

How to Avoid OHS Liability When Contracting with “Prime Contractors”/“Constructors”



Implement a contracting due diligence strategy when hiring contractors to work at your site.

Hiring contractors to do construction and other work at your site creates OHS liability challenges. That's because compliance becomes trickier when work is carried out at a site where workers of multiple employers work. The right of the employer that owns the site (which we'll refer to as the 'host employer') to delegate responsibility for safety to a 'prime contractor' or 'constructor' varies depending on the province and type of work involved. Some provinces, including AB, BC and NB, let host employers designate the contractor as a 'prime contractor' to control the work and ensure compliance with OHS laws. Others, such as ON and SK, limit such arrangements to 'construction' projects. There are also certain residual safety obligations coming from occupying the site that a host employer can never delegate, such as, pointing out the hidden confined spaces or hazardous chemicals the site contains.

Practical impact: All host employers have some exposure to liability for safety violations committed by the contractors they hire (and the subcontractors they hire), even if the contractor is a 'prime contractor.' As OHS coordinator, it falls to you to ensure that these obligations are met and these liability risks are managed. Here's how to accomplish both goals.

Due Diligence & Contracting

While it's technically a legal defence, 'due diligence' can also be used as a standard for OHS compliance. What the standard demands isn't perfection but reasonableness. Mistakes can happen and violations can occur. If you're ever prosecuted for those violations, your liability will be based on whether you took all reasonable steps under the circumstances to ensure compliance and prevent the violations.

Due diligence applies to employers when they use their own workers to conduct operations at their sites; and it applies to employers when they hire contractors to perform those operations. However, while the concept remains the same, 'reasonable steps' to ensure due diligence are different when the employer

is contracting out work. There are essentially 3 sets of measures a host employer can take to ensure due diligence in contracting.

Phase 1: Pre-Qualification Audit of Contractors

The first thing host employers must do is select a contractor who's likely to do the job safely and in accordance with OHS requirements. Contractor selection should be made on the basis of safety, not just price. One way to build safety into the contracting process is to conduct a pre-qualification H&S audit of contractors. Don't let contractors submit bids until and unless you've completed your audit and are satisfied that they meet all of your health and safety criteria.

What should your audit cover? Unfortunately, neither the OHS regulations nor court cases specify what host employers must know about prospective contractors to judge whether they're likely to comply with the OHS laws. But, according to a Toronto OHS lawyer, there are 'generally accepted' parameters of what an inquiry should focus on, including these aspects of a contractor's organization:

Its safety program: Most provinces and territories require 'employers' to create written safety policies and detailed safety programs to implement them. The first part of your audit should be to review the policies and programs the contractor has created for its own workers and subcontractors. Are all the appropriate policies and programs in place? Are they clearly written? Do they contain all legally required elements, such as regular inspections and incident reporting? Does the contractor post its policies and programs and distribute them to workers and subcontractors?

Its training program: Verify that the contractor provides appropriate safety training to all persons it uses to perform a job, including subcontractor workers. 'Contractors that simply hire experienced workers without providing them training on the specific job and OHS requirements involved should raise a red flag,' the lawyer warns.

Its supervisors: OHS laws require the furnishing of adequate supervision by 'competent' persons. If the contractor intends to use its own people to supervise, find out who its supervisors are and verify that they're 'competent' to oversee the work. Make sure the contractor has enough competent supervisors to conduct the work safely. **Rule of thumb:** The more hazardous the activity, the greater the number of supervisors required.' And if the work is particularly hazardous, supervisors might also have to be present at the site while it's performed.

Its safety record: Do some digging into the contractor's safety record, including:

- The contractor's 'safety numbers,' such as injury and illness rates, incident frequency, severity, etc.;
- Previous convictions or charges under safety laws. If a contractor has been convicted or charged of an OHS offence, find out what happened and how the matter was resolved. You can get this information from the contractor and, depending on the province, from regulatory agencies and/or press releases;
- Convictions and charges against supervisors the contractor plans to have oversee the project; and

- Workers comp rating records.

Its insurance: How much liability coverage does the contractor have? Does it have a clearance certificate or proof of good standing under the workers' compensation authorities of each jurisdiction where it operates?

Caveats on Questionnaires

Some employers require prospective contractors to complete health and safety questionnaires. This helps facilitate the collection and review of the information you need to complete your audit. Just be careful. Relying on questionnaires may not be enough to establish due diligence, especially if your questionnaire is a preprinted, one-size-fits-all form. 'To be meaningful and probative of due diligence, the assessment must be specific to the particular work and OHS regulations involved,' the Toronto lawyer explains. So, at the very least, tailor questionnaires to the circumstances of the job. In addition, don't rely only on the information supplied by a contractor in a questionnaire. To judge a contractor's safety qualifications, you need to do some digging of your own.

Phase 2: Contract Negotiation

The next phase in the strategy is for host employers to leverage their contracting power to impose appropriate safety responsibilities on contractors. A simple contract clause purporting to make the contractor 'solely responsible' for safety is of limited value. However, there are a number of key provisions you can and should add to the contract to manage your liability risk in case the contractor commits a safety violation. Better yet, these provisions can make the contractor less likely to commit a safety violation in the first place. Such protections can include a clause requiring the contractor to:

- Comply with all applicable health and safety requirements:

Model Language: 'Contractor shall perform the work in accordance with all applicable laws and regulations, including but not limited to the Occupational Health and Safety Act and regulations of [province]';

- Implement a safety program:
- **Model Language:** 'Contractor shall implement a comprehensive health and safety program that meets the standards of [province's] Occupational Health and Safety requirements, including but not limited to, written safe work practices, policies and procedures, workplace inspections, the provision of supervision and training to all workers and the investigation and reporting of workplace incidents';
- Immediately notify you if any health and safety incidents occur;
- Send you weekly OHS progress reports in connection with the work; and
- 'Indemnify' or pay you back for any losses you suffer as a result of the contractor's violations.

You should also have the right to terminate the contract if the contractor doesn't meet its safety obligations.

Phase 3: Post-Hiring Monitoring

The third phase of contracting due diligence starts after the contracts are signed and the contracted work actually begins. Even though the contractor will be in control over the work, your own safety obligations as host contractor don't end. You must keep a close eye on the work and monitor whether contractors and subcontractors are complying with the applicable health and safety requirements. At a minimum, you need to make inquiries about:

- **Training:** Is the appropriate instruction, training and orientation being provided to all workers involved in the project'
- **Supervision:** Are supervisors performing their duties and exercising adequate oversight over the work'
- **Workplace orientation:** Have all the workers been familiarized with your workplace and its specific hazards, for example, which hazardous chemicals you store and keep on the site'
- **Conduct of the actual work:** Are jobs being carried out in accordance with safe work practices, the contractor's and your own health and safety policies and OHS requirements' If infractions occur, are they being detected and are the workers involved being disciplined'

You must also be prepared to respond if you detect safety violations being committed by the contractor, subcontractor or any supervisors or workers. Although you should refrain from interfering with the work, you need to notify the contractor about your concerns. If the problem isn't resolved, you should be prepared to exert pressure on the contractor up to and including possible termination of the contract.

Compliance Pointer: Keep a written record of all your monitoring efforts and responses to perceived problems. You may need these records in a lawsuit against the contractor and/or to establish that you showed due diligence in case a safety violation occurs and you get charged with an OHS offence.

Takeaway

The bottom line is that hiring 'prime contractors,' 'constructors' or whatever they're called under your province's OHS laws doesn't eliminate your risk of being found liable for a safety violation. Although the extent of your obligation will differ depending on the province and kind of work involved, you retain some level responsibility for safety even if the contractor is running the project.

To manage the risk, you must take reasonable steps to prevent the violation at all phases of the contracting process'from bidding to job completion. Following the general blueprint set out in this article should help you do what's necessary. In addition to preventing contractor safety violations, these steps should help you establish a due diligence defence so that you can avoid being held liable for any violations that may occur.