



Construction

Doing Business In Canada

The construction industry is a vital part of the Canadian economy showing no signs of slowing down. International owners, consultants and construction companies who undertake construction and infrastructure projects in Canada should be aware of several issues that are unique to the Canadian construction industry.

Public-private partnerships (P3s) are increasingly being used by governments around the world, including in Canada. P3s allow a public sector entity to partner with a private sector entity to provide specific assets and deliver specific services over many years. Canada has a very robust, stable and sophisticated P3 market. (Please refer to the Cassels Brock *Doing Business in Canada* article on **Public-Private Partnerships** for more information.)

The Construction Contract

Standard Forms

The Canadian Construction Documents Committee (“**CCDC**”) publishes standard form contracts that can be used for a variety of construction projects and construction project delivery methods. The most common form of CCDC used is a CCDC 2 stipulated fixed price contract between the project owner and the contractor. It is also common for contractors or owners to provide their own form of contract for a project.

Other standard form contracts are published by The Royal Architectural Institute of Canada (“**RAIC**”) and the Canadian Construction Association (“**CCA**”).

The terms of the standard form contracts allocate risk between the parties; however, it is common for the parties to amend the standard terms by negotiating supplementary conditions that redistribute the obligations,

risks and liabilities of each party. An example of a typical supplementary condition requested by contractors is to redistribute all risks arising from project modifications or unexpected sub-soil conditions to the owner.

Where an owner is looking for a “turn-key” solution, a design-build contract may be used for a project. In a typical design-build scenario, a design professional (e.g., architecture firm and/or engineering firm) will partner with a construction contractor to deliver to the owner the complete design, engineering and construction of the project.

Change Orders & Change Directives

It is a requirement of most construction contracts that any changes to the scope of the work or services to be performed are documented in a written “change order” or “change directive,” signed by both the owner and the contractor, before the additional work or services are performed. The difference between a change order and change directive is significant. A “change order” records the agreed terms of the change, including any change in the contract price and/or extension of time for performance. By contrast, a “change directive” allows the owner to direct a change in the work or the services prior to an agreement being reached on the adjustment, if any, to the contract price and/or time for performance.

Payment

Payment to the contractor usually occurs by way of periodic progress payments reflecting the stage of completion of the project and any payment schedule established by the contract. A typical payment process requires the contractor to submit an application for payment to the owner and a third party “payment certifier” who verifies the amounts being claimed by the



contractor. The payment certifier then directs the owner to pay the amounts of the contractor's application that have been verified (i.e., approved) for payment. Where there is no payment certifier, the owner and the contractor can agree on the amounts to be paid upon each application by the contractor.

Lien Legislation

Lien legislation, referred to as "Builders," "Construction," "Miners" or "Mechanics" lien legislation, exists in Canada's common law provinces as a means of financial protection for contractors who provide materials or services to a construction project in advance of receiving payment. It is important to be aware that parties cannot contract out of, or waive, the application of these lien statutes.

In Ontario, the *Construction Lien Act*, R.S.O. 1990, c C.30 is the governing statute. In addition to creating the lien, the *Construction Lien Act* and those like it in other provinces, typically require each payer upon a construction contract to retain a percentage of the price of the materials and services as they are supplied under the contract. In Ontario, this retainage is called the "basic holdback" and each payer must holdback 10% of the price of the services and materials supplied. Once the time period to register liens against a project has expired, the basic holdback is released.

Liens in Ontario, Alberta, and British Columbia must be registered or preserved by claimants within a specific timeframe to be valid. Owners, contractors, and subcontractors are encouraged to check the relevant statute in the province where work is being performed to confirm the applicable timeframe for registering a lien.

Trust rights, which take different forms across the various provincial lien statutes, are an alternate statutory remedy for unpaid accounts resulting from misappropriation of project money. For example, in Ontario, the *Construction Lien Act* allows a subcontractor to pierce the corporate veil of a contractor and enforce a breach of trust claim against officers, directors, or others who are the controlling mind of a contractor where the contractor has failed to use project funds paid by the owner to pay its subcontractors. When doing business in Canada, it is important for contractors to consult the applicable provincial lien legislation to determine whether the trust

provisions apply to them and, thus, expose their directors and officers to personal liability where project funds are diverted away from the project.

Builder and Project Licences

Other than a standard business licence, general contractors typically do not require a special contractor's licence at the provincial level. However, general contractors must be registered under the applicable mandatory provincial workers compensation insurance regime.

It is important to contact municipalities to determine if a municipal business licence or contractor's licence is required. Some municipalities require business licences for anyone undertaking a trade, calling or business within the boundaries of the municipality.

Architects, engineers, plumbers, and electricians are required to obtain professional licensing accreditation from the appropriate governing body in each province. Architects and engineers are also subject to the Code of Ethics enforced by their respective regulatory bodies in the province in which they will be providing services.

Prior to the start of a project, consideration must be given as to whether environmental approvals, federal licences or permits and/or building permits need to be obtained. Land use planning and zoning permissions may need to be acquired. Continual inspections will be required throughout the construction process to ensure compliance with any federal, provincial or municipal laws. A final occupancy permit will be ordered by the municipality, which will require building code compliance and safety system approval.

Health and Safety

To ensure the health and safety of workers, occupational health and safety statutes and regulations have been enacted in each province and territory.

In Ontario, the *Occupational Health and Safety Act* ("OHS") is the applicable legislation. Every construction project in Ontario must have both an "owner" and a "constructor," as those terms are defined in the OHS. A "constructor" is a single person or entity with overall authority for health and safety matters on a project.



A party deemed to be a “constructor” under the OHSA is responsible for providing a safe workplace for everyone on site, complying with the requirements of the OHSA, and providing required notices to the Ministry of Labour for on-site accidents. Constructors must also abide by the OHSA Regulation for Construction Projects, which contains guidelines to govern the activity on construction projects and to ensure work sites are safe for all workers in the construction industry.

Failure to comply to the requirements of the OHSA can lead to monetary fines of up to US\$500,000 per contravention for corporations or monetary fines up to US\$25,000 or up to 12 months imprisonment for individuals.



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