

## *Prime Contractor Obligations*

The awareness around prime contractor responsibilities appears to be much greater now than it did even a decade ago, certainly based on our dealings with clients and construction industry members. It is not uncommon, for example, to now see prominent signs near construction sites identifying the party assuming the prime contractor's role. For those NRCA members that are new to the industry or new to the idea of 'prime contractor', this article sets out the legal duties with respect multiple-employer worksites under the British Columbia Workers Compensation Act (the "Act") and the regulations enacted thereunder which govern with respect to workplace health and safety in British Columbia.

Section 115 of the Act creates a duty on employers to ensure the health and safety of all workers, at all workplaces where that employer's work is being carried out, whether they work for the employer or not. Most development projects are likely to involve the developer's construction of off-site servicing within municipal road allowances. Although such works are occasioned by a private development, WorkSafeBC characterizes such activities as being within a municipal workplace because the work is conducted on the municipality's infrastructure.

Section 118 of the Act requires one party to coordinate the activities of employers, workers and other persons at the multiple-employer workplace relating to occupational health and safety. The owner is deemed as the prime contractor unless one is designated through a written agreement. However, merely using a written agreement to offload such obligations without meaningful participation in the process as an owner and employer may not be sufficient. If the owner enters into more than one agreement that purports to create a prime contractor for the same period of time, neither agreement is effective and the owner is considered the prime contractor.

In December 2005, a worker employed by a contractor installing a new sewer service within a municipal roadway was fatally injured by the collapse of the open trench in which the work was being constructed. The service installation was planned to service a condominium development being constructed on the developer's adjacent lands and was required by the municipality as a condition of the approval of the development.

WorkSafeBC determined that the municipality had failed to discharge its statutory obligations for occupational health and safety on worksites and levied significant administrative fines. A 2008 review of the earlier WorkSafeBC orders in respect of this incident illustrates WorkSafeBC's approach to allocating responsibilities under the prime contractor provisions of the Act and provide a sobering reminder for all owners to ensure that their obligations under this Act are fully and appropriately discharged through written agreement, and that meaningful participation in the prime contractor's discharge of its prime contractor obligations is evidenced.

From the prime contractor's perspective, limiting liability involves the proper discharge of its obligations. This entails:

- having a written agreement with respect to the prime contractor obligations;
- identifying and addressing hazards and developing the action plans needed to monitor, prevent and respond to hazards;
- having systems in place to enable effective communications with subcontractors, and coordinating and disseminating safety information to all subcontractors and workers attending the site;

- understanding and confirming the health and safety activities of the subcontractors;
- coordinating multi-party efforts with respect to work-site health and safety;
- establishing a notification protocol amongst the parties where potentially hazard activities are to be conducted;
- establishing and implementing an emergency response plan, complete with provisions for safety training, equipment and supplies; and
- adopting practices for documenting and retaining records to evidence compliance.

An executed written agreement between the owner and the prime contractor that clearly outlines their respective roles and responsibilities is key. The written agreement should properly set out the scope of the prime contractor's obligations, and should also require the provision of regular reports with respect to the prime contractor's performance so that the owner can ensure that the prime contractor's actual performance complies with the requirements of the Act and regulations.

For owners and prime contractors alike, the delegation and scope of the prime contractor responsibilities, as well as indemnities, insurance and liability provisions contained within the parties' governing contracts play an important role in defining the risk allocation between the parties. Thus, the provisions in these agreements are not straightforward and should be given due consideration.

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Sonia is a founding partner of Civic Legal LLP, and practises in the areas of procurement, construction and land development, with a particular focus on tendering law, procurement

fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advise on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure.

She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects.

Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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