

You Ought To Know

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Lawyer, construction law expert and Partner at Soloway Wright, Dan Leduc took the lead on this special issue of ECAO's You Ought to Know to provide general guidance on steps you should consider when bidding on work in areas of the Province that are currently, or could be, facing a labour shortage.

Read on – there's much you ought to know!

Can a labour shortage qualify as force majeure?

Let's start with creating commonality in our understanding of force majeure. The Canadian Bar Association advises that the intent of force majeure clauses is to expressly allocate risk for supervening events that affect parties in the performance of their contractual obligations.

Across Ontario, the construction industry is experiencing the same issue: there simply are not enough workers available to meet the demands of the current construction market. Between major infrastructure projects, private developments, and workers sometimes moving from one project to another where incentives are offered, labour availability has become a real operational challenge in some areas of the Province.

A question that often arises is whether a labour shortage can qualify as a force majeure event if it results in delays or difficulty meeting project schedules.

In most cases, the answer is (unfortunately) no.

Labour shortages are generally treated as a contractor risk.

When a contractor bids on and accepts a construction project, the contractor is generally taken to have assumed responsibility for providing the labour, materials, and equipment necessary to perform the work.

Under most construction contracts and legal decisions in Ontario, labour availability is considered part of the contractor's normal business risk. Even where there is a general shortage of workers in the market, or where workers move between projects because incentives are offered elsewhere, those conditions are typically treated as market realities, not legal excuses for delay.

As a result, delays caused by an inability to obtain sufficient labour will rarely relieve a contractor from its contractual obligations.

Force majeure only applies if the contract provides for it.

Another point that is often misunderstood is that force majeure is not automatic. It only exists to the extent that the contract includes a force majeure clause and defines what events qualify.

Most construction contracts list events such as natural disasters, fires or floods, war or terrorism, government shutdowns, or strikes and lockouts. Labour shortages or the inability to obtain workers are not usually included in standard force majeure clauses. If the contract does not expressly cover those circumstances, it will generally be difficult to rely on force majeure if a labour shortage leads to delay.

Does it make a difference if contractors know about labour shortages before bidding the work?

Where labour shortages are already widely known in the industry at the time a contractor bids on a project, it may be even more difficult to argue later that the situation was unforeseen.

In those circumstances, owners may take the position that contractors should have accounted for labour availability when they prepared their bids and project schedules.

For that reason, contractors who are concerned about labour availability should consider addressing the issue before entering into the contract, rather than attempting to rely on force majeure after problems arise.

What steps should contractors consider to protect themselves at a time of labour shortages when bidding for work?

Contractors concerned about labour availability may wish to consider a few practical steps when bidding on projects or negotiating contracts.

First, review the force majeure clause carefully. If the clause only covers traditional events such as natural disasters or strikes, it may not provide protection where labour simply cannot be obtained. Where possible, contractors may wish to request wording that expands the clause to include circumstances such as industry-wide labour shortages or the inability to obtain sufficient qualified labour despite reasonable efforts.

Second, contractors may wish to ensure that their bids clearly state the assumptions on which they are based. In some situations, it may be appropriate to include language such as:

This bid is based on the availability of qualified labour in the market at the time of tender. If the Contractor is unable to obtain sufficient qualified labour due to market conditions beyond its reasonable control, the Contractor shall be entitled to request a reasonable adjustment to the project schedule.

Third, contractors may wish to request schedule relief where labour cannot reasonably be obtained by including language such as this:

If the Contractor is unable to obtain sufficient qualified labour necessary to perform the Work due to an industry-wide labour shortage or labour market disruption beyond the Contractor's reasonable control, the Contractor shall be entitled to a reasonable extension of time for completion of the Work.

Finally, contractors should ensure that project schedules realistically reflect labour availability in the market, particularly where multiple large projects are competing for the same workforce.

When it comes to labour shortages as a force majeure event, what is the bottom line?

Labour shortages are an increasingly common challenge in the construction industry. However, under most construction contracts they are still treated as a **contractor risk**, not a force majeure event.

Contractors should therefore not assume that labour shortages will excuse delays. The better approach is to address labour availability risks at the time of bidding and contracting by reviewing force majeure provisions, requesting appropriate wording where possible, and ensuring that project schedules reflect the realities of the labour market in the area the job is located.

Taking those steps early can help avoid disputes later.

Dan Leduc

Partner
Soloway Wright LLP

Dan Leduc practices construction law, with a focus on construction contracts, procurement issues, delay claims, and dispute resolution in the construction industry.

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