

Chapter 2

Parties to the Contract

2.1 Introduction

Construction work may include building of a new structure, additions, alterations, expansion, replacement, dismantling, erection, commissioning, rehabilitation, renovation, etc. Construction is a high-risk activity and must be actively managed from inception through completion.

When constructing a project, many parties/specialists are involved in the process of planning, designing, financing, monitoring, and building. Each of these parties has a different role to play, but they are temporarily joined together for certain period by a legal contract. However, this legal contract/agreement is signed by two main parties. The Owner, the first party, intends to carry out certain works for the implementation of a project and is sponsoring the works. The first party then appoints a Contractor, the second party, to execute the works.

No doubt the agreement is usually signed by two parties; however, taking a construction project from inception through to completion and commissioning requires the concerted and coordinated efforts of three distinct parties: the Owner of the project, the Consultant, and the Contractor. The Consultant is not a party to the contract but is appointed by the Owner to carry out duties that are stated in the contract.

The standard form of Contract FIDIC [1] identifies all three parties as “Employer,” “Engineer,” and “Contractor,” whereas standard form of contract CCDC-2 [2] identifies all these three as “Owner,” “Consultant,” and “Contractor.” Throughout this book, these terms wherever applicable will be used referring to FIDIC [1] and CCDC-2 forms; however, in general for the rest of the text “Owner” and “Consultant” terms will be used.

The goals and objectives of each of these parties are unique and often partially in conflict. In most situations the conflict and related disputes come to surface during the actual construction process. However, if the Owner understands the role and responsibilities of its construction Contractor, it will increase the prospects of a

project with minimal conflict and adversity and greater opportunity for success. For most projects, the Contractor has little or no involvement until the bidding phase. During the planning and design phases, the focus is on the design of the project and in the preparation of the Contract Documents. It is the Contract Documents that contain the definitions of the roles and responsibilities of the Owner, the Consultant, and the Contractor during the construction phase.

2.2 The Owner

The Owner, when planning to construct a project, will have to face many challenges, such as time and cost constraints, program and quality goals, selection of a management team, a Contractor, etc. The Owner basically decides the scope, program, and budget for a project before starting the project design. During the design and construction phases, the Owner monitors the progress of work being done including its quality and makes periodic payments to the Consultant and Contractor.

The Owners within the construction industry could be from public sector as well as private organizations and may include:

1. Federal government.
2. Provincial, cities, and municipalities government departments.
3. Nationalized departments (autonomous bodies) like airports, hospitals, large industries, etc.
4. Private sector: it includes all those organizations that are not directly funded by some form of government money supply. The owner of a private sector may be a house owner, a builder, or multinational company.

In traditional contracts, the Owner has separate contracts with the Consultant and the Contractor. The Consultant provides professional services to undertake the responsibility of design and construction administration of the required project, whereas the Contractor is responsible for the construction phase. The success of every construction project depends as much on the project Owner as it does on the Consultant and Contractor.

As soon as the Consultant is appointed by the Owner, a sequence of activities like feasibility report, sketch design, detailed design, bill of quantities, Contract Documents, tendering, construction supervision, and commissioning are undertaken. All these activities involve many professionals like architect, structure and services engineers, quantity surveyor, geo-consultants, General Contractor, subcontractor, etc.

Generally the role of the Owner may include:

1. Identify needs.
2. Set out the parameters that define the project.
3. Establish reasonable goals for the project.
4. Arrange adequate funds.

5. Select appropriate consultants and appoint authorized representatives.
6. Develop and understand reasonable expectations for the project, its goals, and the parties involved in design and construction.
7. Negotiate the procurement package.
8. Arrange timely possession of site to the General Contractor.
9. Develop the understanding of responsibilities of the parties and their risks and providing authority to manage them.
10. Provide timely responses to the Consultant's submissions.
11. Provide timely responses to the Contractor's submittals, request for information, proposed changes, and claims forwarded by Consultant.
12. Issue timely progress payments.

Each Owner needs to define the project in terms of scope, standards, and outcomes and to manage the contracted relationships to ensure successful completion. The more complex the project, the more necessary it is for these organizations to have the capability, skills, and expertise, which are applied to procurement planning, design and documentation, tendering, and project and contract management.

2.2.1 Rights and Obligations of Owner

The contract prescribes the nature of the relationship. The Conditions of Contract are the primary source for determining the responsibilities and obligation of all parties. As per CCDC-2 [2] and FIDIC Conditions of Contract [1], some of the Owner's important responsibilities includes:

- (i) CCDC-2 Sub-clause 3.2.2 provides that when Owner performs work for some other parts of the project either with his own forces or through another Contractor, the Owner shall provide coordination within the work activities among all the parties on site, assume overall responsibility of health and safety, take all reasonable precautions to avoid labor disputes or other disputes on the project, enter into the separate contracts with other Contractor compatible with the conditions of the contract for General Contractor, and ensure that insurance coverage is provided to the same requirements as of the insurance coverage of the General Contractor.

FIDIC Conditions of Contract [1] under Sub-clause 2.3 also calls for the Employer to make sure that Employer's personnel and other contractors working on site cooperate with Contractor's efforts under Sub-clause 4.8 (a), (b), and (c) for safety requirements and under clause 4.18 for protection of the environment.

- (ii) CCDC-2 [2] Sub-clause 5.1.1 specifies that on request of the Contractor, before signing the contract, and from time to time, the Owner must provide the Contractor reasonable proof that financial arrangements are available to adequately fund the project. Under Sub-clause 5.1.2, the Owner has to give notice

in writing to the Contractor if there is any material change to the Owner's financial arrangements.

FIDIC [1] Conditions of Contract include a similar provision in Sub-clause 2.4; however, FIDIC recommends a 28-day period to show evidence of financial arrangements after receiving request from the Contractor.

- (iii) CCDC-2 [2] Sub-clause 5.3.1.3 provides that the Owner shall make progress payment to the Contractor on or before 20 calendar days after the later of receipt of the Consultant's application for payment or the last day of the monthly payment period. If the Consultant fails to issue a payment certificate or Owner fails to pay the Contractor due certified amounts or to provide evidence for availability of sufficient funds to meet the contract requirements, then in accordance with Sub-clause 7.2.3 and 7.2.4, the Contractor may give notice in writing to the Owner requiring a correction to the default within 5 working days. If the default is not corrected within those 5 days, the Contractor may suspend or terminate the contract.

Whereas, FIDIC Conditions of Contract [1], under Sub-clause 14.7(b), provide that the Employer shall make interim progress payments within 56 days after the Engineer receive the Contractor's statement and supporting documents. If the Owner fails to issue payment, then Sub-clause 16.1 provides that the Contractor may give 21-day notice and then suspend or reduce the rate of work. Additionally, under Sub-clause 16.2(c), the Contractor is entitled to terminate the contract if payment is not received within 42 days following the due date.

- (iv) FIDIC Conditions of Contract [1] under Sub-clause 15.2 entitles the Employer to terminate the contract upon giving 14-day notice to the Contractor, if the Contractor fails to meet the requirements of performance security under clause 4.2 or abandons the work or have intentions not to continue with work; fails to proceed with work in accordance with clause 8 of commencement, delays, and suspension; or fails to comply with instructions issued under Sub-clause 7.5 for rejected plant, material, and workmanship or Sub-clause 7.6 for remedial work within specified period of 28 days or subcontracts the whole of the works without the required agreement.

The Employer is also entitled to terminate the contract immediately as per subparagraph (e) and (f) of the same FIDIC [1] Sub-clause 15.2, if the Contractor becomes bankrupt; or he or his personnel gives or offers any bribe, gift, gratuity, commission, or other thing of value.

The Employer can also terminate the contract at any time for his convenience under Sub-clause 15.5 without Contractor's default or any other justification.

Whereas, CCDC-2 [2] under Sub-clause 7.1.1 entitles the Owner to terminate the contract if the Contractor becomes bankrupt. Additionally under Sub-clause 7.1.2 and 7.1.4, the Owner may also terminate the contract in whole or part if the Contractor fails to correct a default in the time specified or the Owner may elect to correct such default and deduct the cost as certified by the Consultant from Contractor's due payments.

2.3 The Consultant

The Consultant in the context of a construction project means a consulting firm, the Consultant's authorized representative. The Consultant may be an architectural firm or an engineering firm or a sole proprietorship firm that is legally engaged/licensed in rendering professional services.

The role of the Consultant varies based on the services required. For full professional services, under a traditional approach, the Consultant is responsible for two separate functions: design and construction administration. Construction administration is essentially the monitoring of the Contractor's work in executing the design. The responsibilities incumbent on the Consultant as well as the limits of authority should be clearly defined in the agreement between the Owner and the Consultant and within the construction Contract Documents.

In general, the role of the Consultant, based on provision of full professional services, will cover stages of preconstructing, construction, and post-construction phases. Services provided by the Consultant as part of the preconstruction phase include:

1. Determining the feasibility of constructing a project.
2. Preparing preliminary budget and cost estimates.
3. Undertake conceptual, preliminary, and detailed design including site investigations.
4. Developing and evaluating alternatives with respect to design, location, and types of construction.
5. Preparing an environmental assessment and impact studies.
6. Assisting in obtaining approvals of authorities having jurisdiction over the project.
7. Preparation of Contract Documents.
8. Preparation of bid documents and contract formation.

The Consultant is responsible for the timely and impartial administration of the construction contract between the Owner and the Contractor. The services under this role of construction and preconstruction phases may be summarized by the following:

1. Direct and manage project execution.
2. Responding, advising, and consulting with the Owner during construction.
3. To ensure Contractor submits required insurance policies and performance bond prior to start work.
4. To issue information and instructions to the Contractor as the work proceeds.
5. To ensure that the work carried out conforms to the drawings and specifications, meeting with the required quality standards.
6. To watch for faulty workmanship or material incorporated in the work and issue instructions for remedial measures.
7. To monitor Contractor cost, schedule, and technical performance.
8. To ensure that the Contractor complies with all applicable safety regulations.

9. To liaise between Contractors and other authorities and organizations for the smooth completion of the project.
10. To verify the measurements of the work done by the Contractor and evaluate and certify contractor's applications for payment.
11. To review and approve Contractor's submittals such as work programs, shop drawings, product data and samples, etc.
12. Arrange monthly meetings to keep the owner well informed about the construction matters and to resolve Contractor's issues and other related site and work progress problems.
13. To prepare notices of change and change orders.
14. To review and evaluate Contractor's claims with respect to changes in contract sum or contract time and recommend to Owner.
15. To act as a channel for all claims and disputes between the Owner and Contractor and provide record and facts relevant to that.
16. To ensure that all records like files, tender drawings, construction drawings, and any superseded drawings are maintained properly.
17. To review of an application for substantial performance of work noting defects and deficiencies observed in the work.

2.3.1 Rights and Obligations of the Consultant

Some of the Consultant's important responsibilities as outlined in CCDC-2 [2] and FIDIC Conditions of Contract [1] are:

- (i) FIDIC Conditions of Contract [1] provides under clause 3 that the Engineer shall be deemed to act for the Employer while carrying out his duties as per contract and shall have no authority to amend the contract. It further specifies that any approval, check, certificate, inspection, consent, instruction, examination, test, notice, proposal, request, or similar act by the Engineer shall not relieve the Contractor of his obligation to identify to the Owner any perceived errors, omissions, discrepancies, and non-compliance.

CCDC-2 [2] under Sub-clause 2.2.1 provides that the Consultant will administer the contract as described in the Contract Documents and clarifies under Sub-clause 2.2.6 that the Consultant will not be responsible for and will not have control, charge, or supervision of construction means and methods or safety precautions of the Contractor or for the acts or omissions of the Contractor, subcontractor, suppliers, or their employees or agents or any other persons performing portions of the work. Also the Consultant shall not be responsible for the Contractor's failure to perform work as required under contract.

- (ii) FIDIC Conditions of Contract [1] provides that whenever required under contract that the Engineer shall proceed under clause 3.5 to render judgement on an issue (e.g., any claim dispute), the Engineer should consult both the parties to

reach an agreement. This compels the Engineer to perform a role similar to a mediator. If no agreement can be reached, the Engineer has to make a fair determination in accordance with the contract, taking due regard of all relevant circumstances. However, as per clause 3.2, the Engineer cannot delegate this task unless otherwise agreed by both parties. If the dispute continues, then FIDIC [1] Sub-clause 20.2 requires that the parties shall jointly appoint a dispute adjudication board (DAB) by the date stated in the appendix to tender.

The DAB comprises one or three people (who are usually appointed at the start of the project) to render impartial decisions on any construction disputes. If a party is not satisfied with the DAB decision, the dispute can be referred to an arbitrator.

Whereas under Sub-clauses 2.2 of CCDC-2 [2], as further discussed in Chap. 17 regarding dispute resolution, it is specified that the differences between the parties to the contract on issues of work performance or interpretation of the Contract Documents shall be initially referred in writing to the Consultant, who will not show partiality to either party in evaluation of such interpretation and findings and reply his conclusion in writing to the parties within reasonable time. However, if the dispute is not resolved, then a procedure as set out in Sub-clauses 8.1.3 and 8.2.3 to 8.2.8 of negotiation, mediation, and arbitration shall apply to that dispute.

2.4 The Contractor

The Contractor is second party to the contract and, therefore, the Contractor is mentioned extensively in every Conditions of Contract. The Contractor under most forms of contract is required to execute and complete the works and remedy any defect in accordance with the Contract Documents and the instructions from the Consultant.

Despite various difficulties and inclement weather conditions or troubles, the Contractor is expected to complete the project and finish the work in the prescribed manner. The Contractor, who is responsible for constructing the entire project, is referred to as the “main,” “prime,” or “general” Contractor. Contractors may also function as a subcontractor or specialty Contractor, in which case will have responsibility for only a limited aspect of the project. All contractors will agree to do awarded work within a stipulated time period and for an agreed amount of money.

The Contractor’s main responsibilities can be summarized as follows:

1. Supply and provide labor, material, and equipment as necessary to perform the works within the contract period.
2. Provide competent, experienced management and supervision for performance of the work.
3. Comply with all statutory laws and regulations during execution of the works and ensure that all who are employed on the site abide by these conditions.
4. Select and provide the means, methods, techniques, sequences, and procedures of construction.

5. Initiate, maintain, and supervise all safety precautions and programs for all personnel on site and the general public who may be affected by the works. In this regard, the Contractor shall ensure that all personnel on site are adequately trained and observe safe working procedures.
6. Implementation of quality control systems for aspects of the works as specified.
7. Schedule and coordinate the work with other groups like suppliers, subcontractors, etc. working on site.
8. Warrant and guarantee that all work done will be in accordance with the Contract Documents and will not be defective.

The cooperation and assistance of the Owner, Contractor, and Consultant is critical to the success of the project. Prior to starting works, the Contractor should submit any securities, guarantees, and insurance policies required by the contract. The Contractor is responsible for the security of the works throughout the construction period until the works are taken over by the Owner. The Contractor is required to provide insurance, not only to meet his direct liability but also for the Owner's protection. He is expected to exercise every reasonable safeguard for the protection of persons and property related to work under contract and adjacent to the construction site.

Building and civil engineering firms or companies can operate on a local, national, or international level and can be divided into small, medium, large, or very large concerns. It is desired that all parties engaged in construction must abide by some code of conduct. The Owner, Consultant, and Contractor must remember that they share a common goal, which is the successful completion of the project. The Construction Industry Development Board of the United States has published principles governing the conduct of parties. It says that in the interest of a healthy industry that delivers value to owners and society, the parties in any public or private construction-related procurement should abide by the following in their dealing with each other [3]:

1. Behave equitably, honestly, and transparently.
2. Discharge duties and obligations timeously and with integrity.
3. Comply with all applicable legislation and associated regulations.
4. Satisfy all relevant requirements established in procurement documents.
5. Avoid conflicts of interest.
6. Not maliciously or recklessly injure or attempt to injure the reputation of another party.

2.4.1 Rights and Obligations of the Contractor

Some of the Contractor's important responsibilities outlined in CCDC-2 [2] and FIDIC Conditions of Contract [1] are:

- (i) CCDC-2 [2] under Sub-clause 3.1 provides that the Contractor shall have total control of the work and shall effectively direct and supervise the work ensuring that it conforms to the Contract Documents and shall remain solely responsible for construction means, methods, techniques, sequence, and procedures and for coordinating the various parts of the work.

However, it is clarified by CCDC-2 [2] within clause Sub-clause 5.9.1 that no payment under the contract or occupancy of work (partial or full) by the Owner shall constitute an acceptance of any portion of work or product which is not in accordance with the requirements of the Contract Documents.

- (ii) Under Sub-clause 3.5 of CCDC-2 [2], the Contractor is required to prepare and submit before first application of payment, a construction schedule in conformity with the contract time, indicating the timing of the major activities of the work including with details of critical events. The schedule shall be updated on a monthly basis based on progress of the work. The Contractor shall advise the Consultant of any revisions to the schedule resultant from a request for extension of contract time.
- (iii) CCDC-2 [2] under Sub-clause 3.7.1.3 provides that the Contractor shall be fully responsible for acts and omissions of subcontractors, suppliers, and persons directly or indirectly employed by them.
- (iv) CCDC-2 [2] under Sub-clause 6.6.1 specifies that if the Contractor intends to make a claim for an increase to the contract price or if the Owner intends to make a claim for credit, the related party shall give timely notice in writing of intent to claim to the other party and Consultant.
- (v) Under clause 7.2 of CCDC-2 [2], the Contractor is entitled to suspend the work or terminate the contract by giving such notice in the following events:
 - 1. If the Owner turns bankrupt.
 - 2. If the work is either delayed or suspended without the fault of the Contractor for a period of 20 working days or more by court order or other public authority.
 - 3. If the Owner fails to provide reasonable financial arrangements on request of the Contractor.
 - 4. If the Consultant fails to issue payment certificate in specified time or Owner fails to pay any due payments within specified time period.
 - 5. If the Owner violates the contract requirements to a substantial degree and Consultant confirms in writing that the Contractor is entitled to give 5-working-day notice to the Owner and Consultant to rectify the default and if Owner fails to do so, the Contractor may suspend the work or terminate the contract.

Whereas FIDIC Conditions of Contract [1] addresses Contractor's entitlement for suspension of work and termination of contract under clause 16 and conditions mostly matches CCDC-2 [2] conditions discussed above.

- (vi) Other Contractor's obligations under CCDC-2 [2] are: the Contractor shall be solely responsible for construction safety at the place of work (Sub-clause 9.4.1); and the Contractor shall provide all required insurance policies under clause GC 11.1, evidence of compliance with workers compensation legislation (Sub-clause 10.4), and required contract security (Sub-clause 11.2). The Contractor shall protect the work and Owner's property including property adjacent to the place of work from damage due to Contractor's operations (Sub-clause 9.1).
- (vii) FIDIC Conditions of Contract [1] define most of the Contractor's obligations under clause 4. Some of the Contractor's main obligations covered under clause 4 are briefed as follows:
 1. The Contractor shall execute and complete the works in accordance with the contract and with the Engineer's instructions and to remedy any defects in the works.
 2. The Contractor shall be responsible for the adequacy, stability, and safety of all site operations and of all methods of construction.
 3. The Contractor shall provide a performance security, in the amount stated in the Contract Documents, deliver to the Employer within 28 days after receiving the letter of acceptance, and shall send a copy to the Engineer,
 4. The Contractor shall appoint the Contractor's representative with authority necessary to act on the Contractor's behalf.
 5. The Contractor shall not subcontract the whole of the works and shall be responsible for the acts and defaults of his subcontractor, agents, or employees and comply with applicable safety regulations (also addressed under Sub-clause 6.7).
 6. The Contractor shall set up a quality assurance system to meet the requirements of the contract. The Engineer shall be entitled to audit any aspect of the system.
 7. If the Contractor encounters unforeseeable adverse physical conditions on site, the Contractor shall give notice to the Engineer as soon as practicable.
 8. The Contractor shall take all reasonable steps to protect the environment (both on and off the site) and to minimize damage and nuisance to people and property resulting from pollution, noise, and his other operations.
 9. The Contractor shall submit monthly progress reports and shall be responsible for keeping security on site.

Additionally, clause 8.7 of FIDIC Conditions of Contract [1] specifies that if the Contractor fails to complete work within the specified completion time period, the Contractor shall be liable to pay delay damages to the Owner. Sub-clause 13.1 provides that the Contractor is bound to carry out any variation/changes to the quantity, quality, and other characteristics of the items of work. These changes may include omissions, additions of work or services deemed necessary for permanent works, or changes to the sequence or timing of the execution of the works. The Contractor

shall not carry out any addition or alteration unless an approved change order or variation is issued by the Engineer which is signed by the Owner.

For complete details with respect to Contractor's obligations FIDIC, [1] and CCDC-2 [2] can be referenced.

Reference and Further Reading

1. The FIDIC. (1999). Conditions of contract for construction – Red book; Author FIDIC.
2. CCDC-2. (2008). (Canadian Construction Document Committee) – Stipulated price contract.
3. CIDB (Construction Industry Development Board). Principals governing the conduct of parties, Brooklyn Square USA.

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