Don’t Get More Than You Bargained For: Minimizing OHS Risks When Contracting for Work

Canadian Society of Safety Engineering

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March 14, 2017
Agenda

• The Current OH&S Enforcement Environment
• Key Contracting Roles Under OHSA
• Complexities Arising When Contracting for a Construction Project
• Contracting for Services
• Due Diligence
CURRENT ENFORCEMENT ENVIRONMENT
Current Enforcement Environment

• Corporation: Since August 15, 1990, $500,000 maximum per offence (plus 25% surcharge)

• Individual: $25,000 (plus 25% surcharge) and/or one year imprisonment maximum per offence

• Jail time being sought more frequently

• Potential *Criminal Code* charges
Current Enforcement Environment

• Constructor, Employer(s), Supervisor(s), Directors and Officers all have potential OHSA liability

• Ministry of Labour has discretion in issuing orders and commencing prosecutions relating to contracted work
KEY CONTRACTING ROLES UNDER OHSA: “OWNER”, “EMPLOYER” AND “CONSTRUCTOR”
Key Contracting Roles

Owner

An “Owner” is a workplace party who owns a workplace or construction project, but “Owner” is defined broadly.
Key Contracting Roles

Obligations of “Owner” of Operating Facility or Construction Project

• Determine whether any designated substances are present and provide list of such “DSRs” as part of tendering information to prospective constructor, contractors

• Comply with obligations in Asbestos on Construction Projects and in Building and Repair Operations Regulations including notifying prospective constructor, contractors
Key Contracting Roles

Employer

“Employer” means “a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services…”

(Section 1, Ontario OHSA)
Key Contracting Roles

Core “Employer” Obligations

• Ensuring that “prescribed” equipment, materials, protective devices are provided

• Equipment, materials, protective devices are maintained in good condition

• Equipment, materials, protective devices are used as “prescribed”
Key Contracting Roles

Core “Employer” Obligations

• Provide information, instruction, supervision (training) to workers

• Appoint “competent” supervisors

• Prepare, and review annually, written safety policy, and maintain safety program
Key Contracting Roles

Core “Employer” Obligations

• “Take every precaution reasonable in the circumstances for the protection of a worker”

• Sections 25 and 26 OHSA contain multiple obligations. See legislation for complete obligations
Key Contracting Roles

Constructor

“Constructor” is “a person who undertakes a project for an “Owner” and includes an “Owner” who undertakes all or part of a project by himself or by more than one “Employer””. (Either “Owner” of workplace or general contractor undertaking project for “Owner”)

(Section 1 Ontario OHSA)
Key Contracting Roles

Core “Constructor” Obligations

On a project undertaken by "Constructor" must ensure *OHSA* and Regulations carried out on project by all employers and workers, and ensure health and safety of all workers on project protected.
Key Contracting Roles

Constructor Obligations Under Regulations

• Complete and file MOL registration
• File Notice of Project before commencing work (Section 6 Construction Regulations defines notifiable projects)
• Supervisor for every project with five or more workers
• Competent person to inspect project at least once a week
COMPLEXITIES WHEN CONTRACTING FOR A CONSTRUCTION PROJECT
Construction Project Complexities

The Most Important Concepts

• The “Constructor” concept
• Is it a “construction project” (OHSA defines)?
• Who is the “Constructor”? 
The Constructor Concept

- Must be a constructor for every construction project
- Constructor undertakes project for the owner or is the owner if owner has undertaken project
- Classic example is circumstance where owner contracts with general contractor who agrees to act as constructor and actually exercises greatest degree of control over project
Is it a Construction Project?

Construction defined: “includes erection, alteration, repair, dismantling, demolition, structural maintenance, painting, land clearing, earth moving, grading, excavating, trenching, digging, boring, drilling, blasting or concreting, the installation of any machinery or plant, and any work or undertaking in connection with a project…”
Is it a Construction Project?

Project defined: “means a construction project, whether public or private, including:

a) The construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, parking lot, cofferdam, conduit, sewer, water main, service connection, telegraph, telephone or electrical cable, pipeline, duct or well, or any combination thereof.”
Is it a Construction Project?

b) “the moving of a building or structure, and

c) Any work or undertaking, or any lands or appurtenances used in connection with construction”
Is it a Construction Project?

Analysis

1. Are any objects being worked upon within definition of project?

If so, consider

2. Are any of the activities within definition of construction?
Is it a Construction Project?

Analysis

• If the activity is construction and the object is a project, the work will be construction (i.e. repair of a structure, construction of a building or parking lot)

• If the activity is construction but the object is not a project (i.e. repair or alteration of machinery as opposed to structure or plant) it will often be industrial (or at least a non-construction activity)

• Installation of machinery or equipment and structural maintenance are always construction as a result of definition
Identifying the “Constructor”

Role Of The “Constructor”

The “Constructor” in relation to a construction project is the party who exercises the greatest degree of control over the entire project and all working upon it. The “Constructor” plans and organizes the entire project…”
Identifying the “Constructor”

Scenario

An “Owner” decides to add an office to an operating wastewater complex. It retains ABC Contractors as “Constructor” and ABC files the NOP, hires all trades, supervises, monitors, coordinates and controls the office construction project.

Who is the “Constructor”? 
Identifying the “Constructor”

Scenario (cont’d)

But the “Owner” issues a daily work permit to all contractors who enter its site. The “Owner” also insists that all contractors follow its site safety procedures. The “Owner” also has its own Project Manager involved in daily meetings and giving direction on safety issues which require resolution.

Who is the “Constructor”?
Identifying the “Constructor”

Keeping Control Over Project With Constructor

• “Constructor” should select and approve subcontractors

• “Constructor” must train, instruct, provide policies for, meet with, organize and schedule contractors and subcontractors

• “Constructor” must control, monitor, inspect and direct safety aspects of construction project
Multiple Constructors

Scenario

An “Owner” wishes to proceed with two capital projects - the installation of new boilers in one location at its premises at the same time in the same area as it is adding a new office. Can it have two separate “Constructors” for these separate projects?
Multiple Constructors

Strategies for Owner Wishing to Separate Simultaneous Projects

• Apply for “designation” of two projects as separate projects with separate “Constructors” (s. 4 Construction Regulations)

• Each “Constructor” can file separate Notice of Project and attach with NOP detailed description and outline of geographic location. Detail separation by time or space

• Each respective “Constructor” must carefully maintain control and direction over each project
CONTRACTING FOR SERVICES
Contracting for Services

- All contracting that is not a construction project:
  - Window cleaning
  - Janitorial services
  - Security services
- No “constructor”
- Contracting in capacity of “employer” and must discharge the obligations of an “employer”
Contracting for Services

Where “Employer” obligations exist, there is no ability to contract away responsibility and liability to another “Employer”. No matter how well the contract is written, or how specialized the contractor, the “Employer” cannot fully contract out of OHSA obligations.
Contracting for Services

*R. v. Wyssen* (1992, Ontario Court of Appeal)

- Window cleaning case
- “Employer” includes *contracts for service*
- Recognition that definition contrary to sense of fair play. In *Wyssen*, the “Employer” contracted out work to a contractor due to his expertise
- Stated that defence of “due diligence” applies, and acknowledged that “due diligence” may be carried out in different manner where contract for services
Contracting for Services

*R. v. Wyssen* (1992, Ontario Court of Appeal)

- *Wyssen* stated that the “Employer” must “ensure” obligations met, and this “puts an “Employer” virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors”
DUE DILIGENCE WHERE ACTING AS “CONSTRUCTOR” OR “EMPLOYER” (OWN WORKERS OR CONTRACTING FOR SERVICES)
Due Diligence

What is Due Diligence?

• It is a legal standard which allows a defence if stringent, court-developed standards can be met by workplace party

• It is a standard by which an organization's steps and its supervisor's steps to project workers can be judged on an ongoing basis
Due Diligence

“Hands on” or “Hands off” Due Diligence?

• Must decide between “hands on” or “hands off” approach to due diligence

• “Hands off” approach only possible when “Owner” fully and completely contracting “construction project” to “Constructor”

• Otherwise, must practice “hands on” due diligence
Due Diligence

Summary of Due Diligence Elements

• Knowledge of legal obligations (organization, individual representatives)
• Determining and assessing all potential workplace hazards - ongoing
• Corrective action at workplace based on assessment of hazards - ongoing
• Appropriate pre-job orientation and training of workers on site - ongoing
Due Diligence

• Review familiarity with OH&S legislation before retaining contractor (even if contractor is an “expert”)

• Prequalification of contractor before hire, by confirming appropriate rules, “competent” supervision, training, monitoring and other policy matters

• Check contractor’s safety record
Due Diligence

- Competent supervisors provided?
- Ongoing supervisory monitoring to confirm practices and procedures followed
- Reminders of safety expectations ("toolbox" talks)
- Ongoing communication of hazard information to workers, particularly with complex tasks, multiple trades
- Enforcement of safety infractions with discipline
- Diligent ongoing documentation
Questions?

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