

CONSTRUCTION

CANADA

Dawn of the 'super contract'

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Reducing the number of standard construction contracts

Over the years, the Canadian Construction Documents Committee (CCDC) has developed and kept current a series of standard construction contracts for use across the country. Among the many such contracts standardized by CCDC, seven govern the relations between owners and prime contractors.

Those seven can be divided into three categories:

- general contract (*i.e.* CCDC 2, CCDC 3, CCDC 4, and CCDC 18);
- design-build contract (*i.e.* CCDC 14); and
- construction management contract (*i.e.* CCDC 5A and CCDC 5B).



*Can 'super contracts' help avoid situations where the client insists on using a less-appropriate standard one?
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General contract

In the general contract category, the owner entrusts the prime contractor with overall performance of the work, and the latter sub-contracts directly with any trade contractors whose services may be required (*i.e.* Canadian Construction Association [CCA] 1, *Stipulated Price Subcontract*).

Those four CCDC contracts essentially differ in the way the prime contractor is remunerated. That is either:

- with a single, pre-determined fixed price or lump sum (CCDC 2, *Stipulated Price Contract*, and CCDC 18, *Civil Works Contract*);
- on a cost-plus basis (CCDC 3, *Cost-plus Basis*); or
- on the basis of a pre-determined fixed amount for each unit of work performed (CCDC 4, *Unit Price Contract*).

Design-build

For CCDC 14, *Design-Build Stipulated Price Contract*, in addition to the overall performance of the work, the owner entrusts the prime contractor with its design. If necessary, the contractor engages one or more consultants to perform the required design services (CCDC 15, *Design Services Contract between Design-Builder and Consultant*) and enters into sub-contracts with any trade contractors whose services may be required (CCA 1).

Construction management

In this scenario, the owner engages a construction manager to provide advisory, administration, and oversight services (e.g. pre-construction, construction, and post-construction phases). In the case of CCDA 5A, *Construction Management Contract for Services*, the owner contracts directly with the trade contractors for the performance of the work (CCDC 17, *Stipulated Price Contract for Trade Contractors on Construction Management Projects*).

In the case of contract CCDA 5B, *Construction Management Contract for Services and Construction*, the construction manager is responsible for performing the work and subcontracting with any trade contractors whose services may be required (CCA 1).

Sorting out confusion

Supplemented by agreements between the prime contractor and subcontractors (CCA 1 for contracts CCDC 2, 3, 4, 14 [construction phase], 18, and 5B), between the prime contractor and the consultant (CCDC 15 for CCDC 14 [design phase]), and between the owner and the trade contractor (CCDC 17 for CCDC 5A), together with their respective user guides, this plethora of standard contracts poses a significant document-management challenge for both the parties and their legal counsel.

How can we facilitate the selection of the most appropriate standard contract, avoid situations where the client insists on using a less appropriate one¹ and concentrate our conservation, training, and updating efforts on a reduced number of documents? The solution may be reliance on ‘super contracts.’

Super contracts

The authors believe contracts CCDC 5A and 5B already have potential for ‘super contracts’ because they are suited to a great many situations covered by contracts CCDC 2, 3, 4, and 18. For example:

1. They provide (on their own or on a combined basis) for all modes of remuneration.²
2. They can be concluded before, during, or after the design phase,³ according to the project’s progress and the range of pre-construction, construction, and post-construction services included à la carte in Schedule A1.⁴
3. They allow the parties to choose their degree of risk exposure, depending on whether or not the prime contractor assumes responsibility for the work (CCDC 5A⁵ versus CCDC 5B,⁶ commonly called an ‘at-risk construction management contract’).
4. In the case of CCDC 5B, the title of ‘construction manager’ is not at odds with that of ‘contractor,’ since the former is not acting as agent of the owner.

Since the CCDC 5 contracts are not currently suited to the design-build scenario, the next revision could be, via a schedule providing for a design services option. The advantages would be manifold, including:

- reducing the large amount of paperwork;
- increasing the ability to concentrate development and training efforts by focusing on these contracts; and
- minimizing the risk and expense associated with identifying and properly understanding the appropriate contract.

Further, the concept of super contracts would resolve the question of pre-construction services often offered in practice by the prime contractor, but not covered as comprehensively as under CCDC 5B (which covers details that may prove useful to the parties in the event of abandonment of the project or abrupt termination of the contract by the owner).

Additionally, it offers the parties additional options not found in contracts CCDC 2, 3, 4, and 18, such as:

- combination of modes of remuneration;
- conversion of a cost-plus contract into a fixed price or lump sum contract; and
- a range of à la carte and refundable cost services.

While reducing the number of standard contracts between owners and prime contractors would be a step in the right direction, the authors feel the remainder should be significantly trimmed down, as they are often intimidating to owners and trade contractors due to the sheer number of provisions they contain.

Notes

¹ Such is the case with contract CCDC 3, which is often preferred over CCDC 5B. (back to [top](#))

² See Section A-5, Schedule A-1, Schedule A-2, Schedule B, and, in the case of 5-B, the Lump Sum Schedule. (back to [top](#))

³ Contracts CCDC 2 and CCDC 18 are ill-suited to projects in the design phase. As for CCDC 3, it is more suitable but the range of pre-construction services and related fees is not as comprehensive as under CCDC 5B. (back to [top](#))

⁴ All that is required is to adequately flesh out the agreement—particularly sections A-3 and Schedule A-1—in accordance with the project’s progress. (back to [top](#))

⁵ It is less risky for the contractor as the latter does not directly assume responsibility for performing the work, which is assumed directly by the trade contractors who have contracted with the owner (CCDC 17). (back to [top](#))

⁶ This is because the contractor directly assumes the responsibility for the performance of the work vis-à-vis the owner. (back to [top](#))



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