

OGCA, CDAO ask legislators for COVID contract relief

Don Wall August 11, 2020



Ontario’s contractors are about to face a severe cash crunch caused by a confluence of COVID-19-related factors, provincial legislators serving on a standing committee were told recently, with one stakeholder pleading, “This is the start of a financial crisis that requires the government’s immediate response.”

Giovanni Cautillo, president of the Ontario General Contractors Association (OGCA), Sandro Perruzza, chair of the board of the Construction and Design Alliance of Ontario (CDAO), and **Andy Manahan, vice-chair of the CDAO and executive director of the Residential and Civil Construction Alliance of Ontario**, alternately outlined a case for government assistance and intervention in the interpretation of force majeure clauses in contracts.

They discussed providing relief from creditors and streamlining the project approvals process during two sets of addresses to the legislature’s Standing Committee on Finance and Economic Affairs on Aug. 4.

Both the OGCA and the CDAO are asking the government to commit to stimulus infrastructure spending.

The CDAO submission urged the government to develop a comprehensive project investment pipeline document, similar to the Infrastructure Ontario P3 Market Forecast.

Cautillo told committee members, “When the economy is suffering, the government turns to our construction industry to be the engine that drives the growth that will keep our economy thriving. And shovel-ready infrastructure projects, whether they be large or small, are critical to the success of our industry and our province.”

“We want the floodgates to open,” he added in an interview.

Using the term “crisis” several times, Cautillo told the MPPs that a survey of contractors done by the Ontario Construction Secretariat (OCS) revealed the cost of new safety initiatives was shown to have increased project costs by 13 per cent. But standard force majeure clauses in construction contracts do not anticipate pandemic-related delays or shutdown of the industry. So unless the owner agrees to contribute to the additional costs, he said, the contractor is legally liable for all costs and delay penalties.

“We are not asking the government to have the owner pay for everything,” Cautillo explained in the interview. “Everyone has to be reasonable in the circumstances. We have come across some owners who are somewhat inflexible.

“We can either have one clause to deal with COVID and pandemics, or we can have all force majeure clauses include the pandemic. Either way, it has to include the pandemic. Because if we do have a second wave, we want to make sure the industry is insulated from it.”

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— **Sandro Perruzza**

Construction and Design Alliance of Ontario

Cautillo told the legislators the crisis will be compounded over the next few months by a cash-flow shortage caused by a six-week gap in billings.

“The timing literally cannot get any worse as contractors are presenting their second quarter statements to their banks and bonding companies,” he said.

Referring to Bird Construction’s recent rescue of Stuart Olson, Cautillo said, “We are fortunate that bankruptcy was avoided, but industry experts are convinced that without intervention, many companies will soon fail.”

He explained later the OGCA is asking the banks and the bonding companies “to be a little more flexible at this time” and avoid calling in loans and bonds “and bankrupting companies because that would be detrimental to the recovery.”

The CDAO submission offered a different path to relief on contracts, recommending that “a legislated provision for accommodation (both time and compensation) should be inserted into all construction and professional services contracts where the effects of COVID-19 might result in failure to perform or delay, including workforce and supply chain considerations.”

Perruzza explained in an interview, “With all public tender projects, if there is a second wave and third, there needs to be things in the contract language to indemnify not only the contractors but the subcontractors and the design professionals to account for things outside of our control.

“Let’s find a way to resolve that without having to go to litigation or have penalties.”

During his presentation Manahan urged the government to ensure that infrastructure stimulus funding is allocated to capital projects based on evidence-based, business-case approaches, supported by asset management plans for municipal projects.

The CDAO also recommended the province use its COVID-19 response to achieve climate stability and build the province’s capacity to build sustainably.

Perruzza linked that point to the announcement the same day of the federal government’s \$3.3-billion COVID-19 Resilience funding stream, intended, said federal Minister of Infrastructure Catherine McKenna, to develop sustainable, economically healthy, low-carbon and inclusive communities.

“We are really encouraged by federal infrastructure minister,” Perruzza said. “Projects should not only be shovel-ready but they should be shovel-worthy. The whole idea of the stimulus package is to stimulate the economy but also bring something back to the communities. The CDAO has always been a proponent of shovel-worthiness so we are always encouraged to see there is that recognition.”