



## CCDC 5A – 2010 Construction Management Contract for Services and CCDC 5B – 2010 Construction Management Contract for Services and Construction

In November 2010, the Canadian Construction Documents Committee will replace the CCA 5 Construction Management agreement with two new documents: CCDC 5A and CCDC 5B.

CCDC 5A is to be used in the traditional construction management scenario where the *Owner* hires *Trade Contractors* directly to carry out the construction. In contrast, CCDC 5B is used in the increasingly common scenario of a Construction Manager at Risk, where the Construction Manager takes on the obligation to carry out the actual construction using its own *Subcontractors*. This bulletin will highlight some of the provisions in the new documents that you, as a construction manager, need to be aware of when using these contracts.

### CCDC 5A

There are some significant differences between the rights and obligations imposed by the old document compared to the new form of agreement, and you cannot assume that what you used to do under the old CCA 5 is what you will be doing under the new CCDC 5A. The following points illustrate some of the differences of which you need to be aware:

- CCDC 5A provides, in Schedule A1, (illustrated below), a chart listing the *Services* to be provided, either by the *Owner*, the *Construction Manager*, or others. “*Services*” is a defined term in the agreement and means all of the services set out in Schedule A1 and B1 (schedule of additional services). Those schedules also specify how each of those *Services* will be paid for. The list of *Services* is broken down into the same three distinct time frames, as was the case in CCA 5, namely pre-construction (now comprised of five distinct phases: pre-design, schematic design, design development, construction document and construction procurement phases), construction and post-construction, with a separate list of services to be provided in each time period. For each of the items in the chart, the *Owner* and *Construction Manager* must turn their mind as to who will be providing that particular service. If it is being performed by the *Construction Manager*, then the *Owner* and *Construction Manager* must decide how the *Construction Manager* will be paid for that task, and indicate that on the chart. The chart is set up like this:

**SCHEDULE A1 TO THE AGREEMENT – SERVICES AND COMPENSATION**

	Performed by the Owner or Someone Other Than the Construction Manager	Performed by the Construction Manager (*E1/F2/F3)	Not Applicable
<b>1. PRECONSTRUCTION</b>			
(*Note: F1 Included in the fixed amount as described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES. F2 Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 – COMPENSATION FOR SERVICES. F3 Fee to the <i>Construction Manager</i> based on time-based rates as described in paragraph 5.2.3 of Article A-5 – COMPENSATION FOR SERVICES.)			
<b>1.1 General Services</b>			
.1 Attend regular <i>Project</i> meetings with the <i>Owner</i> and the <i>Consultant</i> .	-	[F3]	-
.2 Provide advice to the <i>Owner</i> and the <i>Consultant</i> with respect to construction and market conditions.	-	[F3]	-
<b>1.2 Pre-design</b>			
<b>.1 Estimating:</b>			
(1) Confirm or prepare a <i>Class D Construction Cost Estimate</i> .	-	[F3]	[]
(2) Advise the <i>Owner</i> if it appears that the <i>Construction Cost Estimate</i> may exceed the <i>Project</i> budget, and make recommendation for corrective action.			
<b>.2 Scheduling:</b> Prepare a preliminary overall <i>Project</i> schedule.	-	[F3]	

2. **Payment** – Article A-5 provides for the *Construction Manager* to be paid a fee for the *Services* by way of either a fixed amount, a percentage of the *Construction Cost* or, alternatively, on time-based rates. In addition, and like CCA 5, the *Construction Manager* is to be reimbursed for the actual expenses it incurs in carrying out the *Services*, but the new document now includes an option to include a mark-up on those expenses.
3. **Reimbursable expenses** – Schedule A2 is a chart of the possible reimbursable expenses. It requires the *Owner* and *Construction Manager* to consider and decide upon whether the costs are included in the *Construction Manager's* fee or whether the *Construction Manager* is entitled to additional payment for those as a reimbursable expense. The list of reimbursable expenses in CCDC 5A is very different than the list previously found in Appendix A to CCA 5. For example, the salaries, wages and benefits for the *Construction Manager's* personnel are no longer included as a reimbursable expense in Schedule A1. Therefore, they must be provided for in either the *Construction Manager's* fee or, alternatively, added as an additional cost on Schedule A2.
4. **Builders liens** – Article A-6 of the new contract makes clear that all payments to the *Construction Manager* will be subject to the applicable builders lien laws in the province in which the *Project* is being undertaken, including the holdback provisions .
5. **Own Forces Work** – Under CCA 5, the parties could provide for the *Construction Manager* to undertake some own forces work on the *Project*. No such provision is expressly included in the new document. CCDC has expressed a view that any own forces work ought to be undertaken using a CCA 17 - 2010 form of trade contract. However, the CCDC 5A includes Schedule B1 where the *Construction Manager* and *Owner* can provide for additional services to be carried out by the *Construction Manager*, together with the payment details in respect of those additional services in Schedule B2. It may be that *Owner* and *Construction Manager* will want to make provision for the *Construction Manager* to carry out own forces work simply by including it in that Schedule B1. In that case, care must be taken to ensure all aspects of that own forces work are provided for, such as scope, schedule, etc.
6. **Cost Estimates** – During the pre-construction phase, the *Construction Manager* may be required to carry out four separate construction cost estimates, each of increasing sophistication as the design and drawings are developed and refined to the point where the drawings can be issued for tender. This may be a much more onerous level of cost estimating than some construction managers are used to providing and care must be taken to ensure that the fee is adequate to reflect this additional responsibility.
7. **Temporary Work** – *Temporary Work* is defined in the new document as “temporary supports, structures, facilities, services, and other temporary items, excluding construction equipment, required for the execution of the *Work* but not incorporated into the *Work*.” The *Construction Manager* has the obligation, in Section 1.4.1(4) of Schedule A1 to prepare the general functional layout of *Temporary Work* and, in 2.3.1, to “arrange for the required *Temporary Work*” during construction. If it is the *Construction Manager* who is going to undertake this *Temporary Work* (e.g. heating, hoarding, fencing, etc.), that must be set out in Schedule B1 to the agreement, with the reimbursable expenses for same provided for in Schedule B2. If, however, the *Temporary Work* is going to be provided by the various

*Trade Contractors*, then the *Construction Manager* must turn its mind to what is going to be required and ensure that each of those items is covered by the trade contracts as a whole.

8. **Insurance** – Under CCA 5, the obligation of the *Owner* to maintain insurance protecting the *Construction Manager* was worded in a very general manner, and preserved the ability of the *Construction Manager* to place its own liability insurance, the cost of which would be borne by the *Owner*. The insurance provisions in CCDC 5A, contained in Part 8, are much more detailed. Note that the *Owner* must maintain a wrap up policy of not less than \$10 million and coverage for completed operations hazards for a period of 2 years after the *Project In-Use Date*. The *Construction Manager*, in turn, is responsible to provide and pay for \$5 million of liability insurance coverage for “completed ops” until completion of the *Services*.
9. **Indemnification and Waiver of Claims** – The new form of agreement adopts the indemnification and waiver of claims language and limits from CCDC 2 – 2008. The *Construction Manager* must be aware of the waiver of claims provisions in CCDC 5A because of the serious consequences of not giving a timely *Notice in Writing*.

### **CCDC 5B**

As noted above, CCDC 5B is the form of contract to be used in a Construction Manager at Risk scenario. CCDC 5B distinguishes between “*Services*” and “*Work*”. Accordingly, the document itself is a hybrid of the CCDC 5A, in respect of the construction management *Services*, and a CCDC 2 – 2008 and CCDC 3 – 1998 Cost Plus contract in respect of the actual construction *Work*. Given that it is a new document, any *Construction Manager* considering using this document must review it carefully to ensure it adequately addresses the circumstances unique to the particular project for which it is being considered. Particular attention should be paid to the following provisions:

1. **Payment** – Article A-5 breaks down the *Construction Manager’s* fee into two portions, being a fee for the *Services* and a fee for the *Work*. Like CCDC 5A, the fee for *Services* is based on a fixed amount, a percentage of the construction cost, or time-based rates. The fee for the *Work* is either cost-plus or a fixed fee. Reimbursable expenses for the *Services* are provided for, again with a mark-up. In respect of the *Work*, the *Cost of the Work* is provided for in Article A-7 with a list of items to be included. The list is similar, but not identical, to the list found in CCDC 3, so particular care must be taken to ensure the costs of all items of work are captured, adding additional items to the list in Article A-7 as necessary.
2. **Pricing Options and Conversion** – Article A-8 allows the *Owner* and *Construction Manager* to change the price of the *Services* and the price of the *Work* to a GMP option, a GMP plus percentage cost savings option or, alternatively, a stipulated price option. In the event the parties agree to exercise the stipulated price option, there is an appendix which amends the articles, definitions and general conditions, effectively creating the equivalent of a CCDC 2 – 2008 document.
3. **General Conditions** – Generally speaking, all of the general conditions, GC 1 through GC 12, follow the form and content found in CCDC 2 – 2008, often with the only change being a reference to “*Construction Manager*” in CCDC 5B rather than “*Contractor*” as found in

CCDC 2 – 2008. A summary of the provisions in the CCDC 2 – 2008 document is available on our website at [http://www.jml.ca/pdf/pubs/CCDC2\\_2008\\_JML\\_Chart.pdf](http://www.jml.ca/pdf/pubs/CCDC2_2008_JML_Chart.pdf). There are, however, some changes to the general conditions that are worthy of note:

- (a) In GC 1.5 of CCDC 5B, the *Construction Manager* is expressly relieved of responsibility for architectural or engineering aspects of the project and, in respect of the *Services*, the *Construction Manager* does not offer any professional design advice. Further, the *Construction Manager* is expressly deemed not to assume any duties or responsibilities as agent for the *Owner*, which is different than the agency relationship established in CCDC 5A.
  - (b) GC 2.1.1 provides a list of *Owner* responsibilities relating to both the *Services* and the *Work*. It includes such things as providing full and timely information and approvals, timely decision making, etc. *Owners* would be well served in understanding these newly expressed responsibilities and making provisions for them on the *Project*.
  - (c) Transparency – Unlike a general contractor acting under a CCDC 2 – 2008, GC 3.7.2 of CCDC 5B requires the *Construction Manager*, before entering into agreements with either *Subcontractors* or *Suppliers*, to submit to the *Owner* all bids received for the various parts of the *Work* and to obtain the *Owner*'s acceptance of the *Subcontractors* and *Suppliers*. This promotes and maintains the element of transparency, which element is an often cited reason for using a Construction Manager at Risk project delivery method rather than a traditional General Contractor delivery method.
4. The *Construction Manager* in a CCDC 5B – 2010 is expected to use the CCA 1 – 2008 Stipulated Price Subcontract when contracting directly with the sub trades, rather than the CCA 17 – 2010 trade contract which will be used by the *Owner* in a traditional construction management scenario under CCDC 5A – 2010.

There is no substitute for reading the actual contracts and being familiar with their terms. If you have any questions on the new contracts, or the impact they may have on your particular operation, please give any of the lawyers listed below a call. We will be pleased to discuss these with you.

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