

## BCCA 200, and CCA 1 Forms of Subcontract Comparison of Key Terms

	BCCA 200 - 1999	CCA 1 – 2001
<b>Compatibility with CCDC2</b>	Does not track CCDC2 provisions.	Document is intended for use where CCDC2 forms the Prime Contract.
<b>Integration with Prime Contract</b>	Recitals stipulate that the Prime Contract includes the work to be performed under the Subcontract, and that the Subcontractor has agreed with the Prime Contractor to be bound by the provisions of the Prime Contract, where applicable, including any schedules issued under the Prime Contract. (This could be ambiguous in interpretation.)	<p>Option exists to use either page 2A or 2B, depending upon whether the conditions of the Prime Contract are to be incorporated into the Subcontract, and are to govern in the event of conflicts.</p> <p>If page 2A is used, the effect of Art.1.3 is to incorporate <i>all</i> provisions of the Prime Contract (at least insofar as they are applicable to the subcontract). The Prime Contract is given precedence in the event of a conflict between the subcontract and Prime Contract terms.</p> <p>If page 2B is used, the subcontract documents do include the Prime Contract and the Prime Contract definitions and general conditions. However Article 1.3 provides: AIn the event of any conflict between the terms of this Subcontract and the Prime Contract, <i>this Subcontract shall govern.</i>@ Commercial terms not included in the subcontract, but not inconsistent with the subcontract may thus be incorporated B possibly an undesired result.</p>
<b>Precedence</b>	Clause 1: In the event of discrepancies between the Subcontract and the Prime Contract, the Subcontract prevails on matters relating <i>solely</i> between the Prime Contractor and the Subcontractor and the provisions of the Prime Contract prevail on all other	<p>If page 2A is used: Art.2A requires Prime Contract to be read as if the parties were Contractor and Subcontractor (instead of Owner and Contractor), and if any conflict arises with the Subcontract, the <i>Prime Contract</i> governs.</p> <p>If page 2B is used: Art.2B requires that the <i>Subcontract</i> governs in the event of</p>

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	matters. (With this wording, it is arguable that the provisions of the Prime Contract <i>never</i> prevail.)	conflict with the Prime Contract.
<b>Payment terms</b>	<p>Article 111(b) sets out two triggering events, either of which can initiate payment to the Subcontractor: a stipulated number of days after the submission of the claim by the Subcontractor, or 7 days after the certification of the relevant progress claim by the Consultant. Article III(b)(iii) makes it clear that the Subcontract is not Apay when paid@ by indicating that the Prime Contractor is to pay the amount due to the Subcontractor not later than 7 working days after the Prime has received payment from the Owner, or 30 days after the date on which payment is due under the Subcontract, whichever is the earlier.</p> <p>The Prime Contractor determines the amount payable.</p>	<p>Article 6.2 stipulates that the Contractor is to pay the Subcontractor no later than 30 days after the submission date of the application for payment, or 10 days after Aa Consultant=s certificate for payment@, whichever is later. The clause does not specify which Consultant=s certificate is the trigger.</p> <p>This is not a Apay when paid@ Subcontract.</p> <p>According to Art.6.2, either the Contractor or the Consultant can write down the Subcontractor=s progress claim.</p> <p>Article 6.3 allows the Contractor to extend the time for payment to the Subcontractor in the event that the Consultant fails to issue a certificate for payment or the Owner fails to make payment within the time prescribed within the Prime Contract. However, the period of delay must be specified, and be not longer than 90 days (or as otherwise agreed).</p> <p>Note that 6.3.2 <i>requires</i> the Contractor to put the Owner in default if payments fall into arrears. This course of action may be risky for the Contractor in the event of a dispute. While the Owner=s non-payment relates to non-payment of amounts certified by the Consultant, there are some circumstances under CCDC2 where the Owner is entitled to withhold payment from the Contractor or assert a set-off against amounts which have otherwise been certified by the Consultant (for example see <i>Swagger Construction Ltd. v. U.B.C.</i>, 2000 BCSC 1839).</p>
<b>Scope of agreement</b>	Per Art.IV, the Subcontract supersedes all	A suitable Aentire agreement@ clause is missing.

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	prior agreements, negotiations, etc.	
<b>Security</b>	Not mentioned.	SCC 11.3 requires the Contractor to furnish evidence that Acontract security has been provided@. Since it is unclear which Acontract@ is meant, the enforceability of this clause is uncertain.
<b>GST treatment</b>	The subcontract price is inclusive of all taxes and custom duties applicable to the work at the later of the time the Subcontractor submitted its tender to the Prime Contractor and the time of bid closing (if bid depository used). GST and other tax increases are only recoverable if the Prime Contract allows the general contractor to pass them on to the Owner.	SCC 10.1.2 indicates that any increase or decrease in costs to the Subcontractor due to changes in taxes and customs duties in effect at the time of the bid closing shall increase or decrease the Subcontract Price accordingly.
<b>Interest</b>	<p>Article 111(g): where the Prime Contractor has received a progress payment but fails to pass on the Subcontractor=s share when due, interest is payable at a rate of 4% per annum over the prime rate being charged by a specific Canadian chartered bank.</p> <p>Where the Prime Contractor=s progress payment is late in arriving, interest is payable to the Subcontractor <i>only</i> if received by the Prime Contractor from the Owner.</p>	Article 6.5 provides that interest on overdue accounts is to be paid at 2% over the prime rate charged by a specific Achartered lending institution@, with interest being compounded on a monthly basis.
<b>ACarried@ sub-</b>	Not mentioned.	By SCC 3.4.2, Contractor can compel Subcontractor to engage the sub-

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<b>subcontractors</b>		subcontractors it Acarried@ in its bid.
<b>Insurance</b>	\$2,000,000 minimum liability coverage required (Clause 11). Owner / Prime Contractor obliged to carry All-Risk property insurance in which Subcontractor is an Aadditional unnamed insured@.	\$2,000,000 minimum liability coverage required (SCC 11.1.1).  From SCC 11.2.1 it appears that the Subcontractor is <i>not entitled</i> to be added to the project all-risk coverage B a potential trap for the Subcontractor.
<b>Conformity with BC Builders Lien Act</b>	The Contractor is probably the Apayment certifier@per Art.III(b)(i), but this is not absolutely clear.  Per Art.III(f), the holdback is due one day after expiry of lien rights, and payable within 7 days of the Prime Contractor=s receipt or a stipulated period, whichever is earlier.	The Consultant is clearly designated as the Apayment certifier@ in Art.6.1.1 (even though the Contractor has no power to compel the Consultant to discharge this responsibility). Confusingly, Art.6.2 goes on to say that the amount to be paid is the amount which Athe Contractor or the Consultant determines to be properly due.@ Art.4.2 states that substantial performance is reached Awhen approved by the Contractor and certified as such by the Consultant@. These clauses need to be reconciled (via a supplementary condition) for conformity with the <i>Builders Lien Act</i> provisions regarding Apayment certifier@.  Per Art.6.4.1, the holdback is due one day after expiry of lien rights.
<b>Responsibility for code compliance</b>	Subcontractor responsible for complying with safety legislation (Clause 6). Other code compliance not mentioned.	SCC 10.2.5 stipulates that the Subcontractor is not responsible for verifying that the Subcontract Documents are in compliance with the applicable laws, ordinances, rules, regulations or codes relating to the Subcontract Work.  NB: SCC 10.2.5 is deemed to be <i>deleted</i> if page 2A is used and if the Prime Contract has no similar provision (see Art.2.2)
<b>Responsibility for proper performance</b>	Not mentioned.	SCC 12.3.2 stipulates that the Subcontractor shall be responsible for the proper performance of the Subcontract work <i>only</i> to the extent that the design and Subcontract Documents permit such performance. This is contrary to the law as

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		held by the Supreme Court of Canada in the <i>Nowlan v. Brunswick Construction</i> case. (1975) 49 D.L.R. (3d) 93.
<b>Concealed conditions</b>	Not mentioned.	Under SCC 6.4, the party observing a concealed condition is required to give notification before conditions are disturbed and in no event later than 3 days after first observance. This a relatively short time period and it is a provision that will undoubtedly be used as a bar to claims if the ground has been disturbed or the reporting to the other party has been delayed for some reason.
<b>Testing</b>	<p>Clause 4 indicates that the work is subject to inspections and tests as may be required. It stipulates that if work is found to be in accordance with the specifications, the party requiring such work is to pay the costs of re-examination.</p> <p>This is a weak provision. It provides little incentive to the Subcontractor to arrange for testing before covering up the work.</p>	Per SCC 2.2.4, if the Subcontractor covers the work it is responsible to pay the costs of examination, whether or not the work is found to be in accordance with the Subcontract requirements.
<b>Toxic waste</b>	Not mentioned.	SCC 9.3 requires that the Subcontractor take reasonable steps to protect the public and to immediately report such circumstances to the Contractor in writing if it encounters toxic or hazardous substances.
<b>Cleanup</b>	Clause 18 provides that Contractor can charge <i>all</i> cleanup costs if Subcontractor fails to perform after written notice.	SCC 3.8 provides that Contractor can charge Subcontractor <i>reasonable</i> cleanup costs if Subcontractor fails to perform after written notice.
<b>Warranty period</b>	Clause 10(a) stipulates that the warranty period is one year unless stipulated	SCC 12.3.1 indicates that the warranty period under the Subcontract is one year

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	otherwise in the Prime Contract. Clause 10(b) indicates that any special provisions regarding guarantees or warranties are to be included in Appendix AA@.	from the date of the Substantial Performance of the Work.
<b>Changes</b>	Art.III(e) provides that changes are to be valued by any combination of cost plus, unit prices, lump sum, or A in accordance with the Prime Contract@.	Same AChange Directive@ and AChange Order@ scheme as in CCDC2.  Art.5.5 requires that the parties agree to and specify the subcontractor=s fee applicable to change directives. This allows for an up-front negotiation of the percentage fee and provides certainty as to the Subcontractor=s entitlements and the Contractor=s obligations.
<b>Claims</b>	Clause 8 requires A reasonable@ notice of any claim for damage caused by the other party.	SCC 6.6 requires that a party intending to make a claim against the other give notice Apromptly@. This is inconsistent with the other provisions (re differing site conditions, delays) where a specific time frame is given.
<b>Indemnification</b>	Not mentioned.	SCC 12.1 provides a narrow indemnification of the Contractor by the Subcontractor for third party claims (requires personal or property damage, requires negligence, ends after 6 years, limited to aggregate of \$2 million after substantial performance). This generally tracks CCDC2. It is important that this SCC be compatible with the Prime Contract.  NB: SCC 12.1 is deemed to be <i>deleted</i> if page 2A is used and if the Prime Contract has no similar provision.
<b>Waiver</b>	Not mentioned.	SCC 12.2 overrides the statutory limitation period and limits actions by the Contractor against the Subcontractor to 6 years from the date of Substantial Performance unless pre-identified or arising from A substantial defects or deficiencies@.

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		NB: It is important that this SCC be compatible with the Prime Contract B could result in a greater obligation from Contractor to Owner than can be passed on to Subcontractor.
<b>Termination</b>	<p>Clause 22(a) indicates that the Prime Contractor may elect to terminate the Subcontract by giving 5 working days written notice to the Subcontractor under certain conditions (not enough workers, not paying accounts promptly, persistent breaches).</p> <p>Clause 24: If Subcontractor gives 5 days notice to Prime Contractor that payments are more than 7 days late, Subcontractor can terminate unless the payment is made within that period.</p>	<p>SCC 7.1.2 allows the Contractor to give 3 days notice of termination if the Subcontractor fails to prosecute the work properly, or fails to comply with the Subcontract to a substantial degree. The Subcontractor can redeem himself by correcting the default (or beginning to correct the default in accordance with an agreed schedule) within the notice period.</p> <p>SCC 7.2.3 and 7.2.4: If Subcontractor gives 5 days notice to Prime Contractor that payments are late, Subcontractor can terminate unless the payment is made within that period.</p>
<b>Delays</b>	<p>Art.II requires completion by a stipulated date; it also gives the Prime Contractor the right to adjust the schedule, but a prerequisite is consultation with the Subcontractor.</p> <p>Clause 19(a) indicates that if the Subcontractor is delayed in the completion of the work by the Owner, Consultant or the Prime Contractor, or any other subcontractor</p>	<p>Art.4.1 requires completion by a stipulated date; it also gives the Prime Contractor the right to adjust the schedule, but like BCCA 200 a prerequisite is consultation with the Subcontractor.</p> <p>SCC 6.5.1 indicates that if the Subcontractor is delayed by the Owner, Consultant or Contractor, the Subcontract Time is to be extended <i>and</i> the Subcontractor is to receive the reasonable costs of delay.</p> <p>In SCC 6.5.2, in the event that the Subcontractor is delayed by a stop work order issued by a Court or other public authority, provided that such Order was not</p>

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	<p>of the Prime Contractor, or by changes ordered in the work, then the time of completion is to be extended as the <i>only</i> compensation for such delays to the Subcontractor.</p> <p>Clause 19(c) indicates that no extension is to be made for delay under (a) or (b) unless written notice of claim is given to the Prime Contractor by the Subcontractor within 5 working days of its commencement.</p>	<p>issued as a result of any act or default of the Subcontractor, the Subcontract Time is to be extended <i>and</i> the Subcontractor is to be reimbursed by the Contractor for its reasonable costs.</p> <p>SCC 6.5.3 indicates that if the Subcontractor is delayed by labour disputes, fire, abnormally adverse weather conditions or other cause beyond the Subcontractor's control, then the Subcontract Time is to be extended without an increase in price, unless such delays result from the actions of the Owner or the Contractor.</p>
<b>Dispute resolution</b>	<p>Clause 26 indicates that either party may require a dispute to be submitted for determination by a single arbitrator, and if both parties agree to arbitration, the arbitrator's decision is to be final and binding. This is a <i>discretionary</i> arbitration provision, and may not accord with the arbitration requirements of the Prime Contract.</p>	<p>SCC 8.1.1 makes the Contractor the <i>first-instance</i> interpreter of the Subcontract.</p> <p>SCC 8.2.5: Either party may refer a dispute to be finally resolved by arbitration. This is meant to be a mandatory arbitration provision, provided that the notice is given no later than 10 working days after the termination of mediated negotiations under SCC 8.2.4. However if a notice is not given within 10 working days after the termination of mediated negotiations, the arbitration agreement under SCC 8.2.5 is not binding on the parties, and the parties may refer the unresolved dispute to the Courts.</p> <p>SCC 3.1.6 provides that the Subcontractor is <i>deemed</i> to have consented to arbitration with any other subcontractor with whom the Subcontractor has a dispute and who has requested arbitration with the Contractor. This is a positive step towards a single arbitration, but note that the document does not contemplate the Consultant being joined into such disputes (if appropriate to do so).</p>