

# Office of the Procurement Ombud

## Contract Administration in Construction Contracts

July 7, 2025



Government  
of Canada

Office of the  
Procurement Ombud

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## The Office of the Procurement Ombud

The Office of the Procurement Ombud (OPO) is a neutral and independent organization of the Government of Canada that works collaboratively with federal departments and Canadian businesses (suppliers) to promote fairness, openness, and transparency in federal procurement. OPO delivers on this mandate by connecting stakeholders, investigating complaints, resolving problems, reviewing procurement practices and making recommendations, and sharing best practices.

In 2018, OPO launched a knowledge deepening and sharing (KDS) initiative to better understand key issues in federal procurement. This Contract Administration in Construction Contracts study is the 13<sup>th</sup> study conducted under the KDS initiative, all of which are published on [OPO's website](#). Through the publication of KDS studies, OPO intends to share knowledge and provide helpful guidance for federal procurement stakeholders.

## Acknowledgements

OPO would like to thank the participating federal organizations and private sector interviewees for their input in developing this study.

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Cat. No.: P114-33/2025E-PDF  
ISBN: 978-0-660-77522-7

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# Introduction

## Purpose of Study

This study explores some of the common issues that are affecting the administration of construction contracts. The research for this study included an environmental scan of publicly available literature, studies, reports, articles, and policies and guidance, as well as consultation with the construction industry and federal government stakeholders.

The following issues, as identified by private and public sector industry representatives and experts, will be examined in this study.

- 1) Planning and execution of the procurement
  - a. Scope of Work: Change Orders, Costing, and Payment
- 2) Contract Terms
  - a. Dispute Resolution Process Challenges
  - b. Clarity and Effectiveness of Substantial Performance Clauses
  - c. Undefined *Force Majeure* in Construction Contracts
- 3) Inconsistent Standard Construction Contract Documents

## Overview of Federal Construction Contracting

Contract administration (also known as contract management) is a critical phase of the construction process that occurs once a contract has been awarded and the work has begun.<sup>1</sup> Contract administration can involve many activities to ensure the fulfillment of a contract in accordance with its terms and conditions. These activities can include: contract payment administration, change management, risk management, document and schedule control, quality assurance, quality audit, dispute mitigation and resolution, claims management, performance assessment and warranty management. One cannot overestimate the importance of contract administration, as it ensures value preservation and the proper stewardship of taxpayer dollars established in the award process. If done incorrectly, the good outcomes obtained in the award process will not come to fruition.

As defined in section 2 of the *Government Contracts Regulations*, a “construction contract” means a contract entered into for the construction, repair, renovation or restoration of any work except a vessel and includes:

- a. a contract for the supply and erection of a prefabricated structure
- b. a contract for dredging
- c. a contract for demolition, or
- d. a contract for the hire of equipment to be used in or incidentally to the execution of any contract referred to in this definition<sup>2</sup>

In Canada, in order to carry out the federal contracting process for construction, contract authorities and monetary thresholds are delegated to federal departments. For most departments that are subject to Treasury Board policy, authority to enter into construction contracts is quite

limited. The basic contracting limits, as specified in the Directive on the Management of Procurement, are currently \$750,000 for competitive and \$100,000 for non-competitive construction contracts.<sup>3</sup> Given these relatively low thresholds, many construction contracts are established by Public Services and Procurement Canada (PSPC) on behalf of other government departments. PSPC's basic contracting limits are \$75,000,000 for competitive and \$1,250,000 for non-competitive construction contracts.<sup>3</sup> The Directive also outlines exceptional contracting limits that permit a small number of departments to exceed the basic contracting limits that apply to other departments. Any contracts exceeding departmental delegated thresholds require approval by Treasury Board.<sup>3</sup>

## Project Delivery Methods

In federal government procurement there are four project delivery methods that are typically used for construction projects: (1) Design-Bid-Build (DBB), (2) Design-Build (DB), (3) Construction Management (CM), and (4) Public Private Partnerships (P3).<sup>4</sup> Each offers different costs and benefits depending on the circumstances, however, DBB has been used by PSPC as a standard delivery process,<sup>5</sup> while the DB and CM methodologies have been more prevalent in the private sector.<sup>6</sup> The priorities of the job can dictate the approach, and each of these approaches creates different risks and silos of responsibility.<sup>7</sup> However, it is also possible to blend approaches, for example an umbrella approach like CM could be utilized, while subcontracts utilize other methodologies.<sup>8</sup>

### Design-Bid-Build (DBB)

In DBB, the contracts for design (architecture, engineering) are separate from general construction.<sup>9</sup> DBB uses competitive bidding with clear, established scopes of work, where costs and timelines are fixed.<sup>10</sup> However, work on the design is completed prior to the procurement process for construction beginning,<sup>9</sup> following a linear process.<sup>11</sup> Despite the potential for longer timelines compared to other methodologies,<sup>12</sup> DBB gives the government more control over the design of the building<sup>8</sup> because the government business owner is entering into the design contract with the architect/engineer directly and it is completed separate from and prior to entering into the construction contract. However, this method is not applicable to all scenarios as there could be cases where designs may not be able to be finished prior to starting construction.

### Design-Build (DB)

Under the Design-Build model, the government business owner contracts for both design and construction from one firm, and the contractor hires a design consultant who works hand-in-hand on both the design and construction.<sup>13</sup> This reduces the owner's exposure and risk associated with design errors and omissions,<sup>14</sup> as well as creating a single point of responsibility.<sup>15</sup> This model allows the contractor to work closely with the designer, which can increase efficiencies, however, since the designer is working for the contractor, the owner's ability to influence design is reduced in comparison to DBB.<sup>16</sup> Two benefits of this method are more efficient project timelines and fostering collaboration between stakeholders.<sup>17</sup>

## Construction Manager (CM)

The CM method combines some elements of DBB and DB. However, the distinction is that CM incorporates a construction manager (a contractor decided upon by the government business owner) who guides the design and construction phases.<sup>18</sup> Despite guiding both the design and building processes, the processes are still split similar to DBB.<sup>19</sup> The CM would be a prime contractor, with subcontracts for both the design and build phases approved by the government business owner. The construction manager is invested with a lot of power to deliver the project and, like DB, is a single source of responsibility. However, the person with the role of CM can make or break a project.<sup>19</sup>

## Public Private Partnerships (P3)

The P3 method is much different from the previous three methods discussed, and include a number of different contractual structures which realign risks between the public and private sector.<sup>20</sup> The difference that sets P3s apart from the other methods is that there is private sector financing and continuing private sector lifecycle obligations.<sup>21</sup> By modifying the risk structure, “the public sector is able to minimize its exposure to cost overruns, increased financing costs, and delay costs.”<sup>22</sup> P3s are typically used on larger construction projects where private sector financing can assist governments struggling with budgets, or financially unable to get the project off the ground, and, as one author notes, “P3s are increasingly seen as a cost-effective alternative to traditionally delivered projects due to the possibility of more creative financing and delivery solutions.”<sup>22</sup>

# Construction Administration Issues

## Planning and Execution of the Procurement

### Scope of Work: Change Orders, Costing, and Payment

OPO regularly hears from suppliers party to construction contracts that there are issues with deviations from or changes to the scope of the contract, or unclear requirements. These “scope” issues generally trickle down creating other sub-issues including: change orders, refusals to pay, delays in holdback release, late payments, and payment issues between prime and sub-contractors.<sup>23</sup>

It is not just OPO that hears these issues, they are also raised among other construction related communities. Academics have noted that “the construction sector, for instance, is likely to have conflicts relating to scope, delays, and communication issues.”<sup>24</sup> Further, a case study of a construction project suggested that “the client must have a clearly defined scope of work,” and that problems in contract administration “could have been avoided if the owner had clearly defined the scope of work.”<sup>25</sup> Toronto’s auditor general has also noted the issue in a 2019 audit of the city’s construction procurements, ultimately finding that a “majority of change orders were caused by design errors, omissions and inaccurate estimates,” and that design errors and omissions caused 51% of change orders.<sup>26</sup>

Associations have also noted the issue. For example, the World Commerce & Contracting Association has noted the most frequent sources of disputes as each of those listed above, with the most frequent as “price changes” to the contract value.<sup>27</sup> Further, this organization also included “lack of clear scope and goals” as the top pitfall to avoid in contracting.<sup>28</sup> A recent report by the design, engineering and management consulting company Arcadis on construction issues noted “errors and/or omissions in the contract documents” as a top issue from 2023.<sup>29</sup>

Changes to the scope of work is a crucial issue.<sup>30</sup> If there are a high number of changes to the scope after the contract has been awarded and work has begun, then it is indicative of issues with inaccurate or incomplete construction drawings.<sup>16</sup> In some cases more robust project planning and site investigations are needed to better prepare for the project.<sup>31</sup> One department interviewee was clear that a “well defined scope is needed to reduce issues.”<sup>32</sup> Planning at all stages is crucial to a successful construction project. Government business owners must have clear knowledge of the expected outcomes and involve people from all aspects of a project (e.g., design, engineering, finance, legal, procurement) in project planning right from the start. Robust planning can minimize the risk of a requirement for changes or claims for extras.

Change orders are the method by which revisions, additions, or deletions are made to a contract after work has begun, and affect the “original designs or scope.”<sup>33</sup> Change orders are not unique to any one construction procurement methodology,<sup>34</sup> and can provide flexibility to address changes—be it from client requests, unexpected site conditions, or other unknowns.<sup>16</sup> However, the costs that can result from these changes generally require contract amendments to increase the value of the contract.<sup>16</sup>

There are many causes of change orders, including “schedule changes, ambiguous design, scope changes, contract discrepancies, poor coordination, safety considerations, employer financial problems, design changes, sociocultural factors, and changes in government policies/regulations.”<sup>35</sup> Timing is an issue, as there are often delays that can result in change orders—be it from schedule changes, market conditions, supply chain disruptions, or revisions to planning documents.<sup>36</sup>

Suppliers can exploit change orders to inflate the value of the contract. If a department creates a request for proposal and there are gaps or interpretation issues in the statement of work, the expected design, or other outcomes, a supplier may use these gaps to create “as many change orders as possible.”<sup>32</sup> In some cases looking for gaps and issues has become a method of business, and some suppliers have specific people looking for these “opportunities.”<sup>32</sup> The methodology is captured by the saying “bid low, let it grow.”<sup>32</sup> An academic study also noted that “it is widely believed in the industry that some contractors are strategically manipulating their bids in anticipation of changes.”<sup>32</sup>

The method of “bid low let it grow” undermines the purposes of competitive procurements. When suppliers bid low it is an indication that the work can be completed for a certain value. When there are substantial differences between the value of the bids and the final contract value, then it is an indication that there were issues.

It ultimately becomes a fairness issue and undermines competition because it disadvantages other suppliers who could've won and delivered on the contract. It creates an artificial number that bears no resemblance to the value of the work to be completed. On the other hand, there could be instances where the other suppliers bidding are all using the same "bid low" methodology, thus wholly undermining the true value of the work.

It is not just suppliers who are at fault here. The government fosters such activities by not properly defining a statement of work that accurately reflects site conditions. By not properly defining the statement of work—and failing to accurately and fully described what it is that is being bought—the government also jeopardizes the expected outcomes of the project.

There is some reason to believe that the procurement methodology (Design-Build (DB), Design-Bid-Build (DBB), and Construction Manager (CM)) could have an impact on change orders.<sup>37</sup> For example some of the variables that could be impacted by the methodology include:

1. Change orders resulting from a poorly defined scope of work
2. Owner directed versus supplier directed change orders
3. Unforeseen change orders resulting from circumstances not contemplated in the scope of work<sup>38</sup>

OPO's research on scope of work issues and their impact on change orders, costing and payment found that this area of construction procurement administration was a high risk area, and that a more systemic review should be undertaken by way of Procurement Practice Review to address it. Though not a focus of this study, OPO found that there are reasonable connections that can be made between procurement methodology and change orders and that efforts should be made to better understand this in Canada to mitigate the risks.

## Contract Terms and Conditions

### Dispute Resolution Process Challenges

Dispute resolution involves a process set out in a contract that guides parties on how disputes are to be resolved. This process can involve a range of methods including negotiation, mediation and arbitration, and it can result in legally binding settlement agreements or decisions that can require future actions from the parties. PSPC has standard dispute resolution clauses that can be included in construction contracts. Traditionally these were found in the Standard Acquisitions Clauses and Conditions (SACC) manual. While the SACC manual was phased out in 2024, PSPC continues to include standardized clauses in its procurements.<sup>39</sup>

OPO regularly hears from suppliers concerning construction contract administration including issues respecting the statement of work, the scope of work, or quality of work.<sup>40</sup> OPO has received written complaints and requests for dispute resolution on construction contracts, which have accounted for 89 cases and 155 issues between 2020 and 2024.<sup>40</sup> In some cases, there have been claims that standard dispute resolution mechanisms are inadequate and sometimes prohibitive.<sup>41</sup> For example, dispute mechanisms included in construction contracts may be cost prohibitive to small and medium sized businesses that are prime contractors and that must absorb

the costs of the dispute.<sup>41</sup> OPO also notes that some suppliers fear retribution for engaging in dispute resolution processes, opting for the path of least resistance and not “rocking the boat.”<sup>40</sup>

Beyond OPO, the Canadian International Trade Tribunal (CITT) has also engaged with this topic. The CITT frequently receives complaints about contract administration, highlighting that there are issues in the area, and that not all issues are being addressed by the dispute resolution mechanisms in contracts.<sup>42</sup> However, the CITT does not have the mandate to deal with contract administration issues, leaving it to dismiss all cases.<sup>43</sup> Ultimately, suppliers are looking for more cost and time efficient dispute resolution options.

In terms of mandate, this leaves the Office of the Procurement Ombud as the only federal organization mandated to resolve disputes that occur during the administration of federal contracts through Alternative Dispute Resolution (ADR). OPO can provide mediation services with respect to a dispute on the interpretation or application of the terms and conditions of a contract. These services are offered free of charge upon the consent of the parties to the federal contract. Historically many OPO led dispute resolution processes have been shown to yield positive results allowing parties to get back to work, while preserving constructive work relationships.<sup>44</sup>

Different perspectives exist regarding the effectiveness of current dispute resolution processes specifically for federal construction contracts. When OPO questioned government interviewees, the feedback was mixed. In some cases, OPO heard that there were no issues or that the clauses included in federal contracts are generally adequate to resolve disputes.<sup>16</sup> Another official confirmed as well that these processes have “successfully and efficiently” resolved disputes.<sup>45</sup> In another case, an interviewee confirmed that there were generally no issues, however, there was some preference for using Canadian Construction Documents Committee (CCDC) clauses rather than PSPC clauses.<sup>32</sup> Note that CCDC clauses are discussed later in this report in the section titled ‘Inconsistent Standard Construction Contract Documents.’

Despite this, one federal interviewee did provide some points for improvement.<sup>16</sup> One area of concern related to dispute resolution clauses that differ for contracts of different values. The interviewee explained that there is a binding arbitration clause for contracts valued between \$100,000 and \$5,000,000.<sup>16</sup> However, for contracts over this amount the process ends at mediation, leaving parties with no additional dispute resolution options outside the courts.<sup>16</sup> This has potential to not always be efficient, as there are potentially low-value disputes in large contracts that could be resolved through arbitration.<sup>16</sup>

In contrast, consultations with an industry association indicated that they do have issues with dispute resolution processes. Some are excessive and complicated, and can pose challenges to contractors.<sup>46</sup> In particular, it was encouraged that “it is essential to ensure that both the interim (e.g. negotiations and mediation) and final steps (e.g. arbitration and litigation ) in the dispute resolution process strike an appropriate balance between procedural protection and expediency based on the circumstances of the project in question.”<sup>46</sup> The World Commerce and Contracting Association has even noted dispute resolution in its list of most negotiated contract terms.<sup>47</sup> And a research report from the International Association for Contract and Commercial Management on the purposes of contracts noted in its surveys with industry that the second highest ranked

item for what a contract should do was “providing protection and remedies in the event of a dispute.”<sup>48</sup>

Alternative dispute resolution (ADR) has increasingly become common in construction contracts, as an alternative to litigation.<sup>49</sup> One reason is efficiency—cost and time savings—has become a key concern when choosing dispute resolution processes.<sup>50</sup> Further signaling its importance, a number of companies in the USA have recognized the benefits of ADR, and have signed the “21<sup>st</sup> Century ADR Pledge.”<sup>51</sup> In Canada, the Department of Justice issued the Policy on Dispute Prevention and Resolution in 1996 (revised in 2021).<sup>52</sup> The Policy notes that “where possible, disputes should be prevented, or resolved at the earliest possible opportunity in a timely manner and before the situation escalates.”<sup>52</sup> And it requires Department of Justice employees to advise clients about ADR options.<sup>52</sup>

The dispute resolution clauses used by the government are one factor but there is also the practical implications of a dispute to consider. Unresolved disputes heading to litigation can have the effect of stopping work (“downing tools”) until the issue is resolved. This can substantially increase the costs to both parties of the contract and extend the completion of the work far into the future. The emphasis on ADR is to provide parties to a contract both a cost effective and flexible alternative to litigation, but also to allow work on the contract to continue.

The federal government should be proactive—not just in including dispute resolution clauses in contracts and directing parties to the appropriate organizations that can resolve disputes in the early stages, but also in noting and understanding how and why issues develop. Knowing and addressing the factors that lead to disputes would support the timely and efficient delivery of construction projects.

### Substantial Performance

Substantial performance is a term used in construction contracts to measure progress. It is important for the transfer of risk and for the timing of payment. Beyond showing a contractor’s progress toward meeting its contractual obligations, the term also has other effects on both the site in question and the contractors working on the site. If a construction project is substantially performed, then the building is formally handed back to the client, making that party responsible for security, safety, and maintenance.<sup>8</sup> It is further the trigger point for hold-back release, providing remaining funds to contractors and, through them, to subcontractors.

It is normally a point of risk transfer but it is not always handled the same in all contracts. Canada uses what is sometimes referred to as the “3-2-1 rule” when measuring substantial performance.<sup>8</sup> The Standard Acquisition Clauses and Conditions (SACC) manual defines this as:

“The Work shall be considered to have reached Substantial Performance when

the Work or a substantial part thereof has passed inspection and testing and is, in the opinion of Canada, ready for use by Canada or is being used for the intended purposes; and

the Work is, in the opinion of Canada, capable of completion or correction at a cost of not more than

3 percent of the first \$500,000;  
2 percent of the next \$500,000; and  
1 percent of the balance  
of the Contract Amount at the time this cost is calculated.”<sup>53</sup>

OPO’s interviewees also provided views about the clarity and effectiveness of substantial performance clauses. One government branch confirmed that it thought the clauses were clear and that it was not aware of disputes arising from this.<sup>16</sup> A second branch also confirmed there were no issues resulting from this, and specifically that the “strength of field oversight limits issues from arising.”<sup>54</sup>

One government official managing large Crown projects argued that the clauses for substantial performance are not adequately defined, and that in some cases it causes issues.<sup>8</sup> Further, industry has also noted this as an issue,<sup>46</sup> indicating that “criteria that are ambiguous, unduly onerous, or at the [government] owner’s sole discretion can lead to disputes and potentially delay the Contractor’s achievement of these milestones.”<sup>46</sup> And in another case it was argued that it should be outlined as an “if-this-then-that” process map, rather than the present 3-2-1 rule in the SACC manual.<sup>8</sup>

There are other factors that figure into substantial performance. One such example is occupancy.<sup>8</sup> Typically, substantial performance and occupancy go hand-in-hand.<sup>8</sup> For a building to be occupied, normally it must first pass a municipal safety inspection. There is a grey area where a contract for a building could be classified as substantially performed, yet not cleared for occupancy. An occupancy classification also has an effect on those working on the site, as it is the trigger point where individuals no longer have to wear personal protective equipment.<sup>8</sup> There are cases where large federal contracts contemplate substantial performance, but remain silent on occupancy.<sup>8</sup>

For large building projects (high value, long duration), partial substantial performance may be used to delineate between some areas that meet substantial completion criteria, while other areas are still in need of work.<sup>8</sup> This allows for financial holdbacks to be released at milestones, rather than at contract completion, supporting the liquidity of contractors working on the project. Holdbacks have strategic intention, as some departments have had difficulties with contractors where payments are made prior to work being completed.<sup>32</sup>

Overall, the research on substantial performance was mixed. It revealed a clear disagreement between most of the government interviewees who saw no issues with the PSPC clause, and industry, that believed that there were issues with the clause. There is room for more research to look at PSPC clauses in practice, and investigate whether contract disputes have stemmed from the use of PSPC’s substantial performance clause.

## Undefined Force Majeure in Construction Contracts

The use of *force majeure* clauses in construction is a best practice. While these clauses are not mandatory, purchasing departments can protect themselves from disputes during contract administration by clarifying these factors ahead of time.

A *force majeure* clause provides some clarity surrounding what happens in the event of unexpected and uncontrollable events (such as weather events like floods, fires, and hurricanes to name a few) that may affect the performance of a contract.<sup>55</sup> Without these clauses, the law would default to the common law doctrine of *frustration*, which states that when events happen that make performance of a contract impossible, illegal, or radically different from what was originally envisioned, parties can terminate a contract.

There are three aspects to *force majeure*. First, they identify “triggering events,” or events that would ordinarily frustrate the completion of a contract. Second, they often include requirements for specific impacts that must arise from these triggering events to constitute *force majeure*. Finally, they include obligations, such as notice and mitigating actions, outlining what parties need to do if a valid triggering event happens.<sup>55</sup>

Interviewees from the construction industry were unanimous in their belief that the *force majeure* clauses used by the federal government were insufficient.<sup>46</sup> Specifically, they identified issues surrounding the classes of events that can trigger *force majeure* clauses and a lack of clarity regarding the effect of invoking these clauses.<sup>46</sup> Interviewees made the point that “contracts must provide contractors with appropriate and accessible relief when circumstances arise beyond the parties’ control.”<sup>46</sup>

The COVID-19 pandemic is an example where *force majeure* clauses were insufficient. In some cases government drafters of contracts did not contemplate disease outbreaks, epidemics, and pandemics in the list of supervening events.<sup>45</sup> However, in other cases where *force majeure* clauses were used and pandemics were contemplated, COVID-19 was generally treated as a *force majeure* triggering event.<sup>54</sup> But when issues have gone to court, the courts have been conservative in the application of these clauses.

For example in *Porter Airlines v. Nieuport Aviation Infrastructure Partners GP (2022)*, the Ontario Superior Court held that the consequences of the pandemic did not engage a *force majeure* clause because it didn’t sufficiently impact the airline’s ability to operate and pay its creditors.<sup>56</sup> While Porter did indeed argue that the pandemic restricted it from fulfilling its side of the deal and paying Nieuport, the company could still make money, since other airlines could still earn revenue. Therefore, it was still required to pay its terminal fees, even if COVID-19 was such a huge event that theoretically should have triggered a *force majeure* clause. The idea and lesson learned from the case is that with good definitions of triggering events, this whole dispute could have been avoided.

In contrast to the construction industry, most interviewees from the federal government did not believe that *force majeure* clauses were an issue.<sup>57</sup> In some cases, departments didn’t view it as

an issue and don't have *force majeure* clauses in their contracts.<sup>57</sup> Further, the PSPC-managed standard federal construction contract form does not contain a "*force majeure*" clause of the same type contained in some industry documents (e.g. the CCDC 2 – Stipulated Price Contract form).<sup>16</sup> In some cases there is more nuance. For example, in cases where Canada is not the responsible party, like natural disasters, contractors also have insurance, and are required to have it as part of their contracts.<sup>8</sup> There was a counter point raised concerning other provisions that provide relief for delays and changes to work, default, suspension or termination of a contract, and extra expenses and damages.<sup>58</sup> However, one federal government interviewee argued that there are issues with the clause, claiming in some projects the clause was insufficient and was vague, thus increasing the risk of disputes.<sup>8</sup>

Despite the lack of a conclusive answer from interviewees, by not creating robust *force majeure* clauses purchasing departments only increase their risks of having the issue settled via litigation, rather than pre-emptively addressing it in the contract. By clearly defining *force majeure* in the contract, the parties get control over what events will trigger *force majeure*, and what effect the event will have on future performance of the contract. While the government is free to design its own contract clauses, and ambiguity regarding triggering events does not violate trade agreements or government policies, such ambiguity could still cause contract administration problems. Failing to clarify such matters in the contract, in advance, will force parties to rely on the doctrine of frustration if there is no *force majeure* clause at all, or lead to disputes regarding the interpretation if the clause is not sufficiently clear.

#### Inconsistent Standard Construction Contract Documents

Standardized contracts are essential when it comes to construction contract management, offering consistency, clarity, and certainty of obligations thereby reducing the risk of disputes and misunderstandings and improving vendor relationships.<sup>59</sup> OPO's research found that, while the Government of Canada uses standardized procurement templates for construction requirements, not all federal organizations use the same templates.<sup>8</sup> These inconsistencies have created some frustration and confusion for the Canadian construction industry.<sup>8</sup>

There are two principal sources for construction contract documents in Canada.

The Canadian Construction Documents Committee (CCDC) is an organization that develops consensus-built standardized construction documents and contract templates produced using simplified, plain language.<sup>60</sup> The CCDC includes representation from both public and private sectors in the construction industry, as well as four national associations representing the construction industry.<sup>60</sup> These clauses are "the go-to clauses for the construction industry in Canada."<sup>61</sup> In the opinion of one government representative, CCDC industry standards may be better to engage with smaller firms and create more competition.<sup>8</sup>

PSPC supports federal departments and agencies in their daily operations as their central purchasing agent and real property manager, amongst other functions.<sup>62</sup> PSPC has created its own construction contract templates to standardize and modernize procurement processes,<sup>16</sup> promote a "common look and feel" by standardizing terminology, simplify contract language, and ensure greater consistency and uniformity.<sup>63</sup> Standard procurement templates for

construction requirements were developed by PSPC incorporating construction-specific terms and conditions, to ensure continuation and consistency with this same “common look and feel.”<sup>64</sup>

There are many differences between the two sets of clauses. As described by a federal government interviewee, “CCDC clauses are a lot more detailed, leave less room for interpretation, and have been industry tested.”<sup>61</sup> Parties using CCDC contracts tend to know the expectations, “and resolutions during disputes are easier to navigate.”<sup>61</sup> A government department has even noted that some construction companies even refuse to work on PSPC projects because the PSPC general clauses are burdensome, leading to lost profits.<sup>61</sup> In some cases, suppliers are unlikely to bid on contracts that include PSPC clauses because it requires additional time and money for legal representation to review contract documents.<sup>61</sup>

There are three issues at play here.

First, government departments and agencies do not all use a single approach. Some federal departments and agencies use PSPC templates, while others, like some Crown Corporations have more flexibility when it comes to business management and procurement and use CCDC templates.<sup>8</sup> For example, Defence Construction Canada opts to incorporate CCDC language in its procurements.<sup>32</sup>

Second, of the departments and agencies that rely on PSPC templates and clauses, some choose to adopt and adapt the documents to meet their own department’s operating context. What this means in practice, is that there is no coherent standard across federal procurement. Mixing methods and modifying templated language creates grey areas in contracts, making disputes more likely and more difficult to resolve.<sup>8</sup> An interview with a government representative with experience managing large Crown projects indicated that there are instances where PSPC general conditions are modified by the business owner, creating documents that deviate from a standardized approach. This interviewee encouraged the government, including departments and Crown corporations, to “stick with one standard that people are used to.”<sup>8</sup>

Third, outside of government construction, the industry is used to using the CCDC forms and the industry is familiar with and accept these because they, themselves, were part of the committee that developed the terms and conditions. By using a standardized set of templates, industry is able to set expectations and reduce costs associated with contract creation.

## Conclusion

This study looked at some of the common issues affecting construction contract administration. The issues discussed were:

- 1) Planning and execution of the procurement
  - a. Scope of Work: Change Orders, Costing, and Payment
- 2) Contract Terms
  - a. Dispute Resolution Process Challenges
  - b. Clarity and Effectiveness of Substantial Performance Clauses

## c. Undefined *Force Majeure* in Construction Contracts

### 3) Inconsistent Standard Construction Contract Documents

Issues with the scope of work are often raised to OPO, and also form the focus of much academic research and discussion by non-governmental contracting organizations. Our research found that “scope” issues are a critical piece of contract administration. More due diligence at the start of a procurement process to properly define the scope of work goes a long way to reducing confusion, reducing risk, and ensuring smooth contract administration and contract delivery. OPO concluded that these are high risk issues and warrant further investigation.

OPO investigated dispute resolution process challenges and concluded that there are many issues that are not being resolved by standard dispute resolution clauses in contracts and that parties still seek third party recourse. OPO concluded that preventative measures, like Alternative Dispute Resolution (ADR), particularly early intervention, are a means of more efficiently addressing contract administration issues. Over the last several years, the government has been referencing OPO’s ADR services in federal contracts as a means of resolving disputes, yet federal departments still at times decline to participate in this process.

In researching substantial performance, it was found that there was concern that PSPC’s clause was not adequate and could potentially cause problems. There was further concern that the clause was not detailed enough, and that some federal contracts do not contemplate the crucial issue of occupancy with substantial performance. There is room for more research to look at PSPC clauses in practice, and investigate whether disputes are implicated with them.

OPO has previously published research on [\*force majeure\*](#). However, for this study OPO looked at its implication in contract administration. There is reason to believe that the present usage of the clause is either inadequate (not properly defining the triggering events and required mitigation actions) or that it is not being included at all. *Force majeure* clauses are a best practice and should be used in federal contracts.

OPO found that there are two sources for standard construction documents in federal procurement: those created by Public Services and Procurement Canada (PSPC templates) and those created by the Canadian Construction Documents Committee (CCDC templates). The issue goes beyond what templates are used for procurements, and includes instances where templated language, whether PSPC or CCDC is being modified by government business owners creating a “grey” area in the contract, which can lead to disputes.

This study found that there is, on the whole, disagreement between government officials, and other sources of information like private sector interviewees, academic studies, and contracting organizations. Specifically that on the issues of substantial completion and *force majeure* that most government officials interviewed were of the opinion that there are no issues—making it an outlier among other stakeholders. The fact that there was such unanimous agreement on the government side that there are no issues under substantial completion and *force majeure* while industry thought there were issues, warrants further research.

## Future Considerations

Preventative measures could be of value.

One preventative measure is investigating the use of change orders in federal contracts. Change orders have been subject to much academic investigation, looking at the causes and outcomes in construction contracts.<sup>65</sup> There is room in Canadian federal procurement to look at the use of change orders, not just the change in contract values from award to completion, but at the root causes of change orders and how they can differ between contracts, procurement methodologies, and types of construction. A more in-depth review could look at how change orders are implicated in some of the issues discussed in this paper.

A second preventative measure could be investigating the practice referred to as “bid low let it grow” that is believed to be used regularly in construction procurement. This is a methodology of bidding whereby bids are not addressing “best value” per se, but are solely focused on maximizing profit after contract award. This is not solely a private sector issue, as the government business owner has a lot of capacity to reduce the issue by creating clear, well-defined, scopes of work and understanding how certain types of change orders come to fruition. There is a crucial fairness issue here. Suppliers are not always being measured on their ability to deliver on the contract, but rather on their ability to manipulate the basis of selection included in a request for proposals. This rules out both suppliers who may have bid on the contract using a fair estimate of the work, and suppliers who may not have bid in the first place because they did not know the “true” value of the work.

There may be room for the government to innovate its standard construction clauses to more closely reflect the industry accepted CCDC clauses, or in some cases use them word for word. This may go a long way to addressing some of the issues that stem from terms and conditions in federal contracts, as well as simplifying contracting documents, opening up more opportunities for companies that are reluctant to work with the current clauses used by the government. The interviewees from both industry and government consulted in this research, for the most part, had a preference for the CCDC clauses.

Preventative measures are also about understanding the root causes, and applying that understanding to future procurements, not just in one department but horizontally across departments. Through this study it was apparent that construction is siloed, and that lessons learned in one procurement are often not utilized in another.

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- <sup>3</sup> Canada, Directive on the Management of Procurement, 2021, Appendix A.
- <sup>4</sup> Public Services and Procurement Canada, "Supply Manual: 9.10.15 Construction Services section (d)," August 8, 2024. <https://canadabuys.canada.ca/en/how-procurement-works/policies-and-guidelines/supply-manual#section-3>
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- <sup>6</sup> Public Services and Procurement Canada, "Supply Manual: 9.10.15 Construction Services," August 8, 2024. <https://canadabuys.canada.ca/en/how-procurement-works/policies-and-guidelines/supply-manual#section-3>
- <sup>7</sup> Woodhead, Bill, Theron Davis, and Robert Walker. "Collaborative Construction Contracts." *Alberta Law Review* 61, no. 2 (2023): 315.
- <sup>8</sup> Office of the Procurement Ombud, Interview Federal Government, September 16, 2024.
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- <sup>12</sup> Fassa, Ferdinand, and Andreas Wibowo. "Issues and Challenges of Employing the Design-Build Contract System in Government Construction Projects: Lessons Learned from the Gelora Bung Karno Project." *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 16, no. 3 (2024): 1.
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- <sup>22</sup> Ricchetti, Leonard, and Timothy J Murphy. *Construction Law in Canada*. Markham, Ont: Lexis Nexis, 2010: 205.
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[ca&utm\\_content=sacc-bas-banner-en#section-3](#) For more information on the Contract Modernization Initiative and the Standard Acquisition Clauses and Conditions Manual see this questions and answers page: <https://intranet.tpsgc-pwgsc.gc.ca/app-acq/text/nouvellesapp-newsacq/comm2023/qa-ap-internal-eng.html>

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<sup>41</sup> Canadian Supplier “GC8 clauses mediation and arbitration,” email to the Office of the Procurement Ombud.

<sup>42</sup> See some of the following cases by the CITT. A DCC contract, for the construction of a building in Petawawa.

While it had valid grounds, it was time-barred on a technicality. <https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/521204/index.do?q=%22Construction%22> Construction case for the rehabilitation of an old road. The complainant had a whole list of issues, but the CITT found in favour of the government on all facts.

<https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/521020/index.do?q=EXACT%28Construction%29> A dispute about contract admin. However, the CITT cannot deal with contract admin cases, so it was dismissed.

<https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/521058/index.do?q=EXACT%28Construction%29> A dispute about a contract to replace roofs at CAF bases. However, this was also contract admin, so the CITT couldn't hear it.

<https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/520962/index.do?q=EXACT%28Construction%29>

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<sup>46</sup> Office of the Procurement Ombud, Interview Construction Association, June 14, 2024.

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<sup>50</sup> Hietanen-Kunwald, Petra, and Helena Haapio. “Effective Dispute Prevention and Resolution through Proactive Contract Design.” *Journal of Strategic Contracting and Negotiation* (Print) 5, no. 1–2 (2021): 5.

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<sup>56</sup> *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, 2022 ONSC 5922.

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