

DISPUTE RESOLUTION UNDER CCDC - 2008

CCDC-2008 has changed how disputes under a CCDC construction contract are to be resolved. Anyone using CCDC construction contracts should be aware of these changes.

Part 8 of CCDC 2-1994 created a three-level procedure for dispute resolution, namely, negotiation (with the assistance of the project's Consultant), mediation, and arbitration. Also, the "Rules for Mediation" and the "Rules for Arbitration" of CCDC 2 Construction Disputes were incorporated by reference into the revised form of contract. CCDC-2008 maintains the general structure for resolving disputes but changes the roles of the different players involved in the dispute.

(i) Authority and Role of the Consultant

During the construction phase of a project, the Consultant has authority to act on behalf of the Owner and generally has the responsibility to provide contract administration services. Furthermore, the Consultant has traditionally been the arbiter of first instance with respect to disagreements or disputes between the Owner and the Contractor.

Differences between the parties as to the interpretation, application or administration of the contract, are to be settled in accordance with Part 8 of the General Conditions of the contract. If a particular dispute is not resolved promptly, the Consultant will usually give such instructions to the parties so as to ensure the proper and continuous performance of the work and to prevent delays pending settlement of the dispute. Unless a party disputes the Consultant's decision, after the passage of 15 working days from the date of receipt of the Consultant's findings the parties are deemed to have accepted the finding of the Consultant, and to have expressly waived and released the other party from any claims in respect of the particular matter in dispute.

Despite the fact that the Consultant is generally retained by, and has the authority to act on behalf of, the Owner, his adjudicative or arbitral role is intended to be exercised in an unbiased, evenhanded, fair and professionally competent manner. This is reflected in GC 2.2.9, which provides that *"interpretations and findings of the Consultant shall be consistent with the intent of the Contract Documents. In making such interpretations and findings the Consultant will not show partiality to either the Owner or the Contractor"*



(ii) Negotiation

If one of the parties is unsatisfied with any particular finding made by the project Consultant as arbiter of first instance, and does not want to be deemed to have accepted that finding or to have waived or released the opposing party, the unsatisfied party, within 15 working days of the receipt of the Consultant's findings, must send a Notice in Writing of the Dispute to the opposing party and the Consultant. That Notice must contain the particulars of the specific matter in dispute, as well as the relevant provisions of the contract. The sending of a Notice serves to invoke the next formal step in the dispute resolution process, namely negotiation.

Within 10 working days of receiving the Notice in Writing of the Dispute, the opposing party must send a Notice in Writing of Reply to the dispute. The parties must then sit down and try to resolve the dispute themselves before moving on to the next more adversarial step in the process.

(iii) Mediation and the Project Mediator

The parties to the contract are required to appoint a "Project Mediator" either within 20 working days of the date of the award of the contract, or within 10 working days after either party makes a written request by Notice in Writing that a Project Mediator be appointed. The Project Mediator would stand by, without involvement, unless and until such time as one of the parties is unsatisfied with any finding made by the project Consultant.

If the dispute is still unresolved after the 10-working day process of negotiation has been exhausted, the parties must ask the Project Mediator to step in to assist them by way of a mediated negotiation. CCDC 2-2008 directs that the mediated negotiation shall be conducted in accordance with the "Rules for Mediation of Construction Disputes" as provided in CCDC 40-2005 in effect at the time of the bid. Any such mediation is non-binding until a settlement of the dispute is achieved and is conducted on a "without prejudice" basis. A decision is not imposed upon either party, as the Mediator's role is to help the parties to communicate with each other while keeping all disclosures, as well as any resultant settlement, confidential.

(iv) Arbitration

If the dispute has not been resolved within 10 working days after the Project Mediator's assistance was requested (or within such further time on which the parties may agree), the Project Mediator shall terminate the mediated negotiations by giving Notice in Writing to the Owner, the Contractor and the Consultant.



Subsequently, but within 10 working days after the termination of the mediated negotiations, either party may give Notice in Writing to the opposing party and the Consultant, referring the particular dispute to Arbitration under the "Rules for Arbitration of Construction Disputes" as provided in CCDC 40-2005 in effect at the time of the bid closing.

On the other hand, if a Notice in Writing is *not* given within 10 working days after the termination of the mediated negotiations, the specific unresolved dispute may be referred to the courts or alternatively to any other form of dispute resolution which the parties may have agreed to use.

Many issues come into play in determining whether or not to refer a dispute to Arbitration. For example, bilateral arbitration may not be the best strategy or solution where there are multiple parties who may have contractual responsibilities, obligations and potential liability but who may not be compelled by contract or inclination to participate in, or be bound by, a final and binding arbitration award.

It is widely accepted however that Arbitration is seen as having advantages over conventional litigation by permitting the parties to select a neutral person with particular expertise in the area of the dispute, by being a more informal (and possibly less expensive) process, which is governed by relatively straightforward rules, by bringing the dispute before the arbitrator in a timely way at a time and place which suits the parties, thus avoiding the delays often associated with litigation and by facilitating a more private process and by limiting or eliminating the likelihood of appeals.

(v) Litigation

As can be seen, taking disputes to Court is viewed as a last resort under CCDC 2-2008. Some parties, although apprehensive about unfamiliar alternative dispute resolution processes, are nevertheless mindful of the fact that the time, expense and risks of litigation are a significant burden to be avoided.

The new dispute resolution provisions of CCDC-2008 provide an effective and usually less expensive process to resolve construction disputes. It gives parties to a dispute many opportunities to resolve their differences short of an expensive and time consuming Arbitration or Trial. These provisions should be used whenever possible.

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