

## CCDC 17 – 2010 – Stipulated Price Contract Between Owner and Trade Contractor for Construction Management Projects

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### Summary

CCDC 17 - 2010 *Stipulated Price Contract between Owner and Trade Contractor for Construction Management Projects* became available in late 2010, after a number of years of development by the Canadian Construction Documents Committee (CCDC). The document replaced the older Canadian Construction Association document (CCA 17, 1996) and included a number of significant changes which affect the services of holders of Certificates of Practice (Holders).

This Practice Tip (PT) provides an overview of CCDC 17 and identifies recommended amendments, supplementary conditions, and procedural cautions.

### Background

In November, 2010, CCDC published a 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).

CCDC 17 is intended for use with CCDC 5A for projects where the construction manager (CM) is providing advisory services only, and the owner is entering into direct contracts with various trade contractors, who would be the same as subcontractors under CCDC 2, 3 or 5B. The advisory services of the CM include advising and overseeing the trade contracts signed with the owner under CCDC 17.

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 17, 2010 version and the Council endorsed its use subject to recommended supplementary conditions issued by the OAA.

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 the 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 Amendments and Supplementary Conditions

The concerns that the OAA has with the CCDC 17 contract fall into two categories. Firstly, CCDC 17 has split the role of making interpretations and findings, which rested with the *Consultant* only in the 1996 contract, so that this role is now split between the *Consultant* and the *CM*.

Secondly the *Contract* is a stipulated price contract and thus the OAA Recommended Supplementary Conditions for CCDC 2 - 2008 apply as well to CCDC 17.

The explanation for the concerns are listed below and referenced as individual items or in groups where the concern relates to more than one location in the text of the *CCDC 17* contract. The actual wording of the amendments and supplementary conditions is in the attachment to this PT.

### Roles of the Construction Manager and the Consultant

The wording of CCDC 17 assigns the ultimate decision-making (finding) in the case of a dispute to either the *CM* with respect to the performance of the *Work* or the interpretation of the *Contract Documents*, while the *Consultant* is assigned the ultimate decision-making (finding) with respect to the requirements of the design or any and all architectural and engineering aspects of the *Work*. The OAA is of the opinion that matters related to the performance of the *Work* and the interpretation of the *Contract Documents* can be one and the same as matters related to the design or any and all architectural and engineering aspects of the *Work*, and thus may cause considerable confusion as to the authority of each party, leading to disputes and ultimately litigation.

For this reason, the OAA recommended Amendments and Supplementary Conditions for CCDC 17 revise the responsibilities of the *CM* and the *Consultant* to be in keeping with the traditional roles of the industry, and as prescribed in all other CCDC contracts. These amendments and supplementary conditions prescribe the following basic concepts:

- (1) The *CM* fulfils the role traditionally carried out by the general contractor, with the exception that the trades are in direct contract with the *Owner*. The *CM* also carries out additional administration functions pertaining to clarification and/or changes to the *Work* and with regard to applications for payment by the trades.
- (2) While the *CM* may, in the first instance, give interpretations on matters in questions relating to the performance of the *Work* or the requirements of the *Contract Documents*, matters that are not resolved to the satisfaction of the *Owner*, *Trade Contractor*, *Consultant*, or *CM* shall be referred to the *Consultant* to given an interpretation and finding in accordance with GC 2.2.2.2.
- (3) The *CM* will provide copies of the documentation related to all matters of compliance with the requirements of the *Contract Document* in order that the *Consultant* will be informed and will be able to give a finding that takes precedence over any interpretation related to differences between the parties to this *Contract* and which may become an unresolved dispute requiring the procedures prescribed in GC 8.1 and GC 8.2.
- (4) The *Consultant* carries out the general review of the *Work*, and makes interpretations and findings where matters remain unresolved and not to the satisfaction of the *Owner*, *Trade Contractor*, *CM*, or *Consultant*.
- (5) Whereas the *CM* is administering the CCDC 17 contract, the *Consultant* provides the necessary technical information to the *CM* as required for clarification and/or changes to the *Work*, and with respect to application for payment.

The OAA recommended supplementary conditions modify CCDC 17 GC 2.1.2 / 2.2.1.2 / 2.2.1.3 / 2.2.2.2 / 2.2.2.3 / 2.2.3.2 / 2.3.3 / 2.3.5 / 2.4.3 / 5.4.1 / 6.3.12 / 6.4.2 / 6.4.3 / 6.6.1 / 6.6.3 / 6.6.4 / 6.6.5 / 8.1.1 / 8.1.2 / 8.2.2 / 8.2.5 / 8.2.6 / 9.2.6 to reflect this basic concept.

## **Amendments and Supplementary Conditions similar to those recommended for CCDC 2, 2008.**

### **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 be tried in absentia.

These [Recommended Supplementary Conditions](#) provide that, in the event of arbitration between the *Owner* and *Trade Contractor*, 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 1.1.2.3 / 9.2.7.4 / 9.5.3.4 / 12.1.1.3)**

The requirement for the *Trade Contractor* and/or *Owner* to indemnify the *Consultant* in situations caused by the actions of either of the two parties to the *Contract* is not included, and may be detrimental to the interests of the *Consultant*. The OAA recommends it be included by means of supplementary conditions.

### **Trade Contractor's Standard of Care (GC 3.4.1 / 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 *Trade Contractor*, a Supplementary Condition GC 3.14 Performance by *Trade Contractor* 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 the Contract)**

- Article A-7: Article revised to delete "electronic communication" as an acceptable form of communication for *Notices in Writing*.
- Definitions: Added definition for *Submittals* that are not included under the new definition for *Shop Drawings*.
- Sub-Paragraphs 2.2.2.2 / 2.2.2.3: The *Consultant* is required to make findings with regard to claims 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 is extensive. (See OAA 600-2021 GUIDE Guide to the Standard Form of Contract for Licensed Member's Services.)

- Sub-Paragraphs 2.4.1.1 / 2.4.1.2: Added sub-paragraphs to emphasize that the *Trade Contractor* is responsible for all defective work and cannot rely only on the *Consultant* to identify such items. Also, the *Trade Contractor* 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 *Trade Contractor's* responsibility to properly co-ordinate the *Work*.
- Paragraph 3.6.2: Caution – The paragraph clarifies that information and instructions provided by the *Consultant* to the *Trade Contractor's* appointed representative are deemed to have been received by the *Trade Contractor*. The converse of this is that if instructions are provided to a person other than the appointed representative, the *Trade Contractor* 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 and to the *CM*.

- Paragraph 3.8.4: Added new paragraph clarifying the *Trade Contractor'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 *Trade Contractor, Consultant, and CM* 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 3.10.13: Deleted the reference to causing a delay and added a time period for the *Consultant's* return of *Shop Drawings* by the *CM*.
- Article 4.1: Amended Paragraphs 4.1.4 and 4.1.5 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*. If, as an example, 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 5.4.1: Caution – It should be recognized that the requirement for the *Trade Contractor* to deliver to the *CM, Consultant, and Owner*, within one working day, a comprehensive list of 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 *Trade Contractor* 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 *Trade Contractor* for all reasonable costs incurred, including *Consultant's* fees for additional services that arise out of a delay caused by the *Trade Contractor*.

Caution: If the *Consultant's* fees for additional services become a matter of dispute between the *Trade Contractor* and *Owner*, the *Consultant* must refrain from making a finding due to a conflict of interest.

- Paragraph 6.6.5: In addition to modifying the basic responsibilities of the *Consultant*, the amendment allows additional time for *Consultant* to make findings after receipt of detailed account(s) of claim if agreed by the *Owner, Trade Contractor* or *Consultant*.
- 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 *Trade Contractor*.
- 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.

## Suggested Procedures

1. Familiarize yourself in detail with CCDC 17, 2010, 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 contract.
2. Determine if CCDC 17, 2010 is going to be utilized as a construction contract prior to finalizing the client/Holder contract. If so, carefully review and identify all of the consultant’s various defined responsibilities in CCDC 17, 2010 and coordinate with the client/Holder contract so that fair and reasonable fees are established for the CCDC 17 defined services, and provisions are made for additional services which arise during construction and could not be previously determined. The defined role of the consultant in CCDC 17 may have increased or decreased the level of your services in some areas due to the role of the CM.
3. It is a good practice to review the OAA’s recommended *Amendments and Supplementary Conditions* with your client prior to using CCDC 17, 2010 on their project. While you can appropriately share with your client information, your understanding, and experience with construction management projects, remember to avoid giving legal advice.
4. OAA 600-2021 is coordinated with CCDC 17, 2010. For example, procedures for the use of ADR between client and contractor are included in OAA Document 600. Use the latest version of OAA 600, especially when your client intends to employ the CCDC 2-2020 ADR process. If using standard RAIC forms, include the procedures outlined in OAA 600-2021 for the use of ADR procedures by the client in the owner/contractor contract.
5. The OAA supports and endorses the concept of standard industry documents such as those produced by CCDC. Care is taken to attempt to coordinate CCDC documents with OAA and RAIC contracts. For example, the role of the consultant as amended by the OAA’s recommendations 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 the use of industry-recognized documents to your clients. It is good practice to keep supplementary conditions to a minimum.

## References

1. [CCDC website](#) – contracts and guides.
2. PTs 23.2, 23.13 & 23.14 re: CCDC 5A & 5B
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 Stipulated Price Contract between Owner and Trade Contractor for Construction Management Projects](#)

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*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.*

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