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NEW CCDC-2 (2020) - LESS IS NOT NECESSARILY MORE

The rules of engagement for construction projects are in a state of flux. As we reported in earlier *News ReLeases*, the construction legislation in Ontario was significantly amended in 2018 and 2019. The amendments impose a short payment time frame and a compulsory adjudication regime that can force payments in the face of legitimate disputes. Similar amendments are in the works in other provinces.

In late 2020, the Canadian Construction Documents Committee (the “CCDC”) released a new version of its standard “stipulated price” contract, the “CCDC-2”.

The CCDC is comprised of about 20 members from various parts of the construction industry, principally being large construction, architectural, engineering and ownership groups. It develops and publishes standard form construction contracts, which enjoy widespread use across Canada. None of the members seem focused on the issues faced by small to mid-sized owners. The CCDC tries to produce standard forms that are balanced and allocate risk fairly; however, many experienced owners (including landlords and tenants involved in constructing improvements) have found that the CCDC standard forms require a set of (often lengthy) “supplementary conditions” be appended.

One of the stated goals of the new CCDC-2 (2020) was to reduce the length of supplementary conditions (or perhaps do away with them altogether). However, some changes, in ostensible coordination with legislators, appear aimed at expediting payment to contractors. Other changes remove provisions that relate to day-to-day procedures and obligations at the job site. As a result, owners may find that

using the CCDC-2 (2020) requires even lengthier supplementary conditions.

“READY-FOR-TAKEOVER”

Substantial performance of the contractor’s obligations under the construction contract (or the date on which the contract is completed, abandoned or terminated) triggers the deadline for registering liens relating to the completed work. The period between substantial performance (or the date on which the contract is completed, abandoned or terminated) and this deadline is often referred to as the “lien period”. The duration of the lien period varies from province to province; in Ontario it is 60 days. If the lien period expires and no liens have been registered, the CCDC-2 requires the owner to release the basic holdback – a good result for contractors, but, as we will outline, not so good for owners.

Owners often amend the CCDC form so that they are not required to release the basic holdback until the contractor delivers important operational documents, such as: operating manuals, warranty information, as-built drawings, occupancy permits, and completes certain work (clean-up of the jobsite, for example). In an effort to uncouple these conditions from release of the basic holdback, the CCDC-2 (2020) introduces a new construction milestone called “ready-for-takeover” which acts as a deadline for satisfaction of these conditions. Notably, as was the case under the previous version of the CCDC-2, the date for release of the basic holdback is still expiry of the lien period. As a result, an owner is required to release the basic holdback regardless of whether these important operational documents have been delivered or the jobsite has been cleaned-up. Without possession of the basic holdback, the

owner has little leverage to ensure satisfaction of these obligations in a timely manner.

The “ready-for-takeover” milestone creates the perception that an owner’s interest in the timely delivery of these documents and clean-up of the jobsite is protected. Unfortunately, the CCDC-2 (2020) continues to deprive the owner of its main tool for ensuring the contractor fulfils its obligation in a timely way (i.e. retention of the basic holdback). Therefore, if an owner wants to use the CCDC-2 (2020), then supplementary conditions will be required to deal with this issue.

Under Ontario’s new *Construction Act*, the owner is **required** (not just permitted) to release the basic holdback following expiry of the lien period, unless it publishes a refusal to pay not later than 40 days following substantial performance (or the date on which the contract is completed, abandoned or terminated). The door has therefore been left open to delay release of the basic holdback until additional conditions are satisfied. Owners are likely to use this option.

REMOVAL OF IMPORTANT CONTRACTOR OBLIGATIONS

Several provisions relating to the contractor’s obligations in executing the work have been deleted from the new CCDC-2 (2020), including: an obligation to keep a set of the contract documents at the site, requirements regarding the form of shop drawings (and the timeline for delivering and revising them), the

performance of cutting and remedial work, and an obligation to maintain a safe and tidy workplace. These obligations have, for the most part, been moved into the CCDC’s form of Division 1 – Master Specification.

If you are wondering what that is, you are not alone. As we have noted, the CCDC members hail from large construction, architectural, engineering and ownership entities (as well as members of Construction Specifications Canada). These entities regularly incorporate into their contract documents a suite of detailed and technical documents setting out information regarding the work and how it will be carried out. However, many owners (and their architects), especially in smaller projects, don’t use the Division 1 - Master Specification.

In theory, the Master Specification could serve as an alternative location for important contractor obligations. In practice, moving obligations from the CCDC-2 to the Master Specification leaves many owners without important rights. Mitigating this outcome will be achieved by adding provisions to the supplementary conditions, which will again cut against the CCDC’s stated goal.

In addition to the challenges posed by construction law, landlords and tenants must also respond to changes in the CCDC standard forms. CCDC-2 (2020) is currently in use. New versions of the cost-plus contract (CCDC-3) and project management contracts (CCDC-5A and CCDC-5B) are not far behind. Stay tuned!

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



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