CCDC 2: Updates to the Stipulated Price Contract

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The Canadian Construction Documents Committee (CCDC) introduced an updated version of CCDC 2 this month. CCDC 2 is a stipulated price contract commonly used in the Canadian construction industry. As the CCDC documents cannot be edited, it is a common practice for parties to update the base CCDC documents with "supplementary conditions."

Most of the updates to CCDC 2 account for required updates due to prompt payment legislation introduced or planned in several Canadian provinces, and common modifications made to CCDC 2 through supplementary conditions. CCDC would prefer if parties did not need to use supplementary conditions. Introducing an updated CCDC 2 document is an attempt to reduce the need for modification. It remains to be seen whether the update will reduce the length of supplementary conditions.

Ready-for-Takeover and early occupancy

CCDC 2 – 2020 introduces the concept of "Ready-for-Takeover" as a new milestone for completion of the work. This milestone is achieved when various conditions, as confirmed by the consultant, are satisfied, including:

- Achieving substantial performance under relevant lien legislation;
- An occupancy permit is issued;
- Final cleaning and waste removal is complete;
- Operations and maintenance documents are delivered to the owner; and
- As-built drawings are complete.

The conditions listed may be relevant to certain construction projects, such as residential building construction, but may not all be relevant or applicable to all projects. CCDC requires that the consultant certifies all conditions listed to achieve Ready-for-Takeover; however, the consultant may not be able or willing to certify all items listed.

CCDC 2 previously tied most timelines to substantial performance under applicable lien legislation. The updated document now links most obligations to Ready-for-Takeover, such as the delivery date for the work, the warranty period, insurance periods, indemnification obligations and waiver of claims deadlines.

CCDC 2 – 2020 now permits the owner to take early occupancy of all or a part of the work before it is Ready-for-Takeover. On the date of early occupancy, the responsibility for the work passes to the owner, and the warranty period begins. Parties will likely want to clarify how this warranty period will function for those portions of the work still being used by both the owner for early occupancy and contractor to complete the work, such as elevators.

Payment terms and release of holdbacks

CCDC 2 – 2020 also updates the terms related to payment and release of holdbacks in response to recent legislative changes tied to prompt payment in several provinces. Most of these changes are consistent with the prompt payment legislation introduced or proposed in various Canadian jurisdictions. However, some of the changes to the payment provisions may raise concerns.

The updates made to the progressive release of holdback provisions to address prompt payment legislation permitting holdbacks to be released annually for multi-year projects also eliminated previous language addressing early holdback releases for subcontractors. This attempt to simplify and combine two very different processes will likely result in required modifications to clarify how these provisions apply to early holdback releases for subcontractors under applicable legislation.

In addition, newly introduced language now requires evidence of compliance with workers' compensation legislation and a declaration by the contractor as to the distribution made of the amounts previously received using CCDC 9A with each payment application. Depending on the jurisdiction, these requirements may or may not meet the needs of the parties.

Safety

A common modification in supplementary conditions to the previous version of CCDC was to contractually assign the role of "prime contractor" or "constructor" under applicable occupational health and safety legislation. If this is not properly assigned, it can be assumed to be the owner's responsibility. The 2020 version of CCDC 2 has been updated to require both parties to comply with health and safety legislation and health and safety precautions and programs established at the place of the work, but does not specifically assign the "prime contractor" or "constructor" role. Users of CCDC 2 will probably want to specifically assign this role.

Insurance

The insurance requirements contained in CCDC 2 are tied to CCDC 41 – CCDC Insurance Requirements. In addition to the updates to CCDC 2, changes have been made to CCDC 41 that increase limits for several policies and add an obligation to obtain contractor's pollution liability insurance. Parties should review the updated CCDC 41 document with their insurance advisors and confirm whether changes need to be made to its current policies, what pricing implications may be associated with these updates and whether additional or reduced insurance requirements should be incorporated for their project.

Document review

The obligation on the contractor to review the contract documents and promptly report any error, inconsistency or omission in the previous CCDC 2 has been deleted and replaced with an obligation to report any error, inconsistency or omission that are discovered by, or made known to, the contractor.

Division 01 of the specifications

Certain clauses from CCDC 2 – 2008, have been moved to CCDC's Division 01 Specifications. Its incorporation as a contract document is not assumed, so parties will need to specifically list these specifications or, if not used, consider whether some of these deleted items will need to be reinserted through supplementary conditions.

Cash allowances

The updated version of CCDC 2 now allows the consultant to combine all cash allowances, so that unexpended amounts from other cash allowances may be accessed to cover shortfalls. These significant modifications may drive users of this document to consider revising the proposed mechanism to clarify how it will operate in practice.

Change directive

CCDC 2 – 2020 updates the costs to be considered in the valuation of a change directive and clarifies that they may only be charged if they contribute directly to the implementation of the change directive.

Consequential damages

There is no universal definition of "indirect" or "consequential" damages in Canadian law. Recent case law creates uncertainty around what is considered an "indirect" or "consequential" damage. The indemnification obligations in CCDC 2 have been updated to exclude any liability for indirect, consequential, punitive or exemplary damages, but does not define those terms. Parties should consider if additional language is needed to clarify what damages are "consequential" and 'indirect" to the specific project and, as this language and the existing overall dollar limitations are limited to the obligation to indemnify, if this allocation of risk is acceptable to each party.

Adjudication

A new GC 8.2 (Adjudication) has been added in CCDC 2 – 2020 to clarify that nothing in the contract affects the parties' rights to resolve any dispute by adjudication pursuant to legislative changes introduced in Ontario and proposed in other Canadian provinces.

Conclusion

One of CCDC's stated goals of updating CCDC 2 was to eliminate or reduce the need for supplementary conditions. While the newest version of CCDC 2 updates several commercial terms to address common modifications and recent legislative changes, it does not address many of these amendments, and some of the changes introduced may drive a need for additional clarifications.

Supplementary conditions will likely remain an important tool for owners and contractors alike. Any existing supplementary conditions will need to be reviewed and updated to account for these recent changes. It is advised that parties contemplating using the new CCDC 2 and any associated supplementary conditions seek legal advice regarding their use and modification.

Note that CCDC has indicated it will continue to publish the 2008 version of CCDC 2 for a year and that similar changes will be made to some of its other documents in 2021, including CCDC 3 – Cost Plus Contract, CCDC 5A – Construction Management Contract – For Services and CCDC 5B – Construction Management Contract – For Services and Construction.

BLG will continue to monitor and provide updates on these developments. If you have questions about the updated CCDC 2, reach out to any of the key contacts listed below.

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