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Back to business in a post-COVID Canada: Managing the impacts on construction and infrastructure projects

June 25, 2020

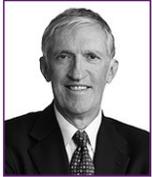
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Assignments/novation of contracts and subcontracts

Sean Ralph
Partner, Calgary

1. **Contractual Issues:** assignment without consent? Assignor continues to be liable for work?
2. **Warranty:** who will be liable for workmanship claims or defects following assignment?
3. **Holdback:** How should statutory or contractual holdbacks be handled?
4. **Schedule:** How will this affect a Project's timeline?

- What do the relevant documents require for an assignment?
- Does it require notice to the counterparties? Consent?
- What does the agreement say about liability post-assignment?

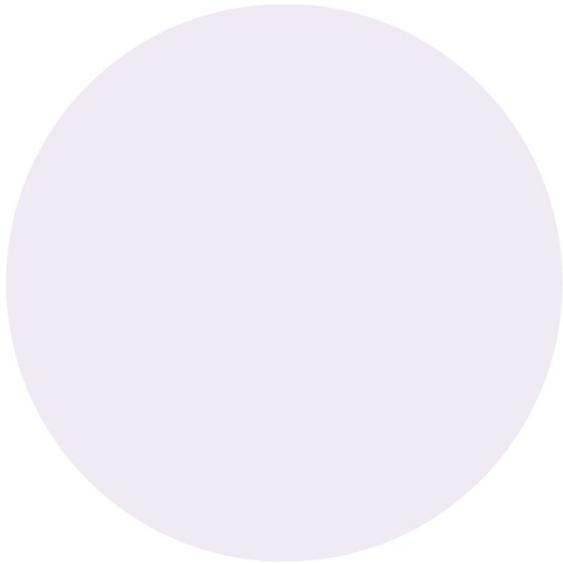
- “Finger pointing” among parties.
- Bringing a claim and delays in construction.
- Warranties effect on termination by EPC Contractor?

- Who is required to maintain a holdback under legislation? Under contract?
- What record keeping is in place?
- Should the Owner retain all holdback amounts for simplicity?
- Each jurisdiction is different.

- Any change in Contract has a chance of creating significant delays.
- Mobilization and demobilization may take a significant amount of time.
- Outgoing Contractor not motivated to move quickly?

- **Owner:**
 - What is the relative negotiating power of the party? – i.e. who has the power to withhold consent?
 - How can the Owner ensure that despite the assignment, it is in a position to be made whole from either or both of the contractors?
- **Contractor:**
 - What is the relative negotiating power of the party? – i.e. who has the power to withhold consent?
 - If the original Contractor will keep some exposure to liability for defects, is the successor Contractor reputable?

Questions?



Fast-track procurement

John S. Haythorne
Partner, Vancouver

What do we mean by “Fast-Track Procurement”

- Pressure to award contracts quickly – minimize time or steps from conception to award
- As lawyers to owners: we can assist owners to find methods to find time-savings in procurements
- As lawyers to bidders: we can be alive to any increased risks that bidders might be assuming in fast-track procurements

Legal Restraints: What's the issue?

- Legal Risks
 - Public owners - Statutory restraints – eg Internal Trade Obligations
 - Internal Procurement Procedures – risk of breach (*Tercon*)
 - Procurement policies
 - Common law – *Ron Engineering* – if owner invokes tender law

Legal Restraints: What's the issue?

- **Public Owner:**
 - Authority to award contract to any interested/qualified party? Bypass competitive procurement?
 - Internal Trade Obligations:
 - Federal Government: CITT
 - Political risk – challenge that party selected or price was not optimal – or was in conflict of interest
 - **Time consuming**
 - Prepare Invitation Documents
 - Evaluation and Award
 - “Emergency” Exception

Practical Risks – increase in construction disputes

- Move on “Shovel-Ready” projects
- Design-build
- Hasty awards with key issues left for future “to be agreed by the parties” (scope; price; schedule)
- Interface issues:
 - With connecting Work
 - Design responsibilities

Solutions:

- Where can time be saved in “traditional” procurement?
 - Infinite Strategies available
 - Always a “negotiation”
 - If invite “Quotations”
 - “Tender replaces negotiation”
 - Key – to meet legal and practical risks –
 - Use procurement itself to support good result
 - Take full advantage of right to draft Contract A to meet risk/time-line requirements

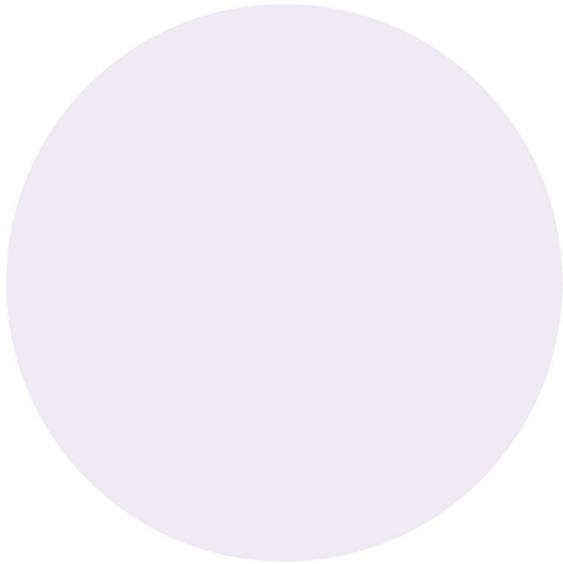
Solutions cont'd:

- DBB:
 - Too long to complete design docs
 - Fast-track a contract which is not fully designed - start work before design completed
 - Need to cover design responsibility
 - Need to cover risk of Changes
 - Convert to DB – but if most of Design is complete then it may not be efficient to ask bidder to assume design responsibility
- DB – requires time for bidders to evaluate design requirements (prepare/develop preliminary design) and prepare cost estimates

Solutions cont'd:

- CM – allows fast track
- Evaluation – can be shortened:
 - Focus on picking “best”
 - Right to drop losers
- Consult with bidders during procurement – make consultation part of “Contract A” – (allow/invite comments)
- Early Contractor Involvement – break work into sequential elements
- “Limited Notice to Proceed” – start work before finalizing contract
- Prequalify – for a number or class of coming contracts

Questions?



Contractual provisions to consider when entering into new construction agreements

Mathieu Huot
Associate, Montréal

- Review the contract
- Presence of a Force Majeure/Relief Event clause
- Presence of a Change in Law clause
 - Does the clause encompass COVID-19 related governmental measures (ex: orders from competent public authorities)
- Defining COVID-19 or pandemics as force majeure events

- Determining available relief
 - Difference between force majeure/relief event and Change in Law
 - Delay
 - Costs
 - Both
- Termination and suspension clauses
 - Suspension of work
 - Termination of the contract
- Suspension of civil procedure delays vs. contractual notice delays

• Force Majeure clause

• 6.5.3. (GC) CCDC-2, ACC-1 or CCDC-4

If the Contractor is delayed in the performance of the Work by:

1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound),

2 fire, unusual delay by common carriers or unavoidable casualties,

3 abnormally adverse weather conditions, or

4 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor,

then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. The Contractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant or anyone employed or engaged by them directly or indirectly.

• Change in Law clauses

• 6.5.2. CCDC-2 or ACC-1

If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay.

• 10.2.4. CCDC-2 or ACC-1

The Contractor shall give the required notices and comply with the laws, ordinances, rules, regulations, or codes which are or become in force during the performance of the Work and which relate to the Work, to the preservation of the public health, and to construction safety.

- **Change in Law clauses**

- **10.2.5. CCDC-2 or ACC-1**

The Contractor shall not be responsible for verifying that the Contract Documents are in compliance with the applicable laws, ordinances, rules, regulations, or codes relating to the Work. If the Contract Documents are at variance therewith, or if, subsequent to the time of bid closing, changes are made to the applicable laws, ordinances, rules, regulations, or codes which require modification to the Contract Documents, the Contractor shall advise the Consultant in writing requesting direction immediately upon such variance or change becoming known. The Consultant will make the changes required to the Contract Documents as provided in GC 6.1 - OWNER'S RIGHT TO MAKE CHANGES, GC 6.2 - CHANGE ORDER and GC 6.3 - CHANGE DIRECTIVE

• Termination of the contract or suspension of the work

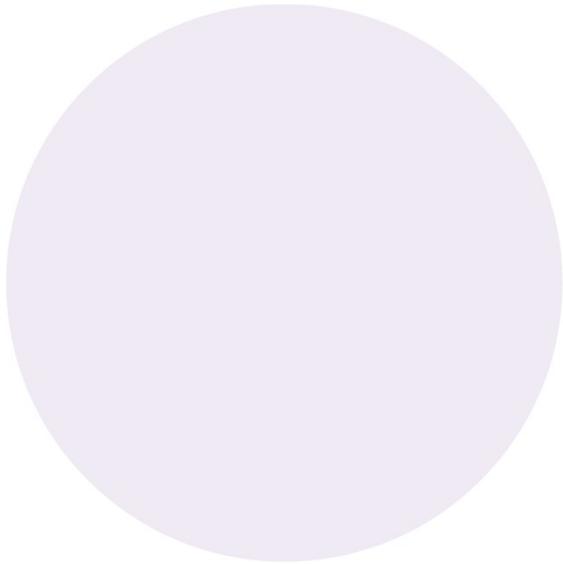
• 7.2.2. CCDC-2 or ACC-1

If the Work is suspended or otherwise delayed for a period of 20 Working Days or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or of anyone directly or indirectly employed or engaged by the Contractor, the Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner Notice in Writing to that effect.

• 7.2.5. CCDC-2 or ACC-1

If the Contractor terminates the Contract under the conditions set out above, the Contractor shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon Products and Construction Equipment, and such other damages as the Contractor may have sustained as a result of the termination of the Contract.

Questions?



Thank you

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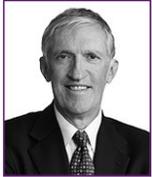
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