Downing Tools: Powerful but Risky

BY NORM STREU AND CHRIS HIRST

When a contractor is unpaid under a construction contract, the most satisfying response can be to down tools. From the contractor's perspective, stopping work has a simple and indisputable logic — "no payment, no work."

In addition to its underlying logic, downing tools can be effective. First, it exercises the most powerful leverage the contractor possesses. Without the contractor's continued work, the project cannot move forward. Nothing puts more pressure on the project to respond to a non-payment issue than the cessation of work. Second, it avoids exacerbating the non-payment issue. If the contractor is unpaid for work already completed, why would it risk completing more work for which it may not be paid.

In many circumstances, stopping work for non-payment can be contractually justified. Depending on the language of the contract, non-payment that goes to the root of the payment obligations may entitle the contractor to stop work.

However, contractors need to be aware that a stop-work strategy is not without real risk. The contractor can be on the hook for significant damages if it is later determined that relevant contractual provisions were not adhered to, payment was not actually owed, or the non-payment did not go to the root of the contract.

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A case in point is the recent decision in Campus Construction Inc. v. Torbear Contracting Inc., 2023 ONSC 6782.

Torbear Contracting Inc. was hired as the prime contractor for the construction of a pumping station in Vaughan, Ontario. Torbear entered into a sub-contract with Campus Construction Inc. where Campus was to provide the material and labour necessary for the installation of high-pressure concrete watermains and sewers.

The dispute arose when Campus claimed they had not been paid for recent progress invoices and had not received confirmation that they would be paid for extra work done. In response, Torbear claimed that Campus had not completed the work in accordance with the schedule set out in the contract.

Campus refused to continue to do work under the contract until it had been paid. In response, Torbear issued a notice declaring that Campus was in default and subsequently terminated the contract.

At trial, the court examined Campus's requests for additional payment and found that Campus had not complied with the contractual terms when Campus issued a demand for additional payment. Payment terms that Campus failed to comply with included invoices that had not been submitted within a specific time period and the failure to establish that Torbear had been paid by the owner for the work in question. Ultimately, the court determined that Campus failed to prove they were owed any money when they issued the demand for payment and eventually stopped work.

In reaching its decision, the Court stated:

[...] in a fixed price contract, a party that refuses to complete the contract for non-payment of invoices does so at its own peril. In situations where the work performed pursuant to the contract has not been completed for alleged non-payment of work, the contractor or subcontractor must be certain that the payment is due and owing pursuant to the payment terms of the contract and that non-payment goes to the root of the contract to support the decision to not continue with the work. For if that certainty is not present, the contractor or subcontractor puts itself at peril to be liable for breach of the contract in not performing the work as mandated by the contract and be responsible for any damages flowing from the breach to perform the work mandated.

The court found that Campus's claim for non-payment was not supported by the evidence. As a result, Campus failed to prove that its inability to complete the contract was due to reasons beyond its control. Therefore, the court determined that Campus's failure to complete the work was a breach of contract, and that Campus abandoned the contract when it stopped work.

The decision provides a clear and sharp warning of the risks of a stop-work strategy. A contractor who stops work can be liable for breach of contract for failing to perform as required. They may also be responsible for damages resulting from this breach, such as the cost of hiring a replacement contractor, and all of the costs associated with project delays.

In summary, stopping work due to non-payment can be an effective and powerful strategy. However, it is not a strategy without significant risks. A contractor should tread carefully before employing this strategy and should first fully investigate its position, consider consulting a lawyer, and ensure that it understands all the risks involved in downing tools. CB

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