

Design–Build: CCDC 14 – 2013

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Summary

The Canadian Construction Documents Committee (CCDC) published new standard contract forms for design-build: CCDC 14 – 2013, Design-Build Stipulated Price Contract; and CCDC 15 – 2013, Design Services Contract between Design-Builder and Consultant which replaced the earlier (2000) versions of the Standard Construction Documents 14 & 15.

CCDC 14 is a contract for design services and construction between an owner and a design-builder. This Practice Tip (PT) addresses issues and concerns of importance to architects involved in design-build projects using CCDC 14.

Background

Design-build is a form of project delivery where an owner contracts, under a single contract, with one entity (a design-builder) to provide and take contractual responsibility for both the design services and the construction services.

Owners often use a Request for Proposal (RFP) process to solicit proposals from design-builders for both the design and construction for a fixed price. The design proposals are based on the owner's functional program and statement of requirements which may be rudimentary or more detailed. An owner may select a contractor that they have had a successful relationship with and ask that they engage the architect and other consultants. They all work together until a design with an acceptable fixed price is settled.

In 2013, the CCDC released updated standard contract forms for design-build: CCDC 14 – 2013, Design-Build Stipulated Price Contract, and CCDC 15 – 2013, Design Services Contract between Design-Builder and Consultant. The previous 2000 versions of 14 & 15 were not endorsed by all of the CCDC constituent organizations; the 2013 versions now have the consensus agreement of all: the Canadian Construction Association (CCA), Construction Specifications Canada (CSC), Association of Consulting Engineering Companies – Canada (ACEC) and RAIC / Architecture Canada.

The Ontario Association of Architects (OAA) established a review process of the CCDC 14 – 2013 version and the OAA Council endorsed its use subject to appropriate recommendations.

The OAA supports the concept of industry standard contracts as produced by the CCDC and endorsed by RAIC/ Architecture Canada but continues to believe that services contracts for architects should be under the purview of the architectural associations and as such recommends the use of OAA 600-2013 with July 1, 2018 Amendments, and OAA 600–2013 with Amendments to October 1, 2019 Standard Form of Contract for Architect's Services (**herein referred to collectively as OAA 600**) amended for use on design-build projects as described in PT.25, Design-Build: OAA 600-2013 with July 1, 2018 Amendments, and OAA 600–2013 with Amendments to October 1, 2019.

The supplementary conditions that the OAA recommends for CCDC 2 – 2008 Stipulated Price Contract, as they may apply to similar clauses in CCDC 14, have not been included in this PT. Architects can review PT.23.1 to determine which supplementary conditions may be applicable for their project or situation.

It is unusual for either architects and/or clients to utilize CCDC contracts without any supplementary conditions. The publishing of these recommendations, suggested supplementary conditions and/or procedural cautions does not preclude the incorporation of additional items by clients and/or architects in order to address specific project conditions.

This PT does not make an exhaustive analysis of the contract and the information provided is not a substitute for involvement of legal counsel. Clients should be advised to discuss specific wording and the inclusion of amendments and supplementary conditions with their own legal counsel.

This PT addresses issues and concerns of importance to architects involved in design-build projects and how they may be affected by the use of a CCDC 14 contract between the owner and the design-builder.

Issues

Areas of concern to architects in CCDC 14 are described below with suggestions for supplementary conditions and/or management procedures. Architects may not be in a position to have the owner/design-builder contract amended if it is already in place or the architect's client (the design-builder) is reluctant to pursue changes with the owner. However, architects should be aware of clauses giving rise to concern. If changes to the CCDC 14 cannot be made, architects should be able to deal with the concerns successfully via the design-builder/architect contract (refer to PT.25 & PT.23.7 Design-Build: CCDC 15 – 2013) or by management procedures during the course of the project.

CCDC contracts use the term "*Consultant*" to refer to either an architect or engineer and where it is used below in this Practice Tip, it refers to the "Architect".

Copyright, CAD and BIM files and Use of Drawings

There are two concerns with respect to copyright and the use by others of a *Consultant's* drawings (prints, PDFs, CAD files or BIM files):

- the question of whether CAD or BIM files are to be provided or not and if so under what conditions,
- the rights of the *Consultant's Client* (or others) to "use" drawings being contingent upon payment of fees.

The concerns are described below along with suggested contract language for possible amendments.

CAD and BIM

The definitions in OAA 600 clarify that the *Consultant's Instruments of Service, Electronic Documents* or computer-generated designs do not include editable CAD or BIM files. Neither CCDC 14 nor 15 make this distinction and thus a *Design-Builder* and/or *Owner* may assume that CAD files will be provided when in fact the intent of the *Consultant* may be only to provide prints or non-editable electronic (PDF) files of drawings.

The RAIC [Practice Builder 19](#), The Exchange and Transfer of Electronic Documents and RAIC CHOP 2.3.7 – Appendix A – Digital Copyright and Architects, are excellent references for information regarding electronic files, CAD, BIM, etc. with disclaimers and authorization language for the use of CAD or BIM files by trades in preparing shop drawings or the *Owner* for facility management.

Use and Payment

A particular concern in CCDC 14 is GC 7.2.5.1 which states that if the *Owner* suspends or terminates the *Contract* with the *Design-Builder*, the *Owner* has the right to use the *Consultant's* drawings to complete the design or the construction. The clause also says that the *Consultants* take no responsibility for the use of such documents, but there is no qualification that the *Consultant's* copyright must be respected and that the *Owner* may not use the drawings if the *Consultant* services have not been fully paid. The CCDC 15 contract has this requirement (GC 1.2.4) but CCDC 14 does not.

GC 7.2.5 goes on further to state that the *Owner*, subject to the rights of third parties, may "finish the *Design Services* and *Work* by whatever method the *Owner* may consider expedient" and withhold further payment until issues are settled. The financial determinations are made by the *Payment Certifier* with a timeframe for settlement that can extend to the end of the warranty period.

Such situations are a risk the *Consultant* takes on. Suggestions to manage the risk include actions to:

- modify the *Owner/Design-Builder* contract to clearly state that the use of drawings is contingent on payment of fees (see GC 1.1.11 below)
- modify the *Design-Builder/Consultant* contract for payment in the shortest reasonable period - OAA 600 uses 45 days whereas a shorter time may be prudent and CCDC 15 has 90 days,
- invoice promptly and if payment is outstanding beyond the deadline, advise, after consulting legal counsel, that services will be suspended and no drawings will be forwarded until payment is received,
- control the distribution of drawings, especially CAD files, if payment of invoices is outstanding beyond the defined maximum period of time for payment.

Use by Others

Incorporation of the following text for supplementary conditions is advantageous in better protecting the *Consultant* with regard to the use of the *Instruments of Service*.

- Change the last sentence of GC 1.1.7 to read “Their alteration by the Owner or any other person is prohibited”.
- Change the 3rd line of GC 1.1.10 to read, “the Owner shall indemnify the Design-Builder, the Consultant, and Other Consultants against claims and costs (including legal costs) associated with such improper alteration or use.”
- Add GC 1.1.11:
 - 1.1.11 As a condition precedent to the use of the *Consultant’s Instruments of Service* corresponding related fees, reimbursable expenses and value added taxes of the *Consultant* or *Other Consultants* are required to be paid in full.”

Design Services – Role of the Consultant

The previous CCDC 14 – 2000 contract included a summary of the *Consultant’s* services. The 2013 version says (GC 3.1.4) that the *Design-Builder’s Contract* with the *Consultant* shall be based on CCDC 15 or with terms and conditions consistent with it.

The OAA recommends that architects utilize OAA 600 – 2013 *Standard Form of Contract for Architect’s Services* modified for use on design-build projects per PT.25 or if that is not possible, CCDC 15 with amended terms and conditions described in PT.23.7.

GC 3.1 CONTROL OF THE DESIGN SERVICES AND THE WORK, states that the *Design-Builder* shall have total control and sole responsibility for the *Design Services*; however this is not intended to reduce the *Consultant’s* professional responsibilities. The *Consultant* is required to act in accordance with the performance standards in Regulation 27 under the *Architects Act* and the requirements of applicable law (including the Building Code) and of authorities having jurisdiction.

GC 3.11 NON-CONFORMING DESIGN AND DEFECTIVE WORK, in 3.11.2 states that the *Design-Builder* is required to correct defective work rejected by *Owner*. This does not preclude correcting defective work reported by the *Consultant* and *Other Consultants* in carrying out general review and contract administration whether or not the *Owner* identifies the defective item or not. Though it is not stated clearly in CCDC 14, the *Consultant’s* responsibility for identifying defective work and work not compliant with building codes is clear in both CCDC 15-2013 and OAA 600.

3.11.4 allows the *Owner* to deduct from the *Contract*, value of defective work or work not completed if it is not expedient to correct. In the situation where a *Consultant* believes that the deletion of work or failure to correct is a serious concern they need to advise the *Design-Builder* and the *Owner*. If the deletion or defect is contrary to applicable law or is a building code related matter, *Consultants* should take the necessary action to make the *Design-Builder* and building department aware that such deletion or defect is not acceptable and constitutes a deficiency which will be recorded in site visit reports and in final report or sign-off letters.

Owner's Advisor

In design-build project delivery, some *Owners* engage another *Consultant* or non-professional as an *Owner's Advisor*, also called "advocate consultant." The *Owner's Advisor* where one has been designated is a separate entity from the *Consultant*. Currently there are no standard contracts or guides describing this role. CCDC 14 states (GC 2.3.1 & .2) that the role shall be described in the *Contract Documents* so that all parties have a clear understanding. It is essential that the separation of professional duties of the *Consultant*, and the responsibilities of the *Payment Certifier*, and the *Owner's Advisor* are clearly defined in writing.

Interpretation but no Finding

GC 2.2.3 states that "The *Owner* will be, in the first instance, the interpreter of the requirements of the *Owner's Statement of Requirements*." The *Owner* is directly or indirectly, the author of these requirements and it is appropriate that they interpret them, just as the *Consultant* is the interpreter of the *Construction Documents* which they author (GC 3.3.1). In situations where the *Design-Builder* does not agree with the *Owner's* interpretation it becomes a dispute to be negotiated or dealt with under GC 8 DISPUTE RESOLUTION without input from the *Consultant*.

GC 3.3.1 states that the *Consultant* and *Other Consultants* are "in the first instance the interpreter of the requirements of the *Construction Documents* that they have prepared." In other CCDC and OAA contracts, the making of a "finding" is included along with the *Consultant's* interpretation. If that finding is not accepted by either party (*Owner* or *Contractor*) a dispute is initiated. In the CCDC 14 there is no role for the *Consultant* to make a finding in order to initiate the dispute resolution process. It is important for the *Consultant* to understand the limitation placed on their role in situations under dispute.

Payment Certifier and Substantial Performance

The CCDC 14 – 2013 provides the option of a separate *Payment Certifier* other than the *Consultant*. The term *Payment Certifier* is defined, the entity designated to be the *Payment Certifier* is named in Article A-1.2 and the role described separately (GC 2.4). The *Owner* is responsible for designating the *Payment Certifier* (GC 2.4.1). It could be the *Consultant* or a separate entity.

Some believe that it is not appropriate for the *Consultant* to certify to the *Owner* the *Design-Builder's* progress payments as the *Consultant* is under contract to the *Design-Builder*; others believe that it is no more or less of a conflict of interest that when the *Consultant* is engaged by the *Owner* and does payment certification in a traditional design-bid-build scenario.

One thing that is different in a design-build situation is that the *Payment Certifier* is required to certify the *Contract Price which includes the Work* and also the *Design Services* (GC 2.4.1). An *Owner* with previous experience and confidence in a *Consultant* and a *Design-Builder* may not have a problem with this scenario; however, a *Consultant* certifying their own fees would be perceived as having a conflict of interest. At a minimum, a *Consultant* carrying out payment certification must declare the conflict of interest to the *Owner* or any other party that may be relying upon the certificates for payment or alternatively certify the *Work* but not the *Design Services*.

Since the definition of *Work* excludes *Design Services*, any *Construction Cost* progress reports or certificates for payment should only relate to *Work* and not include costs of *Design Services*. If a *Consultant* is only certifying the value of *Work* and not fees for their own *Design Services*, the conflict of interest issue would be eliminated.

Substantial performance is more difficult. In Ontario, both the *Construction Act* (CA) and form 9, *Certificate of Substantial Performance*, and the *Construction Lien Act* (CLA) and form 6, *Certificate of Substantial Performance*, refer to Substantial Performance of the **Contract** not of the *Work*. Although there can be variations there appear to be three possible scenarios:

- (A) Where the *Consultant* is not acting as the *Payment Certifier* and is not doing any cost reports or involved with Substantial Performance of the *Work* there should be no issues. Either the designated *Payment Certifier* or the *Owner* and *Design-Builder* jointly will issue the CA form 9 or CLA form 6 as appropriate for Substantial Performance of the Contract.

- (B) Where the *Consultant* is not the designated *Payment Certifier* but is providing cost reports to the *Design-Builder*, care should be taken to avoid wording in the reporting that would be perceived as a 'certification' or otherwise be interpreted that the *Consultant* is the designated *Payment Certifier*.
- (C) If the *Consultant* is designated in CCDC 14 as the *Payment Certifier*, they should:
- clarify if certification is intended to include the *Consultant's* own fees; inform all parties in writing of the conflict of interest;
 - also clarify with the *Owner* and the *Design-Builder* who will certify Substantial Performance of the Contract (CA form 9 or CLA form 6); and
 - have the *Design-Builder* separate *Work* and *Design Services* in the schedule of values and progress payment invoices so that documentation can refer to each portion separately.

It is recommended that the following clauses incorporated into CCDC 14 will provide clarification for the *Owner*, *Design-Builder* and the *Consultant* in regards to certification and *Substantial Performance of the Work*. The *Design-Builder* and the *Owner* are advised to consult their own legal advisors.

The *Parties* agree that where the *Contract Price* includes both the cost of the *Work* and the cost of *Design Services* under the *Contract*:

- (1) the payment certification by the *Consultant* made in support of the *Design-Builder's* application for payment is in respect of the value of construction performed and *Products* delivered only. The *Consultant* cannot independently certify the value of the *Design Services* provided by the *Consultant* to the *Design-Builder*; and
- (2) the *Consultant* is not deemed to be the "the Payment Certifier" under s.32(1) of the Ontario *Construction Act* or *Construction Lien Act*, for purposes of certifying the date of Substantial Performance of *the Contract* under s.2 of either Act. The *Consultant* can only assist the *Design-Builder* for the purpose of determining the date on which the *Contract* was substantially performed. In these circumstances, the *Owner* and the *Design-Builder* shall make the determination of substantial performance jointly and both shall sign the certificate (CA form 9 or CLA form 6 as appropriate).

Suggested Procedure

- Become familiar with the design-build form of project delivery. Review referenced material including standard CCDC contracts and CCDC guides, the *RAIC Canadian Handbook of Practice* (CHOP) and OAA Practice Tips.
- If becoming involved in a design-build project or presented with CCDC 14 or CCDC 15 contracts by an *Owner* or *Design-Builder*, review and discuss the benefits of the OAA recommendations in PTs 25, 23.6 and 23.7.
- To clients asking about design-build, provide information, sources for additional information, possible pros and cons from personal experiences, remembering that the determination of the project delivery method is an *owner's* decision. Advising and making strong recommendations may be seen as making a decision and may give rise to liability for the architect.
- It is very important to obtain a copy of the owner/design builder contract. Review and coordinate the 'Role of the Consultant' in that contract with the architect's services described in the design-builder/architect contract. Any inconsistencies should be discussed and clarified in writing.
- If there will be an *Owner's Advisor* designated in CCDC 14 obtain a copy of the written description of the role, responsibilities and services.
- Confirm who will be the *Payment Certifier* designated in CCDC 14 and clarify the roles and responsibilities.
- Clarify that the definition of *Supplemental Instruction* in CCDC 14 pertains to an instruction used by the *Owner* to the *Design-Builder* so as not to be confused with supplemental instructions issued by the *Consultant* or *Other Consultants*.

- Discuss any questions regarding insurance with your insurance provider.

References

PT.25 – *Design-Build*: OAA 600 - 2013

PT.23.7 - *Design-Build*: CCDC 15 – 2013

[CCDC website](#) – contracts and guides.

RAIC CHOP 2.3.2 Types of Project Delivery

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.
