

## HIRING A GC AS "CONSTRUCTOR"... AND KEEPING IT THAT WAY – PART I

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In the OH&S context, there is more to a contract than meets the eye. As an owner you may think that employing a general contractor (GC) to act as "constructor" for a construction project, and having the GC file an NOP with the Ontario Ministry of Labour should result in the owner having no further OH&S responsibility for the project. However, owners often get more than they bargained for when contracting with a "constructor" for a project. This article, Part I in a two part series, examines some of the most common trips and traps for the owner, and strategies to avoid them.

"We have to control parts of the project"

Regardless of the construction project location, if the owner (through its engineering group or other staff) will at any stage be controlling part of the project, careful assessment should be made at the outset as to whether a GC can be the "constructor"

Let's say your project involves installation of new machinery or plant. A GC agrees to undertake the installation; but as the project proceeds it becomes clear that your group is not only directing design aspects, but also day-to-day work.

The problem? Once the owner of the project proceeds beyond involvement in overseeing quality control from the perspective of design or timeliness, and once owner representatives are involved in day-to-day control and oversight, the owner has become the "constructor". The Ontario MOL will ignore contract language and the NOP, and find the owner to be the "constructor" in almost all instances. In the event of a workplace accident, the owner is the "constructor" responsible. Section 1(3) Ontario OHS Act provides only a limited exception where the owner does not become the constructor if it oversees quality control.

The solution? Owners should assess the scope and degree of involvement anticipated before commencing the project. In the event that ongoing involvement, direction and oversight is anticipated, it is best to acknowledge that the owner is the "constructor" from the outset. Sometimes, the project can be phased, with a GC responsible for the initial phase and the owner responsible for a middle or end phase. This can be difficult and complex to administer. The test applied by Courts and Tribunals in determining whether the owner or GC is "constructor" is whether it has gone beyond the involvement of a "prudent owner", into scheduling, directing, project coordination and taking responsibility for safety.

"We want to hire some contractors or have our employees enter the project"

This is undoubtedly the most common complexity owners encounter. Unfortunately, even frontline MOL inspectors are often uninformed about whether an owner sending in its own personnel to perform work within the envelope of a construction project (for which the owner has appointed a GC to act as "constructor") becomes the "constructor" for the project instead of the GC. This situation can be simplified by dividing it into questions of:

- Whether the owner has sent its own workers or contractors in to perform project work on the project; or
- Whether the owner has sent its own workers or contractors into the project to perform non-construction work.

Let's deal with each of these in turn.

Imagine as owner engaging a GC to fully control and oversee a refurbishment project, with the necessary contractual language executed and a proper NOP filed. But within the construction project is piping, operating equipment or boilers which must be accessed regularly or even on an emergency basis, by the owner's personnel. The owner sends in the workers, and an accident occurs. The Ontario MOL investigates and attempts to treat the owner as the "constructor" even though these workers were not performing the work of the construction project.

The problem? Several aspects must be carefully considered by the owner before proceeding. Firstly, the workers or contractors who are performing services and not the work of a construction project are entering into a construction project and the OHSA requires appropriate protection for the project. Ongoing discussions with the Ontario MOL suggest that the MOL expects that service contractors, or employees performing services at a project, must wear all PPE for the project, and communication and coordination ought to be initiated with the GC as constructor to ensure these workers are not endangered by any work. Coordination processes must be arrived at. The workers are employees of the owner, and the owner has "employer" responsibilities under the OHSA. Lastly, it may surprise some owners to hear that the Ontario MOL has recently agreed that sending workers or contractors into the worksite to perform non-construction work does not render the owner the "constructor" in this situation. Thus, the problem is protecting workers as "employer". It may be necessary to educate the frontline MOL inspector and obtain legal assistance if the MOL attempts to treat the owner as "constructor" in this situation.

Imagine a slightly different situation now, where our owner, who has retained a GC to act as "constructor", wishes to have its workers or hire some of its own contractors to perform part of the work of the project itself. Perhaps the owner has a preference respecting flooring installers or painters, or perhaps the project is nearing completion and the owner wishes to have its own workers or contractors present installing wiring for security or installing machinery or plant.

The problem? Once the owner retains its own contractors or it sends its own workers into the project to perform work, there is a very high risk that the Ontario MOL will treat the owner as the "constructor". At a construction project, either the owner or a third party controlling the project will always be the "constructor". If it is not possible to determine clearly who the "constructor" is, this status reverts back to the owner. In the event of violations by personnel anywhere on the project, or in the event of a terrible workplace accident, there is a very high chance that the owner will be treated as the "constructor" responsible.

The solution? Several potential solutions are available to the owner in these circumstances. Generally speaking, these solutions should be anticipated and dealt with in advance of proceeding with the project. The owner can seek agreement from the GC appointed as "constructor" to oversee the owner's contractors and workers. In other words, the owner can retain and pay for contractors at the project directly but have the "constructor" fully control, coordinate and take responsibility for these contractors. The GC must agree to this, however,

and often the MOL will wish to see contract language showing that the GC is responsible for the owner's contractors, and even language in the NOP indicating that the GC is responsible for the owner's contractors. As well, the owner must keep its project personnel from controlling the contractors it has retained.

Further options and trips and traps for owners to carefully assess will be discussed in Part II of this article in the Spring 2008 issue.

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