

UNRAVELING RISK: Navigating Supplementary Conditions in Construction Contracts

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I AM NOT
A
LAWYER

* that took only 5 words

The BC Construction Association “BCCA”



- A non-profit employer association
- Industrial, commercial, institutional, and multi-unit residential construction sectors
- Non-partisan, representing all employers regardless of labour affiliation
- “Federated” membership model: Regional, Provincial and National organizations



What is “Standard Practices”?

- Supporting Construction Delivery: Procurement and Contracts
- Advocacy: we want governments to be fair, open and transparent
- Guides and Resources:
 - For Industry *and* Owners
 - *Owners Only*: monthly webinars only for public sector owners

DO YOU ...

READ YOUR CONTRACT



- **Contractors:** Do you read every contract... you bid? you sign?
 - GC's: do you read your subcontracts?
 - Trades: are you reading the prime contract?
- **Consultants:** do you read each client's supplementary conditions?
- **Owners:** do *you* read *your* contracts?

Bacon Sandwiches

The Contractor is to attend all meetings and inform sub-contractors, consultants, and suppliers when their presence is required.

The Contractor is required to provide suitable refreshment for those working on behalf of the Employer as follows:

- Morning meetings - The Contractor is to provide bacon sandwiches together with tea and coffee. The bacon sandwiches are to be on white bread with butter (not Margarine or spread). The Contractor is also to provide Heinz Tomato Ketchup and HP sauce to complement the sandwiches as required by the parties in the meeting. No equal or approved will be acceptable.
- Lunch time meetings - Assorted sandwiches.

10.5 Contractor's Site Meetings to be held on site

Hold meetings with appropriate sub-contractors and suppliers shortly before main site meetings and fortnightly Employer's Agent Meetings to facilitate accurate reporting of progress.

... requirements are met and to

Our Message to Industry: Read Your Contract



Don't be afraid to “walk-away” from a potential contract with onerous conditions.

SUBCONTRACTOR BONUS TIPS



Get a copy of the *Prime Contract*.



Read the *Prime Contract*.



**STANDARD CONTRACTS
&
SUPPLEMENTARY
CONDITIONS**

The benefits of standard form contracts

1. Risk *identification* already done (*more or less...*)
2. Risk *allocation* already done (*at least as a starting point...*)
3. Clarity and consistency achieved (*usually ...*)
4. Rational (*often ...*)
5. Well known, understood (*sometimes...*)
6. “Economic efficiency”

Supplementary Conditions

- 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 “good” supplementary conditions

SUPPLEMENTARY CONDITIONS

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

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

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

BUT WHAT ABOUT NON-STANDARD SUBCONTRACTS?



EXAMPLES

Is this Collaboration?

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

Deletions

GC 3.4 REVIEW OF DRAWINGS, SPECIFICATIONS AND MATERIAL AND FINISH SCHEDULES

GC 3.4.2 DELETE paragraph 3.4.2.

What was deleted?

3.4.2 The review of *Drawings, Specifications* and material and finish schedules under paragraph 3.4.1 shall be to the best of the *Construction Manager's* knowledge, information, and belief. In making such review the *Construction Manager* assumes no responsibility for the accuracy of the review. The *Construction Manager* shall not be liable for any damage or costs resulting from errors, inconsistencies or omissions, which the *Construction Manager* did not discover.

“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



EXERCISE

CHANGE ORDERS

1. *What does a Trade think and do?*
2. *Why would an owner add this in?*
3. *What does a General Contractor think and do?*

ADD new GC 6.1.3 and 6.1.4:

GC 6.1.3: "The following shall apply to the valuation of adjustments to the *Contract Price* attributable to changes in the *Work*, whether by *Change Order* or by *Change Directive*:


- .1 the adjustment to the *Contract Price* will not exceed the actual direct cost incurred by the *Contractor* to perform the *Work* attributable to the change plus the *Contractor's Fee* calculated as follows:
 - (1) for any part of the *Work* attributable to the change performed by the *Contractor*, a 10% mark-up;
 - (2) for any part of the *Work* attributable to the change performed by a *Subcontractor*:
 - (i) a 10% mark-up for the *Subcontractor* on the actual direct cost of the change performed by the *Subcontractor*; and
 - (ii) a 5% mark-up for the *Contractor* on the actual direct cost of the change performed by the *Subcontractor*;

For greater certainty, notwithstanding anything to the contrary, no mark-up shall be provided to any sub-*Subcontractor* or any other party that does not have a direct contract with the *Contractor* for any part of the *Work*.

- .2 The actual direct cost of performing the *Work* attributable to a change will be limited to the actual direct cost for the items listed in GC 6.3.7, less any savings attributable to the change.
- .3 The *Contractor's Fee* set out in GC 6.1.3.1 above will be the entire compensation to the *Contractor* and any *Subcontractors* for any overhead, profit, percentage fee and any other costs that are not listed in GC 6.3.7. The *Contractor's Fee* includes, but is not limited to, the following costs:
 - (1) office administration services including expenses related to an office other than a field office at the *Place of the Work*;
 - (2) preparation of budgets and estimates;
 - (3) construction management;
 - (4) procurement and tendering services including evaluation of alternatives, recommendations regarding pre-qualification, calling and evaluating tenders;
 - (5) maintaining and administering bonding and insurance;
 - (6) assistance in preparation of progress claims, payment to *Subcontractors* and *Suppliers*;
 - (7) accounting services and legal services;
 - (8) consultation and assistance on labour relations, safety and equipment selection;
 - (9) services related to relocation of *Contractor's* personnel;
 - (10) administration and coordination of all *Subcontractors*, *Suppliers*, the *Contractor's* personnel and consultants;



Contractor's Fee is the % Mark-Ups



Contractor's Fee will include these items



THE MOST SUCCESSFUL PROJECTS ARE THE ONES WITH THE FEWEST CHANGE ORDERS

"An excessive amount of change orders is a sign of non-alignment between the owner and consultants."

- Keith, Trade Contractor



**MADE-IN-BC STANDARD
SUPPLEMENTARIES
*B.C. DOCUMENTS COMMITTEE (“BCDC”)***

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 (mutual notice)

EXERCISE

1. *What would a trade think and do?*
2. *Why would an owner add this in?*
3. *A General Contractor?*

Delays by Others

MMCD Contract

Coordination and Connection

(add new clause 6.2.2 as follows)

The *Owner* will not be liable for claims for delay caused by BC Hydro, Telus, MoTI, or District forces for work required to be undertaken on this contract.



Who *should* carry this risk?

Discuss:

what is a trade/contractor/owner thinking?



WHAT CAN OWNERS DO?

What can ~~Owners~~ do?

General Contractors

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?”
4. Ask your prime contractor – what form of contract do you use?

Summary

1. Read your contract | |
Know your contract
2. Consider the impact to the Project
3. *Questions?*
Contact SICCA and BCCA

Final Thought...

9.8.4.4 ARMAGEDDON/ JUDGMENT DAY EXCLUSIVITY

(a) In the event of Armageddon/ Judgment Day or other cataclysmic world ending event occurring between dates immediately following the *Effective Date*, extending to the end of the *Warranty Period* on the Facility (all dates inclusive), all representatives of the *Contractor* (owners, principles, employees, *Subcontractors*, contractors, etc.) will be automatically aligned with the Forces of Darkness unless otherwise specified or assigned to the Forces of Light by the *Owners Representative*, acting unreasonably (in consideration of the implications of the end of man/woman kind).



THANK YOU