



# Protect the Corporation's Interests When Renovating

By Adriana Mot



Adriana Mot

Refurbishment projects in condominiums often wrongfully use the CCDC2 contract for a design-build contractual arrangement. This practice, despite its commonality, is a risky approach.

Let's consider first what construction contracts are for: Simply put, all construction contracts primarily serve three purposes: they give a clear outline of the work to be performed against a sum of money to be paid, and they set out rules to help monitor the money exchange concerning the work progress, and they outline the legal rights and authority of the parties involved in case of disputes, should they arise at any point.

## 3-party Stipulated Price Contract

CCDC-2, the most commonly used contract, is called a 3-party Stipulated Price Contract. That means that two

main parties, the owner (condo corporation) and the contractor, exchange services against money and that a third independent entity, the consultant, mediates that exchange through the functions of payment certification.

Payment certifications are the legal instrument that the consultant uses to arbitrate the exchange between work and money. If that consultant is not unbiased, it is implicit that you will not have a fair arbitration.

A recent case in Alberta where their position has been challenged has reaffirmed the consultant's authority to determine the rights of all parties. While this was already clear in the contract template, having it reinforced in a court of law adds a renewed layer of power.

Even though the consultants are paid by the owners, the legal contract and professional ethical practice ensure that they remain unbiased and effectively perform their duties. Thus in the CCDC 2, from a legal point of view, you have two biased parties and one impartial arbitrator.

## Design-Build Contract

On the other hand, the CCDC-14 design-build contract is set out for two biased parties and two biased arbitrators. Why the extra arbitrator? Because often-times the payment certifier is part of the design-build team. Let's look at it closer:

When you hire a design-build team, the consultant is hired by the contractor. The two parties that enter into a binding contract are the owner on one side and the contractor with the designer on the other.

If the designer performs the supposedly unbiased duties of the payment certifier, a fourth party is added to maintain impartiality and ensure that the certification is neutral. That party is called the owner's advisor, and their role is to balance the fairness scale and protect the owner's interest.

Problems arise when the owner and a design-build company sign a CCDC 2 contract and no independent third-party consultant is designated for the role of payment certifier. It eliminates

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this contract's fairness and exposes the condo corporation to higher risks.

### Mitigate Contract Risks

If informed, the boards have options to alleviate this situation, and there are at least three ways to ensure this does not happen:

1) Use the proper contract. If a design-build procurement method is preferred, ensure that tendering happens ahead and complete a CCDC 14 contract. If a post-design tender is selected, ensure that, when a CCDC 2 contract is signed, there are no conflicting financial arrangements between designer and contractor that prevent impartiality when the designer certifies the payments.

What is of note, yet lesser applied, is that both contracts are multi-party stipulated price contracts, and as such, independent of what route you take, you can use a tendering process before selecting your builder. However, the tender method for design-build is less explored and understood and a primary reason for which corporations tend to gravitate toward the more ubiquitous CCDC 2.

2) Hire a separate and unbiased mediator that solely covers payment certifications, no design. They will

essentially be the equivalent of the owner's arbitrator as stipulated in the CCDC 14. By reducing the responsibility of the design-build team, their fees are reduced, and the liberated funds can then be used for the additional hire.

When a corporation enters a contract with a builder, they have the legal right to select who the consultant is. While it is typical for the designer who designed the project to be the consultant, it is not mandatory.

3) Hire a third party to amend the contract with a well-crafted and appropriate supplementary conditions section that restores the 3-party balance. This option is to be tackled with utmost care since it may not offer the legal protection it may seem to suggest.

When a consultant determines if the work performed is in line with the money requests, they often perform a site visit to assess the progress visually. Determining the funds needed for immediate purchases are more cumbersome to calculate. The risk of unbalanced assessments is reduced if they have additional tools available to make that determination.

### Integrated Project Delivery

And last, a possible fourth option to consider is a relatively new system in

Canada that relies on CCDC 30, called Integrated Project Delivery or IPD. This is a fantastic option to perform a balanced and informed process all along that delivers a project where the entire team contributes. While it has tremendous value in terms of transparency and maximizing the expert contributions on the way, it heavily relies on the business skills of the individual companies involved to best manage their costs. This leads to the disadvantage that those costs are more difficult to control. Given the many alternatives already present, it may not be the best form for condominium corporations. ■

**Adriana Mot** is a registered interior designer in Toronto and the founder of Dochia Strategy Consulting. DSC's mandate is to address current systemic gaps in the construction industry and promote methods that reduce the harmful erosion of construction teams' interaction while minimizing dissatisfaction with the final product. Adriana's experience and knowledge derive from twenty-two years of practice and her interdisciplinary education in Design, Sociology, Culture and Communication.  
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