

CONSTRUCTION CONTRACTS IN CANADA – What You Need to Know and What's New

Satinder Sidhu, Partner
Scott Lamb, Partner
Rosalie Clark, Associate

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Construction Contracts in Canada

1. What is CCDC
2. Types of Construction Contracts
3. CCDC – Key Provisions
4. CCDC 2 – 2020 Updates

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WHAT IS CCDC?



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WHAT IS CCDC?

- Canadian Construction Documents Committee (CCDC)
- CCDC develops, produces, and reviews standard construction contracts, forms and guides
- National joint committee that includes representation from across the Canadian construction industry
- The committee includes two construction owner representatives, one from each of the public and private sectors, as well as representatives from the: 1) Association of Consulting Engineering Companies (ACEC); 2) Canadian Construction Association (CCA); 3) Construction Specifications Canada (CSC); and 4) Royal Architecture Institute of Canada (Architecture Canada)

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WHY USE CCDC?

- Reduced Costs – using a precedent can reduce costs
- Industry Practices – revised over time to meet best practices
- Industry Certainty – parties know what to expect
- Judicial Certainty – likely to be more case law dealing with interpretations and issues
- Transparent – subject to supplemental conditions, experienced parties will know what to expect

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WHY NOT USE CCDC?

- Not enough customization – may not be best for one off/unique projects
- Not very current – latest version of some of the CCDC contracts are over a decade old.
- Parties to the contract can get lazy – assume they understand the terms of the contract because they used them before without issue
- Bias – contractor friendly
- Supplementary conditions are needed – supplementary conditions can significantly revise content of the CCDC

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TYPES OF CCDC CONTRACTS



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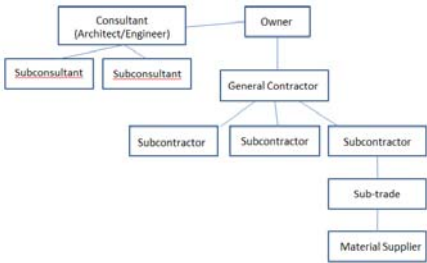
TYPES OF CCDC CONTRACTS

Generally speaking, the CCDC suite of contracts can be divided into three categories:

- 1) general (CCDC 2, CCDC 3, CCDC 4, and CCDC 18)
- 2) design-build (CCDC 14)
- 3) construction management (CCDC 5A, CCDC 5B and CCDC 17)
- 4) integrated project delivery (CCDC 30)

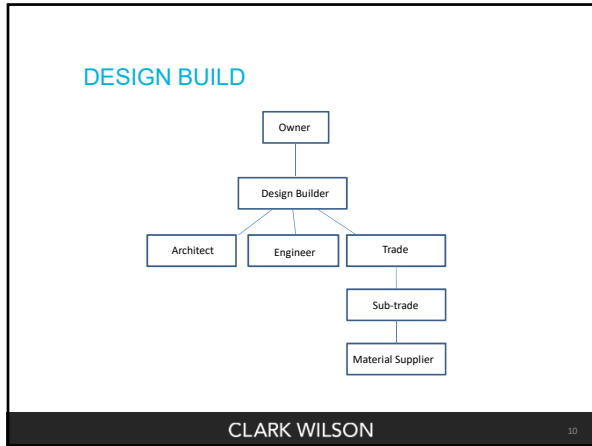
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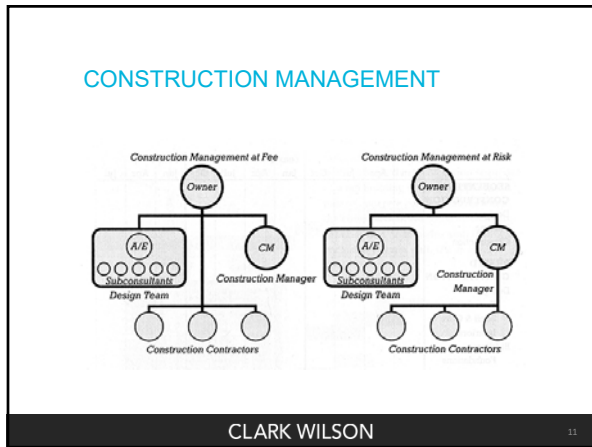
DESIGN BID BUILD



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graph TD; Owner[Owner] --- Consultant[Consultant (Architect/Engineer)]; Owner --- GC[General Contractor]; Consultant --- SC1[Subconsultant]; Consultant --- SC2[Subconsultant]; GC --- SC3[Subcontractor]; GC --- SC4[Subcontractor]; GC --- SC5[Subcontractor]; SC5 --- ST[Sub-trade]; ST --- MS[Material Supplier]
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CCDC 2 – 2020

- CCDC 2 – 2020 Stipulated Price Contract is a standard prime contract between Owner and prime Contractor to perform the work for a single, pre-determined fixed price or lump sum, regardless of the Contractor's actual costs

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CCDC 3 – COST PLUS CONTRACT

- CCDC 3 – 2016 is a standard prime contract between Owner and prime Contractor to perform the work required on an actual cost basis, plus a percentage or fixed fee that is applied to the actual costs

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CCDC 5A

- CCDC 5A – 2010 Construction Management Contract – for Services is a standard contract between Owner and Construction Manager for Services. Work is to be performed by Trade Contractors.
- The Construction Manager acts as a limited agent of the Owner providing advisory services and administering and overseeing the contracts between the Owner and Trade Contractors

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CCDC 5B

- CCDC 5B – 2010 Construction Management Contract: contract between Owner and Construction Manager to provide advisory services during the pre-construction phase and perform the required Work during the construction phase
- At the outset, the Work is performed on an actual-cost basis, plus a percentage or fixed fee applied to actual costs
- The parties may agree to exercise the following options: Guaranteed Maximum Price (GMP), GMP Plus Percentage Cost Savings, and change the CCDC 5B into a Stipulated Price Contract

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CCDC 14

- CCDC 14 is a standard prime contract between the Owner and the Design-Builder where the Design-Builder provides Design Services and performs the Work under one agreement, for a single, pre-determined stipulated or fixed price
- CCDC 14 clearly defines the roles and responsibilities of the contracting parties: the Owner and Designer-Builder

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CCDC 17

- CCDC 17 – 2010 Stipulated Price Contract for Trade Contractors on Construction Management Projects is a standard contract form between Owner and Trade Contractor to perform the Work for a single, pre-determined fixed price, regardless of the Trade Contractor's actual costs. It is specifically for use where the project is performed under the CCDC 5A Construction Management method of contracting

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CCDC 30

- CCDC 30 – Integrated Project Delivery A
- Addresses issues specific to integrated project delivery (IPD) projects including scope allocation, payments, changes, conflict management, termination, insurance and contract security, and liability allocation.
- The pricing structure is cost plus with a target price. The profits of the design/construction team are identified and allocated to a risk pool that remains at risk subject to the achievement of mutually agreed project objectives.
- The integrated project delivery approach is a novel team based approach to construction in Canada. It has been more commonly used in the USA and Europe.


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OTHER CONTRACT FORMS

- CCA forms
- RAIC forms
- Engineering forms for their associations
- MMCD forms
- MOTI forms
- City and Municipal forms
- Bespoke contracts

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CCDC KEY PROVISIONS



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KEY PROVISIONS

- We are using the CCDC 2 – 2020 as our baseline document for the following key terms/subjects:
 - Notice Requirements
 - Schedule of Work
 - Changes to Work and Delays
 - Delays
 - Termination
 - Dispute Resolution

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SPECIFIC CCDC CLAUSES

- CCDC contracts include standard clauses that deal with all stages of the construction project
- Note that some clauses have little to no case law discussing interpretation and application of clauses (such as delay clauses, etc.)
- Be aware that the standard provisions in CCDC contracts are often revised by supplementary conditions
- **Always read the terms of your contract carefully**

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NOTICE

CCDC 2 - 2020

- Definition of "Notice in Writing": *"a written communication between the parties or between them and the Consultant that is transmitted in accordance with the provisions of Article A-6"* .
- Notice receipt provision set out at Article A-6
- Notice must be addressed to the noted address
- Sent by hand, by courier, prepaid first class mail, or email - CCDC 2 – 2020 has removed facsimile as a delivery method for Notice in Writing

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NOTICE

CCDC 2

- Emails are received on the date of transmission, unless received after business hours and then deemed to be received the next working day
- Deemed to be received on the delivery date for hand or courier deliveries
- Mail deemed to be received five days after it was sent or, if the day in question is not a working day, then the following day
- Notice required for new conditions discovered (GC 6.4), delay (GC 6.5), claims for change in contract price (GC 6.6), termination (Part 7), dispute resolution (Part 8), claims for indemnity (GC 13), waiver of claims (GC 12)

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SCHEDULE OF WORK

CCDC 2 – 2020 requirements for the *Contractor* to prepare and submit a construction schedule are now found at **GC 3.4 [CONSTRUCTION SCHEDULE]**

- The Contractor shall:
 - Prepare and submit to the Owner and the Consultant prior to the first application for payment a construction schedule that indicates the timing of the major activities of the Work and provides sufficient detail of the critical events and their inter-relationship to demonstrate the Work will be performed in conformity with the Contract Time
- The Contractor is required to update the schedule on a monthly basis or as otherwise stipulated in the contract documents.

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SCHEDULE OF WORK

CCDC 2
GC 3.4 – Construction Schedule

The Contractor shall:

- Monitor the progress of the work relative to the construction schedule and update the schedule on a monthly basis or as stipulated by the contract documents; and
- Advise the Consultant of any revisions required to the schedule as the result of extensions of the Contract Time as provided in Part 6 of the General Conditions (Changes in the Work)

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CHANGES

CHANGE ORDER vs. CHANGE DIRECTIVE

- GC 6.2 Change Order: used when the Owner and Contractor agree on the adjustment to the Contract Price and Contract Time
- GC 6.3 Change Directive: used when there is no agreement on adjustments to the Contract Price or Contract Time

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CHANGES

CCDC 2 GC 6.2 CHANGE ORDER

- The Owner may make changes through the Consultant without invalidating the Contract
- The Consultant will provide the Contractor with a description of the change, and the Contractor will present a method of adjustment for the Contract Price and Contract Time
- Agreement on adjustment recorded in a Change Order
- The value of the work performed as a result of the Change Order is then included in applications for progress payments

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CHANGES

CCDC 2 – GC 6.3 CHANGE DIRECTIVE

- Much more complex than for Change Orders
- GC 6.3.1: Owner may issue a Change Directive through the Consultant
- GC 6.3.2: Change Directive can only be used to direct a change that is within the general scope of the Contract Documents
- GC 6.3.4: Contractor is compelled to proceed promptly with change (i.e. cannot hold off change work until adjustments to Contract Price and Contract Time are worked out and agreed)
- Adjustments to the Contract Price are governed by GC 6.3.5 through GC 6.3.11 plus GC 6.6

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CHANGES

- **CCDC 2 2020 includes updates to GC 6.3.7 [CHANGE DIRECTIVE]**
- Changes have been made to the costs that may be included in a *Change Directive*
- Costs are only to be included in a *Change Directive* if they contribute directly to the implementation of a *Change Directive*
- A *Contractor* is no longer able to claim for certain items, including:
 - wages of personnel engaged in review of shop drawings, fabrication drawings and coordination drawings; and
 - wages of personnel engaged in processing changes to the *Work*

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CHANGES

CCDC 2 – GC 6.6 CLAIMS FOR A CHANGE IN CONTRACT PRICE

- If Contractor intends to make a claim for increase in Contract Price, shall give timely Notice in Writing to the Owner and Consultant
- Consultants' findings will be given by Notice in Writing 30 Working Days after receipt of the claim and if finding is not acceptable then claim shall be settled in accordance with dispute resolution provisions

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CHANGES

NO CHANGE ORDER OR CHANGE DIRECTIVE

- What does a Contractor do when confronted with what appears to be a change but the Owner refuses to provide a Change Order or Change Directive?
- Some Options:
 - Do the Work or Don't
 - Get an Agreement to Suspend the Dispute
 - Do the Work Under Protest.

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DELAYS

CCDC 2 – GC 6.5 DELAYS

- GC 6.5.1 addresses delays caused by the Owner or Consultant:

"If the Contractor is delayed in the performance of the Work by an action or omission of the Owner, Consultant or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the Contract Documents, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay."
- The Contractor must provide Notice in Writing of cause of delay to Consultant no later than 10 Working Days after commencement of delay (if delay is continuing, one notice is sufficient)

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DELAYS

- GC 6.5.2 addresses delays caused by stop work orders issued by courts or public authorities:

"If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, resulting in the failure of the Contractor to attain Ready for Takeover by the date stipulated in Article A-1 of the Agreement – THE WORK, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay."

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DELAYS

- Consider how GC 6.5.2 will interact with orders made to address public health and safety measures in response to COVID-19.
- For example, what is a "stop work order"? Not defined by the CCDC 2, unless COVID-19 is addressed in supplementary conditions, may end up with a dispute regarding whether or not an order or direction made in connection with public health amount to a COVID-19 order.

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DELAYS

- GC 6.5.3 addresses delays caused by circumstances beyond the control of the Contractor (*force majeure*):

"If the Contractor is delayed in the performance of the Work by:

- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound),*
- .2 fire, unusual delay by common carriers or unavoidable casualties,*
- .3 abnormally adverse weather conditions, or*
- .4 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor,*

then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. The Contractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant or anyone employed or engaged by them directly or indirectly."

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DELAYS

- Note that there are notice requirements that apply when making a claim for under the delay provisions in the CCDC 2, these requirements are set out at GC 6.5.4:

"No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Consultant* not later than 10 Working Days after the commencement of the delay. In the case of a continuing cause of delay, only one *Notice in Writing* shall be necessary."
- Note that if no notice is given, no extension of time shall be made

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CHANGE IN CONTRACT PRICE

CCDC 2 – GC 6.6 CLAIMS FOR CHANGE IN CONTRACT PRICE

- GC 6.6 deals with the circumstance of a Contractor advancing a claim for an increase in Contract Price
- Contractor is required to give timely Notice in Writing to the Owner and Consultant
- Consultant's findings will be given by Notice in Writing 30 Working Days after receipt of the claim and if finding is not acceptable then claim shall be settled in accordance with dispute resolution provisions found at Part 8

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TERMINATION

PART 7 - DEFAULT NOTICE

CCDC 2 – GC 7.1 OWNER'S RIGHT TO PERFORM THE WORK, TERMINATE THE CONTRACTOR'S RIGHT TO PERFORM THE WORK OR TERMINATE THE CONTRACT

- Owner's Right to Terminate in following circumstances:
 - 7.1.1 The Contractor is bankrupt or receiver appointed
 - 7.1.2 Where the "Contractor neglects to prosecute the Work properly or otherwise fails to comply with the requirements of the Contract to substantial degree..." then the Owner can give notice to the Contractor to correct such default within 5 days if the Consultant provides a written statement that "sufficient cause exists to justify such action"

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TERMINATION

- Owner's rights on termination are set out in GC 7.1.5. These rights include the right to:
 - take possession of the Work;
 - withhold further payment;
 - charge the Contractor the full cost to finish the Work;
 - charge the Contractor the amount for the cost of any corrections
- Note also that GC 7.1.6 provides that the Contractor's obligations as to quality, correction and warranty of the Work continue after termination

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TERMINATION

PART 7 - DEFAULT NOTICE
CCDC 2 – GC 7.2 CONTRACTOR'S RIGHT TO SUSPEND THE WORK OR TERMINATE THE CONTRACT

- The Contractor has the right to terminate the Contract in the following circumstances:
 - the Owner becomes bankrupt or receiver is appointed (see GC 7.2.1)
 - the Work is suspended or delayed for 20 Working Days or more under a court order or other public authority

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TERMINATION

- Pursuant to GC 7.2.3, the Contractor may also give the Owner Notice in Writing that it is in breach of its contractual obligations where:
 - the Owner fails to furnish "reasonable evidence that financial arrangements" that it can fulfill its obligations under the Contract;
 - the Consultant fails to a certificate for a progress claim;
 - the Owner fails to pay the Contractor amounts certified by the Consultant (or awarded by an arbitral tribunal or court); and
 - the Owner violates the requirements of the Contract to "a substantial degree" and the Consultant confirms this in writing to the Contractor
- The Owner shall have 5 Working Days to correct the default

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TERMINATION

- GC 7.2.4 The Contractor's Notice to the Owner shall give 5 days to correct the default
- GC 7.2.5 If the Contractor terminates the Contract, the Contractor is entitled to be paid for:
 - all work completed, including a reasonable profit;
 - for loss sustained upon products and equipment; and
 - other damages sustained as a result of termination

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DISPUTE RESOLUTION

CCDC 2 – PART 8

- Provide question to Consultant - Consultant gives interpretation (GC 2.2.8)
- If Consultant's decision is disputed by either party, resolve by negotiations (GC 8.2.3)
- If negotiations fail, request assistance from Project Mediator (GC 8.2.4)
- If dispute not resolved by Project Mediator, Project Mediator gives written notice that mediated negotiations are terminated (GC 8.2.5)
- Either party may refer dispute to binding arbitration (GC 8.2.6)

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DISPUTE RESOLUTION

CCDC 2 – 2020 Updates to GC 8.1 [AUTHORITY OF THE CONSULTANT] and GC 8.2 [ADJUDICATION]

- GC 8.1 [AUTHORITY OF THE CONSULTANT] provides that:

"If a dispute is not resolved promptly, the *Consultant* will give such instructions . . . to prevent delays pending settlement of the dispute . . . it being understood that by doing so neither party will jeopardize any claim the party may have."
- The parties are required to follow the instructions of the Consultant, however, their right to make claims is not jeopardized.
- Note that, if it is subsequently determined that the Consultant's instructions were in error or at variance with the Contract Documents, the Owner must pay the Contractor the costs incurred in carrying out the instructions beyond what the Contract Documents properly required (see GC 8.1.3)

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DISPUTE RESOLUTION

- GC 8.2 clarifies that nothing in the CCDC 1 (including the dispute resolution provisions) affects the Owner or Contractor's rights to resolve disputes by adjudication pursuant to any applicable legislation
- Consideration should also be made to GC 8.3 which sets out when disputes arising under the Contract may be submitted to arbitration
- In September 2020 the new BC *Arbitration Act* came into effect. This new legislation incorporates a right for parties to an arbitration to opt out of their right to appeal an arbitral award

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DISPUTE RESOLUTION

CCDC 2
GC. 8.1 Authority of the Consultant and GC 8.2 Negotiation, Mediation and Arbitration - steps in Dispute Resolution

1. Dispute arises that is not settled by decision of the Consultant in first instance;
2. Party triggers process by sending notice in writing of the dispute within 15 working days of consultant's finding;
3. Responding party sends reply within 10 days of receiving notice of the dispute;
4. Parties negotiate;
5. After 10 working days of negotiation, parties request the assistance of the project mediator;

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DISPUTE RESOLUTION

CCDC 2
GC. 8.1 Authority of the Consultant and GC 8.2 Negotiation, Mediation and Arbitration - steps in Dispute Resolution

6. After 10 working days of mediation, the mediation is terminated unless extended by the parties;
7. If arbitration is requested by either party within 10 working days of termination of mediation, the dispute is referred to arbitration;
8. If arbitration is not requested within 10 working days of termination of mediation, parties must agree to arbitration;
9. A party refers the dispute to the courts;
10. If no express request to arbitrate immediately, then arbitration held in abeyance until substantial performance, terminated or abandonment of work.

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DISPUTE RESOLUTION

CCDC 2

GC. 8.1 Authority of the Consultant; GC 8.2 Negotiation, Mediation and Arbitration:

"If a dispute is not resolved promptly, the Consultant will give such instructions . . . to prevent delays pending settlement of the dispute . . . it being understood that by doing so neither party will jeopardize any claim the party may have."

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CCDC 2 - 2020 UPDATES



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Ready for Takeover

- Key new concept: **Ready for Takeover**
- **"Ready for Takeover"** achieved when various conditions are confirmed by the Consultant to be met:
 - achieving "Substantial Performance" pursuant to the applicable lien legislation;
 - issuance of occupancy permit;
 - completion of final cleanup and waste removal;
 - delivery of required operations and maintenance documents to the Owner;
 - completion and submission or delivery of as-built drawings

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Ready for Takeover

- “Ready for Takeover” linked to other key obligations, including delivery dates for work, warranty periods, insurance, indemnification obligations and waiver of claims deadlines
- Owner is permitted to take early occupancy of all or part of the work before “Ready for Takeover” is achieved for the Project as a whole
- Be aware that early occupancy will start “early running” of applicable warranty periods
- Ensure you have clarified how early occupancy will impact ongoing work

Prompt Payment Legislation

- The CCDC 2 has also introduced the term of “Payment Legislation”:
“Payment Legislation means such legislation in effect at the Place of the Work which governs payment under construction contracts.”
- Reference to “Payment Legislation” is made throughout the CCDC 2 – 2020 to reflect prompt payment legislation that has been introduced in many Canadian provinces (though not yet introduced in BC)
- There is nothing that provides what will occur if there is no prompt payment legislation that applies. Accordingly, reference to “Payment Legislation” will need to be addressed by supplementary conditions

GC 1.1 [CONTRACT DOCUMENTS]

- Under CCDC 2 2008, the Contractor was required to review the Contract Documents and promptly report any error, inconsistency or omission
- In CCDC 2 2020, the Contractor is now required to review the Contract Documents only for the purposes of facilitating the coordination of the Work
- The Contractor is required to report any error, inconsistency or omission in the Contract Documents it discovers or is made aware of

GC 4.1 [CASH ALLOWANCES]

- The general conditions now permit the reallocation of unexpended cash allowances to cover any shortfalls that may occur in connection with a budget item
- An increase in Contract Price will only occur when the cost of an increase exceeds the total amount of all cash allowances provided for in the Contract
- Any unexpended cash allowances will be deducted from the Contract Price

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Holdback

- Changes have been made to the GCs regarding holdbacks, including:
 - progressive release of holdbacks; and
 - submission of evidence of compliance with workers compensation legislation and a declaration by the Contractor as to the distribution of amounts previously received by the Owner by use of a CCDC 9A is the standard of what is required
- There have also been deletions to the Owner's ability to retain sums to satisfy liens. This is contrary to typical practice and should be addressed by supplementary conditions

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GC 9.4 [CONSTRUCTION SAFETY]

- The CCDC 2 now requires both Owner and Contractor to comply with applicable health and safety legislation
- GC 9.4 does not specifically assign the "Prime Contractor" or "Constructor" responsible for health and safety. Note that where no assignment is made, it is assumed to be the Owner's responsibility
- To address this, it is recommended that the Supplementary Conditions be amended to specifically assign the role of "Prime Contractor" or "Constructor" to avoid ambiguity

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GC 11.1 [INSURANCE] / CCDC 41

- Changes have been made to CCDC 41 – CCDC Insurance Requirements.
- These changes:
 - increase limits for general liability insurance, automobile liability insurance and manned aircraft and watercraft liability (from \$5,000,000 to \$10,000,000 per occurrence);
 - require the Contractor to obtain unmanned aerial vehicle liability with respect to owned / non-owned aircraft (with limits of not less than \$5,000,000 per occurrence); and
 - require the Contractor to obtain pollution liability insurance (with limits of not less than \$5,000,000 per occurrence)
- The insurance requirements should be carefully reviewed in order to consider if additional or other insurance requirements should be included

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GC 13.1 [INDEMNIFICATION]

- The indemnification provisions at GC 13.1 [INDEMNIFICATION] have been raised to expressly exclude liability for "indirect", "consequential", "punitive" or "exemplary" damages
- Note: the terms for "indirect", "consequential", "punitive" or "exemplary" damages are not defined. There is also no standard definition of "indirect" or "consequential" damages in Canadian law (it varies on the circumstances)
- Consider if additional language is required to clarify what damages will be deemed "indirect" or "consequential."

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Other General Deletions

- Other general deletions have been made to the CCDC 2 2020, these include:
 - Removal of the express requirement that the *Work* be in accordance with applicable laws and not encumber the *Site*;
 - *Contractor* is no longer required to keep *Contract Documents*, submittals, reports and records of meetings at the *Site* (although submission of as-built drawings are still required for "Ready for Takeover"); and
 - *Contractor* is no longer required to provide contract security.




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CONCLUSION

- Determine your main goals/objectives and work backwards
- Review the contract carefully and be familiar with the terms
- Pay particular attention to the supplemental conditions
- Know what you are signing
- The contract is your rules book for the project – refer to it often and follow it strictly
- When disputes arise, carefully review the contract

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Questions?

 <p>Satinder Sidhu Partner - Moderator 604 643 3119 ssidhu@cwilson.com</p>	 <p>Scott Lamb Partner 604 643 3103 slamb@cwilson.com</p>	 <p>Rosalie Clark Associate 604 643 3190 rclark@cwilson.com</p>
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These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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