

# Contractor Information Session

Southern Interior – May 1, 2013

## BC Hydro

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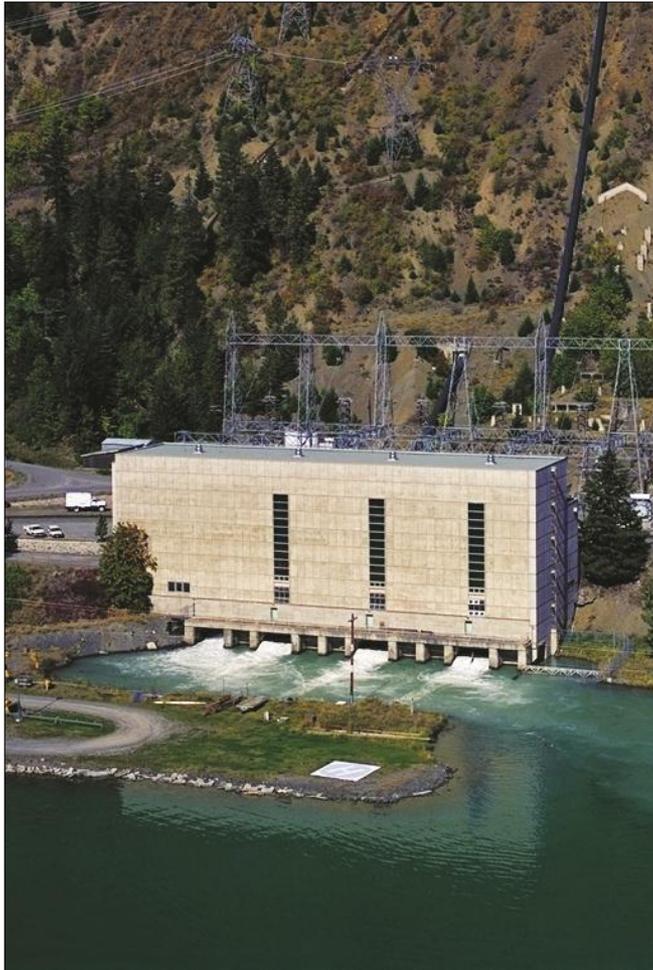


FOR GENERATIONS



Jenkins Marzban Logan LLP

# Background



- BC Hydro has been working closely with industry to implement initiatives in response to industry feedback
- A key initiative has been the review and revision of the construction contract
- A working group with industry was formed, and the contract reviewed and revised
- The focus is to make it easier for contractors to work with the construction contract and bid on opportunities
- The new construction contracts were implemented in January 2013
- BC Hydro is in the midst of an exciting time for construction, with many new projects planned and many currently in flight

# Key Messages



## Contractor relationships

- This is a shift in our contractual relationship and how we work with our contractors
- We are making these changes to make it better for contractors to engage with us, and ultimately work together with our teams to deliver great work

## Working effectively together

- You are crucial to making this change happen and to our success

## What this means for Project Delivery

- Effective contracts drive effective project delivery

# BC Hydro Contract Changes – 2013

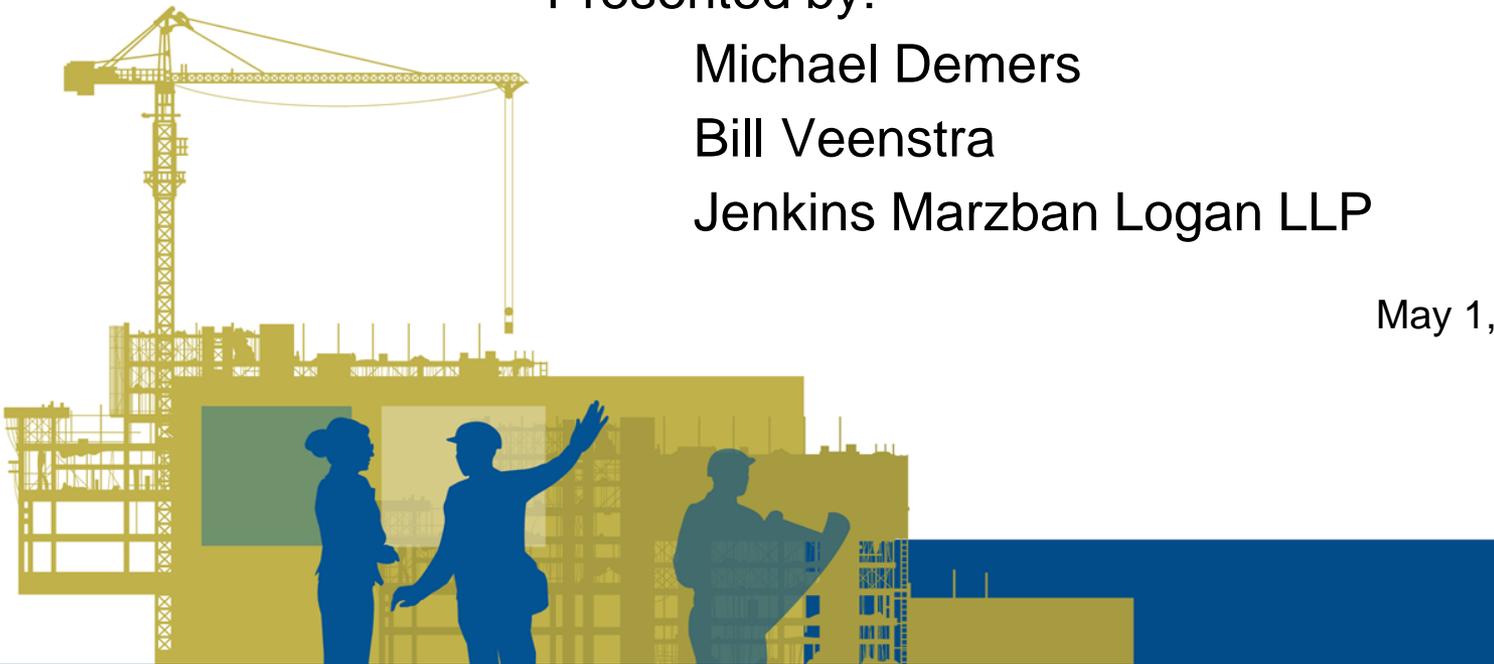
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# Key Issues – Old Contract





## Equitable Adjustment

- Either party could apply/request an “equitable adjustment”
- No entitlement to time or cost unless the Hydro Rep agrees to the EA
- Defined as “a fair and reasonable adjustment” of contract price or time “taking into account the provisions of the Contract and all of the circumstances surrounding the matter in question”
- Up to Hydro Representative to determine what was fair and reasonable
- If decision disputed, could arbitrate but not until end of contract
- Hydro could withhold payment until arbitration completed – even for undisputed amounts



## Hydro Representative

- Undertook functions normally assigned to independent consultant under CCDC/MMCD/private models
- No explicit duty to be fair or impartial
- Also under obligation to BC Hydro to deliver project on budget and on schedule
- Conflict of interest / Apprehension of bias



# Holdbacks

- Contract formerly provided for 15% holdback on each progress draw; in 2009, that was reduced to 10%
- BC Hydro typically not subject to Builders' Lien Act so no need to maintain holdback to protect against subcontractor claims



## Clarifications and Changes

- Contractor required to seek written decision from Hydro Representative on any interpretation, ambiguity, conflict, error, etc.
- Contract stated that if contractor knew, or “ought to have known” about any issue, but failed to refer it “immediately” to the Hydro Representative, then the contractor bears full responsibility for dealing with those issues and cannot request an EA



## Field Advice Memos (FAMs)

- Not referenced by name in contract
  - In practice: Primary means for communication of instructions
- No requirement that it distinguish between mere clarifications and substantive changes
- If a change, then must “immediately” refer issue for clarification
  - If Hydro Representative does not agree, then must request an EA with all necessary supporting documents in accordance with time limits

# Process for Change





## Process for Change

- Retained outside lawyers to prepare new documents
  - Started from scratch
- Review and commentary from industry groups
  - Not every comment accepted
  - Issues were discussed at sessions with industry working group
- Much more balanced, but still an owner-friendly contract
  - Must actively ensure you abide by contract requirements
- But if you do, greater likelihood of being properly compensated for work

# Key Changes in Approach





## Hydro Representative

- Still, in the first instance, the interpreter of the contract documents and the judge of contractual performance (GC 3.5)
- Duty to be ***fair*** and ***impartial*** and ***consistent with the contract*** documents
- Oversight through more realistic dispute resolution process
- Can still delegate some or all of duties



## Compensation for Changes/ Extensions of Time

- The Equitable Adjustment is no more
- Entitled to be compensated or have extension of time based on objective standards
  - Not what Hydro representative thinks is reasonable
- Three different approaches:
  - Change Order
  - Change Directive
  - Contemplated Change



## Change Order (GC 6.1) and Contemplated Change (GC 6.3)

- If the parties agree as to any cost and time consequence of a change, can be documented by a change order
- BC Hydro may request a Quotation for a Contemplated Change
- Quotation must include all amounts to be sought as compensation (including mark-ups, indirect costs and overhead) and time impacts
- If the Quotation is accepted, or agreement reached following negotiation, then change order can be issued
- **DO NOT PROCEED WITH CHANGE UNTIL WRITTEN CHANGE ORDER (GC 6.9)**



## Change Directive (GC 6.2)

- Hydro Representative may instruct Contractor to proceed with a change to work immediately by issuing a Change Directive
- If parties unable to agree on compensation and time impact of Change Directive, then can be resolved through Dispute Resolution
  - Either cost plus (as per GC 6.5) or by unit price (if applicable)
- If cost plus, need to ensure that detailed records kept



## Other Claims for Changes (GC 6.4)

- If instruction from Hydro Representative gives rise to a change, but no Change Directive issued, then:
  - Prior to proceeding, must give written notice to Hydro Representative of intention to make claim
  - Must maintain daily records of resources used for claim, submitted on two day rolling basis



## Consequences

- If daily records not kept and submitted, unable to claim adjustment to contract price (GC 6.4(d))
- If notice not given prior to proceeding with work, then
  - No right to be compensated if BC Hydro materially prejudiced by lack of notice
  - In any event, not entitled to claim for anything more than 7 days before notice actually given.
- **CANNOT SIT BACK – HYDRO NEEDS (AND HAS RIGHT) TO KNOW!**



## Clarification of Drawings and Instructions

- Obligation to review contract documents and “promptly” report any discovered error, inconsistency or omission (GC 4.9)
  - If proceed with work despite an error, inconsistency or omission that a qualified and experienced contractor should reasonably have become aware of, then contractor must at its cost remove, replace or make good the work
  - Otherwise, not responsible or liable to BC Hydro to discover all or any errors, inconsistencies or omissions



## Valuation of a Change (GC 6.5)

- As agreed between representatives (pursuant to Quotation or otherwise)
- By unit price if applicable
- Otherwise, by cost plus, as per detailed rules
  - “Reasonable”
  - “Substantiated”
  - “Direct”



## Valuation of a Change - 2

- Markup ranges from 5% for subcontractors to 20% for straight time wages, and includes:
  - Supervision, overhead and profits
  - “Incidental freight”
  - Small tools
  - “Any other expenses relating . . .”
- Equipment as per Blue Book



# Holdbacks

- Holdbacks have now been changed to 5% from 10%
- BC Hydro considers this a performance holdback

**Note:** Contractors may still have obligations under BLA to maintain holdbacks and are subject to trust obligations.



# Dispute Resolution Process - 1

- Notice of Dispute
- Representatives to use good faith efforts to resolve disputes promptly
- Settlement meeting of authorized representatives of each party who were not previously involved – to occur within 45 days of dispute notice
- There is a possibility of a second meeting, with different representatives if BC Hydro requests



## Dispute Resolution Process - 2

- Arbitration to be commenced within 90 days of dispute notice
  - Independent sole arbitrator chosen from BCICAC roster
  - Hearing within 30 days of arbitrator's appointment
  - Award within 60 days of arbitrator's appointment
- No longer wait until after project completion to resolve disputes



## No Influence (GC 12.9)

- “ ...neither party will make efforts to influence the parties’ representatives by making contact with senior representatives of the other party, or the government, or any third party for the purpose of attempting to influence the terms of the resolution of a Dispute, and, for certainty, the parties agree that any such contact will be a breach of the Contract.”
- Any attempt to influence the outcome of a dispute is a breach of contract
- Encourages good faith efforts to resolve the dispute in a timely manner

# Other Potential Pitfalls





## Permits and Project-Related Permits

- Contract distinguishes between “Permits” and “Project-Related Permits”
- Permits defined very broadly (GC 1.1) and obligation on Contractor to obtain them (GC 4.6)
- Project-Related Permits are those permits specified in Supplementary General Conditions – it is BC Hydro’s responsibility to obtain such permits, with such assistance as it may reasonably request from the Contractor (GC 4.6)
- **MAKE SURE THE SGCS CLEARLY SET OUT WHAT PERMITS BC HYDRO IS TO OBTAIN – OTHERWISE CONTRACTOR RESPONSIBLE NO MATTER HOW UNREASONABLE**



## Contract Formality – Amendments and Changes

- Amendment to contract is only binding if:
  - in a formal form (sample at Appendix D), and
  - signed by the authorized representatives of each party
- GC 1.4 specifically states that the Contract cannot be amended by way of minutes, emails, letters or other written forms
- **DON'T RELY ON THE FACT THAT SOMETHING APPEARS IN MINUTES OR EMAILS AS REFLECTING A BINDING AGREEMENT**



## Subcontractors

- Every subcontractor must be pre-approved – Hydro approval may be “arbitrarily withheld” (GC 4.13(a))
- Term “subcontractor” is defined very broadly and includes sub-subcontractors, suppliers, etc.
- Every “subcontract” must incorporate provisions of head contract – including right to terminate subcontractor if BC Hydro requires it
- Will require diligence to ensure that all subcontracts comply –may not always be feasible



## Work Schedule (GC 4.11)

- Within 7 days of effective date of contract, must submit detailed work program and schedule
- Must update on a monthly basis with each pay application
- If failure to comply:
  - BC Hydro not obliged to make progress payment (GC 5.3)
  - Contractor deemed to be in default and at risk of termination (GC 4.11)



## QA/QC Program (GC 4.10)

- Within 10 days of effective date of contract, must submit formal QA/QC plan
- Based on standard BC Hydro document (Appendix K)
- Have to follow the submitted plan



## Payment System

- Within 10 days before end of month, progress payment estimate to be submitted to Hydro Representative for review. (GC 5.3(a))
- Approved amount to be submitted to BC Hydro's third party invoice processing provider. (GC 5.3(c))
- The Contractor will, at no cost to BC Hydro, implement the Ariba Network eCommerce system to transact all orders and invoicing with respect to the Contract.



# Termination for Convenience / Suspension of Work - 1

- BC Hydro has right to suspend or terminate for convenience
  - At any time, in its sole discretion
  - In whole or in part
- In event of termination, entitled to compensation for:
  - work performed up to termination date
  - plus cancellation charges to third parties, and
  - reasonable and substantiated demobilization costs



## Termination for Convenience / Suspension of Work - 2

- In event of suspension:
  - Cannot remove equipment or materials from site without consent
  - Entitled to compensation for direct costs of securing and making safe all work – nothing more
  - Can terminate if suspended for more than one year (GC 10.1(c))
- Not entitled to claim any consequential damages in either case



## Material on Site

- Unless otherwise specifically agreed in writing by Hydro's Representative, the Contractor may not apply for payment for material that has been delivered to the Site but not yet incorporated into the Work
- If the Work is such that significant amounts of material may have to be ordered, delivered and paid for well in advance of installation, then may want to specifically provide for this in SGCs



## Warranties - 1

- Contract includes a 12 month warranty free from defects in material and workmanship and fit for their intended purpose (GC 19.1-19.3)
- Contract also contains an obligation to correct any defects discovered in the Work, which obligation is not expressly limited to one year (GC 19.6)
- GC 19.2 (d) Free from design defects, faults and faulty operation, including latent defects



## Warranties - 2

- As well, GC 25.11 specifies that “All representations and warranties of the Contractor to BC Hydro and all provisions of . . . GC 19 . . . will continue as valid and enforceable obligations notwithstanding any termination, suspension, cancellation, completion or expiration of the Contract”
- In the case of defective work, may be an evergreen warranty



## Limitation of Liability (GC 18)

- In general, maximum aggregate liability for claims arising out of the Contract limited to contract price plus any insurance proceeds received, recoverable or claimable (GC 18.1)
- Exceptions: Claims arising from gross negligence, third party claims, breach of any laws (e.g. environmental laws) (GC 18.3)
- Neither party liable to the other for indirect, incidental or consequential loss or damage, or loss of overhead or profit



## Records and Audit

- Must retain all books and records for 7 years after completion (GC 15)
- Must make books and records available for audit



## General Rules

- READ THE CONTRACT
  - IT BINDS YOU
  - IF YOU DON'T FOLLOW IT, YOU WILL LOSE YOUR RIGHTS
  
- WHILE TIME LIMITS AND NOTICE REQUIREMENTS ARE, GENERALLY SPEAKING, MORE REASONABLE, THEY STILL EXIST
  - MUST BE COMPLIED WITH TO PRESERVE YOUR RIGHTS



## Caveat

- Our comments are general in nature
- Given time constraints, cover only a part of new contract's provisions
- If you are dealing with BC Hydro, need to read the contract in full and obtain your own legal advice