



CCDC 2-2020 & SUPPLEMENTARY CONDITIONS

Construction Procurement: Community of Practice

Date: June 15, 2023



British
Columbia
Construction
Association

VICA
Vancouver Island
Construction Association

What is “Standard Practices”?

- Supporting Construction Delivery: Procurement and Contracts
 - Kitchen table issues aka what keeps people up at night
- Guides and Resources (for Industry *and* Owners)
- Advocacy and Lobbying: we want government to be fair, open and transparent
 - And follow their own guidelines



BCDC
B.C. DOCUMENTS COMMITTEE

BCDC: Who Are They?



Endorsing Organizations:



*The Ministry of Citizens' Services participated
in the development of BCDC documents*



BC Documents Committee Documents

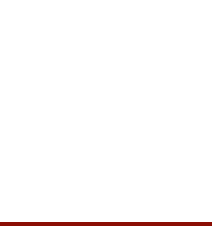
Guidelines and Standard Documents for a
Stipulated Price Bid for Use on
Publicly Funded Building Projects in the Province of British Columbia
Online Bidding System and Paper Submissions

- **BCDC 2 Documents 2022**

1. BCDC 2022 Guide
2. BCDC 2022 Division 00 including bid forms (Part 1.1)
3. BCDC 2022 Supplementary Conditions to CCDC 2 – 2020 (Part 1.2)
4. BCDC Project Specific Amendments 2022 (Part 1.3)
5. BCDC Recommended Modifications to CCDC's Division 01 (Part 1.4)



<https://bcconstructiondocuments.ca/>



BCDC Supplementary Conditions



- Part 1.2: Supplementary Conditions and new Articles/General Conditions
 - Article A-9 TIME IS OF THE ESSENCE
 - GC 5.1 FINANCING INFORMATION REQUIRED (mutual notice of material change)
 - GC 6.3 CHANGE DIRECTIVE (stipulates mark-ups on Change Directives)
 - GC 14.1 CONFIDENTIALITY
 - GC 14.2 INFORMATION TECHNOLOGY RELATED THREATS



SUPPLEMENTARY CONDITIONS

*It's Not the Clause that is Onerous:
It's the Implication*

Message to Industry: Read Your Contract

READ YOUR CONTRACT

Every day is “Read Your Contract Day”. Here are our Top 10 Tips to guide your review.

- 1 Get a coffee and get comfortable in a quiet place so you can focus without interruption.
- 2 Read all the contract documents including all supplementary conditions.
- 3 Check for payment terms.
- 4 Check for penalties and liquidated damages.
- 5 Understand any termination/cancellation “without cause” or “for convenience” clauses, in addition to force majeure. If you don’t understand, get clarity.
- 6 Make sure you know how, where and whom to address the *Notice in Writing*.
- 7 Review *Change Order* and *Change Directive* clauses for specified markups, as well as the process and submittal requirements.
- 8 Provide insurance and contract security clauses to your surety/insurance representative for their review and comment.
- 9 Review warranty start dates and clauses, especially now with *Ready-for-Takeover* in the CCDC 2-2020.
- 10 Don’t be afraid to “walk-away” from a potential contract with onerous conditions.

SUBCONTRACTOR BONUS TIPS

- 1 Get a copy of the *Prime Contract*.
- 2 Read the *Prime Contract*.
- 3 Review payment terms for pre-ordered *Products*.
- 4 Review in the *Prime Contract* the *Change Order* and *Change Directive* clauses.
(specified markups as well as the process and submittal requirements)
- 5 Review for ‘pay-when-paid’ or ‘pay-if-paid’.

Don’t Bid
Don’t Sign

Supplementary Considerations

- It's in the name – these terms should *supplement* the form of contract
- They don't alter risk assignment or the responsibilities of the various parties
- Project specific – but are they ever in the public sector?
- Clarifying
- Page length (yes, it matters):
 - There's no such thing as 20 pages of supplementary conditions

Message to Industry: SCs

SUPPLEMENTARY CONDITIONS

IT'S NOT THE CLAUSE THAT IS ONEROUS, IT'S THE IMPLICATION

CCDC and CCA documents are relied upon as industry standards for their fairness and balance for all parties. But Supplementary Conditions often greatly modify their intent.

FIRST RULE:

Read the supplementary conditions.

SECOND RULE:

You are in control. If they are too onerous for you: Don't Bid & Don't Sign

Good supplementary conditions are clarifying. They are reasonable.
They don't alter risk assignment or the responsibilities of the various parties.

Clarifying and Reasonable

EXAMPLES OF CLARIFYING SUPPLEMENTARY CONDITIONS:



Designating the contractor as the "Prime Contractor"



Written permission to change personnel



Requiring a CCDC9B statutory declaration



Align contractual timelines to match statutory timelines in the BC Builders Lien Act



Setting markups on changes where not included in Division 01

Subcontractors and the Prime Supplementary Conditions

ARTICLE 2A CONFLICT BETWEEN THE PRIME CONTRACT AND SUBCONTRACT

- 2.1 The requirements, terms and conditions of the *Prime Contract* as far as they are applicable to this *Subcontract*, shall be binding upon the *Contractor* and the *Subcontractor* as if the word “owner” appearing therein had been changed to “*Contractor*” and the word “contractor” appearing therein has been changed to “*Subcontractor*”. In the event of any conflict between the terms of this *Subcontract* and the *Prime Contract*, the *Prime Contract* shall govern except for the following provisions:
- Supplementary conditions of the *Subcontract*, if any



CCA 1-2021

Flow down provisions: 95% of the time, GCs to “flow down” their contract to their subcontractors



EXAMPLES

SC Onerous Changes to *Ready-for-Takeover*

GC 12.1 READY-FOR-TAKEOVER

12.1.1 The prerequisites to attaining *Ready-for-Takeover* of the *Work* are limited to the following:

- .1 The *Consultant* has certified or verified the *Substantial Performance of the Work*.
- .2 Evidence of compliance with the requirements for occupancy or occupancy permit as prescribed by the authorities having jurisdiction.
- .3 Final cleaning and waste removal at the time of applying for *Ready-for-Takeover*, as required by the *Contract Documents*.
- .4 The delivery to the *Owner* of such operations and maintenance documents reasonably necessary for immediate operation and maintenance, as required by the *Contract Documents*.
- .5 Make available a copy of the as-built drawings completed to date on site.
- .6 Startup, testing required for immediate occupancy, as required by the *Contract Documents*.
- .7 Ability to secure access to the *Work* has been provided to the *Owner*, if required by the *Contract Documents*.
- .8 Demonstration and training, as required by the *Contract Documents*, is scheduled by the *Contractor* acting reasonably.

12.1.2 If any prerequisites set forth in paragraphs 12.1.1.3 to 12.1.1.6 must be deferred because of conditions reasonably beyond the control of the *Contractor*, or by agreement between the *Owner* and the *Contractor* to do so, *Ready-for-Takeover* shall not be delayed.

GC 12.1.2: Delete in its entirety.

Anonymous Owners

Tying the hands of the Owner's team

SC Onerous Changes to *Ready-for-Takeover*

PART IV – SUPPLEMENTARY CONDITIONS

28. GC 12.1 READY-FOR-TAKEOVER

28.1 In GC 12.1.1 add the following at the end of the paragraph:

- .9 All the *Work*, including the resolution of any known defects or deficiencies, is completed, except those items which may arise under GC-12.3 - WARRANTY.

Anonymous Owner

- Ready-for-Takeover is now final/total completion
- not CCDC's intent completely contrary to RFT and is total/final completion.

Onerous:

- During tender: Contractors run a real risk of being in default by failing to achieve the RFT date

SC Onerous Changes to *Ready-for-Takeover*

6.5.14 The *Contractor* is entitled to complete the *Work* earlier than the contractual *Ready-for-Takeover* date. Neither the *Owner* nor the *Consultants* have a duty or obligation to meet the *Contractor's* accelerated schedule or otherwise actively co-operate with the *Contractor* to achieve its goal of early completion of the *Work*, beyond what is required by the terms of the *Contract*. The *Owner* does not have a duty or obligation to take over the completed *Project* before the contractual *Ready-for-Takeover* date. The *Contractor* is not entitled to additional compensation for delays incurred for any reason whatsoever that prevents it from completing the *Work* before the contractual *Ready-for-Takeover* date.

Anonymous Owner

Onerous: What???

Never, ever use it, so why is it taking up space in the SCs?

This gives the *Contractor* no incentive to try and complete ahead of schedule.

Can't let go: Substantial Performance of the Work

ADD new GC 5.4.7 as follows:

GC 5.4.7 "Any application for *Substantial Performance of the Work* shall be deemed complete only if submitted with required supporting documentation and *Substantial Performance of the Work* has occurred pursuant to the *Contract*, as determined by the *Consultant*."

Anonymous Owner

Conflates Substantial Performance of the Work as a contractual requirement again

- Instead of CCDC 2-2020 definition (BLA=Substantial Performance of the Work)



Themes (the Good, the Bad and the Ugly)

1. Reasonable vs Onerous
2. One Sided
3. Contractor Knows All / Gotcha Clauses
4. Using SCs to “Project Manage” their own Staff
5. Waiving Claims: Changes
6. Other dumb changes lawyers like to make

Reasonable vs. Onerous (and Irrelevant)



GC 5.5 FINAL PAYMENT

5.5.2 Change "calendar days" to "Working Days"

5.5.4 Change "5 calendar days" to "10 Working Days"

BCDC SC

Rationale: acknowledgement of an Owner's administrative processes



GC 5.5 FINAL PAYMENT

GC 5.5.3: After the word "Consultant", add the word "or the Owner", and after the words "thereof, the Owner", add the word "or the Consultant".

GC 5.5.4 Delete the word "5" and replace with "28".



Anonymous Owner

Onerous: BC doesn't have payment legislation – Contractors are being bound to ON payment terms but have no protection

One Sided

1.2 The *Construction Manager* acknowledges that the fundamental relationship of openness, trust and confidence between the *Construction Manager* and the *Owner* is an inherent part of this Agreement and is critical to the success of the Project.



Anonymous Owner

- Why is this only the CM that acknowledges this?
- A fair and balanced contract would say “the Owner and Construction Manager...” or “the parties.”

“Contractor Knows All” / “Gotcha Clauses”

GC 3.1 CONTROL OF THE WORK

ADD new GC 3.1.3 and 3.1.4 as follows:

GC 3.1.3 “In performing its obligations under the *Contract* and carrying out the *Work*, the *Contractor* shall exercise a standard of care, skill and diligence that would normally be provided by an experienced and prudent contractor supplying and performing similar services for projects of similar size and complexity in the province of British Columbia, having regard for the terms of the *Contract Documents*.”



Anonymous Owner

Onerous: Written by Lawyers for Lawyers – only a judge will decide this

Using SCs to “Project Manage” their own Staff

1.6 The Contractor will give to the *Owner* a minimum of 45-calendar day written notice that the Contractor will meet the date set in the Article A-1 for Substantial Performance of Work, or the latest revision to this date that is executed through the endorsement of the Contract or change order/s.”



Anonymous Owner

Pay attention to your project

Waiving Claims: Changes

PART 6 CHANGES IN THE WORK

6.5.4 The *Contractor* shall provide *Notice in Writing* to the *Consultant* of a potential Excusable Event, Owner Caused Event or an event under paragraph 10.2.7 of GC 10.2 within five (5) *Working Days* after the commencement of the delay or impact. Such notice may be in short form and briefly describe that the potential Excusable Event, Owner Caused Event or event under paragraph 10.2.7 of GC 10.2 may have occurred and that more details will be provided.

The *Contractor* waives any claim for extension of *Contract Time* or compensation for costs incurred as the result of an Excusable Event, Owner Caused Event or an event under paragraph 10.2.7 of GC 10.2 unless the *Contractor* provides a detailed *Notice in Writing* of the claim to the *Consultant* within ten (10) *Working Days* after the commencement of the delay or impact.

Anonymous Owner

Extremely Onerous

Impact can easily be unknown

Terms not defined (cut and paste?)

What's a Contractor going to do?

Submit a Notice in Writing for every minor event

Other dumb changes lawyers like to make

- English language
- Specifying the laws that govern are BC Laws
- Specifying it's the BC Builders Lien Act that governs
- Specifying it's the BC WCB WorkSafe laws that governs
- Stipulating Article A-3 Contract Documents even though it's PDF fillable

What can you do?

Ask your legal team:

1. “What are the implications to a Contractor and their subcontractors/supply chain of these changes?”
2. “If they were your client, what would you advise them?”
3. “What is this going to cost me?”

A good lawyer will provide this insight to you.



THANK YOU



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