

10 Key Changes in the CCDC 2 (2020)

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The CCDC 2 (2008) will be pulled off the shelf in June 2022 and officially replaced with the CCDC 2 (2020). This article highlights 10 key changes that owners, contractors, and consultants should be aware of in the CCDC 2 (2020).



1. READY-FOR-TAKEOVER MILESTONE

Ready-for-Takeover (“RFT”) is a new scheduling milestone concept related to the completion of the project. It is intended to be a mechanism to ensure the timely total completion of the project once substantial performance has been achieved.

RFT is in addition to, and does not replace, Substantial Performance, and, importantly, does not replace Substantial Performance as a trigger for the release of the holdback. This new milestone is important in connection with the following contractual terms and provisions: Contract Time; Indemnity; Warranty; Waiver; and Delay.

There are six prerequisites to achieve RFT:

1. Achieving Substantial Performance of the Work under the Contract;
2. Compliance with the requirements for occupancy under the occupancy permits;
3. Final cleaning and waste removal;
4. Delivery of as-builts and any necessary operation and maintenance documents;
5. Completion of any necessary start-up testing, demonstration and training; and
6. Provision to the Owner of the ability to secure access to the work.

If any prerequisite is delayed for reasons outside the control of the Contractor, or by agreement between the Owner and the Contractor, RFT will not be delayed.

There are three key steps to achieve RFT:

1. When the Contractor believes that the Work is ready, it must submit a written application for RFT to both the Owner and the Consultant, together with a list of items to be completed or corrected;
2. Within 10 days of receipt of the application for RFT, the Consultant must either confirm the date of RFT or advise that the Work is not RFT and provide reasons why it is not; and
3. Immediately following confirmation of the date for RFT, the Contractor and the Consultant must establish a reasonable date for finishing the Work.

2. EARLY OCCUPANCY

Another new concept is Early Occupancy. The Owner may take Early Occupancy of part or the entirety of the Work prior to the Contractor attaining RFT. There are two requirements before the Owner can take Early Occupancy:

1. Prior approval from the “authorities having jurisdiction” (i.e. the City of Winnipeg or applicable municipality); and
2. Agreement of the Contractor which cannot be unreasonably withheld.

Early Occupancy does not relieve the Contractor from the requirement to complete the Work, but the Warranty period will commence from the date of occupancy and the Contractor will cease to be liable for the care of any area that has been occupied by the Owner.

3. PAYMENT TERMS

Changes to the contractual payment terms have been made to reflect legislative amendments across Canada in connection with prompt payment. While Manitoba does not have prompt payment legislation, some of the contractual terms are nonetheless applicable to Manitoba projects. The following changes are noteworthy:

1. Applications for payment must be submitted monthly to the Owner and to the Consultant simultaneously.
2. The application for payment must include: (1) evidence of compliance with workers compensation legislation (i.e. WCB); and (2) a CCDC 9A statutory declaration.
3. The parties must comply with the “payment legislation” applicable in the jurisdiction of the work, including, the requirement for a “proper invoice”. *The Builders’ Liens Act* (Manitoba) has not been amended to reflect the concept of “proper invoice” and therefore this requirement has minimal impact in Manitoba at this time.
4. Progress payments are to be made 28 days following the Owner’s receipt of the payment application. The Consultant then has 10 days after the application to make a decision. If the Consultant certifies an amount other than that listed in the payment application or rejects the application entirely, the Owner (rather than the Consultant) must notify the Contractor.
5. Progress payments are subject to prompt payment legislation; however, Manitoba does not have prompt payment legislation and therefore this contractual provision is not applicable to Manitoba projects.

Section 24 of *The Builders’ Liens Act* provides that the holdback is to be paid after substantial performance. The CCDC 2 (2020) cannot change the legislative requirements applicable to the holdback.

4. CHANGE DIRECTIVES AND REIMBURSABLE COSTS

Reimbursable costs are limited to the actual costs directly attributed to the implementation of the change. Costs are divided into the following categories:

- Labour
- Products
- Construction equipment and temporary work
- Subcontracts

The Contractor is no longer entitled to claim:

1. Wages of personnel engaged in the review of shop drawings, fabrication drawings and coordination drawings;
2. Wages of personnel engaged in processing changes of the Work.

5. SAFETY

Under the new CCDC 2, the Contractor is responsible for health and safety AND the Owner is now also responsible for complying with health and safety requirements.

6. DELAYS

GC 6.5.2 has been revised in the CCDC 2 (2020) to preclude claims for extensions for delays caused by a stop work order issued by a court or public authority, UNLESS the delay results in the failure of the Contractor to obtain RFT by the date stipulated in the Contract.

7. INDEMNITY AND WAIVER OF CLAIMS

There are three important changes to the indemnity and waiver of claims provisions of the CCDC 2 (2020):

1. Changes to reflect RFT as the trigger date;
2. Neither party (Owner or Contractor) is liable to the other for indirect, consequential, punitive or exemplary damages; and
3. Indemnification for third party claims is without limit.

8. INSURANCE

There are five changes to take note:

1. Changes to reflect the RFT date;
2. Limits for general liability insurance increased from \$5M to \$10M;
3. Limits for automobile and aircraft insurance increased from \$5M to \$10M;
4. Distinction between manned and unmanned aerial vehicle which includes drones, with unmanned aerial vehicle liability insurance of \$5M; and
5. New category of pollution liability insurance with minimum coverage of \$5M/occurrence for bodily injury, death and damage to property.

9. CASH ALLOWANCES

The Consultant can reallocate any unexpended amounts from cash allowances to cover a

shortfall in other cash allowances. There is no change in the Contract Price unless the cost of an increase in a cash allowance exceeds the total amount of all cash allowances. The total of unexpended cash allowances will be deducted from the Contract Price.

10. DOCUMENT REVIEW

There is no longer a positive obligation on the Contractor to review the Contract Documents and report to the Consultant any error, inconsistency or omission. The Contractor's review of the Contract is only for the purpose of facilitating coordination and execution of the Work.

ARE SUPPLEMENTAL CONDITIONS STILL REQUIRED?

Likely yes. It is important to ensure that the Contract will operate appropriately for the specific project. We encourage you to seek legal advice before drafting supplemental conditions in order to properly assess the nature and scope of the terms. Specific areas that may require consideration include:

1. Enhancing schedule obligations
2. Clarifying timelines for notice requirements
3. Clarifying project safety oversight
4. Proper invoice submission procedures
5. Deficiency correction (timelines, costs, etc.)
6. Warranty
7. Set-off
8. Liens
9. Liquidated damages
10. Modifying dispute resolution
11. Expanding/amending indemnity and/or limitation of liability provisions
12. COVID-19

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