

FIVE SITUATIONS WHEN PRACTITIONERS SHOULD SEEK EARLY LEGAL ADVICE

By José Vera, P.Eng., MEPP

Consider this scenario: A contractor, CON, wins a municipal contract to upgrade a water-pumping station and build a nearby combined sewer-overflow tank. The municipality, MUN, does not instruct its geotechnical engineering firm, GEO, to investigate the bedrock or groundwater at the site. Shortly after commencing the project, CON discovers an excessive amount of hydrogen sulfide gas emanating from the excavation. The hydrogen sulfide poses a threat to worker safety and can damage equipment. The existence of this gas was not disclosed in GEO's report, in the tender or in any contract document. CON submits various proposals to deal with the gas. To make matters worse, a dewatering subcontractor hired by CON informs them of a black sludge that was not identified in GEO's report. Subsequently, the Ministry of the Environment orders the dewatering shutdown. Consequently, CON sends a Request for Information to the engineering team of MUN seeking direction with respect to these unforeseen conditions. Nonetheless, MUN takes the position that the changed conditions resulted from CON's construction practices. Meanwhile, CON notes that extra work is required at this point and requests the terms of the contract be amended. Instead, MUN claims CON is in default of its contractual obligations and shortly after terminates the contract. A lawsuit ensues, and the judge determines that CON was not in breach of contractual obligations, and furthermore the termination was unlawful. Consequently, MUN is ordered to pay over \$2 million in damages and legal costs to CON.

If this case study sounds familiar, it's because it's inspired by *Kingdom Construction Limited v. Regional Municipality of Niagara, 2018 ONSC 29* (www.canlii.org/en/on/onsc/doc/2018/2018onsc29/2018onsc29.html), a case that teaches us that unlawful termination of a contract can be surprisingly expensive. Seeking legal advice early may help practitioners mitigate—or better yet—avert similar situations. Below are five common situations that require early involvement of their organization's legal counsel due to the legal risks involved.

1. A CLIENT WANTS TO TERMINATE THE CONTRACT FOR A PROJECT

PEO's practice advisory team often receives queries from practitioners regarding their professional obligations when a client wants to terminate a contract for a project. Surprisingly, PEO practice guidelines are silent in this matter because if termination of a contract is unlawful, serious consequences could result. Consequently, if a client notifies a practitioner of their intent to terminate a contract, the practitioner should immediately consult with its organization's legal counsel to ensure contractual obligations are properly observed. But perhaps ideally, the practitioner and legal counsel should discuss any possible steps to keep the client to avoid the complications of a terminated contract.

If, after terminating the contract, the client wants to transfer a project to another practitioner—in this case, another engineering firm—both the original practitioner and the new practitioner should seek advice early from their respective legal counsel to both adequately address intellectual property issues and clearly delineate the different responsibilities of both practitioners.

2. THE PRACTITIONER CONSIDERS HAVING THEIR FIRM WALK AWAY FROM A PROJECT

Often, the practice advisory team receives calls from frustrated practitioners who are considering having their engineering firm walk away from a project. In other words, they want to fire a client due to:

- Perceived unrealistic demands from a client;
- Contractual disputes; and/or
- Non-payment or late payment.

Once again, PEO practice guidelines are unfortunately silent in this matter. Therefore, the practitioner must use professional judgment when proceeding. However, considering that terminating a contract can have serious consequences, practitioners should think twice and consult their firm's legal counsel to review all available options. For example, if non-payment is an issue, it may make better business sense for an engineering firm to finish a project and then seek payment, for walking away could be subject to legal action for unlawful breach of contract.

3. ASSUMING A PROJECT STARTED BY ANOTHER PRACTITIONER IN ANOTHER ENGINEERING FIRM

The PEO guideline *Professional Engineering Practice* (www.peo.on.ca/index.php/ci_id/22127/la_id/1.htm) notes the *Professional Engineers Act* imposes no special obligations exclusively for practitioners taking on projects that were started by a practitioner whose contract had been terminated. However, as previously noted, both the original practitioner and the new practitioner should seek early legal advice to both address copyright issues and agree on a clear delineation of responsibilities with the client before the project is transferred to the new practitioner's engineering firm.

4. SHOULD A PRACTITIONER TAKE ON A PROJECT STARTED BY ANOTHER ENGINEERING FIRM IN THE FIRST PLACE?

Taking on a project that was started by another engineering firm is not a simple task, especially if there is no clear agreement on what parts of the design or engineering work belong to whom and who will be responsible for what. Adding to the complications, PEO practice guidelines are silent on how to effectively transfer an engineering project from one practitioner to another. Consequently,

taking on another engineering firm's project is a clear-cut situation where practitioners should reasonably rely on their legal counsel for advice. If the engineering, business and legal risks are significant, practitioners should consult with their legal counsel to determine whether it is best to refrain from taking on such a project.

5. OBTAINING A LEGAL REVIEW BEFORE ACCEPTING AGREEMENTS

The above-mentioned scenario demonstrates the potentially high costs of a contractual dispute in an engineering project. Therefore, your first step should be to review your agreement with legal counsel to both help identify contractual risks in a project and find ways to mitigate and limit liability. For example, agreements can include provisions to resolve disputes via arbitration or mediation as alternatives to the court system. Once civil liti-

gation has begun, it may be too late to find an amicable negotiated solution. Consequently, the best time to retain legal counsel is before accepting an agreement.

Finally, PEO as a regulator cannot offer legal advice. Nevertheless, the practice advisory team often receives calls from practitioners who need legal advice. Our standard response is for practitioners to contact their organization's legal counsel. However, since some organizations may not have a full-time legal counsel, practitioners should contact the Law Society Referral Service (www.lsuc.on.ca/lrs) to obtain professional legal assistance. **e**

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