

HIRING A GC AS “CONSTRUCTOR”...AND KEEPING IT THAT WAY – PART II

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The Ontario *Occupational Health and Safety Act* (OHSA) permits only rare opportunities for an organization to contract out of its OH&S responsibilities and liabilities. When an owner contracts with a general contractor (GC) to undertake and control a construction project for the owner as “constructor”, this is one of those opportunities. Generally owners seek to take advantage of this. But responsibility needs to be fully and completely contracted to the GC, and contracting in complex situations has to take place in accordance with accepted Ontario Ministry of Labour practice, or the owner could find itself inadvertently holding the status and liability of “constructor” when it had no intention to do so.

As many users of construction will know, the general rule of thumb applied by the Ontario Ministry of Labour (MOL) in complex construction contracting situations is that if it is not clear who has undertaken the construction project as constructor for the owner, they will treat the owner as the constructor. As I often say in these matters, if it is not clear that the “other guy” is the constructor, it is you as the owner.

This article, Part II in a series, examines some further common trips and traps for the owner when contracting construction projects to a constructor.

“Our owner representatives must stop blatant safety violations”

Imagine you as owner have retained a GC to undertake and fully control a project. Your contractor administrator observes a blatant safety violation, creating immediate danger to workers or the public. Frequently, the owner’s contract administrators or construction management personnel believe that the moral responsibility to stop a safety infraction or an imminent accident requires them to step and start telling the constructor how to correct the safety violation.

The problem? If the owner of the project steps outside its owner role and into the constructor role by telling contractors on the project how to rectify safety concerns, it is very likely that the owner will be treated as the constructor. The owner could be treated as constructor for the entire project as a result of this overstepping of the owner’s bounds.

The solution? Owner representatives should be trained to rectify safety concerns consistent with the owner role. They may deal with representatives of the constructor to

advise them of the problem and to advise of the expectation of the owner that the constructor will rectify this and carry out work safely in accordance with its constructor role. In a case of imminent danger, the owner may potentially direct a work stoppage and direct the constructor to rectify the problem and set out a plan for proceeding in a safety conscious way before re-starting. But the owner may not direct the constructor how to rectify the concerns or the MOL may treat the owner as constructor.

We want to have two separate constructors for two separate projects at our site”

Owners frequently wish to proceed with two separate projects at the same location and time. Let's say you as owner proceed with two projects, the installation of machinery or plant in one part of a facility, and the addition of an office in another part of the same facility. You proceed with these separate projects with two constructors without applying for a Designation of Project. Both constructors completely separate their respective projects from the operating facility, and they each file a Notice of Project. However, a Ministry of Labour Inspector attends and informs you as owner that you are the constructor for all of the project. Worse still, an accident occurred, and charges are commenced against the owner as constructor with the MOL taking the position that the owner was the constructor for all of the project as there was no Designation of Project.

The problem? As a result of the OHSA definition of “constructor”, whenever an owner undertakes a project through more than one contractor, front line MOL Inspectors will often treat the owner as the constructor.

The solution? A Designation of Project process is briefly outlined under section 4 of the Construction Regulations under the OHSA. While no case law exists on this, MOL practice is to require that the owner apply to have the two separate construction projects, with two separate constructors in control, treated as separate projects. If in the Application (all that is required is a letter not a formal application), the owner satisfies the MOL that the two projects will be completely separated in “space” from each other during the duration of the projects, they will grant the designation and allow two separate constructors to proceed. The MOL needs to be satisfied that these projects will be separated with barricades and processes which keep the constructors apart during all activities including the delivery of materials. The MOL alternatively is prepared to be satisfied that the two projects are separated in “time” meaning that they will take place on different calendar days or at different times of the day.

Whenever multiple constructors on the same site are desired, the owner should engage in pre-planning to ensure that each constructor prepares a separate Notice of Project, and attach to the NOP a detailed description and geographical location of their project. The owner and constructors should engage in pre-planning to ensure that each constructor will be able to carefully maintain separate control and direction over each separate project.

Stepping into the trap of becoming the constructor for a construction project, can create very significant liability for the owner. Often, no due diligence steps have been taken by

the owner, as it believed the constructor had all responsibilities. Taking these simple steps should result in the owner successfully avoiding these difficulties.

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