

Updated Design-Build Contracts

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Background

It is six months since the release of the new CCDC 14 and CCDC 15 standard form contracts by the Canadian Construction Documents Committee (“CCDC”). These 2013 documents replaced versions previously updated in 2000.

CCDC 14 provides terms for a design-build approach to projects, in which the design builder provides both the design and construction services to an owner for a set price. CCDC 15 is a design services contract between the design builder and consultant, intended to be used with the CCDC 14 form.

This article highlights some of the important aspects of the new CCDC documents, but is not meant to be comprehensive.

Role of the Consultant

The 2000 releases of these documents were notable because they were not endorsed by all members of the CCDC. In particular, the Association of Consulting Engineering Companies — Canada withheld its endorsement due to the potential conflict in the role of the consultant, who is appointed by the design builder but is also tasked with protecting the owner’s interests.

The 2013 versions of CCDC 14 and CCDC 15 address these conflicts and are now fully endorsed by all members of the CCDC. The consultant previously interpreted all of the construction documents, determined substantial performance, authorized final payment, and was the first step in dispute resolution. The consultant now interprets only the consultant’s own documents, and the owner separately appoints a payment authorizer to certify substantial performance and authorize final payment, while the consultant no longer plays a formal role in disputes.

Owner’s Statement of Requirements

Design builders should be aware that they retain a residual responsibility under CCDC 14 to check the Owner’s Statement of Requirements. The design builder is not liable for the errors, inconsistencies, or omissions in the Statement of Requirements, but must notify the owner of a “significant error, inconsistency, or omission” in it or any other information provided by the owner, and must not proceed with work until these issues have been resolved. The design builder may be liable if it notices a significant error in these documents and still proceeds with the design or construction work.

Suspension and Change

The remuneration of the design builder in cases of suspension and change in some circumstances is set in broad terms in CCDC 14. If an owner suspends the work for more than 20



days during the design stage, the owner must pay the design builder for the design work already done, together with other damages — which includes reasonable profit. Similarly, if an owner requests the design builder to prepare a change proposal which is then not used by the owner, the owner must pay the design builder “all costs incurred ... in developing the proposal.” This formulation allows additional costs, over and above the design costs themselves, to be recovered, provided they were incurred in developing the requested proposal.

Copyright and Confidentiality

The owner’s rights to the design work prepared for the project are limited under CCDC 14. The design work remains the copyright property of the consultant who prepared it, and its use is conditional on the consultant being paid for it. In addition, the owner may not alter it in any way, and may use the documents only for the “use and occupancy of the work” — specifically a one-time use for the purpose intended for the project at that site.

Confidentiality obligations are not automatic under the terms of CCDC 14. CCDC 14 is drafted to anticipate that a separate confidentiality agreement will be entered into between owner and design builder.

CCDC 15

CCDC 14 assumes that the consultant is engaged by the design builder and has no direct

relationship with the owner. CCDC 15 provides this contractual link between the design builder and consultant, and is drafted to be used with CCDC 14. Its structure has a built-in flexibility. It allows the parties to choose from a list of responsibilities covering the life of the project, as well as payment for each as a fixed fee, percentage fee, time-based fee, or on another basis.

Conclusion

The CCDC 14 and CCDC 15 contracts now update and clarify many aspects of their predecessors. Together they deal with the requirements of a design-build project. It is important to note that all standard form contracts, including CCDC forms, may not adequately address all issues which might arise during a specific project. Each party should be aware of the implications of all contractual terms when assessing their risks and implications in contract negotiations. Reliance on CCDC 14 or CCDC 15 without amendment may result in an unacceptable allocation of risk to either party. **CB**

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