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CONSTRUCTION LAW NEWSLETTER

July 2008

A publication of Miller Thomson LLP's Construction Law Group

Inside

STIPULATED PRICE CONTRACT

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In February 2008, the Canadian Construction Documents Committee issued the new CCDC-2 Stipulated Price Contract, replacing the 1994 edition.[1]

The CCDC-2 is the standard contract when the work is done for a fixed price or lump sum.

This article summarizes some significant changes in the 2008 CCDC-2 that have an impact on engineers in their role as consultants.

Engineers who act as consultants under the CCDC-2 agreement should become familiar with how their role has been amended by the new 2008 edition. They should also ensure that their role is compatible with their obligations under their agreement with their clients.

Key changes that do not directly impact engineers but of which they should be aware in their role as consultants include:

- Progress payments (GC 5.3.1). The owner must now make payment to the contractor within 20 days after the consultant's receipt of the contractor's application for payment, rather than 5 days after the date of the consultant's certificate for payment.

  Delays (GC 6.5.3). "[A]bnormally adverse weather conditions" are now grounds for an extension of contract time.

- Protection of work and property (GC 9.1.2). The contractor must determine, prior to commencing any work, the location of all underground utilities and structures indicated in the contract documents or those that are "reasonably apparent."

- Mould (GC 9.5). The contractor must report any presence of mould at the place of the work and take steps to avoid sickness, injury or damage to people and property. The owner must retain an expert if it does not agree with the contractor regarding the existence, significance or cause of the mould or steps to be taken. The responsible party must indemnify the other and pay for any loss, costs or delay.

- Insurance (GC 11.1). Minimum requirements for insurance coverage are now CCDC 41 - CCDC Insurance Requirements Engineers should note that although the owner and consultant are insured under that coverage, the insurance does not cover negligence. Accordingly, engineers should ensure they have their own coverage for negligence.

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1 *The Canadian Construction Documents Committee (CCDC) is a national joint committee formed in 1974. It includes representatives from the Association of Canadian Engineering Companies (ACEC), Royal Architectural Institute of Canada, Construction Specifications Canada and the Canadian Construction Association.*

Changes Affecting Engineers

Some changes directly affect the engineer's role as a consultant including the ones below.

Administration of the construction contract

Previously, the consultant provided administration of the contract in the manner set out in the contract documents until the final certificate of payment was issued, and, with the owner's agreement, until the correction of any defects was completed. Now, in GC 2.2.1 of the new CCDC-2 contract, there are no restrictions linked to the time that it takes the contractor to perform its obligations under the contract. Also, now in GC 2.2.4, the consultant must inform the owner of the date when the contractor's application for payment were received.

Shop drawings

In the new GC 3.10.9, the consultant must indicate, in writing, the acceptance or rejection of any deviations in the shop drawings. Also, in GC 3.10.10, the contractor is now explicitly responsible for errors or omissions in the shop drawings, even if the consultant accepts a deviation.

Finally, in GC 3.10.12, the consultant is required to review shop drawings with “reasonable promptness so as to cause no delay in the performance of the Work.”

Payment

In GC 5.3.1, the consultant must still issue a certificate for payment to the owner within 10 calendar days after the receipt of an application for payment from the contractor in the amount applied for, or in some other amount as determined by the consultant. However, the consultant must now also provide a copy of that certificate to the contractor.

In GC 5.4.2, the period to review and verify Substantial Performance of the Work and reply to the contractor is now 20 calendar days after the contractor has submitted the application and a list of items to be completed or corrected. Previously, the 1994 CCDC-2 permitted the consultant 10 days to verify the validity of the contractor's application and a further 7 days to notify the contractor whether the work was substantially performed. Engineers should review the 20 day period for against requirements in their builders lien legislation. subsection 7(3) of the *British Columbia Builders Lien Act* allows 10 days to certify.

Previously under GC 5.7.2, upon receipt of an application for final payment, the consultant had 10 days to review the work to verify the validity of the application, and the consultant had an additional 7 days after the review to notify the contractor that the application was valid, or give reasons why it was not. As with GC 5.4.2, the consultant now has 10 calendar days to review the work and advise the contractor in writing.

Changes in the work

In GC 6.5.3 of the new CCDC-2, the contractor may now be entitled to costs where an extension of the contract time is granted for a delay caused by the actions of the consultant or anyone employed by either the consultant or the owner. The new GC 6.6 requires any party intending to make a claim for a change in the contract price to: give timely notice to the consultant; take all measures to mitigate loss or expense; keep all necessary records; and, submit a claim to the consultant within a reasonable time. The consultant must then deliver findings in writing within 30 days from receiving the claim (unless the parties agree otherwise).

Protection of work and property

In the new GC 9.2.6, the consultant is no longer required to provide an initial finding on disputes relating to the steps to deal with toxic or hazardous substances. If the owner and contractor do not agree on the existence or significance of the hazardous substance, or if the substance was brought to the place of the work by the contractor or anyone for whom the contractor is responsible, then the owner is required to retain and pay for an independent qualified expert to make a determination.

In GC 9.3 there is now a requirement for the consultant to investigate the impact of any fossils, articles of antiquity, structures and other remains of scientific or historic interest discovered at the place of the work. If the discovery affects the contractor's time or costs to perform the work, the consultant must, with the owner's approval, issue instructions for a change in the work.

Any artifacts discovered belong to the owner, the contractor must take precautions to prevent their removal or damage.

Indemnification

In the previous GC 12, the contractor indemnified both the owner and consultant. Now, the 2008 CCDC-2 requires only that the contractor and the owner indemnify each other. The consultant is no longer indemnified.

Engineers should determine whether they can address this risk by supplementary conditions or their own insurance or indemnity provisions in the Client-Engineer agreement (or a combination).

The limitation of liability in CCDC-2 2008 on the reciprocal indemnities of the owner and contractor is the greater of the contract price or $2 million, but in no event is to exceed $20 million. The indemnity for third party claims is unlimited for direct loss for personal injury or damage to property.

BLAME IT ON THE QUEEN

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Design Services Limited v. Her Majesty The Queen

The “big bang” in the law of bidding in Canada began with a 1981 Supreme Court of Canada decision arising out of a dispute involving Her Majesty the Queen - *Ron Engineering*. Since then there have been five SCC cases involving the law of bidding, all of which have one thing in common - the Queen, or some creation of the Crown-is a party to each one. So, one could say that Her Majesty started all of this. And, while she parties on, the law of bidding, which applies to Crown and commoner alike, continues to evolve.

In fairness, *Design Services* is not just another bidding case. Sure, it started life as one, but three levels of courts agreed that "Contract A" (a.k.a. the "bidding contract"), first established in *Ron Engineering*, was not the centrepiece.

As a refresher, Contract A creates a contract between a bid issuer and each of the bidders which submits a compliant bid. Contract A requires each bidder to keep its bid open for acceptance by the owner for the period prescribed in the bid documents. The owner is obliged to follow the bid evaluation and award process the bid documents describe. A failure of either bidder or owner to perform is an actionable breach of contract.

In Design Services, the courts wrestled with the nexus between subcontractors and owners where the owner has breached Contract A with the prime bidder. The proposition was that where Her Majesty, through the issuance of a request for proposals ("RFP"), convened a bid process creating the bidding contract with a prime bidder, a duty of care arose, owed by Her Majesty to the subcontractors carried by the prime bidder. The argument was that if Her Majesty breached Contract A with the prime bidder (meaning, failed to follow Her own bid process), she also failed to discharge Her duty of care to the subcontractors - which is a tort.

The Project and the Process

Her Majesty needed a new naval installation in St John's , Newfoundland. Her representatives decided to issue an RFP soliciting design/build proposals from pre-qualified design/build teams. Her Majesty was not particular on how the bidders organized themselves - joint venture, prime bidder - it didn't matter. But, Her Majesty was quite fussy that members of the team - including design consultants and subtrades - be up to the job.

Olympic Construction Limited ("Olympic") decided to respond to the RFP. It recruited Design Services Limited, G.J. Cahill & Company Limited, Pyramid Construction Limited, PHB Group Inc., Canadian Process Services Inc. and Metal Work Incorporated Inc. (the "Team") and all agreed to pursue this opportunity.

Olympic and the Team decided that Olympic would be the prime bidder - and submit the response to the RFP. The Team would be in the nature of subcontractors, providing services to Olympic during bid preparation and if successful Olympic and the Team might have bid as "the Olympic Joint Venture". Or, they might have incorporated a new company with Olympic and the Team owning its shares ("NewCo"). The decision that Olympic would be the prime bidder - with the Team as subcontractors - will turn out to be pivotal in the outcome of the case.

Once Olympic and the Team joined forces, the first step in the pursuit was a pre-qualification process. Only pre-qualified candidates would be permitted to respond to the RFP. Being particular, Her Majesty insisted that the pre-qualification process cover all significant members of any proponent team. In this case, Her Majesty pre-qualified Olympic and the Team.

Olympic was the low compliant proponent when the RFP closed. But Her Majesty's representatives awarded the contract to a non-compliant bidder. Olympic and the Team sued.

The Claims and the Lower Courts

Olympic sued for breach of the bid contract. So did the Team. And the Team claimed concurrently that Her Majesty had a duty to the Team - outside Contract A - to run the RFP according to its terms.

Before trial, Her Majesty settled with Olympic. On their own, the Team continued the double-barrelled claim for breach of the bid contract and for breach of a duty of care in tort.

To get to the Supreme Court of Canada, the Team's claim was adjudicated by the Federal Court, Trial Division and then the Federal Court of Appeal. All courts spent scant time dismissing the Team's claim for breach of the bid contract: the Team suffered from the lack of a direct connection - known as privity - with Her Majesty. The decision to pursue the RFP as a prime proponent (Olympic) with a set of subcontractors (the Team) was fatal to the Team's claim for breach of the bid contract. No privity: no bid contract.

The Team's claim in tort was more perplexing. The claim was for recovery of its bid costs or for recovery of the anticipated profit the Team would have enjoyed had Olympic been awarded the project. The Federal Court, Trial Division, held that Her Majesty owed the Team a duty of care, given the circumstances of the RFP, and concluded that Her Majesty breached Her duty of care and was liable to the Team in tort. Horrified, Her Majesty appealed.

Now, tort law is not particularly complicated - as long as there is personal injury or property damage causing the loss suffered. But, life gets much more interesting where the loss claimed is not a result of matters physical. In this case, the Team was claiming for something that might have been, or for funds they may not have spent had they known what Her Majesty was going to do. The Federal Court of Appeal was quick to conclude this was a claim for "pure economic loss" or "PEL", and reversed the result at trial.

The Supreme Court of Canada

The Supreme Court of Canada, held the Team will have no recovery. The journey the Court took to that conclusion followed an interesting and perhaps debatable roadmap.

Mr. Justice Rothstein defined the Court's task as follows:

> *"The issue in this appeal is whether an owner in a tendering process owes a duty of care in tort to subcontractors."*

In deciding that the answer to the question is "no", the Court first examined the five categories of recovery established for PEL to determine if the Team's claim fit into one of them.

The Court dismissed four of the five categories, including the tort of negligent misrepresentation, and concentrated its analytic attention on the category known as "Relational Economic Loss".

In the several cases cited by the Court, a PEL claim for "Relational Economic Loss" was always associated with physical loss or damage. For example, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co*., [1992] 1 SCR 1011, recovery followed a steamship striking a railway bridge

and rendering it unusable. The owners of the vessel were ordered to pay Canadian National the revenue it lost because it couldn't use the bridge. The nexus was the physical damage rendering the bridge unusable for those whose custom it was to cross it. So, having dismissed the other four categories that found recovery for PEL, the Court dismissed the Team's claim for lack of physical damage and sought other bridges to cross.

(i) A New Duty of Care

For guidance on when a new duty should be recognized, the Court reviewed a test first described in *Anns v. Merton London Borough Council*, [1978] AC 728 (H.L.) ("*Anns*").

The *Anns* test has two parts to it. Test one is whether the relationship between the plaintiff and defendant is close enough - proximate - to give rise to a duty of care. Apparently, this first test also includes a policy element around whether the plaintiff could have organized its affairs so that, notwithstanding the proximity of the relationship, it could have protected itself from the loss it suffered. If test one concludes that the relationship does give rise to a duty of care, the court applies the second test which is whether there are broad policy considerations which militate against recognizing a duty of care under the particular circumstances.

In this case, the Court then examined the relationship between Her Majesty and the Team. The Court observed that of the 150 points awarded in the pre-qualification stage, 70 were related to the Team. And, it was a requirement that no key personnel of a Team member could be substituted without the express, prior, written approval of Her Majesty. To top that, the Team had to participate in a partnering session with Her Majesty. This was to be a hand in glove relationship. After examining the circumstances, the Court acknowledged that these were "the type of factors that one would expect to find in a proximate relationship".

The Court then asked if the Team had an opportunity to protect itself by contract from the loss it suffered. The Court concluded that the Team had fumbled the ball by failing to form a joint venture with Olympic which would have included the Team as parties to Contract A. Olympic used Contract A to secure a settlement against Her Majesty. The Court viewed the Team's failure as fatal, stating:

> *"The fact that the appellants had the opportunity to form a joint venture, and thereby be parties to the "Contract A" made between PW [Her Majesty] and Olympic, is an overriding policy reason that tort liability should not be recognized in these circumstances. In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A" to conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract."*

Keep in mind that Her Majesty was not fussy about the type of corporate structure that a proponent might adopt. It seems a little harsh to fail the first part of the Anns test for doing something that is permissible under the process and is typical for bid submission.

(ii) Policy Matters: The Second Test in Anns

Even though the Team failed the first test in Anns, the Court addressed the second part of the Anns test, revealing its policy perspective.

In Her arguments, Her Majesty had painted a picture of broad classes of litigants claiming against Her for indeterminate amounts of money - a pandemic of litigation.

After examining the Team, the claims being advanced and the possibility that the Team members might have other parties contributing to their efforts, the Court determined that there was a significant policy negative and expressed it as follows:

> *"Given that this type of tendering process is not unique and that there are many types of arrangements that can arise between owners and contractors and in terms between contractors and subcontractors, a recognition of an owner's duty of care toward subcontractors could lead to a multiplicity of lawsuits in tort, an undesirable result. The construction contract context is one in which the indeterminacy of the class of plaintiffs can readily be seen."*

Who are the potential litigants? And, what damages could they recover?

Ron Engineering - which created "Contract A" in the first place - has spawned an enormous amount of bid litigation since it was decided twenty-seven odd years ago. It may be that the Court - aware of the precedent Ron Engineering created - is very leery about creating another. Fair enough - sort of.

What may be missing in the analysis is the measure of damages that such litigants can hope to recover and the impact that measure will have on the decision to sue or not. The rule of recovery - as between contract and tort - may be blurred in this case. Because, the Team's claim appears to cover both the cost of preparing the bid and the expected profit that the Team might have earned had it had the opportunity to carry out the project.

The cost to the Team of preparing its part of the bid is not an astronomical amount of money. And, that fact alone tends to dampen the enthusiasm for starting a lawsuit.

With respect to the parties that may have helped the Team to prepare its proposal, two factors mitigate against the concern of boundless litigation and indeterminate liability. First, those parties - who were not involved in the pre-qualification process - will have a much tougher time establishing proximity with Her Majesty. Second, their input to the proposal is likely to be a fraction of what the Team expended, thus providing a disincentive for trying a long shot case with little reward if successful.

No doubt, Her Majesty, in the Right of the Provinces and of Canada, was uneasy about this case. Her representatives are sleeping better since the Court rendered its decision. But, there is this gnawing feeling that Her Majesty dodged some responsibility.

The party continues.

WHAT'S HAPPENING AROUND MILLER THOMSON

Bidding in Canada is a law unto itself - a peculiarity of our common law jurisprudence. And, the bidding universe continues to expand. The Supreme Court of Canada recently ruled on *Design Services Limited v. Her Majesty the Queen* and will rule soon on *Tercon Contractors Ltd. v. Her Majesty The Queen, in the Right of the Province of British Columbia* a bidding case testing the effectiveness of an exclusion of liability clause in the bid documents. With all this excitement in the air, we thought it was time for Miller Thomson LLP to convene a firm conference focused on the bidding issues that seem to impact our clients most often. These sessions will be convened - in Toronto, Calgary and Vancouver - in late October and in November. You will receive an electronic invitation. Or, please contact one of our construction lawyers to obtain the particulars - and, an invitation.

Newsletters such as this one are not the only way we attempt to communicate with our clients and with the industry. Members of the Miller Thomson LLP construction group are frequent speakers at seminars around the country.

Charlie Bois and *Owen Pawson* will be presenting in two upcoming seminars staged by the Lorman organization. On August 28th, 2008, the topic will be *What To Do When Construction Projects Go Bad* (Sandman Hotel, Vancouver). The second seminar will be held on September 23rd, 2008 where the theme will be Construction Documents: *Not the Same Old Thing!* (Best Western, Chateau Granville Hotel, Vancouver).

Bill Kenny of our Edmonton office is organizing a fall seminar in Fort McMurry Alberta, dealing with contract forms, claims and other issues particular to the oil sands related businesses. Earlier this year, Bill's office in Edmonton staged two seminars on CCDC2-2008.

Dra□en Bulat of our Toronto office will be speaking at the Canadian Institute Superconference November 24th and 25th, 2008. His topic will be bidding and tendering. *Bill Pigott* has two seminars coming up in the fall. The first involves contract structuring for the Roof Consultants Institute of Ontario (October 24th). And, Bill is presenting at the same Superconference as *Dražen Bulat* but on the topic of delay claims on construction projects.

Louis-Michel Tremblay of our Montreal office is speaking at the Superconference sur la construction on November 25th, 2008 (Hotel Hyatt Regency) Louis-Michel's topic is "*Les Meilleures Pratiques pour Naviguer le Processus d'Appel d'Offres avec Facilité*". Earlier in the month (November 13th and 14th) *Louis-Michel* will be speaking at the "4 e èdition Rèclamations en Construction" on topics which include legal hypothec and other forms of construction claims in Quebec.

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