

CIRCULAR

Notable Changes to the CCDC 2 Stipulated Price Contract

At the end of last year, the Canadian Construction Documents Committee (“CCDC”) introduced an updated version of the CCDC 2 Stipulated Price Contract (the “CCDC 2 (2020)”). The main reasons for updating the CCDC 2 were: (1) the desire to reduce the supplementary general conditions that the parties using the CCDC 2 usually draft to amend the standard general conditions of the CCDC 2; (2) the need to respond to the newly introduced prompt payment legislation (which has been adopted or is being considered to be adopted in several provinces); and (3) a general intent to streamline the terms of the CCDC 2. This article discusses the notable changes to the CCDC 2 (2020). The terms used in this article have the meaning given to them in the CCDC 2 (2020).

Ready-for-Takeover and Early Occupancy

The CCDC 2 (2020) introduces the concept of Ready-for-Takeover, which replaces in certain respects the concept of Substantial Performance of the Work that remains to play a more limited role within the Contract. Now, the Contract Time ends with the attainment of the Ready-for-Takeover, as provided in the Contract, instead of the attainment of the Substantial Performance of the Work as has been the case previously.

The prerequisites to attainment of Ready-for-Takeover milestone include the following:

1. The Consultant has certified or verified the Substantial Performance of the Work;
2. Evidence of compliance with the requirements for occupancy or occupation permit as prescribed by the authorities having jurisdiction (eg. municipalities);
3. Final cleaning and waste removal at the time of applying for Ready-for-Takeover;
4. The delivery to the Owner of such operations and maintenance documents reasonably required for immediate operation and maintenance;
5. Make available a copy of the as-build drawings completed to date on site;
6. Startup, testing required for immediate occupancy;
7. Ability to secure access to the Work has been provided to the Owner;
8. Demonstration and training is scheduled by the Contractor acting reasonably.

In order to attain Ready-for-Takeover, items 1 and 2 are necessary, while the items 3 to 8 will not delay the Ready-for-Takeover if they are deferred due to conditions reasonably beyond the control of the Contractor or by agreement between the Owner and Contractor. These latter items have, in the past, been coupled with the prerequisites for Substantial Performance of the Work through supplementary general conditions, which have had the effect of holding up the release of lien holdback funds.

The procedure for the application and review in relation to the Ready-for-Takeover milestone is as follows. When the Contractor considers that the Work is Ready-for-Takeover, the Contractor will deliver for review to the Consultant and the Owner a written application for Ready-for-Takeover together with a list of items to be completed or corrected. The Consultant will review the Work and will promptly, but not later than 10 calendar days after the receipt of the application and the list from the Contractor, advise the Contractor in writing that the Work is not Ready-for-Takeover and provide the reasons why or confirm in writing the date of the Ready-for-Takeover. Immediately upon the confirmation of the date, the Contractor, in consultation with the Consultant, will establish a reasonable date for finishing the Work.

CIRCULAR

Notable Changes to the CCDC 2 Stipulated Price Contract

The Ready-for-Takeover date is an important date within the Contract as it is used as reference to determine timelines which were previously tied to the Substantial Performance of the Work, such as the timelines for insurance, warranty, indemnification and waiver of claims.

The provisions for Ready-for-Takeover are subject to the provisions of the CCDC 2 (2020) that introduce another new concept – “early occupancy”. Now, the Owner may take occupancy of a part or the entirety of the Work before the attainment of Ready-for-Takeover; however, the Owner may do so only with the agreement of the Contractor, which agreement shall not be unreasonably withheld. Another restriction is that the Owner cannot occupy a part or the entirety of the Work without prior approval by the authorities having jurisdiction.

There are some notable consequences that flow from the Owner taking occupancy of a part or of the entirety of the Work. If the Owner takes occupancy of a part of the Work before the attainment of Ready-for-Takeover, that part that is occupied shall be deemed to have been taken over by the Owner as from the date it is occupied, the Contractor will cease to be liable for the care of that part from the date of the occupancy (the responsibility will pass to the Owner), and the warranty period will start from the date that part is occupied. If the Owner takes occupancy of the entirety of the Work before all the prerequisites of the attainment of the Ready-for-Takeover are met, the Work will, subject to requirements of the applicable lien legislation, be deemed to achieve Ready-for-Takeover. The deeming provision does not relieve the Contractor from the responsibility to complete the Work in a timely manner.

Payment Terms and Release of Holdback

The payment provisions of the CCDC 2 have been revised in response to the introduction of prompt payment legislation in several provinces. Prompt payment legislation has the purpose of improving the flow of funds from the owner to the contractor and ultimately to the subcontractors and others in the chain below. In British Columbia, legislation proposing a prompt payment regime was introduced in May of 2019 through Bill M-223. The proposed provisions closely follow

the Ontario Construction Act prompt payment provisions. That said, prompt payment legislation has not yet been adopted in British Columbia.

According to the payment provisions of the CCDC 2 (2020), the Contractor must now submit all applications for any payment to both the Consultant and the Owner. The applications for payment must comply with the provisions of “Payment Legislation”, defined as “legislation in effect at the Place of Work which governs payment under construction contracts”. Further, each application for payment must now include evidence of compliance with workers’ compensation legislation and, after the first payment, must also include a declaration by the Contractor as to the distribution made of the amounts previously received. Such declaration must be made using the CCDC 9A “Statutory Declaration”.

In harmony with Payment Legislation, the Owner rather than the Consultant must now notify the Contractor of any revisions or rejections of the Contractor’s applications for payment. Such notifications must be in writing and in compliance with Payment Legislation. To ensure compatibility with the intentions of Payment Legislation, the CCDC 2 (2020) provides that the Owner will pay the Contractor on or before 28 calendar days after the receipt by the Owner and the Consultant of the application for payment (the old provision required payment after 20 calendar days of the later of: the Consultants’ receipt of the payment application; and, the last day of the monthly payment period for which the application was made).

Under the old provisions of the CCDC 2, the holdback amounts authorized by the certificate for payment of the holdback amount were due and payable on the first calendar day following the expiration of the holdback period stipulated in the lien legislation. Under the revised provisions, the Owner must pay all holdback amounts prescribed by applicable lien legislation no later than 10 Working Days following the expiration of the period provided in the lien legislation. This provision is also subject to Payment Legislation, which may stipulate a different deadline for payment of the statutory holdback.

(Continued on page 3)

CIRCULAR

Notable Changes to the CCDC 2 Stipulated Price Contract

Adjudication

A new section was introduced to the CCDC 2 providing that nothing in the Contract shall be deemed to affect the rights and obligations of the parties to resolve any disputes by adjudication as may be prescribed by applicable legislation. This new section is presumably introduced to conform with Payment Legislation which provides a right to refer matters under that legislation to adjudication in certain circumstances. The concept of adjudication is not defined in the CCDC 2 (2020).

Construction Safety

In contrast to the old provisions under the CCDC 2, the Contractor is no longer solely responsible for the construction safety at the Place of the Work; the Owner shares some of the responsibilities. The Contractor remains responsible for all health and safety precautions and programs in connection with the performance of the Work, however, the Owner must also comply with all the health and safety precautions and programs established at the Place of Work and with the rules, regulations and practices required by the applicable health and safety legislation.

Cash Allowances

The CCDC 2 (2020) allows for any unexpended amounts from other cash allowances to be reallocated to cover a shortfall in a cash allowance. Only when the actual cost of the Work under all cash allowances exceeds the total amount of all cash allowances will the Contractor be compensated for the excess cost incurred and substantiated. The CCDC 2 (2020) also provides that the net amount of any unexpended cash allowances, after providing for any reallocations, will be deducted from the Contract Price, but without an adjustment to the Contract's overhead and profit on such amounts.

Delays

The delay provisions in the CCDC 2 have also undergone some slight changes. Under the new provisions, if there is a delay in the performance of the Work by a stop work order or other public authority, the Contract Time shall be extended

only if such delay results in the failure of the Contractor to attain Ready-for-Takeover by the date stipulated in the Contract.

Indemnification and Waiver of Claims

As mentioned above, the indemnification and waiver of claims provisions are now tied to the date of Ready-for-Takeover instead of the date of Substantial Performance of the Work as provided under the old provisions. Significantly, the indemnification by a party against the other is now restricted to direct loss and damage, expressly excluding any liability for indirect, consequential, punitive or exemplary damages. Further, the new provisions provide that in respect to indemnification respecting claims by third parties, the indemnification is without limit.

Document Review

The obligation of the Contractor to review the Contract Documents and report promptly to the Consultant any errors, inconsistencies or omissions the Contractor may discover has been replaced with an obligation to review the Contract Document for the purpose of facilitating coordination and execution of the Work by the Contractor. However, under the new provisions, if there are perceived errors, omissions, or inconsistencies discovered by or made known to the Contractor, the Contractor has an obligation to promptly report to the Consultant and to refrain from proceeding with the Work until the Contractor has received corrected or additional information from the Consultant.

Other Notable Changes

- *Division 01*: along with CCDC 2 (2020), the CCDC has introduced a new standard document called "CCDC Master Specification for Division 01 General Requirements" which represents a template of specifications which can be modified to fit the specificity of a project. Some of the provisions from the 2008 version of the CCDC 2 have been moved to this companion document.

(Continued on page 4)

- *Change Directives*: the CCDC 2 (2020) updates the costs to be considered in a valuation of a Change Directive and provides that costs for a Change Directive may now only be charged if they contribute directly to the implementation of the Change Directive.
- *Facsimiles*: the option to provide a “Notice in Writing” via facsimile has been deleted.
- *Documents at the Site*: the obligation of the Contractor to keep copies of the Contract Documents, submittals, reports, and records of meetings at the Place of the Work has been deleted.
- *Contract Security*: the section providing for surety bonds has been deleted as these can be included in the CCDC Master Specification for Division 01 – General Requirements.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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