



London & District Construction Association
331 Aberdeen Drive
London, Ontario
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April 9, 2020

Re: Government of Ontario Essential Workplaces Contract Considerations

COVID-19 has created great uncertainty and risk in many areas of ICI and civil/heavy construction work. On April 03, 2020 the government of Ontario published its updated “List of Essential Workplaces” which refined their initial list (March 2020) of what they determined to be “essential workplaces (or businesses)”. This refinement, while necessary and appropriate to stem the growth of COVID-19 has created significant confusion to a broad range of ICI projects, that were previously universally “essential”. If you continue to work on a project that is deemed non-essential you and your company face significant risk, including an up-to \$10,000,000 fine to your company. Your exposure is related to: businesses, workplaces, projects, services and activities. For example, it is conceivable that a project is “essential” or “critical”, but your trade service is not.

The government is being petitioned to provide substantive clarity, but until, or if, that occurs LDCA members should consider various issues. This note is not and should not be considered legal advice, as it is not; it is a list of general, useful considerations. Below are issues to consider:

1. Has the owner (and potentially then through the GC to you) identified the project as “essential” or “critical” and to remain open? If yes, you should then consider:
 - a. Ensure their direction to you is in writing and defines their determination that the project is essential, or critical, and to remain open under an exemption (#1 to #44 in the “List of Essential Workplaces”), that your company’s services and activities meet the criteria, and that you are to remain working. The exemption they are claiming should also be explicitly identified. For instance, in exemption “Maintenance” a qualifier is that the service is “strictly necessary”, you should have that identified by the owner or GC.
 - b. If the owner is making interpretations of any claimed exemption that should be explained. For example, claiming #28, the owner should explain their rationale for the project being considered, for example, “critical provincial infrastructure” or in the Maintenance area why they consider the work to be ‘strictly necessary’.
 - c. This documentation should be shared with your employees, material suppliers, etc. who receive direction from you.
 - d. You should have this documentation on-site and ready to provide any enforcement authority (there is no single enforcement authority at present and



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many groups have that authority) who many come on-site and question your remaining at work.

2. Understand your exposure and risk to government penalty (and that it may very well be different than that of the owner/GC). Decisions on whether a workplace is essential or not is with those who possess enforcement authority (for instance a City by-law officer), it is not with an owner or GC. Whilst there may be shared risk of some sort to some extent, the Emergency Act provisions enable enforcement that may result in the worker or company they work for, facing penalties that may (without the opportunity to close a worksite in lieu of penalty) include:
 - a. Tickets
 - b. Fines, up-to \$100,000 for an individual, \$500,000 for the corporation's directors or officers and up-to \$10,000,000 for the corporation itself
 - c. Imprisonment, up-to to 1 year for individuals, directors or officers

3. Understand your contractual relationship with the owner or GC and/or other project partners, and how risk has been allocated. You may, for many valid reasons make a work/modified work/stop work decision that is counter/independent of an owner/GC direction to you. For example, when faced with an ever-diminishing workforce you might choose to stop work (or in fact must work in ways not considered in your tender). You may face risk and liabilities that you will need to understand and consider in your decision and actions, which may include contract cancellation. For instance,
 - a. If your contract includes 'stop work order' provisions due to court or government action, accommodations may be in-built (e.g. a contract extension may be automatically obtainable, and/or reasonable costs to (de)/(re) commission may be attainable),
 - b. If your contract includes no specific language force majeure, contract frustration or other rights/remedies may have to be evaluated
 - c. Preserve your rights (e.g. liens) efficiently and effectively.

4. Document everything and preferably contemporaneously (in real time with minimal to no delay) or daily, and preferably in some standardized form you create or use regularly. COVID-19 has instantaneously created (as communicated in various government COVID-19 mandates), the need for new jobsite work practices, procedures and processes. Most of these new ways of working, created directly by government mandate, supply chain disruption, workforce disruption, work around methods, etc., create lost productivity, scheduling delays, etc. which add costs, that were unforeseeable in the tender stage. To receive consideration for claims due to these impacts you will need documentation.



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5. If the owner (and potentially then through the GC to you) identified the workplace/project as “non-essential” or “non-critical” and to suspend, stop, pause, minimize, etc. work you should then consider:
 - a. Ensure their direction to you is in writing and defines their determination that, as per the government of Ontario’s published list of “Essential Workplaces”, the project is non-essential or non-critical and to suspend or otherwise stop or reduce work. A determination of non-essential is based on the workplace or project/service/activity not being identified as “essential” and therefore won’t be linked to any specific workplace type (e.g. item #28).
 - b. Various specific information related to their determination should also be provided. For instance, work is stopped until further notice, or until the government of Ontario provides direction to restart work, etc. You should also receive notification/direction on key items, for example, that you are required to decommission the site in an orderly and safe manner.
 - c. You should have this documentation and provide it to any of your suppliers, etc. to whom you may need to rearrange your relationship with.

6. Seek legal counsel if you are unsure of your position, rights, risks, etc.

Finally, this is a very difficult situation for all citizens of the province are in collectively. The foundational principals driving government action seems to be: the primary objective of the government is the health and safety of its citizens regarding COVID-19, the intent of the government seems to be to close all workplaces and businesses except where the risk of being open, as “essential”, is appropriate. As a business owner you have important and consequential burdens and decisions to make. We suggest you manage your businesses, workplaces, services and activities according to what the government is trying to accomplish.

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