

CCDC 5B – 2010 – Construction Management Contract – for Services and Construction

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Summary

CCDC 5B, 2010 - *Construction Management Contract – for Services and Construction* became available in late 2010, after a number of years of development by the Canadian Construction Documents Committee (CCDC). In conjunction with CCDC 5A, it makes a clear separation between the construction manager's (CM) consulting services and the construction services.

This Practice Tip (PT) provides an overview of CCDC 5B and identifies recommended amendments, supplementary conditions, and procedural cautions.

Background

In November, 2010, CCDC published a new suite of three standard contract forms for construction management:

- CCDC 5A Construction Management Contract – for Services (replaced CCA 5-1988, also referred to as CM as Agent);
- CCDC 17 Stipulated Price Contract between Owner and Trade Contractor for Construction Management Projects (replaced CCA 17-1996); and
- CCDC 5B Construction Management Contract – for Services and Construction (also referred to as CM at Risk).

In CCDC 5B, the CM's fee consists of two components:

- (1) Fee for the *Price of the Services*, which can be a fixed amount, percentage amount of the *Construction Cost Estimate*, or an amount based on time-based rates; and
- (2) Fee for the *Work*, which can be a percentage fee of the *Price of the Work* or a fixed fee.

In addition, the 5B contract contains two options related to the CM's fees which may be executed at the time of signing of the *Contract* or later during the project by way of a *Change Order*. These options are:

- (1) *Guaranteed Maximum Price (GMP)*; and
- (2) *Guaranteed Maximum Price plus % cost savings*.

A third option is to change the *Contract* to a *Stipulated Price Contract* in accordance with the amendment provided in the *Contract Appendix*.

As noted, in CCDC 5B the CM's fee consists of two components: a fee for *Services* and a fee for carrying out the construction. The *Cost of the Work* is separate. The *Contract* contains options for fee types: fixed or percentage or combination, for a *GMP*, a *GMP plus % cost savings*, and also an option to convert the *Contract* into a *Stipulated Price Contract* via amendments provided in an Appendix. These options can be implemented at the time of signing of the *Contract* or later during the project by way of a *Change Order*.

This PT does not make an exhaustive analysis of the contract, but highlights content significant to Holders, and identifies recommended amendments, supplementary conditions, and procedural cautions.

CCDC contracts are prepared by consensus of a diverse group of stakeholders including architect representatives of the Royal Architectural Institute of Canada (RAIC). The OAA supports and endorses the concept of industry-standard contracts such as those produced by the CCDC.

The OAA established a review process for the CCDC 5B, 2010 version and the Council endorsed its use subject to recommended supplementary conditions issued by the OAA. The “Amendments and Supplementary Conditions” recommended for CCDC 5B are similar to those recommended by the OAA for CCDC 2–2021, as they are both construction contracts with similar wording.

It is unusual for either Holders and/or clients to utilize CCDC contracts without any supplementary conditions. The publishing of these recommendations does not preclude the incorporation of additional items by clients and/or Holders in order to address specific project conditions. The wording suggested in PTs is not a substitute for involvement of a Holder’s legal counsel. Clients should be advised to discuss specific wording and the inclusion of amendments and supplementary conditions with their own legal counsel.

Overview of the OAA’s Recommended Amendments and Supplementary Conditions (not including Appendix for Stipulated Price Option)

The explanation for the concerns are listed below and are referenced as individual items or in groups where the concern relates to more than one location in the text of the *Contract*. The actual wording of the amendments and supplementary conditions is in the attachment to this PT.

Negotiation, Mediation and Arbitration (GC 8.2)

The Alternative Dispute Resolution (ADR) (negotiation-mediation-arbitration) amendments relate to the procedure for resolution of construction disputes. The OAA continues to have serious concerns that where the Holder is excluded from the arbitration process, they may be unable to defend their position and in effect is tried in absentia.

The recommended amendments and supplementary conditions provide that, in the event of arbitration between the *Owner* and *CM*, the *Consultant* will receive notification, including any issues that may involve the *Consultant*. At that time, the *Consultant*, after consultation with their insurer and legal counsel may elect to become a full party to the arbitration.

Indemnification of the *Consultant* (GC 1.1.2.2 / 9.2.7.4 / 9.5.3.4 and 12.1.1.3)

The requirement for the *CM* and/or *Owner* to indemnify the *Consultant* in situations caused by the actions of either of the two parties to the *Contract* has been deleted and may be detrimental to the interests of the *Consultant*. The indemnification provisions for the *Consultant* existed in previous versions of the CCDC contract and the OAA recommends it continue to be included by means of supplementary conditions.

Construction Manager’s Standard of Care (GC 3.4.1 / 3.4.2 / 3.14 / 6.4.5 / 9.1.1.1 / 9.1.2 / 10.2.5 / 12.3.2)

In order to clarify the responsibilities of the *CM*, a supplementary condition GC 3.14 Performance by Construction Manager has been added and cross-referenced in the other paragraphs and sub-paragraphs noted above. The standard of care is the test currently utilized by the courts and the addition of this supplementary condition highlights its importance.

Other Concerns (listed in same order as *Contract*)

- Article A-10: Article revised to delete “electronic communication” as an acceptable form of communication for *Notices in Writing* and to change the deemed date of receipt of such notices.
- Definitions: Added definition for *Submittals* that are not included under the new definition for *Shop Drawings*.
- Sub-paragraph 1.3.2: Amended wording to include the *Consultant*, thereby being consistent with the wording in CCDC 2, 2008.
- Paragraph 2.2.2: Amended wording to include the *Owner*, thereby being consistent with the wording in CCDC 2, 2008.

- Paragraph 2.3.9: Added waiver by *Owner* and *CM* to protect *Consultant* against claims arising out of interpretations and findings that are consistent with intent of the *Contract Documents* and do not show partiality to either party to the *Contract*.
- Paragraph 2.3.10: Caution – *Consultant* should be aware that interpretations and findings are to be made in writing within a reasonable time.
- Paragraph 2.3.11: The *Consultant* is required to make findings with regard to claims for a change in *Contract Price* regardless of the size, quantity, or number of claims.
Caution: Negotiate the client/Holder contract with the necessary provision to be able to obtain fees for making findings on claims where the size, quantity, or number are extensive.
- Sub-Paragraphs 2.5.1.1 / 2.5.1.2: Added sub-paragraphs to emphasize that the *CM* is responsible for all defective *Work* and cannot rely only on the *Consultant* to identify such items. Also, the *CM* must schedule the corrective action so as not to affect the *Owner's* day-to-day operations.
Paragraph 3.1.3: Added paragraphs to reinforce the *CM's* responsibility to properly coordinate the *Work*.
- Paragraph 3.6.2: Caution: The paragraph now clarifies that information and instructions provided by the *Consultant* to the *CM* appointed representative are deemed to have been received by the *CM*. The converse of this is that if instructions are provided to a person other than the appointed representative, the *CM* may argue that the instructions were never received. The *Consultant* must be careful that instructions given to others are followed up with written confirmation to the appointed representative to avoid any risks to the *Owner*. Such instructions should be confirmed by means of supplemental instructions, site visit reports, minutes of meeting, contemplated change order, or other written format and copied to the appointed representative.
- Paragraph 3.8.3: Added new paragraph clarifying the *CM's* responsibility for safe on-site storage and protection of *Products*.
- Article 3.10: Added “*Submittals*” to the title and throughout the article as the process for handling *Submittals* is similar to *Shop Drawings*.
- Paragraph 3.10.3: Amended to state that the *CM* and *Consultant* shall prepare a schedule related to *Shop Drawing* review. The *Consultant* should review the schedule for completeness of all required *Shop Drawings* and *Submittals* and allotted review times for the *Consultant's* review.
- Paragraph 3.10.12: Deleted the reference to causing a delay and added a time period for the *Consultant's* review.
- Article 4.1: Amended paragraphs 4.1.4 to clarify that unexpended funds from one cash allowance can be reallocated to avoid shortfalls in other cash allowances. This avoids mark-ups for overhead and profit on a shortfall while no credit for same is being offered where there are unexpended funds in some cash allowances.
Caution: It is necessary to specifically define the scope of work or costs included in such cash allowance in the *Contract Documents*. For example, if it is not defined that freight, installation, construction equipment, etc., are included, the cost of such items will be treated as a change to the *Contract Price* with overhead and profit mark-ups.
- Paragraph 4.1.7: Amended to clarify the procedure for establishing the schedule of procurement of cash allowance items.
- Paragraph 4.1.8: Added paragraph to confirm the *Owner's* right to obtain competitive bids for cash allowance items.
- Paragraph 5.5.1: Caution: It should be recognized that the requirement for the *CM* to deliver to the *Consultant* and *Owner*, within one working day, a comprehensive list of if items to be completed or corrected after considering the *Work* as being substantially performed may be unrealistic due to the scope and status of the *Project*.

- Paragraph 6.5.1: Amended to exclude the payment by the *Owner* to the *CM* of any consequential, indirect, or special damages in the case of delays caused by the *Owner* or anyone employed or engaged by them.
- Paragraph 6.5.6: Added to clarify that *Owner* shall be reimbursed by the *CM* for all reasonable costs incurred, including *Consultant's* fees for additional services that arise out of a delay caused by the *CM*.
Caution: If the *Consultant's* fees for additional services become a matter of dispute between the *CM* and *Owner*, the *Consultant* must refrain from making a finding due to a conflict of interest.
- GC 9.2 – Paragraphs 9.2.6 and 9.2.8: Amended to address the situation where toxic and hazardous substances already exist on the site and have been dealt with in accordance with legal and regulatory requirements, but subsequently threaten health and safety or the environment due to the actions of the *CM*.
- CG 12.3: Caution: Practices should clearly specify the scope of work to be covered by an extended warranty, as the warranty may relate only to materials or also include labour for installation of the replacement material plus the making good of the parts of the *Work* affected by the replacement. In addition, the warranty may require more than one warrantor as the material supplier and installer may be two different entities.

Overview of the OAA Recommended Supplementary Conditions for Stipulated Price Option - Appendix

If the *Owner* and *CM* agree to convert the CCDC 5B contract to a *Stipulated Price Contract* as per Article A-8, paragraph 8.4, then the following amendments and supplementary conditions are recommended for use in conjunction with the amendments and supplementary conditions for the base contract CCDC 5B, as noted above.

Unless a definite decision is made at the time of signing CCDC 5B that the Stipulated Price Option will not be exercised, these amendments and supplementary conditions should be included as part of the recommended changes to the CCDC 5B contract.

The wording of these amendments and supplementary conditions are similar to those developed and endorsed for CCDC 2-2021, as explained in PT.23.11, with the exception that those paragraphs, subparagraphs, and clauses that have already been amended for the main part of the CCDC 5B contract do not need to be repeated again.

Suggested Procedure

1. Familiarize yourself in detail with CCDC 5B and other documents listed under “References” below, as well as those which may be issued in the future as more experience develops in the use of the new contract.
2. Carefully review and identify all of the consultant’s various defined responsibilities in the new CCDC 5B version and coordinate with the client/ Holder contract so that fair and reasonable fees are established for the CCDC 5B defined services and provisions are made for additional services which arise during construction and which could not be previously determined. The defined role of the consultant in the new CCDC 5B version may have increased the level of your services in some areas due to the construction delivery process being construction management.

In addition, determine if CCDC 5B with the Stipulated Price Option is going to be converted to a , *Stipulated Price Contract (similar to CCDC 2)*, and the effect which it may have on the level of the Holder’s services.

3. It is a good practice to review the more significant changes in the contract and any proposed amendments with the client prior to using CCDC 5B on their project. While you can appropriately share with your client your understanding and experience with construction management projects, remember to avoid giving legal advice.

4. The OAA 600-2021 standard form of contract is coordinated with CCDC 5B, 2010. For example, procedures for the use of ADR between client and CM are included in OAA 600. Use the latest version of OAA 600, especially when your client intends to employ the CCDC 5B ADR process. If using standard RAIC forms, include the procedures outlined in OAA 600 for the use of ADR procedures by the client in the owner/CM contract.
5. The OAA supports and endorses the concept of standard industry documents such as are produced by CCDC. Care is taken to attempt to coordinate CCDC and OAA/RAIC documents. For example, the role of the consultant in CCDC 5B as amended by the OAA recommended supplementary conditions parallels the description of the Holder's services during construction in the standard Holder/consultant contract except as noted herein and in the recommended *Amendments and Supplementary Conditions*. Recommend to your clients the use of industry-recognized documents. It is also good practice to keep supplementary conditions to a minimum.

References

1. [CCDC website](#) – contracts and guides.
2. PTs 23.2, 23.13 & 23.15 re: CCDC 5A, 5B, & 17.
3. PT.26 – Conflict of Interest Guideline.
4. RAIC CHOP Chapter 4.1 *Types of Design-Construction Project Delivery*.
5. The [AIA Website](#) (Search for “construction management”)

Attachments:

1. [Recommended Amendments and Supplementary Conditions for Construction Management Contract – for Services and Construction, CCDC 5B, 2010](#)
2. [Recommended Supplementary Conditions for Construction Management Contract - for Services and Construction, CCDC 5B, 2010, Attachment for Stipulated Price Option \(Appendix\)](#)

The OAA does not provide legal, insurance, or accounting advice. Readers are advised to consult their own legal, accounting, or insurance representatives to obtain suitable professional advice in those regards.
