



## Reflections on Efficient Change Order Resolution



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### Introduction

One of the major challenges in the administration of a construction contract is the management of changes that arise over the course of a project and its impact on the business relationship between the parties.

This is reflected in the following excerpt from *How to Get Paid for Construction Changes*, a book published in 1998 that discusses various approaches and techniques for a quick and efficient resolution of change orders, to the satisfaction of all parties:

After working 25 years in construction and engineering, the need for a rational, nonadversarial, and cost-effective approach to resolving construction disputes was obvious. Too often I saw disputes between contractors and owners escalate into litigation, or contractors absorb a major loss to avoid drawn-out disputes and damaged business relations. Too often I found records inadequate for verifying the facts and quantifying costs. And too often I saw contractors and their attorneys being forced to rely on claim experts, who present plausible and reasonable testimony yet cannot adequately substantiate their professional opinions. The financial and emotional cost is excessive and creates an atmosphere of ill will and discord within the industry.<sup>1</sup>

Changes are a source of friction between the parties to a construction contract. Parties may often bring into question each other's good faith, gradually creating a climate of mutual distrust. At times, parties are not able to come to an agreement on the conditions of a change order and ultimately engage in a full-blown dispute resolution process.

Construction contracts often include provisions for such a dispute resolution process, which generally require a detailed and comprehensive review of the issues in dispute, the involvement of third-party stakeholders, and the preparation and submittal of various documents, to name a few. This process inevitably requires an investment of time and money, which, in turn, can result in animosity and a further deterioration of the business relationship between the parties.

The above excerpt highlights the root cause for such a lengthy and arduous change order resolution process. Simply stated, **it is the inadequate factual information and lack of details in support of a change order that make it difficult to assess whether there is indeed a change to the contract and, if so, its impact on the performance of the work, particularly in terms of time and money.**

In this article, we reflect on the level of effort required from the parties, be it owners, contractors, consultants or others, to ensure that decision-makers at every level have all of the information necessary to make informed and reasonable decisions for the efficient and timely resolution of changes.

To that end, when it comes to change management, can we do better? In other words:

- When an event gives rise to a change, can we ensure that proper notices are given, mitigation measures are taken, relevant documents are retained, and finally, that the change request is submitted within a reasonable timeframe and with proper backup as to the basis, the time and the dollar amount claimed?
- To the extent possible, can we ensure that the issuance of change orders remains in the hands of the parties directly involved in the administration of the contract?
- Can we ensure that a rational and non-adversarial approach be put in place to allow for the smooth and efficient administration of the contract?
- Can we ensure that contract administration is carried out in an environment of transparency, mutual trust and collaboration, so as to develop a positive and lasting business relationship?

## CCDC Standard Documents and Recommendations for Change Management

The key players in the construction industry understand the importance for decision-makers to have detailed, accurate and complete information for the resolution of change orders. This is evidenced by a review of documents issued by the Canadian Construction Documents Committee (CCDC), a committee which consists of public and private owners, contractors, architects and engineers from across Canada.

### Clauses Related to Change Management

The CCDC standard documents contain numerous clauses addressing the collection, recording, communication and sharing of information between parties involved in change management during the course of a construction contract.

For example, after first stipulating the owner's right to make changes to the contract, *CCDC2 – 2020 Stipulated Price Contract* includes provisions for the progression of change orders, from initiation to resolution:<sup>2</sup>

GC 6.2 CHANGE ORDER

6.2.1 When a change in the *Work* is proposed or required, the *Consultant* will provide the *Contractor* with a written description of the proposed change in the *Work*. The *Contractor* shall promptly present to the *Consultant*, in a form that can be reasonably evaluated, a method of adjustment for the *Contract Price*, if any, and the adjustment in the *Contract Time*, if any, for the proposed change in the *Work*.<sup>3</sup>

The change order mechanism as described in the excerpt above is summarized in Figure 1.

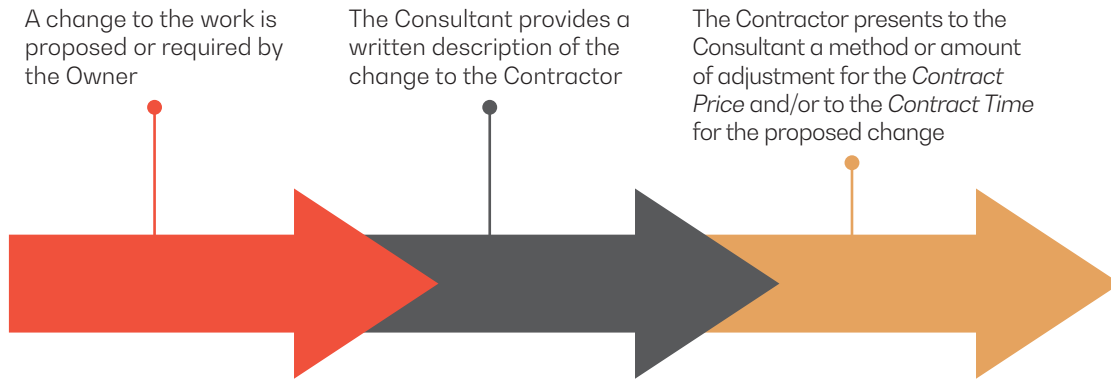


Figure 1 - Summary of conditions for the change order mechanism

With respect to changes in the contract price, *CCDC2 – 2020 Stipulated Price Contract* includes the following provisions:

GC 6.6 CLAIMS FOR A CHANGE IN CONTRACT PRICE

- 6.6.1 If the *Contractor* intends to make a claim for an increase to the *Contract Price*, or if the *Owner* intends to make a claim against the *Contractor* for a credit to the *Contract Price*, the party that intends to make the claim shall give timely *Notice in Writing* of intent to claim to the other party and to the *Consultant*.
- 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 *Consultant* a detailed account of the amount claimed and the grounds upon which the claim is based and the *Consultant* will make a finding upon such claim.<sup>4</sup>

Should the owner require the contractor to execute a change prior to the resolution of a change order, it can issue a change directive, as described in *CCDC2 – 2020 Stipulated Price Contract* as follows:

#### GC 6.3 CHANGE DIRECTIVE

6.3.1 If the *Owner* requires the Contractor to proceed with a change in the Work prior to the Owner and the Contractor agreeing upon the corresponding adjustment in *Contract Price* and *Contract Time*, the Owner, through the *Consultant*, shall issue a Change Directive.

[...]

6.3.6 The adjustment in the *Contract Price* for a change carried out by way of a *Change Directive* shall be determined on the basis of the cost of the *Contractor's* actual expenditures and savings attributable to the *Change Directive*, valued in accordance with paragraph 6.3.7 [...].

[...]

6.3.9 The Contractor shall keep full and detailed accounts and records necessary for the documentation of the cost of performing the Work attributable to the Change Directive and shall provide the Consultant with copies thereof.

6.3.10 For the purpose of valuing *Change Directives*, the Owner shall be afforded reasonable access to all of the Contractor's pertinent documents related to the cost of performing the *Work* attributable to the *Change Directive*.<sup>5</sup>

### Objectives of the CCDC Standard Documents

In order to promote the widespread use of its standard documents, the CCDC has outlined various reasons and benefits for their application. Some examples are as follows:

- “CCDC standard documents are products of a consensus-building process aimed at balancing the interests of all parties involved in construction projects. They reflect recommended industry practices.”<sup>6</sup>
- “The CCDC contract forms:
  - recognize the need to protect and preserve the interests and rights of both parties in a fair and equitable manner;
  - incorporate current standard practices and procedures used in the industry;
  - clearly define the appropriate roles and obligations of the *Owner*, *Contractor* and *Consultant* [...]”<sup>7</sup>
- “[CCDC documents] are developed in a collaborative environment that allows for the serious consideration of the rights, interests and obligations of all parties.
- Balanced contracts reduce the risk of claims and disputes, avoiding needless expense and loss of time to the construction process.”<sup>8</sup>

### Clauses Related to Dispute Resolution

If a dispute cannot be resolved by a decision from the consultant during the course of normal contract administration, the CCDC standard documents define a dispute resolution process in line with the concept of good faith and collaboration between the parties, as described in the following excerpts.

As a first step, the CDCC directs the parties to negotiate in good faith:

8.3.3 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid, and timely disclosure of relevant facts, information and documents to facilitate these negotiations.<sup>9</sup>

Should negotiation fail, the CCDC recommends mediation, then arbitration:<sup>10</sup>

Dispute Resolution sets out, very specifically, the method for the settlement of disputes under CCDC 2 – 2008. It recognizes the need to find alternatives to the costly and slow adversarial litigation process and, therefore, incorporates the Alternate Dispute Resolution (ADR) concepts of negotiation, mediation, and arbitration in a manner that encourages the speedy, inexpensive and voluntary resolution of construction disputes.<sup>11,12</sup>

The CDCC specifically recommends that the parties avoid litigation:

Disputes are common on construction projects. The multiplicity of parties and the complexity of the design and construction process make construction projects susceptible to disagreements between contracting parties. The costs associated with resolving major disputes are burdensome for even the largest of organizations. Delays in resolving outstanding disputes can cause serious cash flow problems for smaller companies. Acrimony fed by the adversarial system can seriously impair or permanently damage future business dealings. When added to the problem of overburdened courts, it is easy to understand the dissatisfaction of construction industry participants with lawyers and judges, and why there is a need for more effective ways to manage conflict on construction projects. Alternative dispute resolution (ADR) methods are intended to encourage speedy, less expensive, and private resolution of disputes.<sup>13</sup>

This dispute resolution process recommended by the CCDC is illustrated in Figure 2.

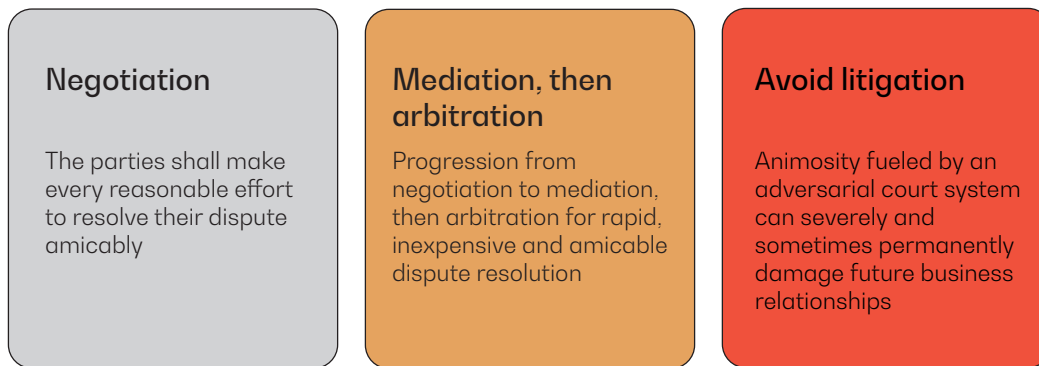


Figure 2 - Summary of CCDC provisions for a dispute resolution process

## How do Contracts in the Canadian Construction Industry Compare to CCDC Standard Documents?

The CCDC states that its standard documents incorporate the best practices currently in use in the Canadian construction industry. As such, we consider the provisions contained therein to be a very good starting point for the development of construction contracts.

The question is whether the practices advocated by the CCDC, or at least their principles, are indeed found in current construction contracts. To answer this question, we have examined the practices adopted by various players in the private and public sectors. We will provide only a brief overview of these sectors, as a detailed presentation is beyond the scope of this article.

### Private Sector

In Canada, the CCDC standard documents are widely used as a basis for the contractual relationship between parties, by both large and small private sector owners, as well as by general contractors and their subcontractors or suppliers.

As such, we consider that the change management practices previously presented in this article generally prevail in private sector construction contracts.

### Public Sector

With respect to the public sector, we examined the general terms and conditions of construction contracts of a few federal and provincial owners.

### Federal Jurisdiction

We first reviewed the “General Conditions and Clauses”<sup>14</sup> that form part of Public Services and Procurement Canada’s (PSPC) construction contracts. Of particular relevance to change management are the clauses “GC6 – Delays and Changes in the Work” and “GC2 – Administration of the Contract.”<sup>15</sup>

These clauses are formulated quite differently from those included in the CCDC documents; however, they rely on essentially the same principles. The administrative procedures are more detailed and rigorous, and are also much more explicit with respect to maintaining cost records and other backup documents:

1. The Contractor shall [...] maintain full records of the Contractor’s estimated and actual cost of the Work together with all tender calls, quotations, contracts, correspondence, invoices, receipts and vouchers relating thereto, and shall make them available on request to audit and inspection by Canada and the Deputy Receiver General for Canada or by persons designated to act on behalf of either or both of them.

[...]

4. The Contractor shall cause all subcontractors at any tier and all other persons directly or indirectly controlled by or affiliated with the Contractor and all persons directly or indirectly having control of the Contractor to comply with the requirements of this clause as if they were the Contractor.<sup>16</sup>

Defence Construction Canada’s<sup>17</sup> contract documents, as well as those of The Jacques Cartier and Champlain Bridges Incorporated,<sup>18</sup> contain similar provisions.

## Provincial Jurisdiction

A review of the “General Conditions” of the construction contracts of provincial public owners shows that they contain similar provisions.

We invite the reader to review the clauses specifically related to document or information management in the context of the administration of changes that are found in their own construction contracts, be it for the private or public sector.

## Are Steps Outlined in Contracts Effectively Being Put into Practice?

The CCDC advocates for parties to record and disclose relevant facts that may facilitate the resolution of a change order. Construction contracts in the Canadian construction industry include similar provisions to those contained in the CCDC standard documents, at times with even more detailed requirements.

Despite these contract provisions, which are intended to promote efficient and non-adversarial change management processes, parties continue to fail in documenting and/or disclosing relevant facts relating to changes, which author Steven S. Pinnell considers to be a major cause of difficulties in the administration of contracts.

This lack of documentation and/or disclosure of relevant facts, in turn, often becomes a source of dispute. These disputes sometimes escalate, occasionally leading to litigation, ultimately resulting in lost time, significant additional costs and damage to business relationships.

## The Concept of Informed Decision-Making

In the context of change management, construction contracts rely on the principles of informed decision-making. To that end, as discussed previously, construction contracts include detailed provisions for the administration of changes. These provisions are included in construction contracts with a view to having the parties disclose relevant facts in order to determine, first and foremost, whether there is indeed a change to the contract, and, if so, its impact on the execution of the work, including delays and additional costs. The disclosure of relevant facts allows decision-makers to effectively and efficiently assess the change and come to a resolution.

Today, there are numerous document management tools to easily compile all of the documents and information needed to adequately assess a change order, as well as to analyze the information in order to fully grasp various aspects of a change order.

These document management tools could be useful in evaluating simple changes, as well as more complex changes that require the input of third-party stakeholders, such as experts, allowing them to have all the information needed to conduct their analyses and form conclusions on schedule delays, productivity impacts, or other technical issues, depending on their particular expertise.

Yet, while these powerful tools are widely being used by the parties during the execution of construction projects to control quality, schedule and costs, they are not being used to their full potential when it comes to change management, as the wealth of information found in these tools is not always effectively shared between the parties.

## Good Faith – A Path to Efficient Change Order Resolution

In that vein, the provisions found in construction contracts appeal to the concept of good faith, which, in principle, should always govern, especially during negotiations: “The parties [...] agree to provide, without prejudice, frank, candid, and timely disclosure of relevant facts, information and documents to facilitate these negotiations.”<sup>19</sup>

The resolution of changes requires making decisions, but not just any decision. It requires informed decisions based on real facts, which are often hidden in the details. This is in keeping with the commitment made to “swear to tell the truth, the whole truth and nothing but the truth,” where the judge seeks to be in a position to render a decision in accordance with the facts and the law. The same applies to all decision-makers.

So, can we do better when it comes to change management? We believe that if the parties approached change management openly and in good faith, they would be more likely to arrive at an equitable resolution without the intervention of a judge or other third party, as suggested in a recent publication by the Quebec Bar Foundation<sup>20</sup> – it just makes good business sense.

- 1 Steven S. Pinnell, *How to Get Paid for Construction Changes: Preparation, Resolution Tools and Techniques*, New York: McGraw Hill, 1998, p. xi.
- 2 Note: Italics shown in the excerpts from the CCDC documents cited are from the original sources. Emphasis added by Revay.
- 3 “Part 6 Changes to the Work,” in *Stipulated Price Contract, CCDC 2 – 2020*, GC 6.2, p. 15.
- 4 *Ibid.*, GC 6.6, p. 18.
- 5 *Ibid.*, GC 6.3, p. 15-17.
- 6 A Guide to the Use of *CCDC 2 – 2008 Stipulated Price Contract; CCDC 20 – 2008*, p. 1.
- 7 *Ibid.*, p. 3.
- 8 *Ibid.*, p. 1.
- 9 “Part 8 Dispute Resolution,” in *Stipulated Price Contract, CCDC 2 – 2020*, GC 8.3, p. 20.
- 10 We refer the reader to the *Rules for Mediation and Arbitration of Construction Industry Disputes; CCDC 40 – 2018*.
- 11 “Part 8 Dispute Resolution,” in *Guide to the Use of CCDC 2 -2008 Stipulated price contract; CCDC 20 – 2008*, p. 24.
- 12 We note that at the time of publication of this article, the *Guide to the Use of CCDC 2 -2020 Stipulated price contract; CCDC 2020* has not been released. As such, we refer to the most current *Guide to the Use of CCDC 2 -2008 Stipulated price contract; CCDC 20 – 2008*.

- 13 *Rules for Mediation and Arbitration of Construction Industry Disputes; CCDC 40 – 2018*, p. 1.
- 14 PSPC, General Conditions and clauses, documents GC1 to GC10; as well as the document entitled “Allowable Costs for Contract Changes under General Conditions (GC) 6.4.1.”
- 15 *Ibid.*
- 16 PSPC, “GC2.8 (2014-06-26) Accounts and Audits,” in “General Condition (GC) 2 – Administration of the Contract – Construction Services”
- 17 DCC, “General Conditions” DCL 32 (R-2012-03), particularly articles GC2.8, GC6 and GC8
- 18 JCCBI, “Section 8 – General Conditions (NV)” V20181214, particularly articles GC5, GC30 and GC46 to GC52
- 19 “Part 8 Dispute Resolution,” in *Stipulated Price Contract, CCDC 2 – 2020*, GC 8.3, § 8.3.3, p. 20.
- 20 Fondation du Barreau du Québec, *Your Conflict, Your Solutions; In Business*, guide, volume 2, 2021.

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