable paragraphs and sections, which is laborious and can be unwieldy. There is a lot more "flipping of pages" back and forth when working with the CCDC forms.

CONTRACTOR AND / OR ARCHITECT BASED IN CANADA?

If the contractor is U.S. based, and a U.S. architect is leading the project, with a U.S. client needing to construct a tenant fit-out or facility in Canada, then there is a lot to be said for using the AIA documents (which everyone will be familiar with) and adapting as needed.

If the contractor or the architect or both are Canadian, they will likely be more accustomed and comfortable with the CCDC documents. Use of the CCDC documents can serve a vital function: the contractor can feel assured that the contractor need only focus on the supplementary conditions proposed by the owner, satisfied that the rest of the contract terms will be sufficiently friendly to the contractor.

SOME AREAS TO CONSIDER

Whether the contract is based on AIA or CCDC, you will want to address a number of issues. To give a sense of the kinds of subjects to consider, here is a sampling:

- **Liens will stymie funding draws.** If the owner has duly paid all progress claims owed to the contractor, then from the owner's perspective the contractor should be responsible under the contract to obtain and register at the land title office a discharge of any liens that are filed (or get a Court order cancelling the liens, if necessary). Commonly the AIA and CCDC standard forms do not adequately provide for this. Under the builders lien legislation in Canada, typically a construction lender will not fund the next draw if one or more liens appear on title.

- **Notice that landlord will not be responsible.** Commonly a notice must be filed at the applicable land registry or posted on the worksite so that the landlord is not responsible for work engaged by a tenant. Failure to address this adequately may result in the tenant being in default under the lease (which can result in termination of the lease, or withholding of a tenant improvement allowance to be paid by the landlord).

- **Canada's tendering framework.** The Supreme Court of Canada case of R*on Engineering* established a contracting framework for competitive bidding in Canada that appears to be counter-intuitive to those accustomed to the U.S. model. This framework incorporates a duty to treat all bidders fairly and to act in good faith. What appears to be fair to one party is often perceived to be unfair from the vantage of another – yet legally you will be expected to be fair to all. Unless appreciated and managed, this can give rise to unexpected liability.

- **Worker Safety.** The occupational health and safety obligations are typically more strident in Canada and call for the designation of a "prime contractor" to be responsible. Owners need to be aware of this and clearly designate responsibility.

- **Payment certifier.** Canadian jurisdictions formally impose responsibilities on the person required to be identified as the "payment certifier." This needs to be recognized and addressed in the contract. In addition, if the architect is designated for this role and does not have a presence in the applicable jurisdiction, then the architect may be unwilling to complete the prescribed certifications without performing the necessary field reviews. This may necessitate engaging a local architect accredited in the jurisdiction (who will want to be separately compensated for the field reviews).

- **Liquidated damages.** Many U.S. parties are surprised by the constraints under Canadian law for liquidated damages. This frequently requires customization.

- **Federal procurement.** Federal procurement involves another layer of considerations.

THE BIG PICTURE

Of course the legal terms of the contract are just one component of the big picture. Getting the specs right (or the owner's statement of requirements) of course is critical. The selection of the "right contractor" is critical. Attentiveness and diligence in managing the progress of the work is critical. If there are problems or the project goes sideways, then having stellar legal terms won't assuredly save the day. But they will help, and often they are essential. U.S. clients engaged in construction projects in Canada will want to arrive at a contract matching their usual expectations, to the extent practicable, and be aware of areas where differences arise. This can be done on the U.S. platform (AIA documents) or the Canadian platform (CCDC documents). Either way, some massaging is required.

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