



New CCA 1-2021 Stipulated Price Subcontract & Best Practices: What you need to know

Barrie Construction Association

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This presentation is for information purposes only.

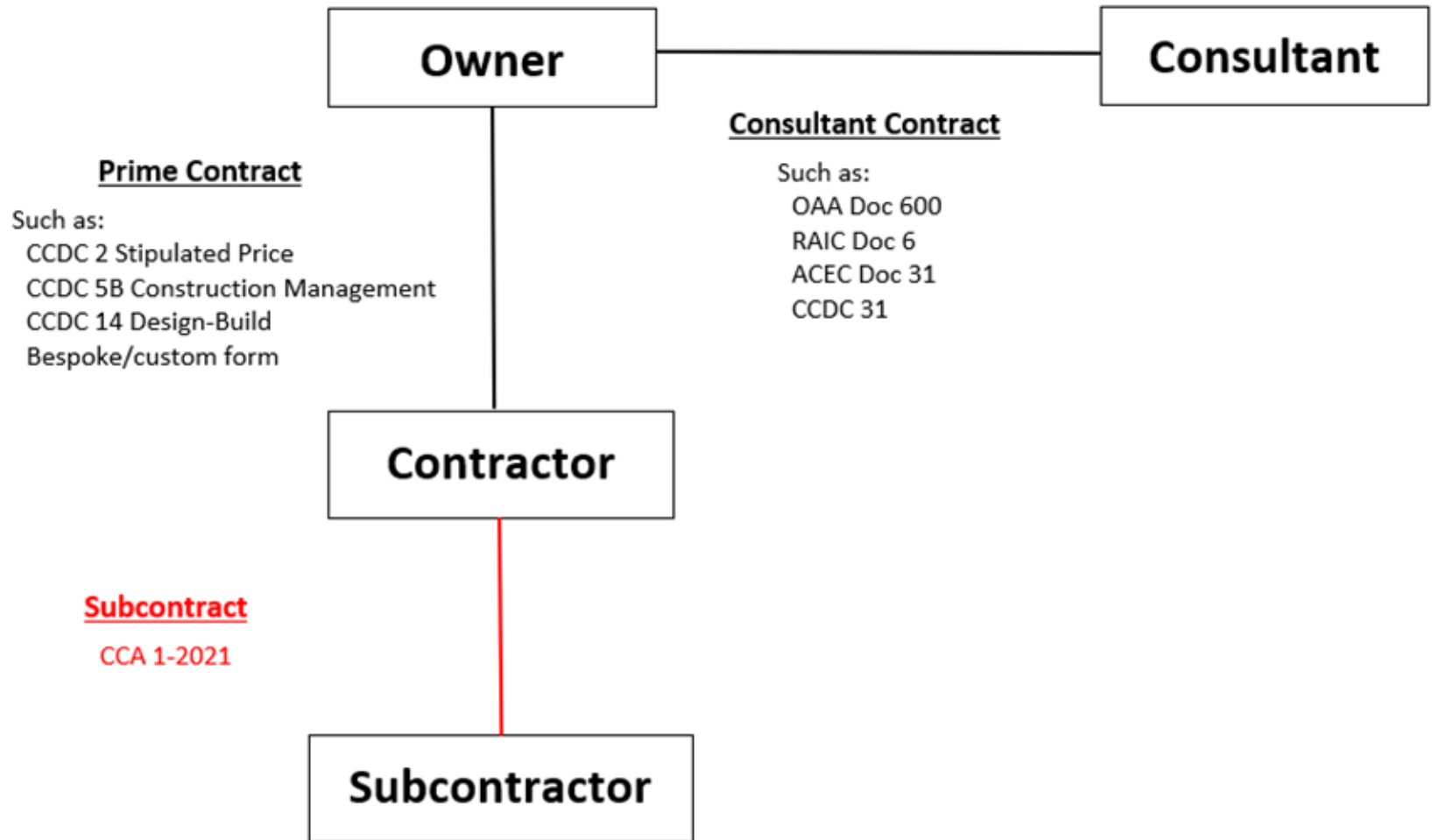
WeirFoulds^{LLP}

Overview

What we'll cover ...

- **CCA 1 overview**
- CCA 1-2021 Key Changes:
 - Payment Terms
 - Subcontract Documents
 - Insurance
 - Ready-for-Takeover & Early Occupancy
 - Indemnification and limits of liability
 - Removal of Division 01-type clauses
- Best practices for using the CCA 1 (and subcontracts generally)
- Addressing current market issues and risks in Subcontracts

CCA 1 Subcontract structure



CCA 1 – Document Structure

Three parts to the document:

Agreement

- Parties
- Project location
- Scope
- Subcontract Documents
- Subcontract Time
- Subcontract Price
- Notice information
- Signatures

Definitions

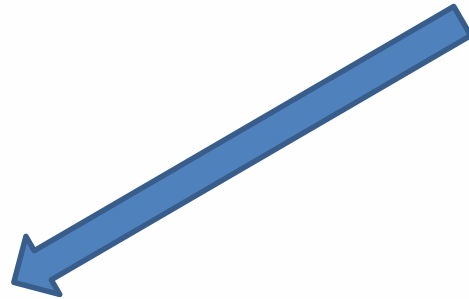
- Meaning of essential terms
- Applies to all Subcontract Documents

Subcontract Conditions

- Administration of Subcontract
- Execution of Subcontract Work
- Payment
- Changes
- Default Notices
- Dispute Resolution
- Insurance
- Indemnification
- Waiver
- Warranty

CCA 1 – Document Structure

The Parties must fill out Articles 1A, 2A, 3A or Articles 1B, 2B, 3B



Use the “A” articles if:

- there is a written Prime Contract between the Owner and Contractor; and
- the Contractor and Subcontractor intend that the conditions of the Prime Contract are to be incorporated into the Subcontract and govern in the event of a conflict

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Payment Terms

- Refinement of payment terms:

- Contractor's payment obligations subject to "Payment Legislation" [Article 6.1]
- Payment due later of:
 - i. 30 days after submission of Subcontractor's pay app
 - ii. 10 days after date of Consultant's certificate for payment,
or as required by Payment Legislation [Article 6.2]
- Pay apps must comply with Payment Legislation [SCC 5.1.4]
- Pay apps must include CCDC 9B stat dec and evidence of WSIB compliance [SCC 5.1.5]
- **Remember**: parties may also have statutory obligations (e.g. prompt payment)



Payment Terms

- Changes to Contractor obligations if Owner non-payment

- If Consultant doesn't issue payment certificate or Owner fails to pay within times prescribed in Prime Contract, Contractor must:
 - inform Owner of default, advise Subcontractor within 2 Working Days, and give Subcontractor a copy of the default notice delivered to the Owner; and
 - if Owner fails to remedy the default, enforce its lien rights and provide Subcontractor notice of steps taken to enforce payment

*(*the Contractor is no longer required to stop work)*

- If the Contractor complies with these obligations, the time for payment under Article 6.2 is extended by [] calendar days
- **Remember**: parties may also have statutory obligations (e.g. prompt payment)

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Subcontract Documents

If using the “A” articles, the parties can now carve-out provisions that will not be subordinate to the Prime Contract in the event of a conflict



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
- [Insert here, attaching additional pages if required, a list identifying all other agreed exceptions to paragraph 2.1]*

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Insurance

SCC 11.1 Insurance & CCDC 41 – Insurance Requirements

- All insurance requirements have been changed to make reference to *Ready-for-Takeover* date
- Increased insurance limit of \$10M (from \$5M) per occurrence for general liability, automobile liability and manned aircraft/watercraft liability insurance
- New unmanned aerial vehicle liability insurance requirement (\$5M)
- New contractor's pollution liability insurance requirement (\$5M)

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Ready-for-Takeover (SCC 12.1)

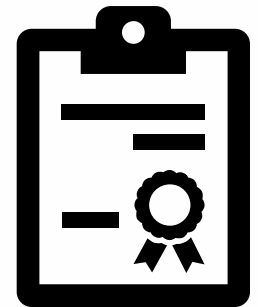
Largely replaces “Substantial Performance of the Work” as key milestone

Prerequisites “as specified in the Prime Contract Documents”

If Prime Contract Documents do not include Ready-for-Takeover, references to it in the CCA 1 are deemed to refer to “Substantial Performance of the Work”

The list in the CCDC 2-2020 standard form includes items such as

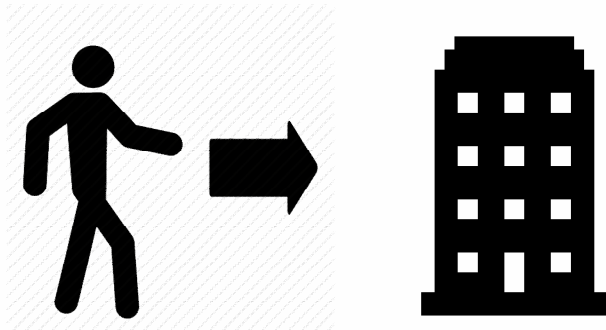
- Consultant certified or verified Substantial Performance
- Compliance with AHJ occupancy/occupancy permit requirements
- Final cleaning and waste removal
- O&M documents necessary for immediate operation and maintenance
- Copy of as-built drawings available on site
- Startup, testing required for immediate occupancy
- Owner has been provided secure access to the Work
- Demonstration and training



Remember: the list in the CCDC 2-2020 does not necessarily apply if the Prime Contract is not a CCDC 2-2020 or has been modified by supplementary conditions. Always check the Prime Contract.

Early Occupancy (SCC 12.2)

- Owner can now occupy all or part of the Work before Ready-for-Takeover.
- Prior to agreeing with Owner, Contractor must obtain Subcontractor's agreement (cannot be unreasonably withheld)
- If Owner occupies part of the Work:
 - that part is deemed to have achieved RFT
 - Subcontractor ceases to be liable for care of the part of Subcontract Work "completed or otherwise being used from this date"
 - warranty for the part of Subcontract Work completed or otherwise being used shall start from the date on which it is occupied



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Indemnification and Limits of Liability

- **Timing:** Timing of indemnification claims [SCC 13.1] and waivers of claims [SCC 13.2] are now tied to Ready-for-Takeover (instead of substantial performance)
- **Limits on Indemnification:** the obligation to indemnify the other party is now limited to direct loss and damage (liability for indirect, consequential, punitive and exemplary damages is excluded) [SCC 13.1.2.3]
- **Indemnification for Third Party Claims:** the obligation to indemnify in respect of third party claims is without limit [SCC 13.1.2.4]
- **Monetary Caps:** monetary caps on indemnity claims remain [SCC 13.1.2.1, 13.1.2.2]



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CCDC Division 01

- Published in December 2020 at the same time as the CCDC 2-2020
- Available in MS Word for editing
- Like the CCDC 2-2008, various clauses in CCA 1-2008 are now absent from the CCA 1-2021 (and are addressed in Division 01) including:
 - Use of the Work
 - Cutting and Remedial Work
 - Clean-up
 - Shop drawings (partially)
 - Bonding requirements

**If using Division 01, list
it in Article 3**

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Best Practices for Using the CCA 1 (and subcontracts generally)

Some simple and inexpensive solutions can mitigate substantial risk:

- Review proposed subcontract form carefully during procurement/negotiation.
 1. Are the terms up for negotiation?
 2. Do the terms comply with legislation?
 3. Are the correct documents listed in Article 3A/3B?
 4. Is the prime contract being flowed-down (if so, are there any exceptions)?
 5. Get broker's advice on insurance terms
 6. Identify red flag clauses (e.g. expanded indemnities, unreasonable risk assumption, removal of liability caps, etc.)

- Make sure *your subcontracts* are properly structured and drafted:
 1. Do they properly reflect risk and entitlements in upstream contract (e.g. scope, time extensions, compensation, indemnity)?
 2. Do they work for your organization / user friendly (e.g. customizable schedules, pre-populated compensation fields for easy selection, etc.)?
 3. Do you have customized forms (e.g. for subcontractors, suppliers, consultants)?

- Know when to get advice!

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Addressing Current Market Issues and Risks in Subcontracts

1. COVID-19
 - a. What (if any) clauses in the subcontract (and prime contract if applicable) address COVID-related delays or disruptions?
 - b. What are implications of Owner or Contractor imposed health and safety requirements?
2. Material price escalation / unavailability
 - a. Price the risk or use contingency?
 - b. Price escalation clause?
 - a. When is it triggered?
 - b. How is the escalation measured?
 - c. How is the escalation substantiated?
 - d. Additional money *and time*?
3. Expanding size and breadth of prime contracts
 1. Lengthy supplementary conditions – are they being flowed down?
 2. Clauses or terms that must *explicitly* be referenced in the subcontract



Questions?

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Any follow-up questions are also welcome.