

Indemnity, insurance, waiver and warranty provisions of the CCDC 2 – Stipulated Price Contract

Canadian Bar Association,
Construction Law Section

Leanne Krawchuk

Agenda

1. Introduction to the CCDC
2. CCDC Standard form contracts - advantages and disadvantages
3. Modifying standard form contracts
4. CCDC-2 stipulated price contract
 - a. Insurance provisions
 - b. Indemnity provisions
 - c. Waiver provisions
 - d. Warranty provisions

Introduction to the CCDC

Canadian Construction Documents Committee

- “... a national joint committee responsible for the development, production and review of standard Canadian construction contracts, forms and guides.”

-CCDC Website

Committee Composition

- Two owners (one private sector, one public sector)
- Lawyer from the Canadian Bar Association sits as an ex-officio member
- Volunteer members from:



RAIC | IRAC
Architecture Canada



**All CCDC documents carry the endorsement of the four constituent national organizations

CCDC Standard form contracts

- **Increase efficiency and reduce costs**

- Much time and expense is saved by using a contract that has already been carefully considered, drafted and used extensively in the past
 - The Agreement, the Definitions and the General Conditions “work together”
- Common usage allows terms to be more easily recognized and understood by contractors, owners, consultants and legal counsel
- Promotes competition as bidders understand risk/cost allocation re: indemnity/insurance provisions

- **Can serve as a proxy code of industry best practices**

- Have been drafted and reviewed by a number of industry participants which have an interest in ensuring the contract conforms to construction industry standards
- CCDC views contract as providing an equitable balance of rights/obligations of parties

- **Judicially considered**

- Specific standard contractual terms in CCDC forms have been interpreted by the courts more frequently than other terms

CCDC Standard form contracts

- **Too “standard”**
 - May not consider the unique circumstances or needs of the project and the parties
 - Examples: CCDC-2 cannot be used if there is no *Consultant*, certain terms inapplicable to work on a “reserve” (as defined in the *Indian Act*)
 - Parties’ use on an “as-is” basis may lead to unforeseen risks or misunderstood obligations (i.e. no coverage for mould/asbestos; insurance limits may be too low for the size of the project)
- **Terms may favour one side of the industry spectrum**
 - Based on the composition of the CCDC drafting committee
- **Inflexible to emerging developments**
 - Latest version of the CCDC-2 and CCDC 41 (Insurance) were released in 2008
 - CCDC Bulletin 7 was last revised in 1998
 - CCDC Bulletin 25 (Standard Indemnification Clause) is dated January 2005

Modifying CCDC standard form contracts

- **Supplementary General Conditions (SGCs)**
 - Attach as a schedule to the CCDC-2 and must be listed as a *Contract Document* in Article A-3
 - Ensure the SGCs take priority over the General Conditions (Paragraph 1.1.7) of the CCDC-2
- **CCDC Bulletin 7 – use of Supplementary Conditions with CCDC Standard Contract Forms (November 1998)**
 - Modifications may: (1) result in assumption of unnecessary or inappropriate responsibilities or risks; or (ii) weaken relationship within the document provisions or between it and other related project agreements

CCDC-2 stipulated price contract

- A stipulated (fixed) price for all the goods and services (including overhead and profit)
 - *Owner* and the *Consultant* conceptualize and design the project
 - *Contractor* builds the project
 - *Consultant* (engineer or architect) inspects the construction for the purposes of payment certification
- Many owners and contractors prefer the CCDC-2 stipulated price contracts because:
 - Perceived cost certainty (the parties' obligations, liabilities, indemnities and cost of insurance are known and familiar)
 - Familiarity with contract allows easier preparation of tendering documents by owner (in Instruction To Bidders) and by contractor (in bid)
 - For use in all jurisdictions in Canada (even Quebec)

CCDC-2 insurance provisions (GC 11.1)

- Identify types and amounts of coverage which may be required to satisfactorily protect each party's interest in the work
 - Beware of exclusions Contractor is not required to insure against
- Engage a qualified insurance professional to review *Contract* terms
- Who will bear the requirement to obtain insurance?
 - The CCDC-2 requires the Contractor to obtain (and pay for) minimum amounts of certain types of insurance

CCDC-2 insurance provisions (GC 11.1)

- Minimums governed by CCDC 41-CCDC Insurance Requirements
 - **General liability insurance** – not less than \$5 million per occurrence; maximum deductible of \$5,000
 - **Automobile liability insurance** – not less than \$5 million per occurrence
 - **Aircraft and watercraft liability insurance** (if applicable) – not less than \$5 million per occurrence

CCDC-2 insurance provisions (GC 11.1)

- Minimums governed by CCDC 41-CCDC Insurance Requirements (cont'd)
 - **“Broad-form” (i.e. “All-risk”) property insurance** – not less than the sum of 1.1 times the *Contract Price* and the full value of *Products* and design services to be provided by the *Owner* for incorporation into the *Work*; deductible not to exceed \$5000
 - **Boiler and machinery insurance** – not less than replacement value of boilers, pressure vessels and other insurable objects forming part of the *Work*
 - **“Broad-form” contractors’ equipment insurance** - in a form acceptable to the *Owner* and not to allow subrogation claims by insurer against *Owner*
- Contractor not required by GC 11.1 to provide coverage for:
 - Mould, cyber risk, asbestos, terrorism

CCDC-2 indemnity provisions (GC 12.1)

- “A provision in a contract in which a party undertakes to be financially responsible for specified types of damages, claims or losses for which the other party may be liable or suffer. Through this provision the contracting parties agree who will assume liability for losses that arise from the performance of the contract and the limits of that liability.”

-CCDC-2 Annotated Stipulated Price Contract

- Provides a contractual right to recover losses in addition to, or as a replacement of, the common law right to sue for a breach of contract or negligence
 - NOTE: must be read in conjunction with CCDC-2 waiver provisions

CCDC-2 indemnity provisions (GC 12.1)

- Designed to allocate risk to the contracting party in the best position to control and manage that risk
- Concept of **mutual** indemnification between the parties
- Changes to the indemnification clause may pose uninsured risks to either party

CCDC-2 indemnity provisions (GC 12.1) (cont'd)

- Note CCDC-2 cap on certain indemnities:

“12.1.2 The obligation of either party to indemnify as set forth in paragraph 12.1.1. **shall be limited as follows:**

.1 In respect to losses suffered by the *Owner* and the *Contractor* for which insurance is to be provided by either party pursuant to GC 11.1—INSURANCE, **the general liability insurance limit for one occurrence as referred to in CCDC 41 in effect at the time of bid closing.**

.2 In respect to losses suffered by the *Owner* and the *Contractor* for which insurance is not required to be provided by either party [...], **the greater of the *Contract Price* [...] or \$2 million but in no event shall the sum be greater than \$20 million [...]**”

CCDC-2 Indemnity Provisions (GC 12.1)

Nature of Claims		Monetary Limit	Limitation Period
Direct claims between the parties	Insured claims	CCDC 41 general liability insurance limit (\$5M)	Shorter of 6 years from the date of <i>Substantial Performance of the Work</i> and any limitation Statute of the <i>Place of the Work</i>
And	Uninsured claims	Greater of <i>Contract Price</i> or \$2M (to a maximum of \$20M)	
Third-party claims other than those relating to bodily injury or property damage			
Third-party claims relating to bodily injury or property damage	Insured or uninsured claims	No limit	
Toxic/Hazardous Substances	Insured or uninsured claims	No limit	No time limitation

CCDC-2 indemnity provisions (GC 12.1)

Exceptions

<i>Owner indemnifies Contractor</i>	Nature of the claims	Monetary Limit	Limitation Period
Infringement or alleged infringement of a patent of invention in executing anything for the purpose of the <i>Contract</i>	Model, plan or design supplied to the <i>Contractor as part of the contract Documents</i>	No limit	No time limit
Lack of, or defect in, title to the <i>Place of the Work</i>			

- CCDC 20- A Guide to the use of CCDC 2-2008 Stipulated Price Contract

CCDC-2 indemnity provisions (GC 12.1)

- Mutual indemnities may not be desired or the caps may be too small for the project
- In-house counsel may want more robust indemnity language
- Should be drafted to include both direct losses/claims and to include third party claims (*Mobil Oil Canada Ltd. v Beta Well Service Ltd.*)
- An example of keeping direct losses separate from third party liability

The *Contractor* shall be:

- .1 liable to the *Owner* and the *Consultant*, and their respective officers, directors, employees, shareholders, and agents; **[the direct loss]** and
- .2 shall fully indemnify and hold completely harmless the *Owner* and the *Consultant*, and their respective officers, directors, employees, shareholders, and agents, **[the third party liability]** from and against[...]"

CCDC-2 waiver provisions (GC 12.2)

- Establishes mutual waivers of claims beginning five days before the expiry of the applicable lien period
 - Accordingly, in Alberta you must know when the Contractor's lien period commences and expires under the *Builders' Lien Act*

CCDC-2 waiver provisions (GC 12.2)

- Drastically simplified waiver provisions
 - Use a more definite waiver period
 - E.g. the date of the final certificate for payment
 - Consider exempting all indemnity claims pursuant to the *Contract* from waiver
- Include a provision excluding consequential losses

“[...] neither party shall be liable to the other for any loss of profits, loss of opportunity, loss of production, loss of use, costs of financing or any other special, punitive, exemplary, indirect or consequential loss or damages arising in respect of the *Work* or the *Project*, whether due to delay or by virtue of strict liability, breach of contract, tort or any other cause and whether or not such event is characterized as a fundamental breach.”

CCDC-2 warranty provisions (GC 12.3)

- “12.3.1 [...] the warranty period under the *Contract* is **one year** from the date of *Substantial Performance of the Work*.” (emphasis added)
 - 12.3.6-extended warranties beyond the one-year warranty period shall be as specified in the *Contract Documents*

Thank you