

CONTRACT LAW

EFMA SPRING WORKSHOP 2025

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CONTRACTS – THE BASICS

Contracts can be formed in one of four ways:

- in writing;
- orally;
- partially in writing and partially orally; or
- through conduct.

A verbal contract is just as binding as a written one

CONTRACTS – THE BASICS

Generally, in order for there to be a legally binding contract there must be:

- *consensus ad idem* (i.e. agreement) on essential terms;
- offer and acceptance; and
- certainty of terms.

CONTRACTS – THE BASICS

- The courts have stated that they will be cautious about attempting to create a valid and enforceable contract out of a vague contractual intent from the parties' language or conduct.
- The court will not create an agreement for the parties where none actually exists, even if it would be a fair agreement calculated to do justice to both or where the parties themselves believe that they have made an enforceable agreement

CONTRACTS – THE BASICS

- These general principles are subject to the more specific principles for building contracts.
- For a building contract to be enforceable, the parties must have agreed on the exact type of building, the timeline for completion and the price.
- The parties must agree on the essential features of the contract for the building in order for their contract to be enforceable. In the absence of those essential terms, the contract may be found to be uncertain and therefore unenforceable.

COMMON MISTAKE #1

Not knowing who you're contracting with

- The contract says "ABC Group", who is that?
- ABC Holdings Inc.
- ABC Construction Ltd.
- 8675039 B.C. Ltd. doing business as the ABC Group

What do you know about them? What can you find out?

- Court records search
- Bankruptcy search (not just the company, but the principals)
- Check references

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PROJECT DELIVERY MODELS – GENERAL CONTRACTOR/FIXED PRICE

Traditional model

- Owner enters into a contract with a single contractor for the entire project;
- General Contractor hires subcontractors, trades, material suppliers directly;
- GC (and, usually, most subcontractors) are engaged at a fixed price; and
- Contractors bear the risk of cost-overruns, subject to entitlements to changes, increases, etc...

CCDC 2 is industry standard document

- Fixed price subject to increase for changes, owner-caused delays and unforeseen site conditions provided notice provisions met

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PROJECT DELIVERY MODELS – GENERAL CONTRACTOR/COST PLUS

Actual cost plus a percentage or plus a fixed fee

- Owner carries more risk (i.e. cost overruns, subcontractor default, etc...)
- (Theoretical) benefit of transparency in pricing
- Be aware - estimates may still have contractual effect

CCDC 3

- Includes Guaranteed Maximum Price (“GMP”) and Target Contract Price options
- GMP and Target Price subject to increase for changes, owner-caused delays, and unforeseen conditions (where notice met)

PROJECT DELIVERY MODELS – CONSTRUCTION MANAGEMENT

Owner hires trades directly

- Usually less exposure for Construction Manager
- Independent trade responsibility can more difficult for owner to succeed on delay claims or damage claims where responsibility is unclear

CCDC 5A

- CM's fee can be structured as fixed fee, a percentage fee, time-based rates, or some combination

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PROJECT DELIVERY MODELS – CONSTRUCTION MANAGER AT RISK

“CM at Risk” not an industry-standard term

- Historically, this was sometimes structured as construction management in early stages and then an assignment of trade contracts to CM and conversion to fixed price
- Key advantage is early contractor involvement

CCDC 5B

- Think cost plus with option to convert to fixed price

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TENDERING – THE BASICS

Contract A / Contract B (a.k.a. Tender 101)

- The call for tenders is the offer by the owner to consider the bids it receives and to enter into the contract to complete the project where a bid is accepted.
- A bidder accepts that offer by submitting a bid that complies with the requirements set out in the tender documents, which creates Contract A (the bid contract).
- The contractual rights and obligations of the parties to Contract A are governed by the express and implied terms of the tender documents.
- An owner has the right to include stipulations and restrictions and to reserve privileges to itself in the tender documents. However, once the owner sets the rules it must itself play by those rules.
- A bid also constitutes an offer to enter into Contract B. This is the contract to complete the project for which bids were sought.

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TENDERING – CONTRACT A

- The following terms are typically implied into Contract A:
 - Owner / general may only accept compliant bid
 - All compliant bidders must be treated fairly and equally in the tender process.
- Implied terms cannot be inconsistent with the express terms of Contract A.
- Express clauses that are typically found in the tender documents include:
 - privilege clause;
 - discretion clause; and
 - negotiation clause.

TENDERING – PRIVILEGE CLAUSES

- Although a “privilege clause” can take many forms, it usually reserves to the owner the discretion to accept or reject the lowest, or any, tender.
- A privilege clause may provide:

The lowest or any tender shall not necessarily be accepted.

TENDERING – PRIVILEGE CLAUSE

- Once the bids are submitted the owner must make a business decision and in so doing it must treat all bidders fairly and equally.
- An owner / general cannot be arbitrary. However, an owner is not obligated to accept the lowest bid. It is entitled to act in its own best financial interests so long as its decision is not unfair to any compliant bidder.

TENDERING – BID MISTAKES AND MATERIAL NON-COMPLIANCE

- Unless a bid price calculation error is apparent on the face of the bid the fact the bidder has made a mistake will not impact the formation of Contract A.
- However, a bidder can withdraw a materially non-compliant bid, which will result where:
 - there is a failure to address an important or essential requirement of the tender documents; and
 - there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

TENDERING – CONTRACT A (DISCRETION CLAUSE)

- A “discretion clause” permits an owner / general to waive irregularities in a tender form.
- The test for compliance is substantial compliance, not strict compliance.
- A typical discretion clause provides:

If a Tender contains a defect or fails in some way to comply with the requirements of the Tender Documents, which in the sole discretion of the owner / general is not material, the owner / general may waive the defect and accept the Tender.

TENDERING – CONTRACT A (NEGOTIATION CLAUSE)

- A negotiation clause permits an owner to negotiate with bidders after the close of tenders.
- A restrictive negotiation clause may provide:

Changes in Tenders will not be permitted after the Tenders have been opened, unless negotiated with the lowest evaluated Tenderer.

TENDERING – CONTRACT B

- A bid also constitutes an offer to enter into Contract B.
- Contract B may be attached or referred to as a part of the tender documents.
- Note that if the construction contract is attached or referred to in the tender documents, parties will likely have been deemed to have agreed to that form of construction contract.

TENDERING - SUBCONTRACTORS

The same Contract A / Contract B analysis applies as between general contractors and subcontractors and subcontractors and sub-subcontractors.

- Accordingly, the same duties and obligations also apply.
- Importantly:
 - the successful general contractor is obligated to enter into construction contracts with the subcontractors it carries in its bid; and
 - the carried subcontractors are obligated to enter into construction contracts with the successful general contractor.
- What is a “carried” subcontractor bid?

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FORM OF CONTRACT

Standard Form Contracts

- Widely used
- Pros – Inexpensive, industry recognized, transparent
- Cons – sometimes seen as contractor-friendly, can be difficult to customize, lengthy supplemental conditions often used,

Custom/Bespoke Contracts

- Can be tailored to specific needs
- Often easier to understand, less intimidating
- May not be as “complete” as a Standard Form Contract

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STANDARD FORM CONTRACTS – SUPPLEMENTAL CONDITIONS

- Standard form contract terms are usually changed by way of supplemental conditions
- Idea is that parties are generally familiar with standard terms, and can easily see changes proposed by way of supplemental conditions
- All contracting parties should look carefully at supplemental conditions proposed by other party, as these may significantly affect the parties' contractual rights and obligations
- Often onerous clauses added through this method

COMMON MISTAKE #2

Not reading and understanding your contract

- There are often many contract documents, assemble them into an easy to read document, flowchart, checklist
- Make sure everyone who needs to know, knows

COMMON SUPPLEMENTAL TERMS – INCORPORATION OF HEAD CONTRACT

- It is not uncommon for a general contractor on a project to want the terms and conditions found in other documents to be incorporated into its subcontract with a subcontractor
- The incorporation of such documents into a subcontract ensures that the subcontractor's obligations to the general contractor with respect to the subcontracted work will correspond with the general contractor's obligations to the owner

COMMON SUPPLEMENTAL TERMS– INCORPORATION OF HEAD CONTRACT

- A subcontractor should obtain copies of the prime contract documents prior to agreeing to a flow-down clause so that the subcontractor may know what additional obligations are being agreed to
- Not all “flow-down” clauses are created equally
 - a subcontractor must look carefully at the wording of the clause in question, particularly where the form of subcontract has been drafted by the general contractor and is not an industry standard form

COMMON SUPPLEMENTAL TERMS – PAY-WHEN-PAID/PAY-IF-PAID

- Generally, a contractor's obligations to pay its subcontractors do not depend on whether the contractor has been paid.
- It is common for subcontracts to provide that the contractor will pay their subcontractors after the contractor is paid by the owner.
- Canadian Courts have found these types of clauses to be valid and enforceable, if they're sufficiently clear and unambiguous.

COMMON SUPPLEMENTAL TERMS – PAY-WHEN-PAID/PAY-IF-PAID

- **Pay-when-Paid**

Concerns only time for payment, does not affect underlying obligation to pay amounts owing

- **Pay-if-Paid**

Entirely transfers risk of non-payment onto subcontractor by making general contractor's receipt of payment a condition precedent to payment of subcontractor

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COMMON MISTAKE #3

Not documenting from day one

- Meeting minutes, emails, memos (texts, but only if you have to)
- Don't rely on everyone's memory and honesty
- Make sure there's no misunderstanding about what's been discussed and agreed to
- Honest misunderstandings can still cause disputes

CHANGES – BACKGROUND

- Most contracts contain written change requirements.
- The contract should set out the process for agreeing to changes for extra work.
- If a contract contains a written change requirement, a subcontractor / trade contractor may not be entitled to the cost of extra work unless it complies with the written requirements.
- Clauses in fixed price construction contracts (e.g. CCA 1 / CCDC 17) requiring change orders or directives for extras are critical to the integrity of such contracts. The owner / prime contractor has contracted to have the work done for a specified amount of money.

CHANGES – BACKGROUND

- If the subcontractor / trade contractor believes that an item is an extra, the owner / prime contractor should be given an opportunity to consider the situation before the work is done.
- It may be that if the owner / prime contractor agrees that the item is outside the scope of the work under the contract, it may not wish to spend the additional money to have the extra done.
- An owner / prime contractor would have no ability to control its costs if the subcontractor / trade contractor were allowed to do the work without a change order or directive and to make a claim for an extra after the work is completed.

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CHANGES - BACKGROUND

- Contracts which entitle the owner / prime contractor to order changes usually contain a provision to the effect that the subcontractor / trade contractor will not be entitled to payment for extras without a written order to do such extra work signed by the consultant, or some other authorized person.
- CCA 1 – 2021:

1.1.1 The intent of the *Subcontract Documents* is to include the labour, *Products* and services necessary for the performance of the *Subcontract Work* by the *Subcontractor* in accordance with these documents. It is not intended, however, that the *Subcontractor* shall supply products or perform work not consistent with, not covered by, or not properly inferable from the *Subcontract Documents*.

CHANGES – CCA 1 TERMS

- CCA 1 – 2021:

6.1.1 The *Contractor*, without invalidating the *Subcontract*, may make:

- .1 changes in the *Subcontract Work* consisting of additions, deletions or other revisions to the *Subcontract Work* by *Change Order* or *Change Directive*, and
- .2 changes to the *Subcontract Time* for the *Subcontract Work*, or any part thereof, by *Change Order*.

6.1.2 The *Subcontractor* shall not perform a change in the *Subcontract Work* without a *Change Order* or a *Change Directive*.

6.2.1 When a change in the *Subcontract Work* is proposed or required, the *Contractor* shall provide the *Subcontractor* with a written description of the proposed change in the *Subcontract Work*. The *Subcontractor* shall promptly present to the *Contractor*, in a form that can be reasonably evaluated, a method of adjustment or an amount of adjustment for the *Subcontract Price*, if any, and the adjustment in the *Subcontract Time*, if any, for the proposed change in the *Subcontract Work*.

6.2.2 When the *Contractor* and the *Subcontractor* agree to the adjustments in the *Subcontract Price* and *Subcontract Time* or to the method to be used to determine the adjustments, such agreement shall be effective immediately and shall be recorded in a *Change Order*. The value of the work performed as the result of a *Change Order* shall be included in the applications for progress payment.

CHANGES – CCA 1 TERMS

- CCA 1 – 2021:

- 6.3.1 If the *Contractor* requires the *Subcontractor* to proceed with a change in the *Subcontract Work* prior to the *Contractor* and the *Subcontractor* agreeing upon the corresponding adjustment in *Subcontract Price* and *Subcontract Time*, the *Contractor* shall issue a *Change Directive*.
- 6.3.2 A *Change Directive* shall only be used to direct a change in the *Subcontract Work* which is within the general scope of the *Subcontract Documents*.
- 6.3.3 A *Change Directive* shall not be used to direct a change in the *Subcontract Time* only.
- 6.3.4 Upon receipt of a *Change Directive*, the *Subcontractor* shall proceed promptly with the change in the *Subcontract Work*.
- 6.3.5 For the purpose of valuing *Change Directives*, changes in the *Subcontract Work* that are not substitutions or otherwise related to each other shall not be grouped together in the same *Change Directive*.
- 6.3.6 The adjustment in the *Subcontract Price* for a change carried out by way of a *Change Directive* shall be determined on the basis of the cost of the *Subcontractor's* actual expenditures and savings attributable to the *Change Directive*, valued in accordance with paragraph 6.3.7 and as follows:
 - .1 If the change results in a net increase in the *Subcontractor's* cost, the *Subcontract Price* shall be increased by the amount of the net increase in the *Subcontractor's* cost, plus the *Subcontractor's* percentage fee on such net increase.
 - .2 If the change results in a net decrease in the *Subcontractor's* cost, the *Subcontract Price* shall be decreased by the amount of the net decrease in the *Subcontractor's* cost, without adjustment for the *Subcontractor's* percentage fee.
 - .3 The *Subcontractor's* fee shall be as specified in the *Subcontract Documents* or as otherwise agreed by the parties.
- 6.3.7 The cost of performing the work attributable to the *Change Directive* shall be limited to the actual cost of the following in as much as it contributes directly to the implementation of the *Change Directive*:

CHANGES – WHAT IS AN EXTRA

- Whether a particular item of work is, or is not, an extra has to be determined by reference to the contract documents (including the drawings and specifications), the nature of the work performed, and the surrounding circumstances.
- If on the proper construction of the contract documents the item of work is one that the subcontractor / trade contractor is required to perform it cannot be an extra, even if the subcontractor / trade contractor may have failed to realize it would be required to perform such work.

CHANGES – WHAT IS AN EXTRA

- Where additional work is claimed as an extra, it will fall into one of three categories:
 1. The additional work might be work which the subcontractor / trade contractor was already required to perform under the contract (i.e. work which was specifically called for by the contract). In these cases, the subcontractor / trade contractor is obliged to perform it without being entitled to any additional remuneration beyond the contract price notwithstanding the fact that the contractor may have failed to realize at the time of entering into the contract that he would be required to perform such work.

CHANGES – WHAT IS AN EXTRA

- Continued:
 2. The additional work might be work not specifically called for by the contract when properly interpreted, but nevertheless properly within the scope of the work as originally contemplated. Because such work comes within the scope of the contract, the owner / prime contractor may compel its performance. There may be a contractual provision governing the performance of, and payment for, this type of extra work (e.g. Change Directive).
 3. The additional work might be work which is substantially different from, and wholly outside, the scope of the work contemplated by the contract. The main difference between this work and the work in the second category is that whereas the owner / prime contractor can compel performance of extra work in the second category, it cannot do so for work in this category (e.g. Change Order).

CHANGES – WHAT IS AN EXTRA

- In determining liability for the cost of extra work, the first question to be answered is whether the work performed was, in fact, extra work; that is, it did not fall within the scope of work originally contemplated by the contract?
- If so, did the owner / prime contractor give instructions, either express or implied, that the work be done or was the work otherwise authorized by the owner / prime contractor?
- Next, was the owner / prime contractor informed or necessarily aware that the extra work would increase the cost?
- Finally, did the owner / prime contractor waive the provision requiring changes to be made in writing or acquiesce in ignoring these provisions?
- These elements must be proved with respect to each extra claimed.

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CHANGES – PROCESS AND RISKS

- Where extra work has been carried out on a contract without regard to a contractual precondition, the party who performs the extra work will generally be unable to recover the extra expenses it incurs.
- The law is clear that if the contract has a precondition to claim for an extra in the form of a change order, change directive or written notice, the subcontractor / trade contractor must comply with that precondition before being entitled to be paid for the extra work.
- When a contract requires a written change order or change directive before the work proceeds, it is generally not sufficient for the subcontractor / trade contractor to write the owner / prime contractor stating that there will be an extra charge.

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CHANGES – PROCESS AND RISKS

- Contracting parties may in certain circumstances be excused from strict compliance with contractual preconditions.
- The party entitled to require performance of a precondition may waive compliance with the precondition. As a result, that party will not be heard later to rely on that provision as a basis for asserting a breach of contract.
- A subcontractor / trade contractor who voluntarily and without instructions does additional work not required by the contract is not entitled to any extra payment for that work, unless the owner / prime contractor, by standing by with the knowledge of what is being done, can be held to have impliedly authorized such extra work, or unless the extra work was necessitated by a misrepresentation made by the owner / prime contractor.

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CHANGES – AUTHORIZATION

- Apart from the question of obtaining a written order, it is important for a subcontractor / trade contractor to make sure that the person ordering the extra work is properly authorized to do so on behalf of the owner / prime contractor.
- A subcontractor / trade contractor is entitled to be paid additional remuneration only for such work as has been authorized by the owner / prime contractor or its duly authorized agent.
- In the absence of such authority the owner / prime contractor will not be bound to pay for the extra work.

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CHANGES – WATCH OUT FOR

- Watch out for clauses that allow an owner / prime contractor to direct changes and then requires the subcontractor / trade contractor to proceed with the change and provide written notice within a specified time of a claim for a change in the contract price, failing which the subcontractor / trade contractor waives any claim it might have for extra costs.
- Also watch out for language in change order or change directive that attempts to release owner / prime contractor from all claims or curtail other rights of subcontractor / trade contractor.

CHANGES – WATCH OUT FOR

- Here is an example:

“The amount set out in this change order represents all amounts due or to become due to contractor for changes referred to herein. Contractor further releases all other claims, if any, for any additional compensation under this contract, including for any delays or disruption of contractor’s schedule as may have arisen prior to the date of this contract modification. Unless otherwise expressly provided herein, the completion date and all other terms and conditions of the contract remain unchanged.”

CHANGES

- Apart from the question of obtaining a written order, it is important for a contractor to make sure that the person ordering the extra work is properly authorized to do so on behalf of the owner. In the absence of such authority the owner will not be bound to pay for the extra work.
- The contract often specifies who is authorized to direct changes

COMMON MISTAKE #4

Not bothering with change orders

- “Everyone is getting along”, “We’ll sort it out later” or “We don’t have time for that”
- Much easier and more productive to “sort it out” before there’s a dispute

COMMON MISTAKE #5

Proceeding without a project schedule

- Most contracts require that a project schedule be produced and circulated
- Without a schedule, how do you enforce project timelines and critical path milestones?
- Who's responsible for project delay if there's no schedule?

DELAY

- The Supreme Court of Canada has held that:

Where a contract provides a time in which the contract work is to be completed, the contractor is entitled to the whole of that time for doing the work, and the owner is not entitled to deprive the contractor of such time either by delaying commencement of the work or causing interferences or delays during its progress.

- The same would apply in the prime contractor and subcontractor scenario.

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DELAY – THE LAW

- A “classic” delay claim is time based.
 - **Subcontractor / trade contractor claims usually include:**
 - Additional equipment rental costs
 - Additional field office overhead
 - Additional supervision costs
 - Extended home office costs
 - **Owner / prime contractor claims usually include:**
 - Lost revenue from late opening or sales (owner)
 - Extended overheads and employee costs
 - Extended home office costs

DELAY – CONTRACT PROVISIONS

- The contract sets out the ‘law’ of the parties, including with respect to delay.
- Accordingly, it is important to read and understand the contract prior to execution to ensure that, among other things, the requirements for making a delay claim and what is recoverable are known and understood.
- Understanding the notice provision of the contract is of particular importance as the failure to give proper and timely notice may bar a legitimate delay claim.

DELAY – CONTRACT PROVISIONS

- Courts have held that clauses requiring written notice are in effect pre-conditions the right of recovery.
- Courts have found that a lack of written notice in accordance with the contract takes away the counterparty's right to consider its options in a timely manner, which is the purpose of giving the notice.
- Without giving the counterparty this benefit, the subcontractor / trade contractor fails to fulfil the condition precedent and may be barred from recovery depending on prejudice.

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DELAY – CONTRACT PROVISIONS

- The purpose of giving notice is to alert the counterparty to the issue so as to allow that party to make a reasoned decision.
- The courts have held that:
 1. Whether or not a counterparty has suffered any prejudice is determined in light of the purpose for requiring notice.
 2. In determining whether the purpose of providing notice has been met, the form of notice is not the governing factor; rather, the issue is whether the notice contains sufficient information to satisfy the purpose for which notice is required.

DELAY – CONTRACT PROVISIONS

- However, reliance on a course of dealings between the parties constituting “substantial” compliance with the notice provision is risky.
- It is better to provide written notice that complies with the contractual requirements in terms of timing and substance in order to:
 1. Allow the counterparty to mitigate; and
 2. Avoid a notice defence.

DELAY – CONTRACT PROVISIONS

- CCA 1 – 2021:

6.5.1 If the *Subcontractor* is delayed in the performance of the *Subcontract Work* by the *Owner*, the *Consultant*, the *Contractor*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Subcontract Documents*, then the *Subcontract Time* shall be extended for such reasonable time as the *Contractor* and the *Subcontractor* shall agree that the *Subcontract Work* was delayed. The *Subcontractor* shall be reimbursed by the *Contractor* for reasonable costs incurred by the *Subcontractor* as the result of such delay.

6.5.3 If the *Subcontractor* is delayed in the performance of the *Subcontract Work* by:

- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Subcontractor* is a member or to which the *Subcontractor* is otherwise bound),
- .2 fire, unusual delay by common carriers or unavoidable casualties,
- .3 abnormally adverse weather conditions, or
- .4 any cause beyond the *Subcontractor's* control other than one resulting from a default or breach of *Subcontract* by the *Subcontractor*,

then the *Subcontract Time* shall be extended for such reasonable time as the *Contractor* and the *Subcontractor* shall agree that the *Subcontract Work* was delayed. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Subcontractor* agrees to a shorter extension. The *Subcontractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*, the *Consultant*, the *Contractor*, or anyone employed or engaged by them directly or indirectly.

DELAY – CONTRACT PROVISIONS

- CCA 1 – 2021:

6.5.4 No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Contractor* not later than 7 *Working Days* after the commencement of the delay. In the case of a continuing cause of delay only one *Notice in Writing* shall be necessary.

ARTICLE 7 RECEIPT OF AND ADDRESSES FOR NOTICES IN WRITING

7.1 *Notices in Writing* will be addressed to the recipient at the address set out below.

7.2 The delivery of a *Notice in Writing* will be by hand, by courier, by prepaid first class mail, or by other form of electronic communication during the transmission of which no indication of failure of receipt is communicated to the sender.

7.3 A *Notice in Writing* delivered by one party in accordance with this *Subcontract* will be deemed to have been received by the other party on the date of delivery if delivered by hand or courier, or if sent by mail it will be deemed to have been received five calendar days after the date on which it was mailed, provided that if either such day is not a *Working Day*, then the *Notice in Writing* will be deemed to have been received on the *Working Day* next following such day.

7.4 A *Notice in Writing* sent by any form of electronic communication will be deemed to have been received on the date of its transmission provided that if such day is not a *Working Day* or if it is received after the end of normal business hours on the date of its transmission at the place of receipt, then it will be deemed to have been received at the opening of business at the place of receipt on the first *Working Day* next following the transmission thereof.

DELAY – CONTRACT PROVISIONS

- CCA 1 – 2021:

- 6.6.1 If the *Subcontractor* intends to make a claim for an increase to the *Subcontract Price*, or if the *Contractor* intends to make a claim against the *Subcontractor* for a credit to the *Subcontract Price*, the party that intends to make the claim shall give timely *Notice in Writing* of intent to claim to the other party.
- 6.6.2 Upon commencement of the event or series of events giving rise to a claim, the party intending to make the claim shall:
 - .1 take all reasonable measures to mitigate any loss or expense which may be incurred as a result of such event or series of events, and
 - .2 keep such records as may be necessary to support the claim.
- 6.6.3 The party making the claim shall submit within a reasonable time to the other party a detailed account of the amount claimed and the grounds upon which the claim is based.
- 6.6.4 Where the event or series of events giving rise to the claim has a continuing effect, the detailed account submitted under paragraph 6.6.3 shall be considered to be an interim account and the party making the claim shall, at such intervals as the other party may reasonably require, submit further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. The party making the claim shall submit a final account after the end of the effects resulting from the event or series of events.

DELAY – CONTRACT PROVISIONS

- CCA 1 – 2021:

Notice in Writing

A Notice in Writing, where identified in the *Subcontract Documents*, is a written communication between the parties that is transmitted in accordance with the provisions of Article 7 of the Subcontract Agreement – RECEIPT OF AND ADDRESSES FOR NOTICES IN WRITING.

Working Day

Working Day means a day other than a Saturday, Sunday, statutory holiday, or statutory vacation day that is observed by the construction industry in the area of the *Place of the Work*.

- Most standard form construction contracts, expressly sets out the process for making a delay claim and what can be recovered.

DELAY – CONTRACT PROVISIONS

- Supplementary Conditions are departures from the standard general conditions in CCA / CCDC boilerplate. Look out for:
 1. Right to an extension but limited/no rights to recover costs
 2. Strict notice requirements
 3. Extremely short notice timeline
 4. Punishing requirements to establish entitlement
 5. Limitations / exclusions of liability (e.g. no loss of productivity)
 6. Waivers of claims, including delay claims
- Also watch out for change orders and payment waivers that contain claim releases.

DELAY – COMMON CAUSES

1. Site access
2. Incomplete Design
3. Changes
4. Poor construction management
5. Labour and material shortages
6. Unrealistic schedules
7. Weather
8. Lack or delay in making decisions / approvals
9. Inspections and permits

DELAY – RELEVANT DOCUMENTS

- Proper record keeping is key to a delay claim, both in terms of entitlement and quantum.
 - Daily, weekly or monthly reports
 - Site diaries
 - Photographs and video recordings
 - Meeting minutes
 - Schedules
 - Drawings
 - Change orders
 - Project correspondence files (Letters, Emails, Texts)
 - Inspection and other reports
 - Cost accounting
 - Equipment records
 - The estimate/bid file

DELAY – RELEVANT DOCUMENTS

- Sometimes a picture is worth 1,000 words:



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DELAY – EXPERTS

- The use of delay consultants in delay claims is a difficult issue.
- They can be very expensive and some are better than others.
- They are expensive because most delay consultants believe they need to review all the project correspondence and project records in order to express an opinion on delay claims.
- Consideration of when to retain an expert is critical – generally the earlier the better.
- In order to properly instruct an expert, proper record keeping is essential.

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COMMON MISTAKE #6

Not giving notice of claims

- Your contract will likely have a term requiring notice of any claims for:
- Extensions of time
- Changes to the price
- Are you waiving by waiting?

DEFAULT AND TERMINATION

- Breach of contract by one party does not necessarily mean the other party can terminate the contract
 - Usual remedy for breach of contract is damages (monetary compensation)
 - Only certain breaches will provide a right to terminate and have no further obligations

DEFAULT AND TERMINATION

- Two situations in which construction contract may be terminated
 - Fundamental Breach
 - Common law right where breach *goes to root of contract*
 - Innocent party must provide other party with clear and unequivocal notice of acceptance of breach
 - Forfeiture clause in contract
 - Contract may explicitly specify situations (which may or may not amount to fundamental breach) in which contract may be terminated

DEFAULT AND TERMINATION

- Common grounds for termination of contractors *for cause* in standard form contracts include:
 - Contractor bankruptcy
 - Poor work
 - Delay
 - Failure to pay subs and suppliers
- A contract may also provide for termination *for convenience* – contract may be terminated at any time by one of the parties without cause

DEFAULT AND TERMINATION

- Forfeiture clause
 - Contractual right to terminate upon particular breach
 - Contractual steps for termination must be strictly followed
 - If steps not followed, termination will be found to be wrongful
 - Standard form CCA and CCDC contracts require notice in writing of default prior to termination, followed by period in which breaching party has a chance to cure its default

- CCA 1 – 2021:

SCC 7.1 CONTRACTOR'S RIGHT TO PERFORM THE SUBCONTRACT WORK, TERMINATE THE SUBCONTRACTOR'S RIGHT TO CONTINUE WITH THE SUBCONTRACT WORK OR TERMINATE THE SUBCONTRACT

- 7.1.1 If the *Subcontractor* is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the *Subcontractor's* insolvency, or if a receiver is appointed because of the *Subcontractor's* insolvency, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Subcontractor's* right to continue with the *Subcontract Work*, by giving the *Subcontractor* or receiver or trustee in bankruptcy *Notice in Writing* to that effect.
- 7.1.2 If the *Subcontractor* neglects to perform the *Subcontract Work* properly or otherwise fails to comply with the requirements of the *Subcontract* to a substantial degree, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, give the *Subcontractor Notice in Writing*, containing particulars of the default including references to applicable provisions of the *Subcontract*, that the *Subcontractor* is in default of the *Subcontractor's* contractual obligations and instruct the *Subcontractor* to correct the default in the 3 *Working Days* immediately following the receipt of such *Notice in Writing*.
- 7.1.3 If the default cannot be corrected in the 3 *Working Days* specified or in such other time period as may be subsequently agreed in writing by the parties, the *Subcontractor* shall be in compliance with the *Contractor's* instructions if the *Subcontractor*:
- .1 commences the correction of the default within the specified time,
 - .2 provides the *Contractor* with an acceptable schedule for such correction, and
 - .3 corrects the default in accordance with the *Subcontract* terms and with such schedule.
- 7.1.4 If the *Subcontractor* fails to correct the default in the time specified or in such other time period as may be subsequently agreed in writing by the parties, without prejudice to any other right or remedy the *Contractor* may have, the *Contractor* may by giving *Notice in Writing*:
- .1 correct such default and deduct the cost thereof from any payment then or thereafter due the *Subcontractor* for the *Subcontract Work*, or
 - .2 terminate the *Subcontractor's* right to continue with the *Subcontract Work* in whole or in part or terminate the *Subcontract*.
- 7.1.5 If the *Contractor* terminates the *Subcontractor's* right to continue with the *Subcontract Work* as provided in paragraphs 7.1.1 and 7.1.4, the *Contractor* shall be entitled to:
- .1 take possession of the *Subcontract Work* and *Products* at the *Place of the Work*, subject to the rights of third parties, utilize the *Construction Equipment* at the *Place of the Work*, finish the *Subcontract Work* by whatever method the *Contractor* may consider expedient, but without undue delay or expense,
 - .2 withhold further payment to the *Subcontractor* until a final certificate for payment is issued,
 - .3 charge the *Subcontractor* the amount by which the full cost of finishing the *Subcontract Work* and a reasonable allowance to cover the cost of corrections to work performed by the *Subcontractor* that may be required under SCC 12.3 – WARRANTY, exceeds the unpaid balance of the *Subcontract Price*; however, if such cost of finishing the *Subcontract Work* is less than the unpaid balance of the *Subcontract Price*, the *Contractor* shall pay the *Subcontractor* the difference, and
 - .4 on expiry of the warranty period, charge the *Subcontractor* the amount by which the cost of corrections to the *Subcontractor's* work under SCC 12.3 – WARRANTY exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the *Subcontractor* the difference.
- 7.1.6 The *Subcontractor's* obligation under the *Subcontract* as to quality, correction and warranty of the work performed by the *Subcontractor* up to the time of termination shall continue in force after such termination of the *Subcontract*.

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DEFAULT AND TERMINATION

- Common grounds for termination of owners for cause in standard form contracts include:
 - Owner bankruptcy
 - Failure to pay in accordance with terms of agreement
 - Owner's failure to provide evidence of financial arrangements
 - Suspension of work for specified period by order of court or public authority
 - Failure of owner to pay holdback monies into holdback account (contractor may suspend operations)
 - Failure of consultant to issue a payment certificate within the time specified in contract

DEFAULT AND TERMINATION

- Potential consequences for wrongful termination
 - Common law damages for wrongful termination
 - For owner, these may include additional costs to complete work by another party as well as costs resulting from delay in completion
 - For contractor, these may include lost profits that terminated contractor would have made had it been allowed to complete the project

COMMON MISTAKE #7

Suspending without proper justification

- Many contractors assume that if they're not getting paid, they can stop working
- The law does not provide a general right to suspend work for non-payment
- Many contracts include a right to suspend work, on certain conditions such as notice and a cure period
- Suspending work for non-payment can be a breach of contract

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DEFICIENCIES AND WARRANTY

The contract may deal expressly with how deficiencies in the work are to be dealt with:

- If discovered during the course of the work or during the warranty period, the party performing the work may be required to fix the deficiency at its own cost
- The paying party may also be entitled to maintain a holdback of something more than the estimated cost to repair to cover payment for deficiencies not yet fixed at the time of final payment
 - the idea is this will then be paid out once deficiencies are fixed
- This is not purpose of builders lien holdback

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DEFICIENCIES AND WARRANTY

Warranty obligations are different than obligations related to deficiencies

- Contractors responsibility generally is to perform the work without deficiencies
- If deficiencies that are covered by warranty are discovered during the warranty period, the contractor is obligated to fix them at contractor's expense
- If deficiencies are detected after the warranty period has expired, the innocent party may claim the cost of repair from the contractor, subject to limitation periods and waiver

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QUESTIONS?



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