

CCDC 2 (2020) Changes

The following article can be found at <https://gowlingwlg.com/en/insights-resources/articles/2020/what-the-new-ccdc-2-stipulated-price-contract-mean/>

For the first time since 2008, the Canadian Construction Documents Committee (CCDC) published a modified CCDC 2 (2020) Stipulated Price Contract.

The new CCDC 2 updates the standard form contract to catch up with recent prompt payment and adjudication changes in Ontario (and soon other provinces). It also introduces a number of other changes to both reflect more recent trends in contracting and to otherwise streamline the contract.



This Building Brief article provides a brief summary of some of these changes, with references to the corresponding paragraphs of the CCDC 2. Fortunately, most of the familiar section numbers of the CCDC suite of contracts have been preserved. Look for a Gowling WLG webinar on the CCDC 2 in 2021.

In this article, terms defined in the CCDC 2 are used.

Payment Terms and the Release of Holdback

While the payment process has not changed fundamentally, it has been refined in response to recent prompt payment legislation in Ontario and anticipated to soon become law in several other provinces. Updated payment terms under the revised CCDC 2 include the following:

- The concept of "Payment Legislation" is introduced, meaning "legislation in effect at the Place of the Work which governs payment under construction contracts"; i.e. prompt payment laws. [Definitions]
- The Contractor must now submit all applications for any payment (including progress payments, final payments, and holdback) to not just the Consultant but to both the Owner and the Consultant simultaneously. [GC 5.2.1]
- The Contractor's application for payment must comply with the requirements of applicable Payment Legislation, which would mean it must be a "proper invoice" under such Payment Legislation. [GC 5.2.6; GC 5.5.4]
- The Contractor must now provide evidence of compliance with workers' compensation legislation with all applications for payments, including progress payments, and holdbacks, not only with applications for final payment and on request. [GC 5.2.7; GC 10.4.1]
- After the first payment, the Contractor must now provide, with all of its subsequent applications for payment, a CCDC 9A Statutory Declaration as to the distribution of the amounts previously received, instead of only upon Substantial Performance of the Work. [GC 5.2.7]
- To conform with Payment Legislation, it is now the Owner (rather than the Consultant) who must notify the Contractor of a rejection of any part of the application for payment by issuing a written notice of non-payment to the Contractor with the reasons for the revisions or rejection of an application for payment in compliance with Payment Legislation. [GC 5.3.1.1]
- The Owner must now pay the Contractor on the 28th day after receipt of the application for payment and, in any event, in compliance with applicable Payment Legislation. The final payment must, however, still be paid within five (5) calendar days after the issuance of a final certificate for payment. [GC 5.3.1.2; GC 5.5.4]
- The Owner must now pay the statutory holdback to the Contractor no later than 10 working days following the expiration of the lien period, subject to the requirements of any Payment Legislation. In many provinces, including Ontario, construction and payment legislation requires payment of statutory holdback on the day after the expiration of the lien period. [GC 5.4.3]
- Note that there is now no provision in the CCDC 2 that allows parties to provide for a non-statutory holdback, i.e. if it is not required or prescribed by applicable lien legislation, such as in Québec. This will need to be expressly stated in supplementary conditions to the CCDC 2. [See Article A-5.1]
- A few of the provisions of GC 5 have been streamlined and consolidated.

Adjudication

Adjudication is now expressly referenced throughout the CCDC 2 (2020). A new GC 8.2 – ADJUDICATION has been added, clarifying that adjudication is a separate path of dispute resolution that does not affect and is not affected by alternative dispute resolution processes, such as mediation and arbitration.

Ready-for-Takeover and Early Occupancy

The CCDC 2 (2020) introduces new milestone Part 12 – OWNER TAKEOVER together with a new concept of "Ready-for-Takeover" and "early occupancy"

The all-encompassing concept of "Ready-for-Takeover" refers to the Substantial Performance of the Work where there is a lien legislation that contains such definition, and where there is not (as for example, in Quebec legislation or where the term does not apply).

The prerequisites for attaining Ready-for-Takeover are outlined under the new GC 12.1 – READY-FOR-TAKEOVER, as follows:

- The Consultant has certified or verified the Substantial Performance of the Work (which is now defined to mean only as defined in applicable lien legislation);
- Evidence of compliance with the requirements for occupancy or occupancy permit;
- Completion of final cleaning and waste removal, as required by the Contract Documents;
- Delivery of operations and maintenance documents to the Owner, as required by the Contract Documents;
- Completion and provision of to-date as-built drawings on site;
- Startup testing completed for immediate occupancy, as required by the Contract Documents;
- Secure access to the Place of the Work has been provided to the Owner; and
- Demonstration and training, as required by the Contract Documents, has been scheduled by the Contractor, acting reasonably.

The achievement of Substantial Performance of the Work (if defined in applicable lien legislation) and the issuance of an occupancy permit are mandatory to attain Ready-for-Takeover. If the completion of the remaining prerequisites are delayed as a result of conditions reasonably beyond the control of the Contractor, or by agreement between the Owner and the Contractor, Ready-for-Takeover must not be delayed.

The Contractor must submit its application for Ready-for-Takeover to both the Owner and the Consultant, together with its list of items to be completed or corrected. Within 10 days of receipt of the application, the Consultant must, in writing, either confirm the date of Ready-for-Takeover, or advise that the Work is not Ready-for-Takeover and provide reasons why.

The CCDC 2 (2020) also now provides for early occupancy of all or part of the Work before achievement of Ready-for-Takeover. Early occupancy can occur only if the Contractor agrees, acting reasonably, and, in any case, subject to prior approval by relevant authorities.

Where the Owner takes occupancy of all or part of the Work, the part of the Project that is occupied will be deemed to have achieved Ready-for-Takeover as from the date of occupation. As of that date, the responsibility for the care of the part of the Work that is occupied will be passed on to the Owner and the warranty period for the occupied parts will start. In the event the Owner occupies the entirety of the Work prior to it being Ready-for-Takeover, the Contractor is not relieved from any responsibility from completing the Work in a timely manner.

Construction Safety

The CCDC 2 (2020) now recognizes that the Contractor will be responsible for overall health and safety on the Project, even when the Owner brings on other contractors by deleting old GC 3.2.2. However, CCDC 2 (2020) also now requires both parties to comply with health and safety regulations. Thus, the Owner is now also responsible for ensuring compliance by its other contractors and its own personnel with the health and safety precautions and programs of the Contractor.

Valuation of Change Directives

The CCDC 2 (2020) refines and organizes in categories the costs that can be charged in the valuation of a Change Directive. In GC 6.3, the Contractor can now charge for the following costs:

- wages of office personnel engaged in a technical capacity;
- costs less salvage value of Construction Equipment Temporary Work, and tools, exclusive of hand tools under \$1,000 owned by the Contractor;
- rental costs of Construction Equipment, exclusive of hand tools under \$1,000;
- Losses and expenses by the Contractor for matters which are the subject of insurance under the policies in GC 11.1 – INSURANCE, when those losses and expenses are not recoverable because the amounts are in excess of collectible amounts or within the deductible amounts;
- Legal costs, in relation to the performance of the Work, provided they are not relating to a dispute between the Owner and the Contractor, the result of the negligent acts or omissions of the Contractor, or the result of a breach of contract by the Contractor;
- Cost of auditing when requested by the Owner; and
- Cost of Project-specific information technology in accordance with the method determined by the parties.

However, the Contractor can no longer charge for (i) wages of personnel engaged in review of shop drawings, fabrication drawings and coordination drawings; and (ii) wages of personnel engaged in the processing of changes of Work.

The pricing mechanism for subcontract amounts must now be approved by the Owner, and deposits will not be claimable if they were lost as a result of negligent acts or omissions of the Contractor.

Cash Allowances

The *reallocation* of unexpended cash allowances to cover shortfalls is now permitted under the CCDC 2 (2020). As a result, an increase in the Contract Price will only occur when the actual cost under all cash allowance exceeds the total amount of all cash allowances under the Contract. Likewise, the net amount of any unexpended cash allowance, *after providing for any reallocations*, will be deducted from the Contract Price. [GC 4.1]

Delays

The CCDC 2 (2020) now further distinguishes between delays caused by the Owner, delays caused by stop work orders, and delays caused by events outside of the Contractor's control. In GC 6.5.2, if there is a delay in the performance of the Work due to a stop order issued by a court or other public authority, then an extension of time is permitted, but only where the Contractor cannot achieve Ready-for-Takeover by the stipulated date in the Contract. GC 6.5.1 (Owner-caused delays) and GC 6.5.3 (delays outside of Contractor's control) are unchanged.

Indemnification and Waiver of Claims

Timing for indemnification claims [GC 13.1] and waivers of claims [GC 13.2] are now tied to the date of Ready-for-Takeover instead of the date of Substantial Performance of the Work.

The revisions to indemnification now limit indemnification to direct claims, expressly excluding any liability for indirect, consequential, punitive or exemplary damages. The CCDC 2 (2020) also clarifies that there is no limit on third party claims of any kind. [GC 13.1.2.3]

General Deletions

Various provisions in the CCDC 2 (2020) have been deleted and/or streamlined, including:

- Facsimiles: Removal of facsimile for notices in writing. [Article A-6]

- Review of Contract Documents: The requirement for the Contractor to review documents has been revised to make clear that such review is only for the purpose of facilitating coordination of the work. [GC 1.1.2]
- Contract Documents at the Site: The requirement to keep Contract Documents, submittals, reports, and records of meetings at the site has been removed. However, the contractor must now make available the as-built drawings completed to date on site at the time the work is Ready-for-Takeover. [old GC 3.9]
- Shop Drawings: The provisions for shop drawings have been simplified, and while there have been deletions of certain subsections, the changes are not substantive. [GC 3.8]
- Use of Work: This provision, requiring that the use of the Work be in accordance with applicable law and not encumber the site, has been deleted in its entirety. [old GC 3.11]
- Cutting and Remedial Work: While the requirement for the Contractor to perform the cutting and remedial work has been deleted, the cost for cutting and remedial work arising from ill-timed work by the Contractor will continue to be valued in accordance with the change provisions at GC 6. [old GC 3.12]
- Cleanup: The old provision relating to clean up of the site has been deleted. *However*, note that the requirement for the Contractor to perform final cleaning and waste removal is now provided for under GC 12.1, before applying for Ready-for-Takeover. [old GC 3.13]
- Contract Security: The requirement for the contractor to provide the contract security in the Contract Documents has been entirely deleted. [old GC 11.2]

What's Next?

Many users of CCDC contracts have developed their own sets of amendments and supplementary conditions to the CCDC standard form contracts. These will need to be reviewed and updated, both for conformity with the new definitions and concepts and also for some of the section references which have changed.

CCDC will continue to publish and issue stickers for the 2008 version for one year. They will also recognize and re-issue already purchased stickers for the 2020 version if you prefer.

As CCDC has done in the past, after amending and updating the CCDC 2, it will be updating the other contracts in its suite of contracts, including CCDC 3 – Cost-Plus Contract, CCDC 5B – Construction Management Contract – For Services and Construction, CCDC 14 – Design-Build Stipulated Price Contract, and other commonly used contracts.

Gowling WLG will be hosting a webinar on the new form of CCDC 2 contract in 2021. Be sure to sign up for our mailing list to be invited to this free information session.