

Here's the Drill: Early Occupancy in Construction Contracts: How does it really Work?

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In December 2020 the Canadian Construction Documents Committee (CCDC) released an updated version of the widely used CCDC 2-2020 Stipulated Price Contract. In December 2021, the Canadian Construction Association (CCA) released an updated version of its standard form stipulated price subcontract, the CCA 1-2021. Both contracts include new language that allows the Owner to take early occupancy of part of the Work on certain conditions, one of which includes obtaining the Contractor's agreement. Both contracts also stipulate that the 1 year warranty period on the part of the Work (or Subcontract Work) being occupied will start to run from that date. While there is some obvious logic to having the Contractor's (and applicable Subcontractors') warranty period starting to run on areas of the Project the Owner is taking occupancy of, having the warranty period commence and expire on a staged basis does create some potential challenges.

Imagine, for example, a project that involves the construction of a three-story office building and the Owner takes early occupancy of the first floor. The Contractor's (and applicable Subcontractors') warranty would start running on the now occupied first floor area. However, how does this apply to a building system or component of the work that runs throughout the building (such as the HVAC, window systems, electrical wiring, or audio visual systems)? Does the 1 year warranty start to run on the entirety of the that system? Does it start to run only on the physical components of the system located on the first floor? Does the 1 year warranty negatively interfere with a manufacturer's warranty? This could be a source of dispute between the parties down the road if a malfunction in the system occurs after the warranty period on the 'first floor' has expired but the warranty on the remainder of the building has not.

Parties may want to try addressing this in their contracts by way of supplementary conditions if this sort of scenario will apply to their project.

It is also important to keep in mind that prior to the publication of the new CCDC 2-2020, it was not uncommon to see provisions added to CCDC supplementary conditions that allowed the Owner to take early occupancy of part of the Work prior to full occupancy or completion. While these clauses may appear similar to the early occupancy sections added to the new CCDC 2-2020 and CCA 1-2021, they often contained important distinctions including language that makes it clear that the Owner's early occupancy *does not* trigger the start of the warranty period or impact any of the Contractor's other obligations under the Contract.

As always, parties should make sure they carefully review the contract they are being asked to sign and consider these types of issues before signing.

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