



# National Trade Contractors Coalition of Canada

*Your Guide To...*

## *CCA -1 STIPULATED PRICE SUBCONTRACT*



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## **IMPORTANT NOTE**

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**CCA and NTCCC remind users that, as with all CCDC and CCA standard documents, the pre-printed contract form is to remain intact and unchanged in any way. Any modifications to the terms and conditions contained in the pre-printed form are to be made using supplementary conditions which are to be prepared and appended to the executed contract.**

**All CCA 1-2008 subcontracts must bear the CCA 1 copyright seal upon execution. In addition to confirming that the user has complied with copyright, the seal verifies that the pre-printed document is an accurate and unamended form, and that alterations, additions or modifications, if any, are as set out in supplementary conditions.**

***“No seal . . . no deal!”***

This Guide has been commissioned by the National Trade Contractors Coalition of Canada to assist its members in using the new CCA 1-2008 Stipulated Price Subcontract form of subcontract agreement.

The CCA 1-2008 document is the latest version of the standard subcontract form most widely used throughout Canada. It was created in a process of joint consultation between general contractors and trade contractors, and seeks to fairly balance the rights and responsibilities of each.

NTCCC endorses and encourages the use of CCA 1-2008.

## **USING THE GUIDE**

The terms and conditions of CCA 1-2008 itself are reproduced on the left-hand pages of the Guide. On the opposing right-hand pages are commentary on specific key provisions.

### **Legend:**

The commentary is colour-coded as follows:

**!!!!** Black is explanatory, stating the essential meaning of the clause.



**Blue** is an advisory note, providing background information and advice on selected clauses.



**Red** is a cautionary note, alerting the reader to matters where particular care and attention must be taken.

## **DISCLAIMER**

*This Guide is provided as a service to the industry for the general information of its readers only. It is not intended that anything in this Guide constitute legal advice, and the reader must not use the Guide for that purpose. Qualified legal counsel should always be consulted in connection with any specific questions or concerns arising in the particular circumstances of each case. Neither NTCCC nor Heenan Blaikie LLP will be responsible for any errors or omissions.*



**stipulated price  
subcontract**

**Project:**

**Subcontract Work:**

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Enquiries should be directed to:  
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CCA 1 is the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. It reflects recommended industry practices. CCA 1 can have important consequences. CCA does not accept any responsibility or liability for loss or damage which may be suffered as a result of the use or interpretation of CCA 1.

**AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR**

**This Subcontract Agreement** made on the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_.  
**by and between the parties**

\_\_\_\_\_ *name of Contractor*

hereinafter called the "*Contractor*"

**and**

\_\_\_\_\_ *name of Subcontractor*

hereinafter called the "*Subcontractor*"

Whereas the *Contractor* has entered into an agreement hereinafter called the "*Prime Contract*" on the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_ with \_\_\_\_\_

\_\_\_\_\_ *Name of Owner*

hereinafter called the "*Owner*" for the construction of

\_\_\_\_\_ *Name of Project*

hereinafter called the "*Project*"

And whereas the *Prime Contract* includes the *Subcontract Work* to be performed under this *Subcontract Agreement* in accordance with the *Contract Documents* for which \_\_\_\_\_

\_\_\_\_\_ *Name of Consultant*

is acting as and is hereinafter called the "*Consultant*"

And whereas the *Subcontractor* has agreed with the *Contractor* to perform the *Subcontract Work* and supply all of the labour, *Products*, tools, construction machinery and equipment necessary therefore as hereinafter set forth;

And whereas the *Contractor* and *Subcontractor* for themselves, their heirs, executors, administrators, successors and assigns do hereby agree to the full performance of the covenants herein contained;

NOW THEREFORE THE SUBCONTRACT AGREEMENT WITNESSETH as follows:

This page 1 identifies the parties. The parts prefaced with “Whereas” are the preamble.



The preamble is important, for example, because it contains a preview of the Subcontractor’s responsibilities. Note them carefully!



Note the *italicized* words throughout CCA 1-2008. Each italicized word or phrase is a defined term in the “Definitions” section found later. Defined terms are intended to have a consistent meaning throughout the agreement, e.g. “Contractor” always means the general contractor, “Subcontractor” always means the subcontractor signatory to this Agreement, who is in direct contract with the general contractor, and so on.

If there is a prime contract in writing, the summary details go in here.



It is not necessary that there be a prime contract in writing in order to use CCA 1. See Articles 1B, 2B, 3B

This is the Consultant named in the Prime Contract. In normal design-bid-build construction, this Consultant will be the Owner’s consultant.



The Consultant has considerable authority over the Subcontractor, particularly concerning approval of payments.



Be sure that the final agreement as executed bears the CCA 1 copyright seal to avoid any infringement of CCA’s copyright. Seals may be obtained at nominal cost from various sources, including most local construction association offices.

(NOTE: THE PARTIES SHALL COMPLETE ARTICLES 1A, 2A AND 3A AND DISCARD ARTICLES 1B, 2B AND 3B IF  
- THERE IS A PRIME CONTRACT IN WRITING BETWEEN THE OWNER AND THE CONTRACTOR, AND  
- IT IS THE INTENTION OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT THE CONDITIONS OF SUCH PRIME CONTRACT ARE TO BE INCORPORATED INTO THIS SUBCONTRACT AND SHALL GOVERN IN THE EVENT OF A CONFLICT.)

#### ARTICLE 1A – WORK TO BE PERFORMED

- 1.1 The *Subcontractor* shall furnish the *Products* and perform the *Subcontract Work* in a proper and workmanlike manner pertaining to: *(Insert full description of all work to be done with reference to specification section as described by number and heading if applicable)*
- 1.2 The *Subcontractor* shall perform the *Subcontract Work* as required by the *Subcontract Documents*.

#### ARTICLE 2A – CONFLICT BETWEEN THE PRIME CONTRACT AND SUBCONTRACT

- 2.1 The requirements, terms and conditions of the *Prime Contract* as far as they are applicable to this *Subcontract*, shall be binding upon the *Contractor* and the *Subcontractor* as if the word “owner” appearing therein had been changed to “*Contractor*” and the word “contractor” appearing therein has been changed to “*Subcontractor*”. In the event of any conflict between the terms of this *Subcontract* and the *Prime Contract*, the *Prime Contract* shall govern.
- 2.2 Paragraphs 10.2.4 and 10.2.5 of SCC 10.2 – LAWS, NOTICES, PERMITS, AND FEES and SCC 12.1 – INDEMNIFICATION shall be individually inoperative and considered as deleted from this contract in the event that conditions of identical wording or effect as they relate to each of these articles are not set out in the *Prime Contract*.

#### ARTICLE 3A – SUBCONTRACT DOCUMENTS

The following are the *Subcontract Documents* referred to in Article 1A of this Subcontract Agreement – WORK TO BE PERFORMED

- *Prime Contract* Agreement between *Owner* and *Contractor*
- Definitions of the *Prime Contract*
- The General Conditions of the *Prime Contract*
- *Subcontract* Agreement between *Contractor* and *Subcontractor*
- Definitions of the *Subcontract*
- The Subcontract Conditions of the *Subcontract*

\*

\* *(Insert here, attaching additional pages if required, a list identifying all other Subcontract Documents, e.g. supplementary conditions; information documents; Specifications, giving a list of contents with section numbers and titles, number of pages and date; material finishing schedules, drawings, giving drawing number, title, date, revision date or mark; addenda, giving title, number and date)*



## Commentary



CCA 1-2008 contains a number of helpful instructions for users. Here is a particularly important one. If the Prime Contract is in writing and is intended to flow down to the Subcontractor, use this page and discard the next page.

**Article 1A** - This is the scope clause, setting out the scope of the Subcontractor's work under this agreement.



Ambiguities, errors and omissions in scope clauses are a particularly common source of disputes. They are also relatively easy to avoid! When describing scope, be precise, thorough and complete. If more space be needed than what the standard form allows, use a Schedule attached at the back of the form – and be sure to include a description of the Schedule as a Subcontract Document under Article 3A or 3B, as the case will be. The Schedule could be entitled "Schedule – Scope of Subcontract Work", and its description under Article 3A or 3B could be "Schedule – Scope of Subcontract Work".

**Article 2A:** This is the flow-down clause. When this option is selected, all the Prime Contract terms and conditions flow down to the Subcontractor as far as they are applicable. Most importantly, if there is any conflict between any specific provisions in the Prime Contract and the Subcontract, it is the Prime Contract that takes precedence.



Since the Prime Contract documents take precedence in the event of any conflict, the Subcontractor when using this option should become thoroughly familiar with all the Prime Contract terms and conditions affecting its work, and note all instances in which those Prime Contract terms differ from those found in the Subcontract.

**Article 3A:** This is the list of all documents comprising the Subcontract.



When using this flow-down option, all the Prime Contract documents become part of the Subcontract too, to the extent they are applicable to the Subcontract Work.



Take this instruction most seriously!  
Be sure to list ALL documents intended to be part of the Subcontract. If a document is not listed here in Article 3A, it will not be part of the Subcontract and the party wishing to rely upon will risk not being able to do so.

(NOTE: THE PARTIES SHALL COMPLETE ARTICLES 1B, 2B AND 3B AND DISCARD ARTICLES 1A, 2A AND 3A IF  
- THERE IS NO WRITTEN PRIME CONTRACT BETWEEN THE OWNER AND THE CONTRACTOR, OR  
- IT IS THE INTENTION OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT THIS SUBCONTRACT REPRESENTS THE FULL SCOPE OF THE SUBCONTRACT WORK AND SHALL GOVERN IN THE EVENT OF A CONFLICT.)

#### **ARTICLE 1B – WORK TO BE PERFORMED**

1.1 The *Subcontractor* shall furnish the *Products* and perform the *Subcontract Work* in a proper and workmanlike manner pertaining to: *(Insert full description of all work to be done with reference to specification section as described by number and heading if applicable)*

1.2 The *Subcontractor* shall perform the *Subcontract Work* as required by the *Subcontract Documents*. Any amendments to the *Contract Documents* that relate to the *Subcontract Work* after time of the submission of subcontract bids to the *Contractor* and prior to execution of the *Subcontract*, shall be agreed in writing by the *Contractor* and *Subcontractor*.

#### **ARTICLE 2B – CONFLICT BETWEEN THE PRIME CONTRACT AND SUBCONTRACT**

2.1 In the event of any conflict between the terms of this *Subcontract* and the *Prime Contract*, this *Subcontract* shall govern.

#### **ARTICLE 3B – SUBCONTRACT DOCUMENTS**

The following are the *Subcontract Documents* referred to in Article 1B of this Subcontract Agreement – WORK TO BE PERFORMED

- *Subcontract* Agreement between *Contractor* and *Subcontractor*
- Definitions of the *Subcontract*
- The *Subcontract* Conditions of the *Subcontract*
- *Prime Contract* Agreement between *Owner* and *Contractor*, if any
- Definitions of the *Prime Contract*, if any
- The General Conditions of the *Prime Contract*, if any

\*

\* *(Insert here, attaching additional pages if required, a list identifying all other Subcontract Documents, e.g. supplementary conditions; information documents; Specifications, giving a list of contents with section numbers and titles, number of pages and date; material finishing schedules, drawings, giving drawing number, title, date, revision date or mark; addenda, giving title, number and date)*

## Commentary



Per this instruction, use this page and discard the preceding page if:

1. there is no Prime Contract in writing; or
2. this CCA 1-2008 Subcontract Agreement is intended to define the full scope of the Subcontract Work and is to take priority in the event of any conflict between it and the Prime Contract.

**Article 1B, paragraph 1.1:** This is the scope clause, setting out the scope of the Subcontractor's work under this agreement.



Ambiguities, errors and omissions in scope clauses are a particularly common source of disputes. They are also relatively easy to avoid! When describing scope, be precise, thorough and complete. If more space be needed than what the standard form allows, use a Schedule attached at the back of the form – and be sure to include a description of the Schedule as a Subcontract Document under Article 3A or 3B, as the case will be. The Schedule could be entitled “Schedule – Scope of Subcontract Work”, and its description under Article 3A or 3B could be “Schedule – Scope of Subcontract Work”.

**Article 1B, paragraph 1.2:** By definition, the “Contract Documents” are the Prime Contract documents. Since the Prime Contract does not take precedence when using this option, the parties need a mechanism to record the Subcontractor's agreement to deal with any Prime Contract amendments after bid that relate to the Subcontract Work. This is the mechanism. The Prime Contractor and the Subcontractor must agree to such amendments in writing before executing this Subcontract, otherwise those Prime Contract amendments do not apply to the Subcontract.

**Article 2B:** This confirms that the Subcontract governs in the event of any conflict between its terms and the terms of the Prime Contract. This is consistent with the underlying intent when using this option.

**Article 3B:** This is the list of all documents comprising the Subcontract.



Note that the Prime Contract documents are included in this list, even though the Subcontract Documents take precedence in the event of conflicts.



There may be terms and conditions in the Prime Contract that affect the Subcontractor's work which are not otherwise picked up in this Subcontract. Article 2B only deals with conflicts between the Prime Contract terms and the Subcontract terms. Where the Prime Contract contains terms which affect the Subcontract Work, and the Subcontract is silent on those issues, those Prime Contract terms will govern. Even when using this option, therefore, it remains important that the Subcontractor review the Prime Contract documents, note any and all terms and conditions that might affect its work, and if necessary, negotiate any such Prime Contract terms and conditions which may not be acceptable and record the agreement using supplementary conditions.



Take this instruction most seriously!

Be sure to list ALL documents intended to be part of the Subcontract. If a document is not listed here in Article 3B, it will not be part of the Subcontract and the party wishing to rely upon will risk not being able to do so.

**ARTICLE 4 – SCHEDULE**

- 4.1 The *Subcontractor* shall perform the *Subcontract Work*:
    - .1 in accordance with a Schedule provided by the *Contractor* at the time of signing this *Subcontract*; or
    - .2 in accordance with a Schedule mutually agreed if provided by the *Contractor* after the signing of this *Subcontract*; or
    - .3 starting on or about (*day/month/year*) \_\_\_ / \_\_\_ / \_\_\_ and substantially perform the *Subcontract Work* by, on or about (*day/month/year*) \_\_\_ / \_\_\_ / \_\_\_.
- The *Contractor* may reasonably adjust any schedule or specified timing during the course of the *Subcontract Work* after consulting with the *Subcontractor*.

**ARTICLE 5 – SUBCONTRACT PRICE**

- 5.1 The *Subcontract Price*, which excludes *Value Added Taxes*, is:

\_\_\_\_\_ /100 dollars \$ \_\_\_\_\_

- 5.2 *Value Added Taxes* (of \_\_\_\_\_ %) payable by the *Contractor* to the *Subcontractor* are:

\_\_\_\_\_ /100 dollars \$ \_\_\_\_\_

- 5.3 Total amount payable by the *Contractor* to the *Subcontractor* for the construction of the *Subcontract Work* is:

\_\_\_\_\_ /100 dollars \$ \_\_\_\_\_

- 5.4 These amounts shall be subject to adjustments as provided in the *Subcontract Documents*.

- 5.5 All amounts are in Canadian funds.

**ARTICLE 6 – PAYMENT**

- 6.1 Subject to the provisions of the *Subcontract Documents*, and in accordance with legislation and statutory regulations respecting holdback percentages the *Contractor* shall:
  - .1 make progress payments to the *Subcontractor* on account of the *Subcontract Price* in accordance with paragraph 6.2 of this Article. The amounts of such payments shall be as certified by the *Consultant* together with such *Value Added Taxes* as may be applicable to such payment;
  - .2 upon *Substantial Performance of the Work*, pay to the *Subcontractor* the percentage of the *Subcontract Price* which has been held back from the preceding progress payments when due together with such *Value Added Taxes* as may be applicable to such payment; and
  - .3 upon the issuance of the *Consultant's* certificate of payment that incorporates final payment of the *Subcontract Work*, pay to the *Subcontractor* the unpaid balance of the *Subcontract Price* when due together with such *Value Added Taxes* as may be applicable to such payment.
- 6.2 The *Subcontractor* shall make applications for payment together with supporting sworn statements and other documents that are required by the *Subcontract Documents* on or before the \_\_\_ day of each month (herein called the Submission Date) to the *Contractor* for approval and due processing. The amount claimed shall be for the value, proportionate to the amount of the *Subcontract*, of *Subcontract Work* performed and *Products* delivered to the *Place of the Work* up to the \_\_\_ day of the month. The *Contractor* shall pay the *Subcontractor*, no later than 30 calendar days after the Submission Date or 10 calendar days after the date of a *Consultant's* certificate for payment whichever is later, \_\_\_\_\_ percent of the amount applied for or such other amount as the *Contractor* or the *Consultant* determines to be properly due. Where the *Contractor* or the *Consultant* makes any changes to the amount of the applications for payment as submitted by the *Subcontractor*, the *Subcontractor* shall be advised promptly in writing by the *Contractor* of changes and given the opportunity to defend the *Subcontractor's* submission without delay.

## Commentary

**Article 4:** This deals with the Subcontractor's schedule for performance of the Subcontract Work. Note that there are 3 possible options. Only one of them would apply in any given Subcontract.



If the schedule is one provided by the Contractor and 4.1.1 therefore applies, that schedule should be listed as one of the Subcontract Documents in Article 3A or 3B, as the case will be. If the schedule is provided by the Contractor after the Subcontract Agreement is signed, that schedule governs only upon the Subcontractor's agreement. CCA 1-2008 does not stipulate how that agreement is to be recorded, but prudence dictates some written record verifying agreement, if only the initials of both the Contractor and the Subcontractor on that schedule. The Contractor controls the schedule. But the Contractor must consult with the Subcontractor about any adjustments to the schedule.

**Article 5:** The Subcontract Price is inserted here, in both words and numbers.



This form is intended to cover stipulated price payment arrangements. If payment is to be made in some other way (e.g. cost reimbursable; unit prices), this Article 5 must be amended by a supplementary condition which strikes this Article 5 and replaces it with wording which covers that alternative pricing arrangement.

**Article 6:** This payment clause stipulates monthly progress payments on account. Article 6.2 contains the payment application procedure and schedule for payments, as well as the due date by which payments are to be made by the Contractor.



Progress payments, holdback release, and final payment are all as certified by the Consultant.



The Contractor or the Consultant may change the payment amounts in the Subcontractor's payment application. However, the Contractor must notify the Subcontractor promptly in writing of any such changes, and the Subcontractor must have an opportunity to defend his payment submission without delay. If there is a continuing controversy about this, the Subcontractor should consider SCC 6.6 CLAIMS FOR A CHANGE IN SUBCONTRACT PRICE.

- 6.3 In the event that the *Consultant* fails to issue any certificate upon which payment shall become payable to the *Contractor* or the *Owner* fails to make a payment within the times prescribed in the *Prime Contract*:
- .1 The *Contractor* shall immediately inform the *Owner* of the *Owner's* default as provided for by the terms of the *Prime Contract*, contemporaneously advise the *Subcontractor* in writing of such default and provide to the *Subcontractor* a copy of any and all notices of default delivered by the *Contractor* to the *Owner*.
  - .2 Should the *Owner* not remedy the default within the time prescribed by the *Prime Contract*, the *Contractor* shall stop the *Work* and shall, within the time stipulated in the applicable lien legislation, take such steps as are required to enforce all of the *Contractor's* lien rights to recover all amounts unpaid on the *Subcontract*. The *Contractor* shall provide the *Subcontractor* prompt *Notice in Writing* of all steps taken to enforce payment.
  - .3 In the event that the *Contractor* has complied with all the provisions of this paragraph 6.3, the time for payment provided for in paragraph 6.2 of this Article shall be extended for \_\_\_\_\_ \*days from that otherwise provided for in paragraph 6.2 of this Article and the amount of the payment so suspended shall be deemed to be a holdback authorized pursuant to the terms of this *Subcontract* and shall be payable at the time provided for in this subparagraph. (\* *NOTE: the suspension time shall be 90 days or as otherwise agreed by the Contractor and the Subcontractor.*)
  - .4 Notwithstanding any suspension as herein provided of the obligation to make payment which would otherwise be payable pursuant to paragraph 6.2 of this Article, the *Contractor* shall be obliged to pay interest on the amount of the payment which is suspended at the date payment of that sum finally becomes due at the rate provided in paragraph 6.5 of this Article calculated from the date when, but for paragraph 6.3 of this Article, payment would otherwise have been due.
- 6.4 If no claims exist against the *Subcontract Work* and the *Subcontractor* has submitted to the *Contractor* a sworn statement that all accounts for labour, sub-subcontracts, *Products, Construction Equipment*, and other indebtedness which may have been incurred by the *Subcontractor* in the performance of the *Subcontract Work* and for which the *Contractor* might in any way be held responsible have been paid in full, except for holdback amounts to be payable out of the funds to be paid to the *Subcontractor* pursuant to this paragraph 6.4 or as an identified amount in dispute, the amount withheld from progress payments made pursuant to paragraph 6.1.1 of this Article and which is payable pursuant to paragraph 6.1.2 of this Article is due and payable:
- .1 In the Common Law provinces, on the day following the expiration of the holdback period stipulated in the lien legislation applicable to the *Place of the Work*. Where lien legislation does not exist or apply, the holdback amount shall be due and payable in accordance with other legislation, industry practice or provisions which may be agreed to between the parties. The *Contractor* may retain out of the holdback amount any sums required by law to satisfy any liens against the *Subcontract Work* or, if permitted by the lien legislation applicable to the *Place of the Work*, other third party monetary claims against the *Subcontractor* which are enforceable against the *Contractor*.
  - .2 In the Province of Quebec, no later than 30 calendar days after the date of *Substantial Performance of the Work*. The *Contractor* may retain out of the holdback amount any sums required by law to satisfy any legal hypothecs that have been taken or could be taken against the *Work* or other third party monetary claims against the *Owner* which are enforceable against the *Contractor*.
- 6.5 Interest
- .1 Should either party fail to make payments as they become due under the terms of this *Subcontract* or in an award by arbitration or court, interest at the following rates on such unpaid amounts shall also become due and payable until payment:
    - (1) 2% per annum above the prime rate for the first 60 days.
    - (2) 4% per annum above the prime rate after the first 60 days.Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by
- 
- (Insert name of chartered lending institution whose prime rate is to be used)*
- .2 Interest shall apply at the rate and in the manner prescribed by paragraph 6.5.1 of this Article on the settlement amount of any claim in dispute that is resolved either pursuant to Part 8 of the *Subcontract Conditions – DISPUTE RESOLUTION* or otherwise, from the date the amount would have been due and payable under the *Subcontract*, had it not been in dispute, until the date it is paid.

## Commentary

**Article 6, paragraph 6.3:** This deals with the possibility that the Consultant fails to issue any certificate for payment or the Owner fails to pay the Contractor within time. In effect, the clause extends the Contractor's due date for payment for some time specified in the "blank" in 6.3.3 (if nothing is specified, it's 90 days), provided that the Contractor takes the steps outlined in 6.3.1 and 6.3.2.

Basically, the Contractor must:

1. notify the Owner that it is in default;
2. notify the Subcontractor of such Owner default;
3. stop work and lien the project if the Owner does not cure the payment default within such cure period as may be stipulated in the Prime Contract.



The extension of the due date for payment by the Contractor only applies if the Contractor has taken these steps. Otherwise, the due date for payment remains as set out in 6.2, even if the Consultant has failed to issue a certificate for payment and/or the Owner has failed to pay the Contractor.



Even if the Prime Contractor takes the required steps and its due date for payment is extended, the Subcontractor is entitled to interest during that period of extension.

**Article 6, paragraph 6.4:** This deals with holdback release.

Holdback is due on the day following expiration of lien rights (Common Law provinces) or 30 days after Substantial Performance of the Work (in Quebec).

Holdback will only be due if no claims exist against the Subcontract Work which are enforceable against the Contractor. If there are liens or other, non-lien, claims which are enforceable against the Contractor, the Contractor may protect itself by retaining payment out of holdback to satisfy such claims.



The "sworn statement" in 6.4 will typically be the CCDC 9B-2001 Statutory Declaration of Progress Payment Distribution by Subcontractor.

**Article 6, paragraph 6.5:** This prescribes the interest rate for the Subcontract, and is identical to the revised interest rate provision in CCDC 2-2008, namely prime + 2% for the first 60 days, prime + 4% thereafter.



It is always open to the parties to stipulate a different interest rate in a supplementary condition drafted to suit. Be sure to insert the name of the bank whose prime rate shall govern the interest calculation.



This interest rate is a double-edge sword! Not only does it apply to late payments by the Contractor, but also to any liabilities which may be found owing by the Subcontractor to the Contractor, for example, reimbursement of the costs of correcting defective work. The contract strongly encourages prompt settlement of claims and disputes.

**ARTICLE 7 – RECEIPT OF AND ADDRESSES FOR NOTICE IN WRITING**

7.1 *Notices in Writing* will be addressed to the recipient at the address set out below. The delivery of a *Notice in Writing* will be by hand, by courier, by prepaid first class mail, or by facsimile or other form of electronic communication during the transmission of which no indication of failure of receipt is communicated to the sender. A *Notice in Writing* delivered by one party in accordance with this *Subcontract* will be deemed to have been received by the other party on the date of delivery if delivered by hand or courier, or if sent by mail it shall be deemed to have been received 5 calendar days after the date on which it was mailed, provided that if either such day is not a *Working Day*, then the *Notice in Writing* shall be deemed to have been received on the *Working Day* next following such day. A *Notice in Writing* sent by facsimile or other form of electronic communication shall be deemed to have been received on the date of its transmission provided that if such day is not a *Working Day* or if it is received after the end of normal business hours on the date of its transmission at the place of receipt, then it shall be deemed to have been received at the opening of business at the place of receipt on the first *Working Day* next following the transmission thereof. An address for a party may be changed by *Notice in Writing* to the other party setting out the new address in accordance with this Article.

**Contractor**

\_\_\_\_\_

*name of Contractor\**

\_\_\_\_\_

*address*

\_\_\_\_\_

*facsimile number*

\_\_\_\_\_

*email address*

**Subcontractor**

\_\_\_\_\_

*name of Subcontractor\**

\_\_\_\_\_

*address*

\_\_\_\_\_

*facsimile number*

\_\_\_\_\_

*email address*

*\* If it is intended that the notice must be received by a specific individual, that individual's name shall be indicated.*

**ARTICLE 8 LANGUAGE OF THE SUBCONTRACT**

8.1 When the *Subcontract Documents* are prepared in both the English and French languages, it is agreed that in the event of any apparent discrepancy between the English and French versions, the English/French\* language shall prevail.

*\* Complete this statement by striking out inapplicable term.*

8.2 This *Subcontract Agreement* is drawn in English at the request of the parties hereto. La présente convention est rédigée en anglais à la demande des parties.



## Commentary

**Article 7:** This prescribes how Notices in Writing are delivered.



Note that notices by “electronic communication” (i.e. email) are now contemplated. If there is concern about the practical difficulty of actually proving that an email was received by the intended recipient, the parties should amend by supplementary condition to remove the option of notice by electronic communication.



CCA 1-2008 contemplates Notices in Writing in numerous instances, including:

- Article 6.3.2 (Contractor’s notice to Subcontractor of steps taken to enforce payment from Owner)
- SCC 3.9.1 (Contractor’s notice to Subcontractor to settle downstream accounts)
- SCC 6.4.1 (notice of materially differing subsurface conditions)
- SCC 6.5.4 (Subcontractor’s notice of delay)
- SCC 6.6.1 (notice of intent to claim)
- SCC 6.6.5 (response to notice of intent to claim)
- SCC 7.1.1 (termination by Contractor due to insolvency of Subcontractor)
- SCC 7.1.2 (Contractor’s notice of default to Subcontractor)
- SCC 7.2.1 (termination by Subcontractor due to insolvency by Contractor)
- SCC 7.2.2 (Subcontractor’s termination due to suspension of work)
- SCC 7.2.3 (Subcontractor’s notice of default due to non-payment)
- SCC 7.2.6 (termination of Subcontract due to termination of Prime Contract)
- SCC 8.2.1 (Subcontractor’s notice of dispute to Contractor)
- SCC 8.2.1 (Contractor’s reply to Subcontractor’s notice of dispute)
- SCC 8.2.4 (Project Mediator’s termination of mediated negotiations)
- SCC 8.2.5 (notice to arbitrate)
- SCC 12.1.6 (claim for indemnification)
- SCC 12.2.1.1 (Subcontractor’s notice of claim to Contractor, prior to substantial performance)
- SCC 12.2.2 (Subcontractor’s notice of claim to Contractor, following substantial performance)
- SCC 12.2.3.1 (Contractor’s notice of claim to Subcontractor, prior to substantial performance)
- SCC 12.2.4 (Contractor’s notice of claim to Subcontractor, prior to expiry of limitations)
- SCC 12.2.5 (Contractor’s notice of claim to Subcontractor, following substantial performance)
- SCC 12.3.3 (Contractor’s notice to Subcontractor of warranty claims)

**IN WITNESS WHEREOF,**

Paragraphs (1) and (2), which only apply to the Province of Quebec, shall read as follows:

- (1) having read and fully understood this *Subcontract* and all the documents it includes or to which it refers, as well as the rights and obligations resulting there from; and
- (2) having had the opportunity of negotiating the essential stipulations of this *Subcontract*,

the parties hereto have executed this *Subcontract* by the hands of their duly authorized representatives.

**SIGNED AND DELIVERED**

in the presence of:

**WITNESS**

**CONTRACTOR**

\_\_\_\_\_  
*signature*

\_\_\_\_\_  
*name and title of person signing*

\_\_\_\_\_  
*signature*

\_\_\_\_\_  
*name and title of person signing*

**WITNESS**

\_\_\_\_\_  
*name of Contractor*

\_\_\_\_\_  
*signature*

\_\_\_\_\_  
*name and title of person signing*

\_\_\_\_\_  
*signature*

\_\_\_\_\_  
*name and title of person signing*

**SUBCONTRACTOR**

\_\_\_\_\_  
*name of Subcontractor*

\_\_\_\_\_  
*signature*

\_\_\_\_\_  
*name and title of person signing*

\_\_\_\_\_  
*signature*

\_\_\_\_\_  
*name and title of person signing*

- N.B. Where legal jurisdiction, local practice, or Contract or Subcontract requirement calls for:*
- (a) *proof of authority to execute this document, attach such proof of authority in the form of a certified copy of a resolution naming the representative(s) authorized to sign the Subcontract for and on behalf of the corporation or partnership; or*
  - (b) *the affixing of a corporate seal, this Subcontract shall be properly sealed.*



**Did you know...**



The NTCCC strongly supports the use of “unaltered” forms of contracts and recommends the use of the CCA 1 Stipulated Price Subcontract.



**Did you know...**



The NTCCC has produced a DVD called “Are You Getting paid?” which is an excellent accompaniment to this Guide and is available for viewing on the website at [www.ntccc.ca](http://www.ntccc.ca).



**Did you know...**



The NTCCC created a “Best Practices for Trade Contractors Guide” which available to download at no charge at [www.ntccc.ca](http://www.ntccc.ca).



**Did you know...**



The NTCCC members have access to more than 30 management level educational courses. The Program Calendar is available at [www.ntccc.ca](http://www.ntccc.ca).

## DEFINITIONS

The following definitions shall apply to all *Subcontract Documents*.

### 1. Change Directive

A *Change Directive* is a written instruction signed by the *Contractor* directing the *Subcontractor* to proceed with a change in the *Subcontract Work* within the general scope of the *Subcontract Documents* prior to the *Contractor* and the *Subcontractor* agreeing upon adjustments in the *Subcontract Price* and the *Subcontract Time*.

### 2. Change Order

A *Change Order* is a written amendment to this *Subcontract* signed by the *Contractor* and the *Subcontractor* stating their agreement upon:

- a change in the *Subcontract Work*;
- the method of adjustment or the amount of the adjustment in the *Subcontract Price*, if any; and
- the extent of the adjustment in the *Subcontract Time*, if any.

### 3. Construction Equipment

*Construction Equipment* means all machinery and equipment, either operated or not operated, that is required for preparing, fabricating, conveying, erecting, or otherwise performing the *Subcontract Work* but is not incorporated into the *Subcontract Work*.

### 4. Contract Documents

The *Contract Documents* are those documents comprising the *Prime Contract* between the *Owner* and the *Contractor* and defined therein.

### 5. Drawings

The *Drawings* are the graphic and pictorial portions of the *Subcontract Documents*, wherever located and whenever issued, showing the design, location, and dimensions of the *Subcontract Work*, generally including plans, elevations, sections, details, and diagrams.

### 6. Notice in Writing

A *Notice in Writing*, where identified in the *Subcontract Documents*, is a written communication between the parties that is transmitted in accordance with the provisions of Article 7 of the Subcontract Agreement – RECEIPT OF AND ADDRESSES FOR NOTICES IN WRITING.

### 7. Owner, Consultant, Contractor, Subcontractor

The *Owner*, *Consultant*, *Contractor*, and *Subcontractor* are the persons or entities identified as such in this *Subcontract Agreement* and include their authorized representatives.

### 8. Place of the Work

The *Place of the Work* is the designated site or location of the *Work* identified in the *Contract Documents*.

### 9. Prime Contract

The *Prime Contract* is the undertaking by the *Owner* and the *Contractor* to perform their respective duties, responsibilities and obligations as prescribed in the *Contract Documents* and represents the entire agreement between the *Owner* and the *Contractor*.

### 10. Product

*Product* or *Products* means material, machinery, equipment, and fixtures forming the *Subcontract Work*, but does not include *Construction Equipment*.

### 11. Project

The *Project* means the total construction contemplated of which the *Work* may be the whole or a part.

### 12. Provide

*Provide* means to supply and install.

### 13. Shop Drawings

*Shop Drawings* are drawings, diagrams, illustrations, schedules, performance charts, brochures, *Product* data, and other data which the *Subcontractor* provides to illustrate details of portions of the *Subcontract Work*.

### 14. Specifications

The *Specifications* are that portion of the *Subcontract Documents*, wherever located and whenever issued, consisting of the written requirements and standards for *Products*, systems, workmanship, quality, and the services necessary for the performance of the *Subcontract Work*.

## Commentary

This is the list of defined terms which are used consistently throughout CCA 1-2008. All italicized words and phrases used anywhere in the document will be defined here. These Definitions essentially flow through the Definitions found in CCDC 2-2008, with changes where necessary to suit the Contractor-Subcontractor relationship rather than the Owner-Contractor relationship in the CCDC 2-2008 document.

**Definition - “Change Directive”:** Change Directive work is work which is otherwise “within the general scope of the Subcontract Documents”.



**It is impermissible to order changed work which is outside the general scope of the Subcontract (as defined by the Subcontract Documents) using a Change Directive.**

**Definition - “Change Order”:** a Change Order must be signed by both the Contractor and the Subcontractor in order to be effective.



**Note the definition of “Contract Documents”. These are the Prime Contract documents, not the Subcontract Documents. The documents which comprise the Subcontract Documents have a separate definition - “Subcontract Documents”.**



**Note the definition of “Project”. The Project is the total construction. The Prime Contract work may be the whole of the Project, or just a portion of it. In turn, the Subcontract Work will be a portion of the Prime Contract work.**



**We now have a definition of “Shop Drawings”, taken from CCDC 2-2008. They are drawings, diagrams, etc. emanating from the Subcontractor and passing upstream to the Contractor. This correlates to the provisions detailing the Subcontractor’s responsibilities in connection with Shop Drawings (see SCC 3.5)**

**15. Subcontract**

The *Subcontract* is the undertaking by the *Contractor* and the *Subcontractor* to perform their respective duties, responsibilities, and obligations as prescribed in the *Subcontract Documents* and represents the entire agreement between the *Contractor* and the *Subcontractor*.

**16. Subcontract Documents**

The *Subcontract Documents* consist of those documents as listed in Article 3A or Article 3B of the Subcontract Agreement – SUBCONTRACT DOCUMENTS, and any other amendments or provisions agreed upon between the *Contractor* and *Subcontractor*.

**17. Subcontract Price**

The *Subcontract Price* is the amount stipulated in Article 5 of the Subcontract Agreement – SUBCONTRACT PRICE.

**18. Subcontract Time**

The *Subcontract Time* is the time stipulated in Article 4 of the Subcontract Agreement – SCHEDULE within which the *Subcontract Work* is to be performed.

**19. Subcontract Work**

The *Subcontract Work* means the construction and related services required by the *Subcontract Documents*.

**20. Substantial Performance of the Subcontract Work**

*Substantial Performance of the Subcontract Work* is as defined in the lien legislation applicable to the *Place of the Work*. If such legislation is not in force or does not contain such definition, or if the *Subcontract Work* is governed by the Civil Code of Quebec, *Substantial Performance of the Subcontract Work* shall have been reached when the *Subcontract Work* is ready for use or is being used for the purpose intended and is so certified by the *Consultant* if the conditions of the *Prime Contract* require the *Consultant* to issue such a certificate.

**21. Substantial Performance of the Work**

*Substantial Performance of the Work* is as defined in the lien legislation applicable to the *Place of the Work*. If such legislation is not in force or does not contain such definition, or if the *Work* is governed by the Civil Code of Quebec, *Substantial Performance of the Work* shall have been reached when the *Work* is ready for use or is being used for the purpose intended and is so certified by the *Consultant* in consultation with the *Contractor* if the *Consultant* is required by the terms of the *Prime Contract* to issue such a certificate.

**22. Sub-Subcontractor**

A *Sub-Subcontractor* is a person or entity having a direct contract with the *Subcontractor* to perform a part or parts of the *Subcontract Work*.

**23. Supplemental Instruction**

A *Supplemental Instruction* is an instruction, not involving adjustment in the *Subcontract Price* or *Subcontract Time*, in the form of *Specifications*, *Drawings*, schedules, samples, models or written instructions, consistent with the intent of the *Subcontract Documents*. It is to be issued by the *Contractor* to supplement the *Subcontract Documents* as required for the performance of the *Subcontract Work*.

**24. Temporary Work**

*Temporary Work* means temporary supports, structures, facilities, services, and other temporary items, excluding *Construction Equipment*, required for the execution of the *Subcontract Work* but not incorporated into the *Subcontract Work*.

**25. Value Added Taxes**

*Value Added Taxes* means such sum as shall be levied upon the *Subcontract Price* by the Federal or any Provincial or Territorial Government and is computed as a percentage of the *Subcontract Price* and includes the Goods and Services Tax, the Quebec Sales Tax, the Harmonized Sales Tax, and any similar tax, the collection and payment of which have been imposed on the *Subcontractor* by the tax legislation.

**26. Work**

The *Work* means the total construction and related services required by the *Contract Documents*.

**27. Working Day**

*Working Day* means a day other than a Saturday, Sunday, statutory holiday, or statutory vacation day that is observed by the construction industry in the area of the *Place of the Work*.

## Commentary



Note the “entire agreement” language in the definition of “Subcontract”. This, together with the definition of “Subcontract Documents”, reinforces the point that the subcontract terms and conditions must be set out in writing, and all the documents intended to constitute the Subcontract must be listed in Article 3A or 3B, as the case may be.



Note again the distinction between “Subcontract Documents” and “Contract Documents”. The Subcontract Documents are the documents listed in Article 3A or 3B (as applicable), and comprise the documents of the Subcontract Agreement.



Take care with the definition “Substantial Performance of the Subcontract Work”. It should not be confused with “substantial performance of the work”, as that term is defined in lien legislation. In some jurisdictions for example (Ontario being one of them), the term “substantial performance” does not apply at all to subcontracts for lien purposes, but only to prime contracts.

Where local lien legislation does not define “Substantial Performance of the Subcontract Work”, the subcontract is substantially performed when it is ready for use or being used for its intended purpose. Furthermore, if the Prime Contract requires the Consultant to so certify, the Subcontract Work is only deemed substantially performed when the Consultant issues that certificate.



Note that “Work” does not mean the work required under the Subcontract, but rather the work required under the Prime Contract. The work required under the Subcontract has its own definition - Subcontract Work, above.

## SUBCONTRACT CONDITIONS

### PART 1 GENERAL PROVISIONS

#### SCC 1.1 DOCUMENTS

- 1.1.1 The intent of the *Subcontract Documents* is to include the labour, *Products* and services necessary for the performance of the *Subcontract Work* by the *Subcontractor* in accordance with these documents. It is not intended, however, that the *Subcontractor* shall supply products or perform work not consistent with, not covered by, or not properly inferable from the *Subcontract Documents*.
- 1.1.2 Nothing contained in the *Subcontract Documents* shall create any contractual relationship between the *Contractor* and a *Sub-Subcontractor* or the *Sub-Subcontractor's* agent, employee, or other person performing any portion of the *Subcontract Work*.
- 1.1.3 The *Subcontract Documents* are complementary, and what is required by any one shall be as binding as if required by all.
- 1.1.4 Words or abbreviations which have well known technical or trade meanings are used in the *Subcontract Documents* in accordance with such recognized meanings.
- 1.1.5 References in the *Subcontract Documents* to the singular shall be considered to include the plural as the context requires.
- 1.1.6 Neither the organization of the *Specifications* nor the arrangement of *Drawings* shall control the *Subcontractor* in dividing the work among *Sub-Subcontractors*.
- 1.1.7 If there is a conflict within *Subcontract Documents*:
- .1 the order of priority of documents listed in Article 3A of the Subcontract Agreement – SUBCONTRACT DOCUMENTS, from highest to lowest, shall be
    - the Agreement of the *Prime Contract*,
    - the Definitions of the *Prime Contract*,
    - Supplementary Conditions of the *Prime Contract*,
    - the General Conditions of the *Prime Contract*,
    - the Agreement of the *Subcontract*,
    - the Definitions of the *Subcontract*,
    - Supplementary Conditions of the *Subcontract*,
    - the Subcontract Conditions of the *Subcontract*,
    - Division 1 of the *Specifications*,
    - technical *Specifications*,
    - material and finishing schedules,
    - the *Drawings*.
  - .2 the order of priority of documents listed in Article 3B of the Subcontract Agreement – SUBCONTRACT DOCUMENTS, from highest to lowest, shall be
    - the Agreement of the *Subcontract*,
    - the Definitions of the *Subcontract*,
    - Supplementary Conditions of the *Subcontract*,
    - the Subcontract Conditions of the *Subcontract*,
    - the Agreement of the *Prime Contract*, if any
    - the Definitions of the *Prime Contract*, if any
    - Supplementary Conditions of the *Prime Contract*, if any
    - the General Conditions of the *Prime Contract*, if any
    - Division 1 of the *Specifications*,
    - technical *Specifications*,
    - material and finishing schedules,
    - the *Drawings*.
  - .3 drawings of larger scale shall govern over those of smaller scale of the same date.
  - .4 dimensions shown on *Drawings* shall govern over dimensions scaled from *Drawings*.
  - .5 later dated documents shall govern over earlier documents of the same type.



## Commentary

**SCC 1.1.1:** This is the “intent” clause, essentially identical to that found in CCDC 2-2008. It stipulates that the Subcontractor’s obligation is to include everything necessary to perform its work in accordance with the Subcontract Documents. The Subcontractor is not obliged to perform work which is inconsistent with what is set out in the Subcontract Documents, or is not covered by them, or is not properly inferable from them.



This language in SCC 1.1.1 comes from a long body of case law, and is probably as close as language can come to dealing with the basic fact that no set of Subcontract Documents could ever completely include each and every item of work or material that the Subcontractor must provide in order to perform its obligations.



While this SCC 1.1.1 should provide adequate protection in most situations, the Subcontractor should take care, for example, if the draft Subcontract Documents are ambiguous about scope definition, or if the scope of the required work is unusual, or is divided among trades in an unusual manner. There is no substitute for a clear and comprehensive set of documents setting out precisely what it is the Subcontractor has agreed to do, and the Subcontractor must review the draft documents carefully before signing.

**SCC 1.1.7:** This is the “precedence” clause, dealing with the order of priority among the Subcontract Documents if there is a conflict within them. Note that the clause contemplates the two possible options for treatment of the Prime Contract - either the Prime Contract takes precedence (SCC 1.1.7.1) or the Subcontract takes precedence (SCC 1.1.7.2).



Before this precedence clause applies, there must be a “conflict” between the Subcontract Documents, i.e. one must address some specific point in one way, while another addresses it in a different way. If there is no conflict between Subcontract Documents, the clause does not apply, and the Subcontract Documents are simply read together. See the “complementary” language in SCC 1.1.3 above.

- 1.1.8 The *Contractor* shall provide the *Subcontractor*, without charge, sufficient copies of the *Subcontract Documents* to perform the *Subcontract Work*.

## **SCC 1.2 ASSIGNMENT**

- 1.2.1 Neither party to the *Subcontract* shall assign the *Subcontract* or a portion thereof without the written consent of the other, which consent shall not be unreasonably withheld.

## **PART 2 ADMINISTRATION OF THE SUBCONTRACT**

### **SCC 2.1 SUPPLEMENTAL INSTRUCTIONS**

- 2.1.1 During the progress of the *Subcontract Work* the *Contractor* will furnish *Supplemental Instructions* to the *Subcontractor* with reasonable promptness or in accordance with a schedule for such instructions agreed to by the *Contractor* and the *Subcontractor*.

### **SCC 2.2 REVIEW AND INSPECTION OF THE WORK**

- 2.2.1 The *Owner*, the *Consultant* and the *Contractor* shall have access to the *Subcontract Work* for inspection whenever it is in preparation or progress. The *Subcontractor* shall cooperate to provide reasonable facilities for such access.
- 2.2.2 If special tests, inspections or approvals are required by the *Subcontract Documents*, or by the *Consultant's* instructions, or by the laws or ordinances of the *Place of the Work*, the *Subcontractor* shall give the *Contractor* timely notice requesting inspection. Inspection by the *Consultant* and the *Contractor* shall be made promptly.
- 2.2.3 The *Subcontractor* shall furnish promptly to the *Contractor* two copies of certificates and inspection reports relating to the *Subcontract Work*.
- 2.2.4 If the *Subcontractor* covers, or permits to be covered, work that has been designated for special tests, inspections or approvals before such special tests, inspections or approvals are made, given or completed, the *Subcontractor* shall, if so directed, uncover such work, have the inspections or tests satisfactorily completed, and make good covering work at the *Subcontractor's* expense.
- 2.2.5 The *Contractor* may order any portion or portions of the *Subcontract Work* to be examined to confirm that such work is in accordance with the requirements of the *Subcontract Documents*. If the work is not in accordance with the requirements of the *Subcontract Documents*, the *Subcontractor* shall correct the work and pay the cost of examination and correction. If the work is in accordance with the requirements of the *Subcontract Documents*, the *Contractor* shall pay the cost of examination and restoration.
- 2.2.6 The *Subcontractor* shall pay the cost of making any test or inspection, including the cost of samples required for such test or inspection, if such test or inspection is designated in the *Subcontract Documents* to be performed by the *Subcontractor* or is designated by the laws or ordinances of the *Place of the Work*.
- 2.2.7 The *Subcontractor* shall pay the cost of samples required for any test or inspection to be performed by the *Consultant*, the *Owner* or the *Contractor* if such test or inspection is designated in the *Subcontract Documents*.

### **SCC 2.3 DEFECTIVE WORK**

- 2.3.1 The *Subcontractor* shall promptly correct defective work that has been rejected by the *Contractor* as failing to conform to the *Subcontract Documents* whether or not the defective work has been incorporated in the *Subcontract Work* and whether or not the defect is the result of poor workmanship, use of defective products or damage through carelessness or other act or omission of the *Subcontractor*.
- 2.3.2 The *Subcontractor* shall make good promptly other work destroyed or damaged by such corrections at the *Subcontractor's* expense.
- 2.3.3 If in the opinion of the *Contractor* it is not expedient to correct defective work or work not performed as provided in the *Subcontract Documents*, the *Contractor*, having obtained concurrence of such opinion from the *Consultant*, may deduct from the amount otherwise due to the *Subcontractor* the difference in value between the work as performed and that called for by the *Subcontract Documents*. If the *Subcontractor* does not agree with the difference in value, the disagreement shall be settled in accordance with Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION.

## Commentary



Article 1.1.8 does not stipulate what constitutes “sufficient copies” of the Subcontract Documents, and in a major subcontract that can be a significant expense. The Subcontractor may wish to stipulate the number of copies in a supplementary condition.

**SCC 2.1.1:** - By definition, “Supplemental Instructions” are additional instructions issued by the Contractor to supplement the Subcontract Documents. They do not involve any change in price or schedule. They are important to the Subcontractor as an assist in performing its work.



The “reasonable promptness” language in 2.1.1 will suffice for many situations, but on large or technically complex subcontracts, the Subcontractor may wish to consider a supplementary condition stipulating a firm deadline date to provide such instructions following a request to do so, or alternatively, agreement with the Contractor upon a schedule by which such instructions will be provided on an ongoing basis.

**SCC 2.2:** These are the rules governing inspections of the Subcontractor’s work in progress. Where special tests, inspections or approvals are required, the Subcontractor must give timely advance notice to the Contractor, and is required to uncover work at its expense to allow such inspections to take place. The Contractor may order any of the Subcontractor’s work to be examined. If the work is found not to be in accordance with the Subcontract Documents, the cost to inspect and correct is borne by the Subcontractor. If the work is found to be in accordance, those costs are for the Contractor. If the Subcontract Documents designate certain tests or inspections, those will be at the Subcontractor’s expense (since the Subcontractor’s bid price presumably included those costs). The Subcontractor must also pay for tests or inspections required by law.



Except for testing and inspection ordered by the Contractor and found to be unnecessary, such costs are generally allocated to the Subcontractor. If those costs are to be allocated differently, that must be specifically addressed by supplementary condition.



**The Subcontractor should never cover up work designated for special testing or inspection! It will have to pay the added costs of uncovering and making good.**

**SCC 2.3:** The Contractor has the right to reject any of the Subcontractor’s work which is defective, and the Subcontractor generally has the obligation to make good such defective work, including other work damaged or destroyed by such making good.

The Contractor - and not the Subcontractor - has the option of deducting the value of defective work from the Subcontract Price if it is not expedient to correct the work. The Consultant must agree.

## **PART 3 EXECUTION OF THE WORK**

### **SCC 3.1 CONSTRUCTION BY CONTRACTOR OR OTHER SUBCONTRACTORS**

- 3.1.1 The *Contractor* reserves the right to award separate subcontracts in connection with other parts of the *Work* to other subcontractors and to perform work with own forces.
- 3.1.2 When separate subcontracts are awarded for other parts of the *Work*, or when work is performed by the *Contractor's* own forces, the *Contractor* shall:
- .1 provide for the co-ordination of the activities and work of other subcontractors and *Contractor's* own forces with the *Subcontract Work*;
  - .2 assume overall responsibility for compliance with the applicable health and construction safety legislation at the *Place of the Work*;
  - .3 enter into separate subcontracts with other subcontractors under conditions of contract which are compatible with the conditions of the *Subcontract*;
  - .4 ensure that insurance coverage is provided to the same requirements as are called for in SCC 11.1 – INSURANCE and co-ordinate such insurance with the insurance coverage of the *Subcontractor* as it affects the *Subcontract Work*; and
  - .5 take all reasonable precautions to avoid labour disputes or other disputes on the *Work* arising from the work of other subcontractors or the *Contractor's* own forces.
- 3.1.3 When separate subcontracts are awarded for other parts of the *Work*, or when work is performed by the *Contractor's* own forces, the *Subcontractor* shall:
- .1 afford the *Contractor* and other subcontractors reasonable opportunity to store their products and execute their work;
  - .2 cooperate with other subcontractors and the *Contractor* in reviewing their construction schedules; and
  - .3 promptly report to the *Contractor* in writing any apparent deficiencies in the work of other subcontractors or of the *Contractor's* own forces, where such work affects the proper execution of any portion of the *Subcontract Work*, prior to proceeding with that portion of the *Subcontract Work*.
- 3.1.4 Where the *Subcontract Documents* identify the work to be performed by other subcontractors or the *Contractor's* own forces, the *Subcontractor* shall co-ordinate and schedule the *Subcontract Work* with the work of other subcontractors and the *Contractor's* own forces as specified in the *Subcontract Documents*.
- 3.1.5 When a change in the *Subcontract Work* is required as a result of the co-ordination and integration of the work of other subcontractors or *Contractor's* own forces with the *Subcontract Work*, the changes shall be authorized and valued as provided in SCC 6.1 – CONTRACTOR'S RIGHT TO MAKE CHANGES, SCC 6.2 – CHANGE ORDER, and SCC 6.3 – CHANGE DIRECTIVE.
- 3.1.6 Disputes and other matters in question between the *Subcontractor* and other subcontractors shall be dealt with as provided in Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION provided the other subcontractors have reciprocal obligations. The *Subcontractor* shall be deemed to have consented to arbitration of any such dispute with any other subcontractor whose contract with the *Contractor* contains a similar agreement to arbitrate.

### **SCC 3.2 TEMPORARY SERVICES**

- 3.2.1 Unless otherwise stipulated in the *Subcontract Documents*, the *Contractor* will provide and pay for all temporary water, power and heat, general purpose lighting and toilet facilities but excluding those temporary services required for the *Subcontractor's* site office.

### **SCC 3.3 SUPERVISION**

- 3.3.1 The *Subcontractor* shall provide all necessary supervision and appoint a competent representative who shall be in attendance at the *Place of the Work* while work is being performed. The appointed representative shall not be changed except for valid reason.
- 3.3.2 The appointed representative shall represent the *Subcontractor* at the *Place of the Work*. Information and instructions provided to the *Subcontractor's* appointed representative shall be deemed to have been received by the *Subcontractor*, except with respect to Article 7 of the Subcontract Agreement – RECEIPT OF AND ADDRESSES FOR NOTICE IN WRITING.

## Commentary

**SCC 3.1:** This deals with various coordination matters involving the Contractor, Subcontractor and other subcontractors, balancing the rights and responsibilities of each.

The Contractor's obligations:

- to provide for the coordination of all work
- to assume overall health and safety responsibility
- to enter into compatible subcontract agreements with the other subcontractors
- to ensure that insurance is coordinated among the team
- to avoid labour disputes

The Subcontractor's obligations:

- to give the others reasonable opportunity to store their materials and access their work
- to cooperate in reviewing the others' construction schedules
- to report deficiencies in prior work promptly, before proceeding with its own work.

The Subcontractor is obliged to coordinate and schedule its own work with the work of the others. However, if that results in a change to the Subcontract Work, the Subcontractor is entitled to a Change Order or Change Directive covering the impacts upon its work and/or schedule.



**The Subcontractor should take care to ensure that any change in Subcontract Work required due to this coordination be dealt with by Change Order or Change Directive before the work is done. Otherwise, the Subcontractor risks losing the right to payment and/or schedule extension.**

**SCC 3.2:** The Contractor provides and pays for temporary water, power, heat, etc., unless the Subcontract Documents provide otherwise.

**SCC 3.3:** This contemplates full-time supervision by the Subcontractor. That supervisor is the Subcontractor's representative for the purposes of the Subcontract.



**If the Subcontractor requires notices and instructions to be given or copied to people other than the site supervisor, that requirement should be covered in a supplementary condition.**

### SCC 3.4 SUB-SUBCONTRACTORS

- 3.4.1 The *Subcontractor* shall preserve and protect the rights of the parties under the *Subcontract* with respect to *Subcontract Work* to be performed under sub-subcontract, and shall:
- .1 enter into contracts or written agreements with *Sub-Subcontractors* to require them to perform their work as provided in the *Subcontract Documents*;
  - .2 incorporate the terms and conditions of the *Subcontract Documents* into all contracts or written agreements with *Sub-Subcontractors*; and
  - .3 be as fully responsible to the *Contractor* for acts and omissions of *Sub-Subcontractors* and of persons directly or indirectly employed by them as for acts and omissions of persons directly employed by the *Subcontractor*.
- 3.4.2 The *Subcontractor* shall indicate in writing, if requested by the *Contractor*, those *Sub-Subcontractors* whose bids have been received by the *Subcontractor* which the *Subcontractor* would be prepared to accept for the performance of a portion of the *Subcontract Work*. Should the *Contractor* not object before signing the *Subcontract*, the *Subcontractor* shall employ those *Sub-Subcontractors* that comply with the requirements of the *Subcontract Documents* and so identified by the *Subcontractor* in writing for the performance of that portion of the *Subcontract Work* to which their bid applies.
- 3.4.3 The *Contractor* may, for reasonable cause, at any time before the *Contractor* has signed the *Subcontract*, object to the use of a proposed *Sub-Subcontractor* and require the *Subcontractor* to employ one of the other sub-subcontract bidders.
- 3.4.4 If the *Contractor* requires the *Subcontractor* to change a proposed *Sub-Subcontractor*, the *Subcontract Price* and *Subcontract Time* shall be adjusted by the differences occasioned by such required change.
- 3.4.5 The *Subcontractor* shall not be required to employ as a *Sub-Subcontractor*, a person or firm to which the *Subcontractor* may reasonably object.
- 3.4.6 The *Contractor* may provide to a *Sub-Subcontractor* information as to the percentage of the *Sub-Subcontractor's* work which has been certified for payment.

### SCC 3.5 SHOP DRAWINGS

- 3.5.1 The *Subcontractor* shall provide *Shop Drawings* as required in the *Subcontract Documents*.
- 3.5.2 The *Subcontractor* shall provide *Shop Drawings* to the *Contractor* to review in orderly sequence and sufficiently in advance so as to cause no delay in the *Subcontract Work* or in the work of other contractors.
- 3.5.3 Upon request of the *Contractor*, they shall jointly prepare a schedule of the dates for provision, review and return of *Shop Drawings*.
- 3.5.4 The *Subcontractor* shall provide *Shop Drawings* in the form specified, or if not specified, as directed by the *Contractor*.
- 3.5.5 *Shop Drawings* provided by the *Subcontractor* to the *Contractor* shall indicate by stamp, date and signature of the person responsible for the review that the *Subcontractor* has reviewed each one of them.
- 3.5.6 *Shop Drawings* which require approval of any legally constituted authority having jurisdiction shall be provided to such authority by the *Subcontractor* for approval.
- 3.5.7 The *Subcontractor* shall review all *Shop Drawings* before providing them to the *Contractor*. The *Subcontractor* represents by this review that:
- .1 the *Subcontractor* has determined and verified all applicable field measurements, field construction conditions, *Product* requirements, catalogue numbers and similar data, or will do so, and
  - .2 the *Subcontractor* has checked and co-ordinated each *Shop Drawing* with the requirements of the *Subcontract Work* and of the *Subcontract Documents*.
- 3.5.8 At the time of providing *Shop Drawings*, the *Subcontractor* shall expressly advise the *Contractor* in writing of any deviations in a *Shop Drawing* from the requirements of the *Subcontract Documents*. The *Contractor* shall indicate the acceptance or rejection of such deviation expressly in writing.
- 3.5.9 The *Contractor's* review shall not relieve the *Subcontractor* of responsibility for errors or omissions in the *Shop Drawings* or for meeting all requirements of the *Subcontract Documents*.

## Commentary

**SCC 3.4.1** - This is the Subcontractor's basic obligation to enter into further sub-subcontract agreements downstream in a manner consistent with the terms of the CCA 1 between the Subcontractor and the Contractor. The Subcontractor is obliged to ensure that its obligations upstream to the Contractor are carried down to its own sub-subcontractors contractually, to the extent applicable.

**SCC 3.4.2 to 3.4.5:** Just as the Owner has the right to reasonably object to the use of a proposed intended subcontractor, so too does the Contractor have a corresponding right to reasonably object to any proposed sub-subcontractor which the Subcontractor wishes to use. These provisions set out that right, as well as the procedure to be used.



Note that if the Contractor requires a substitution of proposed sub-subcontractor to one who bid to the Subcontractor at a higher price and/or a longer schedule, the financial and schedule consequences of that fall upon the Contractor, not the Subcontractor.

**SCC 3.5:** This sets out the basic process for submission and approval of Shop Drawings. By definition, Shop Drawings are drawings, diagrams, illustrations, schedules, performance charts, brochures, product data and other data which the Subcontractor provides to illustrate details of portions of the Subcontract Work.

There is considerable responsibility on the part of the Subcontractor in connection with Shop Drawings. The Subcontractor must provide them as required in the Subcontract Documents, in orderly sequence and sufficiently in advance so as not to delay the work, and they must be in the form specified (or if not specified, as the Contractor directs). If any Shop Drawings require approval by an authority, the Subcontractor must submit them to that authority for the approval.

Beyond indicating acceptance or rejection of deviations, the Contractor is also obliged to review and return the Shop Drawings in accordance with the agreed schedule, or absent such a schedule, with reasonable promptness so as not to delay the work.



The Subcontractor should be cautious about Shop Drawings. SCC 3.5.7 provides that when the Subcontractor presents the Shop Drawings to the Contractor, the Subcontractor makes some important representations about having verified applicable field measurements, etc., and that the Subcontractor has checked and coordinated each shop drawing with the requirements of the Subcontract Work and the Subcontract Documents. Furthermore, the Subcontractor must expressly advise the Contractor in writing of any deviations in a Shop Drawing from the requirements of the Subcontract Documents. While the Contractor must indicate acceptance or rejection of each such deviation, the Subcontractor remains responsible for errors and omissions in Shop Drawings and for meeting the requirements of the Subcontract Documents generally.

- 3.5.10 The *Subcontractor* shall provide revised *Shop Drawings* to correct those which the *Contractor* rejects as inconsistent with the *Subcontract Documents*, unless otherwise directed by the *Contractor*. The *Subcontractor* shall advise the *Contractor* in writing of any revisions to the *Shop Drawings* other than those requested by the *Contractor*.
- 3.5.11 The *Contractor* will review and return *Shop Drawings* in accordance with the schedule agreed upon, or, in the absence of such schedule, with reasonable promptness so as to cause no delay in the performance of the *Subcontract Work*.

### **SCC 3.6 USE OF THE WORK**

- 3.6.1 The *Subcontractor* shall confine *Construction Equipment*, *Temporary Work*, storage of *Products*, waste products and debris, and operations of employees to limits indicated by laws, ordinances, permits, the *Subcontract Documents*, or by direction of the *Contractor* and shall not unreasonably encumber the *Place of the Work*.
- 3.6.2 The *Subcontractor* shall not load or permit to be loaded any part of the *Work* with a weight or force that will endanger the safety of the *Work*.
- 3.6.3 The *Subcontractor* shall comply with the *Contractor's* instructions regarding signs, advertisements, fires, and smoking.

### **SCC 3.7 CUTTING AND REMEDIAL WORK**

- 3.7.1 The *Subcontractor* shall do the cutting and remedial work required to make the affected parts of the *Subcontract Work* come together properly.
- 3.7.2 The *Subcontractor* shall coordinate the *Subcontract Work* to ensure that the cutting and remedial work is kept to a minimum.
- 3.7.3 The *Subcontractor* shall not cut, dig, box, or sleeve any structural member so as to endanger existing work nor alter the work of any others without the *Contractor's* written consent.
- 3.7.4 Should the *Owner*, the *Contractor* or anyone employed by them be responsible for ill-timed work necessitating cutting or remedial work to be performed, the cost of such cutting or remedial work shall be valued as provided in SCC 6.1 – CONTRACTOR'S RIGHT TO MAKE CHANGES, SCC 6.2 – CHANGE ORDER and SCC 6.3 – CHANGE DIRECTIVE.
- 3.7.5 Cutting and remedial work shall be performed by specialists familiar with the *Products* affected and shall be performed in a manner to neither damage nor endanger the *Work*.

### **SCC 3.8 CLEANUP**

- 3.8.1 The *Subcontractor* shall maintain the *Subcontract Work* in a safe and tidy condition and free from the accumulation of waste products and debris caused by the *Subcontract Work*.
- 3.8.2 Before applying for *Substantial Performance of the Subcontract Work*, the *Subcontractor* shall remove waste products and debris caused by the *Subcontract Work* to the satisfaction of the *Contractor*. If the *Contractor* instructs the *Subcontractor* to perform these housekeeping requirements and the *Subcontractor* fails to do so within a reasonable time, the *Contractor* shall have the right to have the work performed by whatever means may be expedient and the *Subcontractor* agrees to pay all reasonable costs of such clean-up and removal of waste products and debris.
- 3.8.3 Prior to application for *Substantial Performance of the Subcontract Work*, the *Subcontractor* shall remove any remaining products, tools, *Construction Machinery*, *Temporary Work*, and waste products and debris resulting from the *Subcontractor's* work.

### **SCC 3.9 PAYMENT OF ACCOUNTS**

- 3.9.1 The *Subcontractor* shall promptly and satisfactorily settle and pay for all accounts, claims or liens with respect to the *Subcontract Work*. If, after having received 2 *Working Days Notice in Writing* from the *Contractor* to settle and pay such accounts, claims or liens, the *Subcontractor* fails or refuses to settle or pay same, the *Contractor* shall have the right to settle or pay such accounts, claims or liens for the account of the *Subcontractor* and the receipt issued to the *Contractor* with respect to such accounts, claims or liens shall be conclusive evidence as to such payments and the amount thereof. Notwithstanding the foregoing provision, the *Subcontractor* shall not be required to pay any such accounts, claims or liens if it has reasonable grounds for disputing same and the *Contractor* in these circumstances will only have the right to pay or settle such accounts, claims or liens in such manner as in its opinion, will not prejudice the *Subcontractor's* right to dispute same.



## Commentary

**SCC 3.6:** This provides some basic restrictions upon the Subcontractor's right to use the work area. In most cases, they should pose little controversy.



If the Subcontractor has particular requirements pertaining to storage of material or equipment, it is prudent to advise the Contractor in advance, preferably at the time of bid, in order to avoid controversy and possibly unanticipated costs for off-site storage and extra handling.

**SCC 3.7:** The Subcontractor is primarily responsible to do the necessary cutting and remedial work required in connection with its work. But it must obtain the Contractor's written consent if its cutting and remedial work pertains to any structural member so as to endanger existing work, or if such work alters the work of others. Note SCC 3.7.4, a provision intended to avoid controversy about who becomes liable for unanticipated cutting and remedial work. If anyone other than the Subcontractor is responsible for ill-timed work which in turn forces the Subcontractor to perform cutting and remedial work, the costs of that are processed as a change.



There is always the possibility of argument about whether or not preceding work was in fact ill-timed. A Subcontractor facing this situation should be careful to not perform such work without alerting the Contractor in advance, and where appropriate, requesting the issuance of a Change Order or Change Directive, and if necessary, giving notice of claim under SCC 6.6.

**SCC 3.8:** The Subcontractor is responsible for its own cleanup.



Note that the Contractor has the right to perform cleanup "by whatever means it deems expedient" - but *only after* instructing the Subcontractor to perform housekeeping and *only after* the failure of the Subcontractor to do so within a reasonable time.

On larger projects, housekeeping on site is often dealt with differently than as prescribed in this SCC 3.8. For example, the Contractor may assume overall responsibility as part of its general conditions, but with a cost-sharing arrangement among the Subcontractors. To avoid controversy about this, it is important that any alternative arrangement be recorded by supplementary condition.

**SCC 3.9:** The Contractor has the right, using the Subcontractor's money, to settle any unpaid account, claim or lien pertaining to Subcontract Work, upon 2 Working Days notice in writing to the Subcontractor. The Subcontractor can still dispute any account, claim or lien upon reasonable grounds.



A Contractor paying a claimant downstream of the Subcontractor in the face of the Subcontractor's objection risks a finding that by doing so, it prejudiced the Subcontractor. For this reason, Contractors will typically invoke this right only infrequently, in the clearest of cases, and where settlement of such downstream accounts is necessary to prevent further complications with the project.



Subcontractors should not ignore the very short 2 Working Day deadline, and respond immediately to any written notice from a Contractor of any intention to settle any account, claim or lien of a Sub-Subcontractor or Supplier.

## **PART 4 ALLOWANCES**

### **SCC 4.1 CASH ALLOWANCES**

- 4.1.1 The *Subcontract Price* includes the cash allowances, if any, stated in the *Subcontract Documents*. The scope of work or costs included in such cash allowance shall be as described in the *Subcontract Documents*.
- 4.1.2 The *Subcontract Price*, and not the cash allowances, includes the *Subcontractor's* overhead and profit in connection with such cash allowances.
- 4.1.3 Expenditures under cash allowances shall be authorized by the *Contractor*.
- 4.1.4 Where the actual cost of the *Subcontract Work* under any cash allowance exceeds the amount of the allowance, the *Subcontractor* shall be compensated for the excess incurred and substantiated plus an amount for overhead and profit on the excess as set out in the *Subcontract Documents*. Where the actual cost of the *Subcontract Work* under any cash allowance is less than the amount of the allowance, the *Contractor* shall be credited for the unexpended portion of the cash allowance, but not for the *Subcontractor's* overhead and profit on such amount. Multiple cash allowances shall not be combined for the purpose of calculating the foregoing.
- 4.1.5 The *Subcontract Price* shall be adjusted by *Change Order* to provide for any difference between the amount of each cash allowance and the actual cost of the *Subcontract Work* under that cash allowance.

## **PART 5 PAYMENT**

### **SCC 5.1 APPLICATIONS FOR PAYMENT**

- 5.1.1 Applications for payment on account as provided in Article 6 of the Subcontract Agreement – PAYMENT may be made monthly as the *Subcontract Work* progresses.
- 5.1.2 The *Subcontractor* shall submit to the *Contractor*, at least 20 calendar days before the first application for payment, a schedule of values for the parts of the *Subcontract Work*, aggregating the total amount of the *Subcontract Price*, so as to facilitate evaluation of applications for payment.
- 5.1.3 The schedule of values shall be made out in such form and supported by such evidence as the *Contractor* may reasonably direct and when accepted by the *Contractor*, shall be used as the basis for applications for payment, unless it is found to be in error.
- 5.1.4 The *Subcontractor* shall include a statement based on the schedule of values with each application for payment.
- 5.1.5 Applications for payment for *Products* delivered to the *Place of the work* but not yet incorporated into the *Subcontract Work* shall be supported by such evidence as the *Contractor* may reasonably require to establish the value and delivery of the *Products*.

### **SCC 5.2 WITHHOLDING OF PAYMENT**

- 5.2.1 If because of climatic or other conditions reasonably beyond the control of the *Subcontractor*, there are items of *Subcontract Work* that cannot be performed, payment in full for that portion of the *Subcontract Work* which has been performed as certified by the *Consultant* shall not be withheld or delayed by the *Contractor* on account thereof, but the *Contractor* may withhold, until the remaining portion of the *Subcontract Work* is finished, only such an amount that the *Contractor* determines is sufficient and reasonable to cover the cost of performing such remaining *Subcontract Work*.
- 5.2.2 The provisions of SCC 5.2 – WITHHOLDING OF PAYMENT shall be effective only when the applicable lien legislation permits the release of any portion of the *Subcontract Price* which has been withheld by way of holdback under the conditions contemplated herein.

### **SCC 5.3 NON-CONFORMING WORK**

- 5.3.1 No payment by the *Contractor* under this *Subcontract* nor partial or entire use or occupancy of the *Work* by the *Owner* shall constitute an acceptance of any portion of the *Subcontract Work* or *Products* which are not in accordance with the requirements of the *Subcontract Documents*.

## Commentary

**SCC 4.1:** This clause covers the treatment of cash allowances for the Subcontract, including how cash allowance payments are authorized, and what happens if actual costs are both over and under the cash allowance amounts as stated.



Note that the Subcontractor's overhead and profit is included within the Subcontract Price, not within the cash allowances. Note also that if actual cost exceeds the amount of cash allowance, the Subcontractor gets overhead and profit on the excess, while if the actual cost is less than the amount of the cash allowance, the Subcontractor keeps the overhead and profit on the unexpended portion of the cash allowance.

**SCC 5.1:** Payment applications are made monthly, using a schedule of values which the Subcontractor must provide to the Contractor in advance of the first application. The Contractor has the authority to direct the form of this schedule of values, but must act reasonably.

**SCC 5.2:** This provision protects the Subcontractor's right to receive payment for partially completed work in circumstances in which items of the work cannot be completed because of conditions beyond the Subcontractor's control. Where that payment includes holdback under lien legislation, this right to payment is effective only when the lien legislation allows the partial holdback release.

**SCC 5.3:** Neither payment nor occupancy by the Owner constitutes acceptance of Subcontract Work which is otherwise not in accordance with the Subcontract Documents.



The Contractor is interested in preserving its right to have the Subcontractor's work done properly and in accordance with the Subcontract Documents. The Subcontractor is interested in maintaining cash flow. This provision seeks to balance those two competing objectives.

## **PART 6 CHANGES IN THE WORK**

### **SCC 6.1 CONTRACTOR'S RIGHT TO MAKE CHANGES**

- 6.1.1 The *Contractor*, without invalidating the *Subcontract*, may make:
- .1 changes in the *Subcontract Work* consisting of additions, deletions or other revisions to the *Subcontract Work* by *Change Order* or *Change Directive*, and
  - .2 changes to the *Subcontract Time* for the *Subcontract Work*, or at any part thereof, by *Change Order*.
- 6.1.2 The *Subcontractor* shall not perform a change in the *Subcontract Work* without a *Change Order* or a *Change Directive*.

### **SCC 6.2 CHANGE ORDER**

- 6.2.1 When a change in the *Subcontract Work* is proposed or required, the *Contractor* shall provide the *Subcontractor* with a written description of the proposed change in the *Subcontract Work*. The *Subcontractor* shall promptly present, in a form acceptable to the *Contractor*, a method of adjustment or an amount of adjustment for the *Subcontract Price*, if any, and the adjustment in the *Subcontract Time*, if any, for the proposed change in the *Subcontract Work*.
- 6.2.2 When the *Contractor* and the *Subcontractor* agree to the adjustments in the *Subcontract Price* and *Subcontract Time* or to the method to be used to determine the adjustments, such agreement shall be effective immediately and shall be recorded in a *Change Order*. The value of the *Subcontract Work* performed as the result of a *Change Order* shall be included in the application for progress payment.

### **SCC 6.3 CHANGE DIRECTIVE**

- 6.3.1 If the *Contractor* requires the *Subcontractor* to proceed with a change in the *Subcontract Work* prior to the *Contractor* and the *Subcontractor* agreeing upon the corresponding adjustment in *Subcontract Price* and *Subcontract Time*, the *Contractor* shall issue a *Change Directive*.
- 6.3.2 A *Change Directive* shall only be used to direct a change in the *Subcontract Work* which is within the general scope of the *Subcontract Documents*.
- 6.3.3 A *Change Directive* shall not be used to direct a change in the *Subcontract Time* only.
- 6.3.4 Upon receipt of a *Change Directive*, the *Subcontractor* shall proceed promptly with the change in the *Subcontract Work*.
- 6.3.5 For the purpose of valuing *Change Directives*, changes in the *Subcontract Work* that are not substitutions or otherwise related to each other shall not be grouped together in the same *Change Directive*.
- 6.3.6 The adjustment in the *Subcontract Price* for a change carried out by way of a *Change Directive* shall be determined on the basis of the cost of the *Subcontractor's* actual expenditures and savings attributable to the *Change Directive*, valued in accordance with paragraph 6.3.7 and as follows:
- .1 If the change results in a net increase in the *Subcontractor's* cost, the *Subcontract Price* shall be increased by the amount of the net increase in the *Subcontractor's* cost, plus the *Subcontractor's* percentage fee on such net increase.
  - .2 If the change results in a net decrease in the *Subcontractor's* cost, the *Subcontract Price* shall be decreased by the amount of the net decrease in the *Subcontractor's* cost, without adjustment for the *Subcontractor's* percentage fee.
  - .3 The *Subcontractor's* fee shall be as specified in the *Subcontract Documents* or as otherwise agreed by the parties.
- 6.3.7 The cost of performing the *Subcontract Work* attributable to the *Change Directive* shall be limited to the actual cost of the following:
- .1 salaries, wages and benefits paid to personnel in the direct employ of the *Subcontractor* under a salary or wage schedule agreed upon by the *Contractor* and the *Subcontractor*, or in the absence of such a schedule, actual salaries, wages and benefits paid under applicable bargaining agreement, and in the absence of a salary or wage schedule and bargaining agreement, actual salaries, wages and benefits paid by the *Subcontractor*, for personnel
    - (1) stationed at the *Subcontractor's* field office, in whatever capacity employed;
    - (2) engaged in expediting the production or transportation of material or equipment, at shops or on the road;
    - (3) engaged in the preparation or review of *Shop Drawings*, fabrication drawings and coordination drawings; or
    - (4) engaged in the processing of changes in the *Subcontract Work*.

## Commentary

**Part 6 CHANGES IN THE WORK:** These provisions essentially flow down into the Subcontract the change provisions in CCDC 2-2008, preserving the rights of the parties upstream of the Subcontractor to make changes and ensuring that the mechanism by which changes are processed is consistent throughout the contractual chain, from Owner through Subcontractor.

**SCC 6.1.1:** Just as the Owner may make changes to the Prime Contract by Change Order or Change Directive, so too is the Contractor authorized to make changes in the Subcontract.



**SCC 6.1.2 is one of the most important provisions in this Subcontract, and the Subcontractor ignores it at its peril. Just as in CCDC 2-2008, the overall intent when dealing with changes is that either a Change Order or a Change Directive is required before any changed work is performed. To reinforce this, the Subcontractor shall not perform a change without one or the other. The Subcontractor should insist that this procedure be followed, and should not by its conduct risk a finding that it waived its contractual right to perform work unless either a Change Order or a Change Directive is issued.**

**SCC 6.2:** Sets out the process for the issuance of a Change Order and the payment for Change Order work as part of the application for payment.



**The essence of a Change Order is the agreement between the Contractor and the Subcontractor concerning the adjustment in the Subcontract Price (or the method of making that adjustment), as well as the adjustment in the schedule, if any. This agreement is to be made prior to the changed work being performed. If there is no such agreement, there is no Change Order. Unlike a Change Directive, the Contractor cannot unilaterally impose a Change Order upon the Subcontractor.**

**SCC 6.3:** Deals with Change Directives, which are intended to be used when the changed work must proceed, usually for reasons of maintaining schedule, before the necessary agreement on adjustment to the Subcontract Price and/or Subcontract Time can be achieved.

Only changes within the general scope of the Subcontract Documents can be made using Change Directives, and a Change Directive cannot be used to direct a change in the Subcontract Time only. Upon receipt of a Change Directive, the Subcontractor must proceed with the work, and is entitled to charge for it on a cost-plus basis using the cost items set out in SCC 6.3.7. The Subcontractor must keep detailed records of its costs, and the Contractor is entitled to reasonable access to those records. The undisputed value of all Change Directive work is eligible to be included in progress payments. When the Contractor and Subcontractor finally reach agreement on the adjustment to the Subcontract Price and/or Subcontract Time resulting from the change, that agreement is recorded in a Change Order. Any dispute concerning the schedule impact of Change Directive work is dealt with under the dispute resolution provisions in Part 8. Although not expressly set out in SCC 6.3, it appears clear that any dispute concerning the adjustment in the Subcontract Price is to be dealt with under SCC 6.6 CLAIMS FOR A CHANGE IN SUBCONTRACT PRICE and the dispute resolution provisions in Part 8.



**The parties should take careful note of two important limitations on the use of Change Directives: (1) a Change Directive can only be used to order changes within the general scope of the Subcontract Documents. If a proposed change is outside the general scope, that change can only be made under a Change Order, i.e. there must be agreement between the Contractor and the Subcontractor as to price and schedule impacts before such outside-scope changed work can be required to be performed; and (2) a Change Directive cannot be used to direct a change in the Subcontract Time only. For example, any acceleration of the Subcontractor Work not made necessary by the Subcontractor's delay, without any other changes to the scope of that work, must be done under a Change Order, and the Contractor cannot unilaterally force the Subcontractor to accelerate in those circumstances.**



**Note 6.3.6.3, "The Subcontractor's fee shall be as specified in the Subcontract Documents or as otherwise agreed by the parties." The parties are effectively given an option: either agree on the fee in advance and record that agreement (typically, by supplementary condition) or negotiate the fee on a case-by-case basis.**

- .2 contributions, assessments or taxes incurred for such items as employment insurance, provincial or territorial health insurance, workers' compensation, and Canada or Quebec Pension Plan, insofar as such cost is based on wages, salaries or other remuneration paid to employees of the *Subcontractor* and included in the cost of the *Subcontract Work* as provided in paragraph 6.3.7.1;
  - .3 travel and subsistence expenses of the *Subcontractor's* personnel described in paragraph 6.3.7.1;
  - .4 all *Products* including cost of transportation thereof;
  - .5 materials, supplies, *Construction Equipment*, *Temporary Work*, and hand tools not owned by the workers, including transportation and maintenance thereof, which are consumed in the performance of the *Subcontract Work*; and cost less salvage value on such items used but not consumed, which remain the property of the *Subcontractor*;
  - .6 all tools and *Construction Equipment*, exclusive of hand tools used in the performance of the *Subcontract Work*, whether rented from or provided by the *Subcontractor* or others, including installation, minor repairs and replacements, dismantling, removal, transportation, and delivery cost thereof;
  - .7 equipment and services required for the *Subcontractor's* field office;
  - .8 deposits lost;
  - .9 the amounts of all sub-subcontracts;
  - .10 quality assurance such as independent inspection and testing services;
  - .11 charges levied by authorities having jurisdiction at the *Place of the Work*;
  - .12 royalties, patent license fees and damages for infringement of patents and cost of defending suits therefor subject always to the *Subcontractor's* obligations to indemnify the *Contractor* as provided in paragraph 10.3.1 of SCC 10.3 – PATENT FEES;
  - .13 any adjustment in premiums for all bonds and insurance which the *Subcontractor* is required, by the *Subcontract Documents*, to purchase and maintain;
  - .14 any adjustment in taxes, other than *Value Added Taxes*, and duties for which the *Subcontractor* is liable;
  - .15 charges for long distance telephone and facsimile communications, courier services, expressage, and petty cash items incurred in relation to the performance of the *Subcontract Work*;
  - .16 removal and disposal of waste products and debris; and
  - .17 safety measures and requirements.
- 6.3.8 Notwithstanding any other provisions contained in this *Subcontract*, it is the intention of the parties that the cost of any item under any cost element referred to in paragraph 6.3.7 shall cover and include any and all costs or liabilities attributable to the *Change Directive* other than those which are the result of or occasioned by any failure on the part of the *Subcontractor* to exercise reasonable care and diligence in the *Subcontractor's* attention to the *Subcontract Work*. Any cost due to failure on the part of the *Subcontractor* to exercise reasonable care and diligence in the *Subcontractor's* attention to the *Subcontract Work* shall be borne by the *Subcontractor*.
- 6.3.9 The *Subcontractor* shall keep full and detailed accounts and records necessary for the documentation of the cost of performing the *Subcontract Work* attributable to the *Change Directive* and shall provide the *Contractor* with copies thereof when requested.
- 6.3.10 For the purpose of valuing *Change Directives*, the *Contractor* shall be afforded reasonable access to all of the *Subcontractor's* pertinent documents related to the cost of performing the *Subcontract Work* attributable to the *Change Directive*, and for this purpose the *Subcontractor* shall preserve such records for a period of one year from the date of *Substantial Performance of the Work* or as specified in the *Subcontract Documents*.
- 6.3.11 Pending determination of the final amount of a *Change Directive*, the undisputed value of the *Subcontract Work* performed as the result of a *Change Directive* is eligible to be included in progress payments.
- 6.3.12 If the *Contractor* and *Subcontractor* do not agree on the proposed adjustment in the *Subcontract Time* attributable to the change in the *Subcontract Work*, or the method of determining it, the disagreement shall be referred to Part 8 of the *Subcontract Conditions – DISPUTE RESOLUTION*.
- 6.3.13 When the *Contractor* and the *Subcontractor* reach agreement on the adjustment to the *Subcontract Price* and to the *Subcontract Time*, this agreement shall be recorded in a *Change Order*.

#### **SCC 6.4 CONCEALED OR UNKNOWN CONDITIONS**

- 6.4.1 If the *Contractor* or the *Subcontractor* discover conditions at the *Place of the Work* which are:
- .1 subsurface or otherwise concealed physical conditions which existed before the commencement of the *Subcontract Work* which differ materially from those indicated in the *Subcontract Documents*; or

## Commentary



The Subcontractor should take careful note of SCC 6.3.9 and 6.3.10. By definition, Change Directive work is cost-plus work. When performing work on this basis, the law is clear that the Subcontractor performing such work must keep full and detailed records of all costs, and provide the Contractor with reasonable access to those records. Failing that, the Subcontractor runs the serious risk of not receiving compensation for that work. These two SCC's carry that legal principle into the Subcontract.

.2 physical conditions, other than conditions due to weather, that are of a nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the *Subcontract Documents*;

then the observing party shall give *Notice in Writing* to the other party of such conditions before they are disturbed and in no event later than 3 *Working Days* after first observance of the conditions.

- 6.4.2 The *Contractor* will promptly investigate such conditions and make a finding. If the finding is that the conditions differ materially and this would cause an increase or decrease in the *Subcontractor's* cost or time to perform the *Subcontract Work*, the *Contractor* shall issue appropriate instructions for a change in the *Subcontract Work* as provided in SCC 6.2 – CHANGE ORDER or SCC 6.3 – CHANGE DIRECTIVE.
- 6.4.3 If the *Contractor* finds that the conditions at the *Place of the Work* are not materially different or that no change in the *Subcontract Price* or the *Subcontract Time* is justified, the *Contractor* shall report the reasons for this finding to the *Subcontractor* in writing.
- 6.4.4 If such concealed or unknown conditions relate to toxic and hazardous substances and materials, artifacts and fossils, or mould, the parties will be governed by the provisions of SCC 9.2 – TOXIC AND HAZARDOUS SUBSTANCES, SCC 9.3 – ARTIFACTS AND FOSSILS and SCC 9.5 – MOULD.

### SCC 6.5 DELAYS

- 6.5.1 If the *Subcontractor* is delayed in the performance of the *Subcontract Work* by an action or omission of the *Owner*, *Consultant*, *Contractor*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Subcontract Documents*, then the *Subcontract Time* shall be extended for such reasonable time as the *Contractor* and *Subcontractor* shall agree that the *Subcontract Work* was delayed. The *Subcontractor* shall be reimbursed by the *Contractor* for reasonable costs incurred by the *Subcontractor* as a result of such delay.
- 6.5.2 If the *Subcontractor* is delayed in the performance of the *Subcontract Work* by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Subcontractor* or any person employed or engaged by the *Subcontractor* directly or indirectly, then the *Subcontract Time* shall be extended for such reasonable time as the *Contractor* and *Subcontractor* shall agree that the *Subcontract Work* was delayed. The *Subcontractor* shall be reimbursed by the *Contractor* for reasonable costs incurred by the *Subcontractor* as a result of such delay.
- 6.5.3 If the *Subcontractor* is delayed in the performance of the *Subcontract Work* by:
- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Subcontractor* is a member or to which the *Subcontractor* is otherwise bound),
  - .2 fire, unusual delay by common carriers or unavoidable casualties,
  - .3 abnormally adverse weather conditions, or
  - .4 any cause beyond the *Subcontractor's* control other than one resulting from a default or breach of *Subcontract* by the *Subcontractor*,
- then the *Subcontract Time* shall be extended for such reasonable time as the *Contractor* and *Subcontractor* shall agree that the *Subcontract Work* was delayed. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Subcontractor* agrees to a shorter extension. The *Subcontractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*, *Consultant*, *Contractor*, or anyone employed or engaged by them directly or indirectly.
- 6.5.4 No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Contractor* not later than 7 *Working Days* after commencement of delay. In the case of a continuing cause of delay only one *Notice in Writing* shall be necessary.
- 6.5.5 If no schedule is made under SCC 2.1 – SUPPLEMENTAL INSTRUCTIONS, then no request for extension shall be made because of failure of the *Contractor* to furnish instructions until 14 *Working Days* after demand for such instructions has been made.

### SCC 6.6 CLAIMS FOR A CHANGE IN SUBCONTRACT PRICE



## Commentary

**SCC 6.4:** This deals with the treatment of concealed or unknown conditions, which are described as “subsurface or otherwise concealed physical conditions which existed before the commencement of the Subcontract Work which differ materially from those indicated in the Subcontract Documents” or as “physical conditions”, other than weather, “that are of a nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Subcontract Documents”. The party observing such conditions must give Notice in Writing before the conditions are disturbed, within 3 Working Days of first observing them. The Contractor must investigate and make a finding as to whether the conditions are in fact materially different and if so, whether that would cause a change in the price or the schedule. If so, that change is processed as a Change Order or Change Directive. If not, the Contractor must give written reasons for his finding to the Subcontractor.

This provision deals with all concealed or unknown conditions other than toxic or hazardous materials, artifacts and fossils, and mould. Those particular items are dealt with separately in the Subcontract.



**Note the obligation to give written notice before the concealed or unknown condition is disturbed. Note also the short 3 Working Day deadline within which such notice must be given.**



**SCC 6.4 does not seem to deal expressly with the possibility that there may be a dispute about the finding of concealed or unknown condition that the Contractor must make under SCC 6.4.2. Several other provisions in CCA 1-2008 do expressly contemplate a dispute and provide that the dispute resolution provisions in Part 8 shall apply, for example, SCC 6.6.6 (dealing with claims for a change in the Subcontractor Price) and SCC 9.2.5 (dealing with a dispute about the expert’s finding concerning toxic or hazardous substances). To avoid potential difficulty about this, the parties may wish to add a supplementary condition which expressly provides that any dispute concerning the Contractor’s finding under SCC 6.4.2 shall be resolved in accordance with the dispute resolution provisions in Part 8.**

**SCC 6.5:** These are delay provisions, and are essentially identical to those set out in CCDC 2-2008.

In essence:

- (a) if the Subcontractor is delayed by the Owner, the Consultant or the Contractor, the Subcontractor gets time and money;
- (b) if the Subcontractor is delayed by a stop work order, the Subcontractor gets time and money provided that the stop work order was not the Subcontractor’s fault;
- (c) if the Subcontractor is delayed by common “force majeure” events (labour disputes, strikes, fire, abnormally adverse weather) or by any other cause beyond the Subcontractor’s control, the Subcontractor gets time but no money, provided the Subcontractor was not responsible for the delay-causing event. If the Owner, Consultant or the Contractor was responsible for that delay-causing event however, the Subcontractor retains the right to get money in addition to time.



**The Subcontractor must take careful note of GC 6.5.4, and the requirement to give Notice in Writing of any delay within 7 Working Days after commencement of the delay. Where the delay is a continuing one, only one notice is required. A failure to give this Notice in Writing jeopardizes the Subcontractor’s right to any schedule extension, and the Subcontractor may thereby be forced to accelerate at its own expense.**



**Unless a schedule for the delivery of supplemental instructions is made, the Contractor (and by implication, the Consultant) is given a grace period of 14 Working Days after demand within which to furnish such instructions. See GC 6.5.5.**

- 6.6.1 If the *Subcontractor* intends to make a claim for an increase to the *Subcontract Price*, or if the *Contractor* intends to make a claim against the *Subcontractor* for a credit to the *Subcontract Price*, the party that intends to make the claim shall give timely *Notice in Writing* of intent to claim to the other party.
- 6.6.2 Upon commencement of the event or series of events giving rise to the claim, the party intending to make a claim shall:
  - .1 take all reasonable measures to mitigate any loss or expense which may be incurred as a result of such event or series of events, and
  - .2 keep such records as may be necessary to support the claim.
- 6.6.3 The party making the claim shall submit within a reasonable time to the other party a detailed account of the amount claimed and the grounds upon which the claim is based.
- 6.6.4 Where the event or series of events giving rise to the claim has a continuing effect, the detailed account submitted under paragraph 6.6.3 shall be considered to be an interim account and the party making the claim shall, at such intervals as the other party may reasonably require, submit further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. The party making the claim shall submit a final account after the end of the effects resulting from the event or series of events.
- 6.6.5 The responding party shall reply by *Notice in Writing* within 10 *Working Days* after receipt of the claim, or within such other time period as may be agreed by the parties.
- 6.6.6 If such reply is not acceptable to the party making the claim, the claim shall be settled in accordance with Part 8 of the Subcontract Conditions - DISPUTE RESOLUTION.

## **PART 7 DEFAULT NOTICE**

### **SCC 7.1 CONTRACTOR'S RIGHT TO PERFORM THE SUBCONTRACT WORK, TERMINATE THE SUBCONTRACTOR'S RIGHT TO CONTINUE WITH THE SUBCONTRACT WORK OR TERMINATE THE SUBCONTRACT**

- 7.1.1 If the *Subcontractor* is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the *Subcontractor's* insolvency, or if a receiver is appointed because of the *Subcontractor's* insolvency, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Subcontractor's* right to continue with the *Subcontract Work*, by giving the *Subcontractor* or receiver or trustee in bankruptcy *Notice in Writing* to that effect.
- 7.1.2 If the *Subcontractor* neglects to prosecute the *Subcontract Work* properly or otherwise fails to comply with the requirements of the *Subcontract* to a substantial degree, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, give the *Subcontractor* *Notice in Writing* that the *Subcontractor* is in default of the *Subcontractor's* contractual obligations and instruct the *Subcontractor* to correct the default in 3 *Working Days* immediately following the receipt of such *Notice in Writing*.
- 7.1.3 If the default cannot be corrected in the 3 *Working Days* specified or in such other time period as may be subsequently agreed in writing by the parties, the *Subcontractor* shall be in compliance with the *Contractor's* instructions if the *Subcontractor*:
  - .1 commences the correction of the default within the specified time, and
  - .2 provides the *Contractor* within the 3 *Working Days* with an acceptable schedule for such correction, and
  - .3 corrects the default in accordance with the *Subcontract* terms and with such schedule.
- 7.1.4 If the *Subcontractor* fails to correct the default in the time specified or in such other time period as may be subsequently agreed in writing by the parties, without prejudice to any other right or remedy the *Contractor* may have, the *Contractor* may:
  - .1 correct such default and deduct the cost thereof from any payment then or thereafter due the *Subcontractor*, or
  - .2 terminate the *Subcontractor's* right to continue with the *Subcontract Work* in whole or in part or terminate the *Subcontract*.
- 7.1.5 If the *Contractor* terminates the *Subcontractor's* right to continue with the *Subcontract Work* as provided in paragraphs 7.1.1 and 7.1.4, the *Contractor* shall be entitled to:
  - .1 take possession of the *Subcontract Work* and *Products* at the *Place of the Work*; subject to the rights of third parties, utilize the *Construction Equipment* at the *Place of the Work*; finish the *Subcontract Work* by whatever method the *Contractor* may consider expedient, but without undue delay or expense; and
  - .2 withhold further payment to the *Subcontractor* until a final certificate for payment is issued; and

## Commentary

**SCC 6.6:** This is a new provision in CCA 1-2008, and is intended to provide both the Contractor and the Subcontractor with greater certainty about claims, and to prevent “surprise” claims for additional payment or for back charges at the end of the job.

If either the Subcontractor intends to claim for an increase in the Subcontract Price or the Contractor intends to claim a credit to the Subcontract Price, that party must give “timely” Notice in Writing to the other. The claiming party must also submit a detailed account of the claim and the grounds upon which the claim is being made “within a reasonable time”. Where the claim is a continuing one, this detailed account is considered an interim account only, and the other party is entitled to demand updated interim accounts at reasonable intervals. The party receiving such a notice of intent to claim must respond with 10 Working Days, or such longer period as may be agreed. If the response is insufficient to resolve the matter, the claim moves to the dispute resolution provisions in Part 8 to be settled. The party asserting the claim is obliged to mitigate its losses and to keep records.



While terms such as “timely” and “reasonable time” remain open to interpretation and may depend upon the circumstances, it is clear that any Subcontractor or Contractor who “lies in the weeds” amassing claims or backcharges for presentation only near the end of the project runs the risk of losing its right to payment upon such claims or backcharges if notice is not given.

**SCC 7.1:** These provisions, analogous to those in CCDC 2-2008, provide for the Contractor’s rights in the event of a default by the Subcontractor. There are essentially two kinds of defaults contemplated: bankruptcy or equivalent; and a neglect to prosecute the work or otherwise comply with the Subcontract to a substantial degree.

The Contractor is obliged to give 3 Working Days notice of default to the Subcontractor, and the Subcontractor has the right to cure the default either within those 3 Working Days, or if that not be possible, to provide an acceptable schedule for correction.

If the default continues, the Contractor has various options, being correction of the default at the Subcontractor’s expense, termination of the Subcontractor’s right to continue with the work, or termination of the Subcontract. If the Contractor terminates the Subcontractor’s right to continue with the work or terminates the Subcontract, the Contractor is entitled to take possession of the Subcontract Work and Products, withhold further payment until the final payment certificate is issued, and charge the Subcontractor for the costs of completion by others plus an additional amount to cover warranty claims.



In practice, a formal notice of default from the Contractor to the Subcontractor under this GC 7.1 will likely not be a surprise in most cases. A Subcontractor receiving such a notice should nonetheless be mindful of the 3 Working Day period stipulated within which the default must be corrected, or an acceptable schedule for correction must be given if the time required to correct exceeds 3 Working Days.

- .3 charge the *Subcontractor* the amount by which the full cost of finishing the *Subcontract Work* and a reasonable allowance to cover the cost of corrections to work performed by the *Subcontractor* that may be required under SCC 12.3 – WARRANTY, exceeds the unpaid balance of the *Subcontract Price*; however, if such cost of finishing the *Subcontract Work* is less than the unpaid balance of the *Subcontract Price*, the *Contractor* shall pay the *Subcontractor* the difference; and
  - .4 on expiry of the warranty period, charge the *Subcontractor* the amount by which the cost of corrections to the *Subcontractor's* work under SCC 12.3 – WARRANTY exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the *Subcontractor* the difference.
- 7.1.6 The *Subcontractor's* obligation under the *Subcontract* as to quality, correction and warranty of the work performed by the *Subcontractor* up to the time of termination shall continue after such termination of the *Subcontract*.

## **SCC 7.2 SUBCONTRACTOR'S RIGHT TO SUSPEND THE SUBCONTRACT WORK OR TERMINATE THE SUBCONTRACT**

- 7.2.1 If the *Contractor* is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the *Contractor's* insolvency, or if a receiver is appointed because of the *Contractor's* insolvency, the *Subcontractor* may, without prejudice to any other right or remedy the *Subcontractor* may have, terminate the *Subcontract* by giving the *Contractor* or receiver or trustee in bankruptcy *Notice in Writing* to that effect.
- 7.2.2 If the *Work* should be suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Subcontractor* or of anyone directly or indirectly employed or engaged by the *Subcontractor*, the *Subcontractor* may, without prejudice to any other right or remedy the *Subcontractor* may have, terminate the *Subcontract* by giving the *Contractor* *Notice in Writing* to that effect.
- 7.2.3 The *Subcontractor* may give *Notice in Writing* to the *Contractor* that the *Contractor* is in default of the *Contractor's* contractual obligations if the *Contractor* fails to pay the *Subcontractor* in accordance with the time for payment stated in Article 6 of the *Subcontract Agreement – PAYMENT*.
- 7.2.4 The *Subcontractor's* *Notice in Writing* to the *Contractor* provided under paragraph 7.2.3 shall advise that if the default is not corrected within 5 *Working Days* following the receipt of the *Notice in Writing*, the *Subcontractor* may, without prejudice to any other right or remedy the *Subcontractor* may have, suspend the *Subcontract Work* or terminate the *Subcontract*.
- 7.2.5 If the *Subcontractor* terminates the *Subcontract* under the conditions set out above, the *Subcontractor* shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon *Products* and *Construction Equipment*, and such other damages as the *Subcontractor* may have sustained as a result of the termination of the *Subcontract*.
- 7.2.6 If the *Prime Contract* is terminated for any reason, either the *Contractor* or the *Subcontractor* may terminate this *Subcontract* upon *Notice in Writing* to the other party. Thereafter the respective rights of the parties shall be as if the *Subcontractor* had terminated under any of the above conditions.

## **PART 8 DISPUTE RESOLUTION**

### **SCC 8.1 INTERPRETATION AND INSTRUCTION OF THE CONTRACTOR**

- 8.1.1 The *Contractor*, in the first instance, shall decide on questions arising under the *Subcontract* and interpret the requirements therein. Such decisions shall be given in writing. The *Contractor* shall use the *Contractor's* powers under the *Subcontract* to enforce its faithful performance by both parties hereto.
- 8.1.2 Differences between the parties to the *Subcontract* as to the interpretation, application or administration of the *Subcontract* or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by decisions of the *Contractor* as provided in paragraph 8.1.1, shall be settled in accordance with the requirements of Part 8 of the *Subcontract Conditions – DISPUTE RESOLUTION*.

## Commentary

**SCC 7.2:** These provide for the Subcontractor's corresponding default rights against the Contractor. In addition to bankruptcy or equivalent, the Subcontractor may terminate the Subcontract in two other instances: a suspension or other delay in the Subcontract Work for 20 Working Days or more under an order of a court or other public authority (provided the order was not issued due to the fault of the Subcontractor); and failure to pay.

In the case of failure to pay, the Subcontractor must provide the Contractor with Notice in Writing, and the Contractor has 5 Working Days to correct the payment default. If the default remains after those 5 Working Days, the Subcontractor may suspend the work or terminate the Subcontract.

If the Subcontractor terminates, it is entitled to be paid for all work to date, as well as any other damages suffered by the Subcontractor as a result of the termination.



**The Subcontractor should take care to provide the required Notice in Writing of any payment default by the Contractor, giving the Contractor the 5 Working Days to cure, before suspending work or demobilizing upon any project. A failure to do so risks a finding that the Contractor was denied its right to cure the default, and possibly a finding that the Subcontractor was itself in breach of the Subcontract because of its precipitous action.**



**Note that under GC 7.2.6, either party may terminate the Subcontract if the Prime Contract is itself terminated for any reason. Thereafter, the rights of the parties shall be as if the Subcontractor had terminated "under any of the above conditions", including presumably a termination due to a default by the Contractor.**

**Some Prime Contracts contain "termination for convenience" provisions whereby the Owner is entitled to terminate at its option, even if there is no default by the Contractor. Often such termination for convenience clauses provide that the Contractor is entitled to payment for work done to the date of termination plus reasonable demobilization costs, but that the Contractor is not otherwise entitled to payment for lost profits. GC 7.2.6 as drafted allows the Subcontractor to nonetheless claim loss of profit of its own, and Subcontractors can reasonably expect most Contractors to require a supplementary condition to the Subcontract which prevents a claim for lost profits by the Subcontractor in such circumstances, since the Contractor itself cannot flow that claim upstream to the Owner.**

8.1.3 If a dispute is not resolved promptly, the *Contractor* shall give instructions for the proper performance of the *Subcontract Work* and to prevent delays pending settlement of the dispute. The *Subcontractor* shall act immediately according to such instructions, it being understood that by so doing neither party will jeopardize any claim the party may have. If it is subsequently determined that such instructions were in error or at variance with the *Subcontract Documents*, the *Contractor* shall pay the *Subcontractor* costs incurred by the *Subcontractor* in carrying out such instructions which the *Subcontractor* was required to do beyond what the *Subcontract Documents* correctly understood and interpreted would have required, including costs resulting from interruption of the *Subcontract Work*.

## SCC 8.2 NEGOTIATION, MEDIATION AND ARBITRATION

- 8.2.1 The *Subcontractor* shall be conclusively deemed to have accepted a decision of the *Contractor* under paragraph 8.1.1 of SCC 8.1 – INTERPRETATION AND INSTRUCTION OF THE CONTRACTOR and to have expressly waived and released the *Contractor* from any claims in respect of the particular matter dealt with in that decision unless, within 7 *Working Days* after receipt of that decision, the *Subcontractor* sends a *Notice in Writing* of dispute to the *Contractor*, which contains the particulars of the matter in dispute and the relevant provisions of the *Subcontract Documents*. The *Contractor* shall send a *Notice in Writing* of reply to the dispute within 10 *Working Days* after receipt of such *Notice in Writing* setting out particulars of this response and any relevant provisions of the *Subcontract Documents*.
- 8.2.2 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations.
- 8.2.3 After a period of 10 *Working Days* following receipt of a *Contractor's Notice in Writing* of reply under paragraph 8.2.1, the parties shall request the Project Mediator of the *Work* to assist the parties to reach agreement on any unresolved dispute. The mediated negotiations shall be conducted in accordance with the Rules for Mediation of Construction Disputes as provided in CCDC 40 in effect of the time of bid closing with the following amendment:
- .1 the word "Contract" appearing in the rules shall read "Subcontract";
  - .2 delete clauses 5.1 to 5.4 and replace them with the following:  
"5.1 The Project Mediator shall be the Project Mediator of the *Work* appointed by the parties to the *Prime Contract*"; and
  - .3 in clause 11.1, delete "GC 8.2.5" and substitute "SCC 8.2.4".
- 8.2.4 If the dispute has not been resolved within 10 *Working Days* after the Project Mediator was requested under paragraph 8.2.3 or within such further period agreed by the parties, the Project Mediator shall terminate the mediated negotiations by giving *Notice in Writing* to both parties.
- 8.2.5 By giving a *Notice in Writing* to the other party, not later than 10 *Working Days* after the date of termination of the mediated negotiations under paragraph 8.2.4, either party may refer the dispute to be finally resolved by arbitration under the Rules of Arbitration of Construction Disputes as provided in CCDC 40 in effect of the time of bid closing with the following amendment:
- .1 the word "Contract" appearing in the rules shall read "Subcontract"; and
  - .2 delete clause 7.1 (b) and replace it with the following:  
"7.1 (b) the date the *Work* has been completed or the *Subcontract* has been terminated."
- The arbitration shall be conducted in the jurisdiction of the *Place of the Work*.
- 8.2.6 On expiration of the 10 *Working Days*, the arbitration agreement under paragraph 8.2.5 is not binding on the parties and, if a *Notice in Writing* is not given under paragraph 8.2.5 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.
- 8.2.7 Should the dispute be as between the *Contractor* and *Subcontractor* only, arbitration proceedings shall not take place, unless otherwise agreed by the parties, until after the performance or alleged performance of the *Subcontract Work* except:
- .1 when the dispute concerns a payment alleged by the *Subcontractor* to be due; or
  - .2 when either party can show that the matter in dispute requires immediate consideration while evidence which would otherwise be lost is available.
- 8.2.8 In all other instances, the resolution of the dispute by arbitration shall be held in abeyance until the *Work* has been completed or the *Subcontract* has been terminated, whichever is earlier.

## Commentary

**Part 8 DISPUTE RESOLUTION:** This is the stepped dispute resolution mechanism originally embodied in CCDC 2 and carried forward into CCA 1-2008, with appropriate changes to suit.

In essence, the Contractor is first authorized to decide on any questions arising under the Subcontract and to interpret its requirements. If there is a dispute following that initial determination by the Contractor, the parties proceed to negotiation, followed by mediation, followed by arbitration or litigation.

While the dispute is pending, the Contractor may issue instructions for the proper performance of the Subcontract Work, and the Subcontractor must comply, without prejudice to the right of the Subcontractor to recover additional costs if the dispute is eventually resolved in the Subcontractor's favour.

There are a number of very important notice provisions in these dispute resolution provisions however, and these are mentioned immediately below.



**GC 8.2.1 should be carefully read by all users of the document. As is the case with CCDC 2, this dispute resolution provision is intended to bring finality to disputes at an early point unless the dissatisfied party takes timely steps to continue the dispute.**

**Under GC 8.1.1, the Contractor is authorized to decide on any question and to render its decision to the Subcontractor in writing. Under GC 8.2.1, the Subcontractor who disagrees with that decision must send a Notice in Writing of its dispute to the Contractor within 7 Working Days after receiving the Contractor's decision, containing the particulars of the matter in dispute and referring to the relevant provisions of the Subcontract Documents, failing which the Subcontractor is "conclusively deemed to have accepted" the Contractor's decision and to have "expressly waived and released the Contractor from any claims in respect of the particular matter dealt with in that decision". It is imperative that the Subcontractor give timely notice of any disagreement or dispute with the Contractor in respect of any decision made by the Contractor upon any question arising under the Subcontract with which the Subcontractor disagrees.**



**A Subcontractor engaged in a dispute with a Contractor may wish to have the matter arbitrated rather than litigated in court. The right to arbitrate is not absolute however; a Notice in Writing indicating an intention to arbitrate must be given under GC 8.2.5 not later than 10 Working Days after the termination of any mediation. If there is no mediation, that Notice in Writing of intention to arbitrate must be given within 10 Working Days after receipt of the reply which the Contractor must give to the Subcontractor's written notice of dispute (see GC 8.2.11). If the Subcontractor fails to give this timely notice to arbitrate, the right to compel arbitration is lost, and if the Contractor does not thereafter consent to arbitrate anyway, the Subcontractor must resort to the courts.**

**See GC 8.2.6.**

- 8.2.9 Except to the extent that any dispute between the *Contractor* and *Subcontractor* is a part of or relates to a dispute between the *Owner* and the *Contractor*, all disputes between the *Contractor* and *Subcontractor* shall be consolidated into a single arbitration.
- 8.2.10 Should any dispute or portion of any dispute between the *Contractor* and *Subcontractor* relate to a dispute between the *Owner* and the *Contractor*, such dispute or portion thereof as between the *Contractor* and *Subcontractor* shall be disposed of at the same time in the same proceedings and by the same Arbitration Board as is appointed to resolve the dispute between the *Owner* and the *Contractor*.
- 8.2.11 Should no Project Mediator have been appointed by the parties to the *Prime Contract*, and if no mediator is agreed to between the parties within 5 days of a mediator being required under 8.2.3, the provisions of paragraphs 8.2.3 and 8.2.4 shall be inapplicable and the notice required under 8.2.5 shall be given within 10 *Working Days* after the receipt of the *Contractor's Notice in Writing* of reply under paragraph 8.2.1.

### **SCC 8.3 RETENTION OF RIGHTS**

- 8.3.1 It is agreed that no act by either party shall be construed as a renunciation or waiver of any rights or recourses, provided the party has given the *Notices in Writing* required under Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION and has carried out the instructions as provided in paragraph 8.1.3 of SCC 8.1 – INTERPRETATION AND INSTRUCTION OF THE CONTRACTOR.
- 8.3.2 Nothing in Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION shall be construed in any way to limit a party from asserting any statutory right to a lien under applicable lien legislation of the jurisdiction of the *Place of the Work* and the assertion of such right by initiating judicial proceedings is not to be construed as a waiver of any right that party may have under paragraph 8.2.5 of SCC 8.2 – NEGOTIATION, MEDIATION AND ARBITRATION to proceed by way of arbitration to adjudicate the merits of the claim upon which such a lien is based.

## **PART 9 PROTECTION OF PERSONS AND PROPERTY**

### **SCC 9.1 PROTECTION OF WORK AND PROPERTY**

- 9.1.1 The *Subcontractor* shall protect the *Subcontract Work* and shall take all reasonable precautions to protect the *Work* and property of others during the performance of the *Subcontract Work*.
- 9.1.2 Before commencing any work, the *Subcontractor* shall determine the location of all underground utilities and structures indicated in the *Subcontract Documents* or that are reasonably apparent in an inspection of the *Place of the Work*.
- 9.1.3 The *Contractor* shall be responsible for the overall protection of the *Work*. If the *Subcontract Work* or others' work is damaged, the *Contractor* shall assess the responsibility for, extent of and value of such damage and the affected parties shall accept such assessment or process it as a dispute in accordance with Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION.

### **SCC 9.2 TOXIC AND HAZARDOUS SUBSTANCES**

- 9.2.1 If the *Subcontractor*
- .1 encounters toxic or hazardous substances at the *Place of the Work*, or
  - .2 has reasonable grounds to believe that toxic or hazardous substances are present at the *Place of the Work*, which were not brought to the *Place of the Work* by the *Subcontractor* or anyone for whom the *Subcontractor* is responsible and which were not disclosed in the *Subcontract Documents* or which were disclosed but have not been dealt with by the *Contractor* or *Owner* in accordance with applicable legislation related to toxic and hazardous substances, the *Subcontractor* shall
  - .3 take all reasonable steps, including stopping the *Subcontract Work*, to ensure that no person's exposure to any toxic or hazardous substance exceeds any applicable time weighted levels prescribed by applicable legislation at the *Place of the Work*, and
  - .4 immediately report the circumstances to the *Contractor* in writing.
- 9.2.2 If the *Contractor* and *Subcontractor* do not agree on the existence, significance of, or whether the toxic or hazardous substances were brought onto the *Place of the Work* by the *Subcontractor* or anyone for whom the *Subcontractor* is responsible, the *Contractor* shall retain and pay for an independent qualified expert to investigate and determine such matters. The expert's report shall be delivered to the *Contractor* and the *Subcontractor*.



## Commentary



While some disputes will be only as between the Contractor and the Subcontractor, others will necessarily involve the Owner. GC 8.2.10 provides that in those cases in which the Owner is also involved, the dispute between the Contractor and Subcontractor shall be resolved at the same time in the same proceedings and before the same Arbitration Board as is appointed to resolve the dispute between the Owner and the Contractor. A Subcontractor should confirm that the Prime Contract contains provisions that will in fact allow this process to take place, including the express agreement between the Owner and the Contractor to allow for such multi-party arbitration proceedings to take place. Without appropriate language in the Prime Contract, the intent of GC 8.2.10 may be frustrated, and the Contractor and Subcontractor may be left without any effective mechanism to force the Owner, who may bear ultimate responsibility, into their arbitration proceedings with one another.



GC 8.3.1 reinforces the critical importance of the Subcontractor providing timely notice of any dispute or disagreement it may have with any Contractor decision (see the comments under GC 8.2.1 above). GC 8.3.1 provides that no act constitutes any waiver of any rights or recourse, provided that the required Notice in Writing under Part 8 (including the Notice in Writing of any dispute with a Contractor's decision) is given, and provided that the Subcontractor complies with the Contractor's instructions for the continued performance of the work pending resolution of the dispute.

**GC 8.3.2:** The Subcontractor retains its right to lien, and nothing in the dispute resolution provisions in Part 8 limits that right in any way.

**SCC 9.1:** These are the protection of work clauses. The Subcontractor must protect its own work and take reasonable precautions to protect the work and property of others. The Contractor has overall responsibility for protection of the project work. If there is damage to either the Subcontract Work or other work, the Contractor may determine responsibility for that damage, but the Subcontractor retains the right to dispute any finding by the Contractor with which it disagrees. The Subcontractor is responsible to locate all underground utilities and structures indicated in the Subcontract Documents or are otherwise reasonably apparent in an inspection of the site.

**SCC 9.2:** These provisions govern toxic and hazardous substances at the project site, other than those which the Subcontractor itself introduces to the site.

Basically, if the Subcontractor encounters toxic or hazardous substances, or has reasonable grounds to believe they are there, it must take reasonable steps to protect people against exposure and must immediately report to the Contractor in writing. If there is no controversy that such substances are present, the Contractor must deal with the problem, reimburse the Subcontractor for any costs it may have incurred, extend the schedule as required, and indemnify the Subcontractor against any loss or damage which the Subcontractor may suffer.

If there is controversy about the existence, or severity, of any toxic or hazardous substances or about whether those substances were pre-existing at the project site or brought there by the Subcontractor itself, the Contractor must then retain an independent qualified expert to investigate and render a report. If the expert determines that the toxic or hazardous substances were not pre-existing but rather were brought to the project site by the Subcontractor, the Subcontractor must deal with the problem, and must reimburse the Contractor for any costs and indemnify the Contractor.

If there is any disagreement about the expert's finding, the parties remain free to resolve the matter under the dispute resolution provisions in Part 8, but the parties must take such immediate steps as the expert considers necessary to protect persons and property without any jeopardy to their right to claim.

- 9.2.3 If the *Contractor* and *Subcontractor* agree or if the expert referred to paragraph 9.2.2 determines that the toxic or hazardous substances were not brought onto the *Place of the Work* by the *Subcontractor* or anyone for whom the *Subcontractor* is responsible, the *Contractor* shall promptly at no cost to the *Subcontractor*:
- .1 take all reasonable and necessary steps, in accordance with applicable legislation in force at the *Place of the Work*, to dispose of, store or otherwise render harmless toxic or hazardous substances which were present at the *Place of the Work*;
  - .2 reimburse the *Subcontractor* for the costs of all steps taken pursuant to paragraph 9.2.1;
  - .3 extend the *Subcontract Time* for such reasonable time in consultation with the *Subcontractor* and the expert referred to in 9.2.2 and reimburse the *Subcontractor* for reasonable costs incurred as a result of the delay; and
  - .4 indemnify the *Subcontractor* as required by paragraph SCC 12.1 – INDEMNIFICATION.
- 9.2.4 If the *Contractor* and *Subcontractor* agree or if the expert referred to in paragraph 9.2.2 determines that the toxic or hazardous substances were brought onto the place of the *Work* by the *Subcontractor* or anyone for whom the *Subcontractor* is responsible, the *Subcontractor* shall promptly at the *Subcontractor's* own expense:
- .1 take all necessary steps, in accordance with applicable legislation in force at the *Place of the Work*, to safely remove and dispose the toxic or hazardous substances;
  - .2 make good any damage to the *Subcontract Work*;
  - .3 reimburse the *Contractor* for reasonable costs incurred in making good any damage to the *Work*, the *Owner's* property or property adjacent to the *Place of the Work* as provided in paragraph 9.1.3 of SCC 9.1 – PROTECTION OF WORK AND PROPERTY;
  - .4 reimburse the *Contractor* for reasonable costs incurred under paragraph 9.2.2; and
  - .5 indemnify the *Contractor* as required by SCC 12.1 - INDEMNIFICATION.
- 9.2.5 If either party does not accept the expert's findings under paragraph 9.2.2, the disagreement shall be settled in accordance with Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION. If such disagreement is not resolved promptly, the parties shall act immediately in accordance with the expert's determination and take the steps required by paragraph 9.2.3 or 9.2.4 it being understood that by so doing, neither party will jeopardize any claim that party may have to be reimbursed as provided by SCC 9.2 – TOXIC AND HAZARDOUS SUBSTANCES.

### GC 9.3 ARTIFACTS AND FOSSILS

- 9.3.1 Fossils, coins, articles of value or antiquity, structures and other remains or things of scientific or historic interest discovered at the *Place of the Work* shall, as between the *Contractor* and the *Subcontractor*, be deemed to be the absolute property of the *Contractor*.
- 9.3.2 The *Subcontractor* shall take all reasonable precautions to prevent removal or damage to discoveries as identified in paragraph 9.3.1, and shall advise the *Contractor* upon discovery of such items.
- 9.3.3 The *Contractor* shall investigate the impact on the *Subcontract Work* of the discoveries identified in paragraph 9.3.1. If conditions are found that would cause an increase or decrease in the *Subcontractor's* cost or time to perform the *Subcontract Work*, the *Contractor* shall issue appropriate instructions for a change in the *Subcontract Work* as provided in SCC 6.2 - CHANGE ORDER or SCC 6.3 CHANGE DIRECTIVE.

### SCC 9.4 CONSTRUCTION SAFETY

- 9.4.1 The *Subcontractor* shall respect and comply with:
- .1 the rules, regulations and practices required by the applicable construction health and safety legislation, and
  - .2 all safety precautions and programs of the *Contractor*.

### SCC 9.5 MOULD

- 9.5.1 If the *Contractor* or *Subcontractor* observes or reasonably suspects the presence of mould at the *Place of the Work*, the remediation of which is not expressly part of the *Subcontract Work*,
- .1 the observing party shall promptly report the circumstances to the other party in writing, and
  - .2 the *Contractor* and the *Subcontractor* shall promptly take all reasonable steps, including stopping the *Subcontract Work* if necessary, to ensure that no person suffers injury, sickness or death and that no property is damaged as a result of exposure to or the presence of the mould, and

### *Commentary*



**The Subcontractor must take care to immediately report the presence of toxic or hazardous substances to the Contractor, and to take all reasonable steps to protect people and property until the problem is assessed or remediated. A failure to do so exposes the Subcontractor to liability to anyone who suffers harm as a result.**

**SCC 9.3: If the Subcontractor discovers remains, or articles of archaeological, scientific or historic interest at the project site, it must take reasonable precautions to protect these discoveries and advise the Contractor. The Contractor must then investigate the impact of that event upon the Subcontractor's costs and/or schedule, and deal with such impacts by way of Change Order or Change Directive. The Subcontractor is not authorized to keep any items it discovers; as between it and the Contractor, they are deemed to be the absolute property of the Contractor.**

**SCC 9.4: These set out in very basic fashion the safety obligations of the Subcontractor. In essence, the Subcontractor must comply with applicable health and safety legislation, and must abide all safety precautions and programs of the Contractor. Many Contractors go further than this, for example, appending a copy of their safety program to the contract and incorporating that as a Subcontract Document.**

- .3 if the *Contractor* and *Subcontractor* do not agree on the existence, significance or cause of the mould or as to what steps need be taken to deal with it, the *Contractor* shall retain and pay for an independent qualified expert to investigate and determine such matters. The expert's report shall be delivered to the *Contractor* and *Subcontractor*.
- 9.5.2 If the *Contractor* and *Subcontractor* agree, or if the expert referred to in paragraph 9.5.1.3 determines that the presence of mould was not caused by the *Subcontractor's* operations under the *Subcontract*, the *Contractor* shall promptly, at no cost to the *Subcontractor*:
- .1 take all reasonable and necessary steps to safely remediate or dispose of the mould, and
  - .2 reimburse the *Subcontractor* for the cost of taking the steps under paragraph 9.5.1.2, and
  - .3 extend the *Subcontract Time* for such reasonable time in consultation with the *Subcontractor* and the expert referred to in 9.5.1.3 and reimburse the *Subcontractor* for reasonable costs incurred as a result of the delay, and
  - .4 indemnify the *Subcontractor* as required by SCC 12.1 – INDEMNIFICATION.
- 9.5.3 If the *Contractor* and *Subcontractor* agree, or if the expert referred to in paragraph 9.5.1.3 determines that the presence of mould was caused by the *Subcontractor's* operations under the *Subcontract*, the *Subcontractor* shall promptly, at the *Subcontractor's* own expense:
- .1 take all reasonable and necessary steps to safely remove the mould, and
  - .2 make good any damage to the *Subcontract Work*;
  - .3 reimburse the *Contractor* for reasonable costs incurred in making good any damage to the *Work*, the *Owner's* property or property adjacent to the *Place of the Work* as provided in paragraph 9.1.3 of SCC 9.1 – PROTECTION OF WORK AND PROPERTY;
  - .4 reimburse the *Contractor* for reasonable costs incurred under paragraph 9.5.1.3, and
  - .5 indemnify the *Contractor* as required by SCC 12.1 – INDEMNIFICATION.
- 9.5.4 If either party does not accept the expert's finding under paragraph 9.5.1.3, the disagreement shall be settled in accordance with Part 8 of the Subcontract Conditions - DISPUTE RESOLUTION. If such disagreement is not resolved promptly, the parties shall act immediately in accordance with the expert's determination and take the steps required by paragraphs 9.5.2 or 9.5.3, it being understood that by so doing neither party will jeopardize any claim the party may have to be reimbursed as provided by SCC 9.5 – MOULD.

## **PART 10 GOVERNING REGULATIONS**

### **SCC 10.1 TAXES AND DUTIES**

- 10.1.1 The *Subcontract Price* shall include all taxes and customs duties in effect at the time of the bid closing except for *Value Added Taxes* payable by the *Contractor* to the *Subcontractor* as stipulated in Article 5 of the Subcontract Agreement – SUBCONTRACT PRICE.
- 10.1.2 Any increase or decrease in costs to the *Subcontractor* due to changes in such included taxes and duties after the time of the bid closing shall increase or decrease the *Subcontract Price* accordingly.

### **SCC 10.2 LAWS, NOTICES, PERMITS, AND FEES**

- 10.2.1 The laws of the *Place of the Work* shall govern the *Subcontract Work*.
- 10.2.2 The *Owner* or the *Contractor* shall obtain and pay for development approvals, building permit, permanent easements, rights of servitude, and all other necessary approvals and permits, except for the permits and fees referred to in paragraph 10.2.3 or for which the *Subcontract Documents* specify as the responsibility of the *Subcontractor*.
- 10.2.3 The *Subcontractor* shall be responsible for the procurement of permits, licences, inspections, and certificates, which are necessary for the performance of the *Subcontract Work* and customarily obtained by subcontractors in the jurisdiction of the *Place of the Work* after the issuance of the building permit. The *Subcontract Price* includes the cost of these permits, licences, inspections, and certificates, and their procurement.
- 10.2.4 The *Subcontractor* shall give the required notices and comply with the laws, ordinances, rules, regulations, or codes which are or become in force during the performance of the *Subcontract Work* and which relate to the *Subcontract Work*, to the preservation of the public health, and to construction safety.

## Commentary

**SCC 9.5:** These are the provisions dealing with mould at the project site. They are very similar to the provisions governing toxic and hazardous substances.

If either the Contractor or Subcontractor discovers mould, that party must promptly report the circumstances to the other party, and both Contractor and Subcontractor must take reasonable steps to prevent injury to people or property.

If there is no controversy that the mould was not caused by the Subcontractor's operations, the Contractor must take all reasonable and necessary steps to remediate or dispose of the mould, reimburse the Subcontractor for any of its costs, extend the schedule as necessary and indemnify the Subcontractor against any loss or damage.

If there is controversy about the existence, severity or cause of the mould, the Contractor must then retain an independent qualified expert to investigate and render a report. If the expert determines that the mould was caused by the Subcontractor's operations, all those obligations set out above to deal with the problem, reimburse for any costs and indemnify, fall upon the Subcontractor.

If there is any disagreement about the expert's finding, the parties remain free to resolve the matter under the dispute resolution provisions in Part 8, but the parties must take such immediate steps as the expert considers necessary to protect persons and property without any jeopardy to their right to claim.



**The Subcontractor must take care to immediately report the presence of mould to the Contractor, and to take all reasonable steps to protect people and property until the problem is assessed or remediated. A failure to do so exposes the Subcontractor to liability to anyone who suffers harm as a result.**

**SCC 10.1:** the Subcontract Price includes all taxes and duties in effect at the time of bid closing, except for Value Added Taxes. If the Subcontractor's costs change because of any change in taxes or duties after bid closing, the Subcontract Price is increased or decreased accordingly.



**At a time of rapidly changing commodity prices, the Subcontractor should be careful to note that it may have a right to receive an adjustment to the Subcontract Price under this GC 10.1 if its material costs have increased due to the imposition of new taxes or duties.**

**SCC 10.2.2, 10.2.3 and 10.2.4:** these are the permitting and notice obligations. The Subcontractor is responsible for all permits, licenses, inspections and certificates pertaining to its own work, and the Subcontract Price includes the costs of these permits and inspections. The Subcontractor is responsible for giving notices relating to its own work and for complying with all laws governing that work, as well as public health and safety. The Contractor or Owner are responsible for all other permits or rights necessary for the project, unless the Subcontract Documents stipulate otherwise.

10.2.5 The *Subcontractor* shall not be responsible for verifying that the *Subcontract Documents* are in compliance with the applicable laws, ordinances, rules, regulations, or codes relating to the *Subcontract Work*. If the *Subcontract Documents* are at variance therewith, or if, subsequent to the time of bid closing, changes are made to the applicable laws, ordinances, rules, regulations, or codes which require modification to the *Subcontract Documents*, the *Subcontractor* shall advise the *Contractor* in writing requesting direction immediately upon such variance or change becoming known. The *Contractor* will make the changes required to the *Subcontract Documents* as provided in SCC 6.1 – CONTRACTOR’S RIGHT TO MAKE CHANGES, SCC 6.2 – CHANGE ORDER, and SCC 6.3 – CHANGE DIRECTIVE.

10.2.6 If the *Subcontractor* fails to advise the *Contractor* in writing; and fails to obtain direction as required in paragraph 10.2.5; and performs work knowing it to be contrary to any laws, ordinances, rules, regulations, or codes; the *Subcontractor* shall be responsible for and shall correct the violations thereof; and shall bear the costs, expenses, and damages attributable to the failure to comply with the provisions of such laws, ordinances, rules, regulations, or codes.

10.2.7 If, subsequent to the time of bid closing, changes are made to applicable laws, ordinances, rules, regulations, or codes of authorities having jurisdiction which affect the cost of the *Subcontract Work*, either party may submit a claim in accordance with the requirements of SCC 6.6 – CLAIMS FOR A CHANGE IN SUBCONTRACT PRICE.

### **SCC 10.3 PATENT FEES**

10.3.1 The *Subcontractor* shall pay the royalties and patent licence fees required for the performance of the *Subcontract*. The *Subcontractor* shall hold the *Contractor* harmless from and against claims, demands, losses, costs, damages, actions, suits, or proceedings arising out of the *Subcontractor's* performance of the *Subcontract* which are attributable to an infringement or an alleged infringement of a patent of invention by the *Subcontractor* or anyone for whose acts the *Subcontractor* may be liable.

10.3.2 The *Contractor* shall hold the *Subcontractor* harmless against claims, demands, losses, costs, damages, actions, suits, or proceedings arising out of the *Subcontractor's* performance of the *Subcontract* which are attributable to an infringement or an alleged infringement of a patent of invention in executing anything for the purpose of the *Subcontract*, the model, plan or design of which was supplied to the *Subcontractor* as part of the *Subcontract Documents*.

### **SCC 10.4 WORKERS' COMPENSATION**

10.4.1 At any time during the term of the *Subcontract*, when requested by the *Contractor*, the *Subcontractor* shall provide such evidence of compliance by the *Subcontractor* and *Sub-Subcontractors* with workers' compensation legislation, including payments due there under.

## **PART 11 INSURANCE AND CONTRACT SECURITY**

### **SCC 11.1 INSURANCE**

11.1.1 Without restricting the generality of SCC 12.1 – INDEMNIFICATION, the *Subcontractor* shall provide, maintain and pay for the following insurance coverages, the minimum requirements of which are specified in CCDC 41 – CCDC INSURANCE REQUIREMENTS in effect at the time of bid closing except as hereinafter provided:

- .1 General liability insurance in the name of the *Subcontractor* and include, or in the case of a single, blanket policy, be endorsed to name, the *Contractor* as insured but only with respect to liability, other than legal liability arising out of their sole negligence, arising out of the operations of the *Subcontractor* with regard to the *Subcontract Work*. General liability insurance shall be maintained from the date of commencement of the *Subcontract Work* until one year from the date of *Substantial Performance of the Work*. Liability coverage shall be provided for completed operations hazards from the date of *Substantial Performance of the Work*, as set out in the certificate of *Substantial Performance of the Work*, on an ongoing basis for a period of 6 years following *Substantial Performance of the Work*.
- .2 Automobile Liability Insurance from the date of commencement of the *Subcontract Work* until one year after the date of *Substantial Performance of the Work*.
- .3 Aircraft or Watercraft Liability Insurance when owned or non-owned aircraft or watercraft are used directly or indirectly in the performance of the *Subcontract Work*.

## Commentary

**SCC 10.2.5, 10.2.6 and 10.2.7:** These deal with changes to applicable laws, codes, etc. after bid closing. The Subcontractor has no responsibility for verifying that the Subcontract Documents comply with such laws, codes, etc. However, if the Subcontractor becomes aware that they are at variance, or if changes to laws, codes, etc. are made after bid closing, the Subcontractor must notify the Contractor upon becoming aware and request direction. If the Subcontractor fails to advise and obtain direction, and proceeds with work knowing it to be contrary to laws, codes, etc., the Subcontractor assumes the costs, expenses and damages of doing so.



**While this is unlikely to arise often in practice, the Subcontractor should be careful not to proceed with any work in circumstances in which it knows that doing so will violate some applicable law, ordinance, rule, regulation or code. It should instead advise the Contractor, obtain direction, and seek either a Change Order or Change Directive to cover any cost and/or schedule impacts.**

**SCC 10.3:** The Subcontractor is responsible to pay royalties and patent licence fees required for the performance of the Subcontract, and is responsible to indemnify the Contractor against any claims for infringement of any patent by the Subcontractor. The Contractor is responsible to indemnify the Subcontractor against any claims for infringement of any other patent, as well as infringement claims arising from use of the model, plan or design provided to the Subcontractor.

**SCC 10.4.1:** The Subcontractor must provide evidence of compliance with workers' compensation legislation at any time during the performance of its work when requested to do so by the Contractor.



**It is a best practice to stipulate in a supplementary condition how frequently the Subcontractor is required to provide these workers' compensation clearance certificates. Practices vary, from requiring such a certificate only with the first and last payment application, to requiring them monthly with each application.**

**SCC 11.1:** These are the extensive insurance provisions in the Subcontract.



**These insurance clauses have been developed in consultation with the construction insurance industry. The CCDC 41-CCDC INSURANCE REQUIREMENTS document referenced sets out the minimum requirements from time to time, and that version of CCDC 41 in effect at the time of bid closing should be consulted. A detailed commentary on the fine points of the various coverages required is beyond the scope of this Guide.**



**As a best practice generally, the Subcontractor should establish a good ongoing working relationship with a qualified insurance broker, and consult with that broker regularly to ensure that the required coverages remain available and are in place at all times.**

- .4 Boiler and machinery insurance in the joint names of the *Subcontractor*, the *Contractor*, the *Owner*, and the *Consultant*. The coverage shall be maintained continuously from commencement of use or operation of the boiler and machinery objects insured by the policy and until 10 calendar days after the date of *Substantial Performance of the Work*.
- .5 Contractors' Equipment Insurance from the date of commencement of the *Subcontract Work* until one year after the date of *Substantial Performance of the Work*.
- 11.1.2 The *Contractor* shall provide, maintain and pay for "Broad form" property insurance in the joint names of the *Contractor*, the *Owner* and the *Consultant*. The policy shall include the *Subcontractor* as insured. The "Broad form" property insurance shall be provided from the date of commencement of the *Subcontract Work* until the earliest of:
- .1 10 calendar days after the date of *Substantial Performance of the Work*;
  - .2 on the commencement of use or occupancy of any part or section of *Work* unless such use or occupancy is for construction purposes, habitation, office, banking, convenience store under 465 square metres in area, or parking purposes, or for the installation, testing and commissioning of equipment forming part of the *Work*;
  - .3 when left unattended for more than 30 consecutive calendar days or when construction activity has ceased for more than 30 consecutive calendar days.
- 11.1.3 The "Broad form" property policy shall provide that, in the case of a loss or damage, payment shall be made to the *Contractor* and the *Subcontractor* as their respective interests may appear. In the event of loss or damage:
- .1 the *Contractor* shall act on behalf of the *Subcontractor* for the purpose of adjusting the amount of such loss or damage payment with the insurers. When the extent of the loss or damage is determined, the *Subcontractor* shall proceed to restore the *Subcontract Work*. Loss or damage shall not affect the rights and obligations of either party under the *Subcontract* except that the *Subcontractor* shall be entitled to a reasonable extension of *Subcontract Time* agreed between the *Contractor* and the *Subcontractor* in consideration of the extent of the loss or damage;
  - .2 the *Subcontractor* shall be entitled to receive from the *Contractor*, in addition to the amount due under the *Subcontract*, the amount which the *Contractor's* interest in restoration of the *Subcontract Work* has been appraised, such amount to be paid as the restoration of the *Subcontract Work* proceeds in accordance with the progress payment provisions. In addition the *Subcontractor* shall be entitled to receive from the payments made by the insurer the amount of the *Subcontractor's* interest in the restoration of the *Subcontract Work*; and
  - .3 to the *Subcontract Work* arising from the work of the *Contractor*, the *Contractor's* own forces, or another contractor, the *Contractor* shall, in accordance with the *Contractor's* obligations under the provisions relating to construction by the *Contractor* or other contractors, pay the *Subcontractor* the cost of restoring the *Subcontract Work* as the restoration of the *Subcontract Work* proceeds and as in accordance with the progress payment provisions.
- 11.1.4 Prior to commencement of the *Subcontract Work* and upon the placement, renewal, amendment, or extension of all or any part of the insurance, the *Subcontractor* shall promptly provide the *Contractor* with confirmation of coverage and, if required, a certified true copy of the policies certified by an authorized representative of the insurer together with copies of any amending endorsements applicable to the *Subcontract Work*.
- 11.1.5 The parties shall pay their share of the deductible amounts in direct proportion to their responsibility in regards to any loss for which the above policies are required to pay, except where such amounts may be excluded by the terms of the *Subcontract*.
- 11.1.6 If the *Subcontractor* fails to provide or maintain insurance as required by the *Subcontract Documents*, then the *Contractor* shall have the right to provide and maintain such insurance and give evidence to the *Subcontractor*. The *Subcontractor* shall pay the cost thereof to the *Contractor* on demand or the *Contractor* may deduct the cost from the amount which is due or may become due to the *Subcontractor*.
- 11.1.7 All required insurance policies shall be with insurers licensed to underwrite insurance in the jurisdiction of the *Place of the Work*.
- 11.1.8 If a revised version of CCDC 41 – CCDC INSURANCE REQUIREMENTS is published, which specifies reduced insurance requirements, the parties shall address such reduction, prior to the *Subcontractor's* insurance policy becoming due for renewal, and record any agreement in a *Change Order*.
- 11.1.9 If a revised version of CCDC 41 – CCDC INSURANCE REQUIREMENTS is published, which specifies increased insurance requirements, the *Contractor* may request the increased coverage from the *Subcontractor* by way of a *Change Order*.
- 11.1.10 A *Change Directive* shall not be used to direct a change in the insurance requirements in response to the revision of CCDC 41 – CCDC INSURANCE REQUIREMENTS.



## *Commentary*

**GC 11.1.4:** The Subcontractor must provide confirmation of insurance coverage to the Contractor prior to starting its work, and upon the placement, renewal, amendment or extension of any coverages.

**GC 11.1.5:** Deductibles under insurance policies (which can sometimes be significant) are shared between the Subcontractor and Contractor in proportion to their responsibility for the loss.

**GC 11.1.6:** If the Subcontractor fails to provide or maintain the required insurance, the Contractor has the right to obtain it on the Subcontractor's behalf and at the Subcontractor's expense.

**GC 11.1.8 to 11.1.10:** If the insurance requirements reduce during the Subcontract performance, the parties deal with that using a Change Order. If the insurance requirements increase during performance, the Contractor may, by Change Order and not Change Directive, require the Subcontractor to provide that increased coverage.

## SCC 11.2 CONTRACT SECURITY

- 11.2.1 The *Subcontractor* shall provide and maintain in good standing until the fulfilment of the *Subcontract* the contract security required at the time of bidding or mutually agreed upon prior to signing this *Subcontract*.
- 11.2.2 The *Contractor* shall, at the request of the *Subcontractor*, furnish evidence that contract security has been provided in accordance with the *Prime Contract*.

## PART 12 INDEMNIFICATION, WAIVER OF CLAIMS AND WARRANTY

### SCC 12.1 INDEMNIFICATION

- 12.1.1 Without restricting the parties' obligation to indemnify as described in paragraphs 12.1.4 and 12.1.5, the *Contractor* and the *Subcontractor* shall each indemnify and hold harmless the other from and against all claims, demands, losses, costs, damages, actions, suits, or proceedings whether in respect to losses suffered by them or in respect to claims by third parties that arise out of, or are attributable in any respect to their involvement as parties to this *Subcontract*, provided such claims are:
- .1 caused by:
    - (a) the negligent acts or omissions of the party from whom indemnification is sought or anyone for whose acts or omissions that party is liable, or
    - (b) a failure of the party to the *Subcontract* from whom indemnification is sought to fulfil its terms or conditions; and
  - .2 made in writing within a period of 6 years from the date of *Substantial Performance of the Work* as set out in the certificate of *Substantial Performance of the Work*, or within such shorter period as may be prescribed by any limitation statute of the province or territory of the *Place of the Work*.
- The parties expressly waive the right to indemnity for claims other than those provided for in this *Subcontract*.
- 12.1.2 The obligation of either party to indemnify as set forth in paragraph 12.1.1 shall be limited as follows:
- .1 In respect to losses suffered by the *Contractor* and the *Subcontractor* for which insurance is to be provided by either party pursuant to SCC 11.1 – INSURANCE, the general liability insurance limit for one occurrence as referred to in CCDC 41 – CCDC INSURANCE REQUIREMENTS in effect at the time of bid closing.
  - .2 In respect to losses suffered by the *Contractor* and the *Subcontractor* for which insurance is not required to be provided by either party in accordance with SCC 11.1 – INSURANCE, the greater of the *Prime Contract* price or \$2,000,000, but in no event shall the sum be greater than \$20,000,000.
  - .3 In respect to claims by third party for direct loss resulting from bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, the obligation to indemnify is without limit. In respect to all other claims for indemnity as a result of claims advanced by third parties, the limits of indemnify set forth in paragraphs 12.1.2.1 and 12.1.2.2. shall apply.
- 12.1.3 The obligation of either party to indemnify the other as set forth in paragraphs 12.1.1 and 12.1.2 shall be inclusive of interest and all legal costs.
- 12.1.4 The *Contractor* and the *Subcontractor* shall indemnify and hold harmless the other from and against all claims, demands, losses, costs, damages, actions, suits, or proceedings arising out of their obligations described in SCC 9.2 – TOXIC AND HAZARDOUS SUBSTANCES.
- 12.1.5 The *Contractor* shall indemnify and hold harmless the *Subcontractor* from and against all claims, demands, losses, costs, damages, actions, suits, or proceedings:
- .1 as described in paragraph 10.3.2 of SCC 10.3 – PATENT FEES, and
  - .2 arising out of the *Subcontractor's* performance of the *Subcontract* which are attributable to a lack of or defect in title or an alleged lack of or defect in title to the *Place of the Work*.
- 12.1.6 In respect to any claim for indemnity or to be held harmless by the *Contractor* or the *Subcontractor*:
- .1 *Notice in Writing* of such claim shall be given within a reasonable time after the facts upon which such claim is based became known;
  - .2 should any party be required as a result of its obligation to indemnify another to pay or satisfy a final order, judgment or award made against the party entitled by this contract to be indemnified, then the indemnifying party upon assuming all liability for any costs that might result shall have the right to appeal in the name of the party against whom such final order or judgment has been made until such rights of appeal have been exhausted.

## Commentary

**SCC 11.2:** This simply records the obligation of the Subcontractor to provide and maintain such contract security (for example, performance bond, labour and material payment bond) as was required at the time of bid or as was mutually agreed prior to signing the Subcontract.

**SCC 12.1:** These are the mutual indemnity obligations of each of the Contractor and the Subcontractor to the other.

Basically, the Contractor and Subcontractor agree to indemnify one another against all claims attributable to negligence or breach of contract which are made in writing within the limitation period applicable at the Place of the Work, with an outside time limit of 6 years from the date of substantial performance of the Prime Contract. All other claims for indemnity are expressly waived.

There are further limitations on these rights of indemnity:

(a) for insured losses of either party, indemnity is limited to the general liability insurance limit for one occurrence in effect at time of bid closing;

(b) for losses which are not insured, the indemnity is capped at the Prime Contract price or \$2,000,000, whichever is greater, with an absolute cap of \$20,000,000.

There is no limit on the indemnity for claims by third parties for direct losses resulting from bodily injury, sickness, disease or death, or for injury to or destruction of tangible property.



**Notice in Writing of any indemnity claim must be given within a reasonable time after the facts upon which any such claim is based become known.**



**It is extremely important that the Subcontractor obtain and maintain insurance covering its likely risks in connection with the Subcontract, particularly since there is no limitation in the Subcontract to the amount of such liability for any claims by third parties. It is essential that the Subcontractor make a reasonable assessment of its outside exposure to a damage award for catastrophic personal injury, as well as property damage, and that sufficient insurance is provided to protect against that exposure.**



**There is no limitation on the indemnity obligation of the Contractor and Subcontractor to one another for claims pertaining to toxic or hazardous substances, or for patent infringement claims, or for claims attributable to any defect in title. See GC 12.1.4 and 12.1.5, together with the first portion of GC 12.1.1.**

## SCC 12.2 WAIVER OF CLAIMS

- 12.2.1 Subject to any lien legislation applicable to the *Place of the Work*, as of the 10th calendar day before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*, the *Subcontractor* waives and releases the *Contractor* from all claims which the *Subcontractor* has or reasonably ought to have knowledge of that could be advanced by the *Subcontractor* against the *Contractor* arising from the *Subcontractor's* involvement in the *Subcontract Work*, including, without limitation, those arising from negligence or breach of contract in respect to which the cause of action is based upon acts or omissions which occurred prior to or on the date of *Substantial Performance of the Work*, except as follows:
- .1 claims arising prior to or on the date of *Substantial Performance of the Work* for which *Notice in Writing* of claim has been received by the *Contractor* from the *Subcontractor* no later than the 11th calendar day before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*;
  - .2 indemnification for claims advanced against the *Subcontractor* by third parties for which a right of indemnification may be asserted by the *Subcontractor* against the *Contractor* pursuant to the provisions of this *Subcontract*;
  - .3 claims for which a right of indemnity could be asserted by the *Subcontractor* pursuant to the provisions of paragraphs 12.1.4 or 12.1.5 of SCC 12.1 – INDEMNIFICATION; and
  - .4 claims resulting from acts or omissions which occur after the date of *Substantial Performance of the Work*.
- 12.2.2 The *Subcontractor* waives and releases the *Contractor* from all claims referenced in paragraph 12.2.1.4 except for those referred in paragraphs 12.2.1.2 and 12.2.1.3 and claims for which *Notice in Writing* of claim has been received by the *Contractor* from the *Subcontractor* within 390 calendar days following the date of *Substantial Performance of the Work*.
- 12.2.3 Subject to any lien legislation applicable to the *Place of the Work*, as of the 10th calendar day before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*, the *Contractor* waives and releases the *Subcontractor* from all claims which the *Contractor* has or reasonably ought to have knowledge of that could be advanced by the *Contractor* against the *Subcontractor* arising from the *Contractor's* involvement in the *Subcontract Work*, including, without limitation, those arising from negligence or breach of contract in respect to which the cause of action is based upon acts or omissions which occurred prior to or on the date of *Substantial Performance of the Work*, except as follows:
- .1 claims arising prior to or on the date of *Substantial Performance of the Work* for which *Notice in Writing* of claim has been received by the *Subcontractor* from the *Contractor* no later than the 11th calendar day before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*;
  - .2 indemnification for claims advanced against the *Contractor* by third parties for which a right of indemnification may be asserted by the *Contractor* against the *Subcontractor* pursuant to the provisions of this *Contract*;
  - .3 claims for which a right of indemnity could be asserted by the *Contractor* against the *Subcontractor* pursuant to the provisions of paragraph 12.1.4 of SCC 12.1 - INDEMNIFICATION;
  - .4 damages arising from the *Subcontractor's* actions which result in substantial defects or deficiencies in the *Subcontract Work*. “Substantial defects or deficiencies” mean those defects or deficiencies in the *Subcontract Work* which affect the *Subcontract Work* to such an extent or in such a manner that a significant part or the whole of the *Work* is unfit for the purpose intended by the *Contract Documents*;
  - .5 claims arising pursuant to SCC 12.3 - WARRANTY; and
  - .6 claims arising from acts or omissions which occur after the date of *Substantial Performance of the Work*.
- 12.2.4 The *Contractor* waives and releases the *Subcontractor* from all claims referred to in paragraph 12.2.3.4 except claims for which *Notice in Writing* of claim has been received by the *Subcontractor* from the *Contractor* within a period of 6 years from the date of *Substantial Performance of the Work* should any limitation statute of the Province or Territory of the *Place of the Work* permit such agreement. If the applicable limitation statute does not permit such agreement, within such shorter period as may be prescribed by:
- .1 any limitation statute of the Province or Territory of the *Place of the Work*; or
  - .2 if the *Place of the Work* is the Province of Quebec, then Article 2118 of the Civil Code of Quebec.
- 12.2.5 The *Contractor* waives and releases the *Subcontractor* from all claims referenced in paragraph 12.2.3.6 except for those referred in paragraph 12.2.3.2, 12.2.3.3 and those arising under SCC 12.3 – WARRANTY and claims for which *Notice in Writing* has been received by the *Subcontractor* from the *Contractor* within 390 calendar days following the date of *Substantial Performance of the Work*.

## Commentary

**SCC 12.2:** These clauses deal with waiver of claims, and they are probably the most complex in the entire Subcontract. They are essentially identical to those found in CCDC 2-2008.

The basic intent is that each party is deemed to waive and release the other from claims arising under the Subcontract unless timely notice is given by the party making the claim. The timing of this notice depends upon whether the claim arises from acts or omissions prior to the date of substantial performance of the Prime Contract, or afterwards. For claims based on acts or omissions occurring prior to the date of substantial performance of the Prime Contract, the notice is tied to the date of expiry of the lien period. For claims arising from acts or omissions after substantial performance of the Prime Contract, the notice is tied to that date of substantial performance.

**For claims by the Subcontractor against the Contractor,** Notice in Writing of claims due to acts or omissions prior to substantial performance of the Prime Contract must be given and received by the Contractor no later than the 11<sup>th</sup> calendar day before the expiry of the lien period. This time limit does not apply to claims for indemnification against third party claims, claims due to toxic or hazardous materials, patent claims, claims arising from defect in title, and claims arising after substantial performance.

For claims due to acts or omissions after substantial performance of the Prime Contract, the Subcontractor must give timely notice and the Contractor must receive it no later than 390 calendar days after substantial performance. Again, this time limit does not apply to third party indemnity claims, claims due to toxic or hazardous materials, patent claims and claims arising from a defect in title.

**For claims by the Contractor against the Subcontractor,** Notice in Writing of claim must be given and received by the Subcontractor no later than the 11<sup>th</sup> calendar day before the expiry of the lien period. This time limit does not apply to claims for indemnification against third party claims, claims due to toxic or hazardous materials, damage claims arising from “substantial defects or deficiencies in the Subcontract Work”, warranty claims, and claims arising after substantial performance.

There is an absolute limit on the Contractor’s right to claim against the Subcontractor for claims arising from substantial defects or deficiencies in the Subcontract Work. This limit is 6 years from substantial performance of the Prime Contract. If the prevailing limitations legislation prohibits an agreement to extend the limitation period to this 6 years, the absolute limit will be whatever shorter period is prescribed in the limitations legislation.

For claims due to acts or omissions after substantial performance of the Prime Contract, the Contractor must give timely notice and the Subcontractor must receive it no later than 390 calendar days after substantial performance. This time limit does not apply to third party indemnity claims, claims due to toxic or hazardous materials and warranty claims.



**It is essential that timely notice in writing of claims be submitted, otherwise the right to claim will be lost. While the details of this waiver clause are complex, the Subcontractor should follow this simple rule of thumb: if it has any claim against the Contractor, submit notice in writing immediately. There is no particular form for this notice, but there are some requirements which must be met. See the comments on SCC 12.2.6 below.**

- 12.2.6 “*Notice in Writing* of claim” as provided for in SCC 12.2 – WAIVER OF CLAIMS to preserve a claim or right of action which would otherwise, by the provisions of SCC 12.2 – WAIVER OF CLAIMS, be deemed to be waived, must include the following:
- .1 a clear and unequivocal statement of the intention to claim;
  - .2 a statement as to the nature of the claim and the grounds upon which the claim is based; and
  - .3 a statement of the estimated quantum of the claim.
- 12.2.7 The party giving “*Notice in Writing* of claim” as provided for in SCC 12.2 – WAIVER OF CLAIMS shall submit within a reasonable time a detailed account of the amount claimed.
- 12.2.8 Where the event or series of events giving rise to a claim made under paragraphs 12.2.1 or 12.2.3 has a continuing effect, the detailed account submitted under paragraph 12.2.7 shall be considered to be an interim account and the party making the claim shall submit further interim accounts, at reasonable intervals, giving the accumulated amount of the claim and any further grounds upon which it is based. The party making the claim shall submit a final account after the end of the effects resulting from the event or series of events.
- 12.2.9 If a *Notice in Writing* of claim pursuant to paragraph 12.2.1.1 is received on the twelfth or eleventh calendar day before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*, the period within which *Notice in Writing* of claim shall be received pursuant to paragraph 12.2.3.1 shall be extended to two calendar days before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*.
- 12.2.10 If a *Notice in Writing* of claim pursuant to paragraph 12.2.3.1 is received on the twelve or eleventh calendar day before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*, the period within which *Notice in Writing* of claim shall be received pursuant to paragraph 12.2.1.1 shall be extended to two calendar days before the expiry of the lien period provided by the lien legislation applicable at the *Place of the Work*.

### SCC 12.3 WARRANTY

- 12.3.1 Except for extended warranties as described in paragraph 12.3.6, the warranty period under this *Subcontract* is one year from the date of *Substantial Performance of the Work*.
- 12.3.2 The *Subcontractor* shall be responsible for the proper performance of the *Subcontract Work* to the extent that the design and *Subcontract Documents* permit such performance.
- 12.3.3 The *Contractor* shall promptly give the *Subcontractor Notice in Writing* of observed defects and deficiencies which occur during the one year warranty period.
- 12.3.4 Subject to paragraph 12.3.2, the *Subcontractor* shall correct promptly, at the *Subcontractor's* expense, defects or deficiencies in the *Subcontract Work* which appear prior to and during the one year warranty period.
- 12.3.5 The *Subcontractor* shall correct or pay for damage resulting from corrections made under the requirements of paragraph 12.3.4.
- 12.3.6 Any extended warranties required beyond the one year warranty period as described in paragraph 12.3.1, shall be as specified in the *Subcontract Documents*. Extended warranties shall be issued by the warrantor to the benefit of the *Owner*. The *Subcontractor's* responsibility with respect to extended warranties shall be limited to obtaining any such extended warranties from the warrantor. The obligations under such extended warranties are solely the responsibilities of the warrantor.

## Commentary

**SCC 12.2.6:** this provides the basic requirements of any Notice in Writing of claim.

Essentially, any such notice must include a clear and unequivocal statement of intention to claim, a statement of the nature of the claim and the grounds upon which it is being made, and a statement of the estimated amount of the claim.



**It is important that the Subcontractor comply with this requirement so as to avoid an argument that the Notice in Writing of claim was deficient, and therefore its right to claim was lost. In practice, it should not be difficult to comply. The notice can be any written document, for example, a letter, in which the Subcontractor clearly states that it is making a claim for some specific amount (even an estimated amount), and simply stating the nature of the claim and the grounds. An example: “This letter will confirm that we are making a claim against you for payment of \$500,000 (estimated), being reimbursement for our additional costs of acceleration due to your failure to properly schedule and coordinate the work.”**

**SCC 12.2.9 and 12.2.10:** if either the Contractor or Subcontractor receives a Notice of Claim on the 12<sup>th</sup> or 11<sup>th</sup> calendar day before the expiry of the lien period (that is, just before the deadline), each is given additional time to submit a Notice of Claim of its own against the other party who gave notice. Their deadline to do so is extended to 2 calendar days before the expiry of the lien period.

**SCC 12.3:** these are the warranty provisions.

The warranty period under the Subcontract is one year from substantial performance of the Prime Contract. There is an exception for extended warranties, as specified in the Subcontract Documents. The Subcontractor is responsible to obtain such extended warranties for the benefit of the Owner, but that responsibility is limited to obtaining the extended warranty only, and the warranty obligations themselves are those of the warrantor giving the extended warranty.



**SCC 12.3.2 confirms that the Subcontractor’s responsibility for proper performance of its work is only to the extent that the design and the Subcontract Documents permit such performance. The Subcontractor is not responsible for the adequacy of the design.**



# National Trade Contractor Coalition Of Canada

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