



McCarthy Tétrault Advance™
Building Capabilities for Growth

Integrated Project Delivery (CCDC 30), Prompt Payment and Adjudication

Wednesday, June 19, 2019



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Changes to the Ontario *Construction Act*: Are you ready?

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Introduction to Amendments

- CLA has not been amended for 34 years (since 1983)



- Industry changes, e.g: AFP, including financing components, project timelines
- Three key purposes:
 1. Modernizing the Act;
 2. Prompt Payment; and
 3. Dispute Resolution/Adjudication

Status of Amendments

- Royal Assent **December 12, 2017**
- Proclaimed into force in two stages:
 - Substantive changes, regulations and forms, other than prompt payment and adjudication, were proclaimed and came into force on **July 1, 2018**
 - Prompt payment and adjudication provisions, regulations and forms, will be proclaimed and come into force on **October 1, 2019**
 - time required for Authorized Nominating Authority to be established, develop regime for the certification of adjudicators, and to certify adjudicators.
- 4 regulations to support amendments approved:
 - Forms
 - Procedures for Actions under Part VIII
 - General (e.g. monetary thresholds for surety bonding and holdback and notice requirements) and
 - Adjudications under Part II.1 of the Act

Application of Amendments

The *Construction Lien Act* as it read prior to July 1st 2018/ prior to October 1st 2019 will continue to apply to any improvement if:

- ↪ the prime contract was entered into prior to July 1, 2018 / October 1, 2019 regardless of when any subcontract under that contract is entered into
- ↪ a procurement process was commenced by the owner prior to the changes coming into force (e.g. if there has been a RFQ, RFP, or call for tenders)
- ↪ the premises are subject to a leasehold interest whereby, the lease was first entered into prior to July 1, 2018 and the contract for the improvements was entered into prior to December 6, 2018

Overview – October 1, 2019

1. Prompt payment regime
2. Interim adjudication

Prompt Payment Regime Part I.1

- Can't contract out of regime
- Can establish payment milestones, otherwise default is invoice monthly
- Proper invoice – **NB:** cannot be contingent on certification of payment certifier or owner approval, except re: testing, commissioning
 - However, contract can still provide for certification/approval after invoice is given

Prompt Payment Regime Part I.1

- Cascading timelines:
 - Owner 28 days after receipt of proper invoice
 - General contractor 7 days after receiving payment
 - Subcontractor 7 days after receiving payment
 - Subsubcontractor 7 days after receiving payment
- **Notices of non-payment must be given within 14 days** – undisputed amounts to be paid
- Undisputed amounts paid to subs whose work is undisputed or share pro-rata
- GC/subs can also give notice of non-payment
- If owner doesn't pay, GC/sub must still pay its subs **unless** notice of non-payment given **and** undertaking to refer to adjudication within 21 days
- Interest at CJA or contractual rate for late payments

Practical Tips

1. Consider having pre-invoice confirmations
2. Use Milestone payments
3. Payment confirmations by major sub trades
4. Arrange for payment certifier review of work ahead of date for submission of invoice.

Interim Adjudication Part II.1

- Interim, (temporarily) binding dispute resolution process
- Only applicable before the contract is completed (unless agree otherwise)
- Applicable to specific issues:
 - a. Valuation of services materials
 - b. Payment – including change orders, whether or not approved
 - c. Disputes re: Notices of Non-Payment
 - d. Set off claims
 - e. Payment/Non-payment of holdback – **new provisions**
 - f. Any other matters parties agree to adjudicate/prescribed – L&M bonds now prescribed

NB: Can refer to adjudication even if existing action/arbitration, provided not yet determined

Interim Adjudication Part II.1

11

- Authorized Nominating Authority to train, appoint (where applicable), maintain registry of qualified adjudicators
- Expertise with construction industry and dispute resolution
- Can't appoint in advance
- Requesting party submits written notice to other party, and within 5 days of adjudicator appointment submits documents
- Response in writing, deadline specified by the adjudicator
- Inquisitorial, i.e. requesting documents, site visit, etc.
- Authorized to “draw inferences based on the conduct of the parties”
- 30 days receipt of requesting party's documents for a decision, with reasons – extensions (at request of adjudicator with consent up to 14 days, or such time as consented to by the parties), if late no force and effect
- Determination/reasons are admissible in court

Interim Adjudication Part II.1

12

- Judicial review available with leave from the Divisional Court- limited power of review by Court (fatal flaws/process/jurisdiction); no automatic stay pending review
- Provided comply with the requirements of the Act, can agree to a contractual process
- Enforcement – payment within 10 days or suspend work until payment plus interest and suspension costs, and reasonable costs paid on resumption
- Can file determination with court and becomes enforceable as if it were a court Order

Practical Tips

- Status of ANA
- Are your consultants registered?
 - Agree or ANA appoints **NB**: ANA appoints if mandate not accepted within 4 days
- Contractual DRP – consistent with the Act?

Practical Tips

- Be ready for a dispute:
 - Timing – Written Notice of Adjudication will start the clock
 - Consider timing / manner of response
 - Consider process – adjudicator determines appropriate process in the circumstances
 - Collection of documents
 - Witnesses / experts
 - Decision in 30 days or with extension

The New CCDC 30 – IPD Contract- *Rising together and falling together*

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What is IPD?

16

“A project delivery approach that integrates people, systems, business structures, and practices into a process that collaboratively harnesses the talents and insights of all project participants to optimize project results, increase value to the owner, reduce waste, and maximize efficiency through all phases of design, fabrication, and construction”

Definition provided by American Institute of Architects (AIA)

Traditional vs. IPD

17

Component	Traditional	Integrated/IPD
Teams	Fragmented, hierarchical, controlled, formed on "as-needed" basis	Integrated team of key project stakeholders, assembled early in process, highly collaborative
Process	Linear, segregated, siloed	Concurrent, multi-level, openly shared information
Risk	Managed individually, transferred to greatest extent	Managed collectively, appropriately shared
Compensation	Individually pursued, usually on a first-cost basis (lowest price of design and construction of the building alone, without maintenance and other costs)	Value-based team success tied to project goals established up front
Communications	Paper-based and two-dimensional	Digital, virtual, rely heavily on BIM and simulation
Agreements/Contracts	Unilateral effort, allocate and transfer risk, no sharing	Multilateral, open sharing of risk and information
Behaviors	Self-preservation, combative	Open, trusting

Background of IPDs

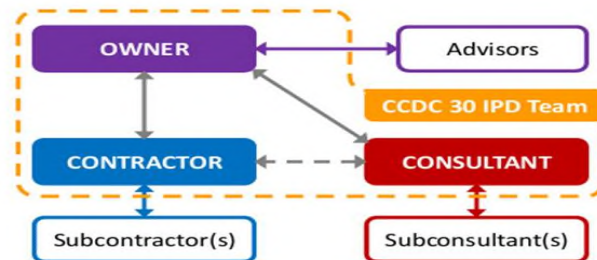
18

- Early days
 - BP Andrew Field Project
 - Mid-1990s Australia
 - Mid-2000s US
- Canadian early experience
 - Terra Nova Project
 - Five Hills Regional Hospital (Moose Jaw)
- Today

IPD Team

19

- Selection
 - Financial
 - Technical
 - Collaborative
- Parties



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Governance

20

- Senior Management Team (SMT)
 - One senior executive representative appointed by each party to the contract
 - Role
 - Decisions by unanimous vote (one exception)
- Project Management Team (PMT)
 - One representative appointed by each party to the contract
 - Role
 - Decisions by unanimous agreement
- Project Implementation Teams (PITs)
 - Interdisciplinary, cross-functional teams organized by the PMT comprised of representatives of the Consultant, Contractor, other IPD Parties, subconsultants and subcontractors
 - Role

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Project Phases

21

- Validation Phase
 - Responsibilities of the PMT
 - Validation Report
 - Go no Go
- Design/Procurement Phase
 - Responsibilities of the PMT
 - Final Target Cost is set
- Construction Phase
 - Requirement of a NTP
 - Responsibilities of the Design/Construction Team
- Warranty Phase
 - Treatment of costs for correcting defects
 - Final distribution of Risk Pool

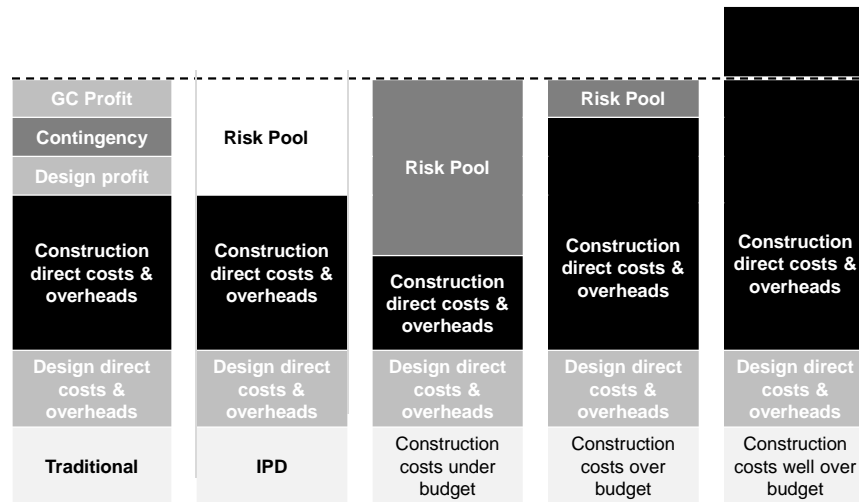
Payment Mechanism

22

- Key Concepts
 - Reimbursable Costs
 - Actual Incurred Cost
 - Overhead
 - Risk Pool
 - Allocation
 - Revisions
 - Increased – Added Value Incentive Items or lower Final Target Cost
 - Increased or decreased – Final Actual Costs

Payment Mechanism - Risk Pool

23



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Payment Terms

24

- Reimbursable Costs
 - Monthly Payment
 - Milestone Payment
 - Applications for payment or progress payment approved by the PMT
 - Payment by Owner in 30 days or shorter period
- Conditions for payment of milestones

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Payment Terms

25

- Risk Pool
 - Portion may be paid at a Milestone, but deemed not earned until final adjustments at end of Warranty Phase
 - Additions to Risk Pool are paid only at final payment

Key Provisions - General

26

- Transparency of Records
 - Design/Construction Team to keep full and detailed accounts and records necessary to document Reimbursable Costs
 - IPD Team allowed reasonable access to these records, which must be preserved for one year after final payment or such longer period determined by the PMT
 - Records transparency is fundamental to the IPD model
- Confidentiality
 - Parties to keep all technical and commercial matters arising out of or relating to the performance of the Contract confidential

Key Provisions - General

27

- Reallocation of Scope

- PMT may change Design/Construction Team's scope of work if it benefits the Project (e.g. reduces Estimated Final Costs, improves schedule or quality, etc.)
- If a reallocation creates a material financial inequity, then the Risk Pool distribution can be recalculated

- Self-Performed Works

- Contractor can competitively bid on and win self-performed trade work on a lump sum basis and can be paid like an independent subcontractor, but cannot also apply overhead or adjust Risk Pool on the fixed amount
- Contractor can be sole-sourced this work, but its profit will be added to the Risk Pool and only the fixed overhead will be applied

Key Provisions - General

28

- Owner Directive

- Owner can direct a change within the general scope of Contract Documents before adjustments in Base Target Cost, Final Target Cost, Milestone Schedule and Risk Pool are agreed upon
- The Design/Construction Team will proceed promptly with the change

- Unforeseen Conditions and Events

- PMT will investigate and issue instructions on conditions or events at the site that become known after the acceptance of the Validation Report and are materially different from those in or anticipated by it
- PMT to determine best course of action in interests of the Project, including to adjust the Base Target Cost, Final Target Cost, Milestone Schedule or Risk Pool as required

Key Provisions - General

29

- Insurance

- Contract contains prescriptive insurance requirements (e.g. Wrap-up, Builders' Risk Broad Form property insurance, Boiler and Machinery/Equipment Breakdown, professional liability insurance, etc.)
- Insurance premiums and deductibles are Reimbursable Costs

- Contract Security

- Any required Contract security will be specified in the Validation Report

Key Provisions – Dispute Resolution

30

- Escalating Dispute Resolution Procedure

1. PMT amicable negotiations – reasonable efforts to resolve differences and failures to agree
2. SMT resolution*
3. Mediation (Rules for Mediation in CCDC 40)
4. Final arbitration (Rules for Arbitration in CCDC 40) if notice of arbitration delivered 10 working days following termination of mediation
5. Court or arbitration, if no notice given

*If SMT cannot resolve dispute, Owner can give instructions to the Design/Construction Team necessary for the proper performance of the Project and to prevent delays pending Dispute's resolution

Key Provisions – Validation Phase Termination

31

- Termination During Validation

- Owner can terminate the Contract at any time before the Owner's acceptance of the Validation Report
- Any Design/Construction Team member can terminate its participation as well before that time (can be replaced or Owner can terminate)
- **Consequences**
 - Owner pays Reimbursable Costs incurred to date without profit
 - If the Contract is not terminated, then the Contract Documents will be revised
 - If the Contract is terminated, all information and documentation prepared or received will be returned or destroyed

Key Provisions – SMT Termination

32

- SMT's Right to Terminate Design/Construction Team Member

- Bankruptcy and insolvency events
- Failure to collaborate for benefit of Project, neglect to properly perform Design Services or Work, or substantial failure to comply with the Contract (min. 5 Working Days cure period)
- Unanimous determination of the SMT - excluding the defaulting party

- Consequences of Termination

- Remaining parties continue the project and take possession of products at the site
- Payment of Reimbursable Costs by the Owner minus losses and damages incurred by the remaining parties (subject to waiver of liability discussed later)
- Payment at the end of the Warranty Phase of share of the Risk Pool relative to the Design Services and Work completed at the date of termination minus such losses and damages
- Clawback provision for previously paid Risk Pool amounts if they were overpaid
- Warranty obligations of the terminated party continue

Key Provisions – Owner Termination

33

- Owner's Right to Terminate the Contract

- Owner can terminate if Design/Construction team neglects to properly perform the Design Services or Work or otherwise substantially fails to comply with the Contract (min. 5 Working Days cure period)

- Consequences of Owner Termination

- Owner can continue the project and take possession of products at the site
- Payment of Reimbursable Costs properly incurred to the date of termination
- Pay fair compensation for construction equipment retained by the Owner
- Liability of Owner for obligations, commitments and unliquidated claims of the parties undertaken or incurred on the Project, except those resulting from parties' neglect or default
- Payment of Risk Pool accrued for Design Services and Work completed at date of termination less losses and damages incurred by the Owner due to the default
- Clawback for previously paid Risk Pool amounts prior to termination if overpaid
- Warranty for work performed continues
- Owner can proceed with other losses or damages claims not waived under the Contract

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Key Provisions – Non-Owner Party Termination

34

- Design/Construction Team's Right to Suspend or Terminate the Contract

- Events of Termination
 - Owner bankruptcy and insolvency events
 - Owner failure to make payment or willful default (5 Working Days cure period)
- Consequences
 - Affected member may suspend performance
 - Affected member may terminate its participation
 - Payment of all Reimbursable Costs
 - Payment of share of the Risk Pool accrued to the date of termination
 - Payment for losses sustained for products and construction equipment
 - Payment of other damages sustained as a result of termination

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Key Provisions – Waiver of Liability

35

- The IPD Parties waive all claims against each other related to the Contract, except for direct loss and damages arising from claims:
 1. for a Party's willful default
 2. for breach of express warranty obligations or a failure to provide warranties
 3. for unpaid due amounts
 4. for violations of IP rights
 5. for failing to provide insurance
 6. covered by insurance required by the Contract
 7. by third parties
 8. substantial latent defects or deficiencies discovered after the Warranty Phase that would make a significant part of the Work unfit for its intended purpose
- This general framework is fundamental to IPD

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Key Provisions – Indemnification

36

- Each party will indemnify the other for all claims for which the general waiver of liability is not applicable
- Includes interest and legal costs
- Limits of liability
 - Insured claims are limited to availability of insurance proceeds
 - No limit for third party claims for bodily injury, sickness, disease or death or injury/destruction to tangible property
 - Limitations on uninsured liability can be added to Validation Report

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When planning a CCDC 30 IPD project

37

- CCDC 30 is new but IPD is not and can be extremely successful if implemented appropriately
 - Canadian industry must
 - overcome IPD skepticism and use CCDC 30
 - gain and share experiences and lessons learned
 - build an IPD culture, new habits and a track-record of “successful” projects
- Assembling and maintaining the right IPD Team is essential
 - Skilled, committed and “integrated” team that embraces a spirit of teamwork, transparency and collaboration is required
 - Very important for Owner representatives on the PMT and SMT

When planning a CCDC 30 IPD project

38

- All IPD Team members must
 - clearly understand the IPD process
 - overcome non-IPD habits and self-interested/individualistic practices
 - Especially if the members or the Project encounters unexpected challenges
- Contractual certainty and clarity is key. Before entering the Contract, each IPD Team member should
 - carefully review and understand the form of CCDC 30 Contract
 - identify its general and project-specific contractual needs and wants
 - negotiate and document them in Supplementary Conditions
 - Avoid “risk-transfer creep”
 - Examples of Supplementary Conditions to consider

When planning a CCDC 30 IPD project

39

- Many issues can be overcome by the Owner carefully planning, documenting and carrying out an effective IPD project procurement
 - Invest in up-front planning and hard work to avoid issues and surprises
 - Procurement documents should include the Owner's
 - general Project information and requirements
 - clearly articulated submission requirements and evaluation criteria
 - Supplementary Conditions

40

This program qualifies for up to 1.5 hours of eligible educational activity or CPD/MCE credit under the mandatory education regimes in British Columbia, Ontario and Quebec.

