CONSTRUCTION CONTRACTS
AND DISPUTE RESOLUTION
A PRACTICAL APPROACH

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Every project is unique

Know your project

- Site conditions, scope and complexity of work, design/construction team, $ value, goals, resources, time, sustainability, special risks
- Don’t skip this step
PROJECT DELIVERY METHOD

- Design-Bid-Build
- Construction Management
- Design-Build
- Integrated Project Delivery/Lean
PRICING METHOD

- Fixed price
- Cost plus
- Cost plus subject to a Guaranteed Maximum Price
- Definition of Cost of Work
- Contractor’s contingency
ROLE OF A/E

- Site conditions
- Design
- Procurement
- Scope of services
- Dispute/claims resolution
- Contract/Construction Administration
THE A/E CONTRACT

- Cost
- Ownership and use of documents
- Timing of services
- Charges
- Termination for cause/convenience
- Insurance
CONTRACT/CONSTRUCTION ADMINISTRATION

- Rejection of defective or nonconforming work
- Review of submittals
- Review of Payment Applications
- Determination of Substantial Completion
- Punch list/close-out
- Claim assessment and resolution
RFQ, RFP, and ITB

Consistent, clear, accurate, complete

What to include (options):

- Summary of key contract terms
- Contract and General Conditions
- Bidding process and rules
- Bidding forms
WHAT HAPPENS IF CONTRACT ADDED AFTER AWARD

- Contractor will often submit its own form contract
- Negotiations
- Owner has reduced leverage
- Delays
WHAT LAWS APPLY

- **Procurement** (MCL 18.1241, 124.417, 247.661c)
- **Covenants against Discrimination** (MCL 37.1209; 37.2209)
- **Differing site conditions** (MCL 125.1592)
- **Progress Payments** (MCL 125.1562)
- **Retainage** (MCL 125.1563)
WHAT LAWS APPLY CONTINUED

- Performance and Payment Bonds (MCL 129.201)
- Indemnification (MCL 691.991(2)
- Iran Economic Sanctions Act (MCL 129.311 et. al)
- Construction Contracts (MCL 125.1569)
SELECTING AND CUSTOMIZING THE CONTRACT

- One size does not fit all
  - Unique aspects of project
  - Purchase Orders/Work Orders
  - Master Services Contract

- Standard forms v. manuscript forms
  - How current
  - Avoid previously negotiated and other terms
SELECTING AND CUSTOMIZING THE CONTRACT

- General Conditions
- Exhibits to contract
  - Contractor’s Proposal
  - Plans, Specifications, Schedule
  - Bond forms
  - Owner’s Rules and Regulations
- Consistent, accurate, complete, relevant
KEY CONTRACT CLAUSES

- Due diligence - Contract Docs and Site
- No surprises – notice clauses
  - Written notice to Owner
  - Stopping work
  - Owner investigation
  - Condition precedent to claim
PROGRESS PAYMENTS - CONDITIONS

- Progress, Quality; Conforming work
- Using the lien laws to avoid payment and bond issues
- Application for Payment and any other documents required by Contract Documents
- Timing of payment – billing and payment cycle
- Withholding payment - when
KEY CONTRACT CLAUSES

- **Liquidated Damages**
  - Damages are difficult or uncertain/speculative
  - Reasonable relation to possible injury
  - No penalty; not unreasonable or excessive
  - Retain notes re calculation
  - Plan B clause – retention of damage claim if void

- **Force Majeure; No damage for delay**
KEY CONTRACT CLAUSES

- Correction period, warranties, and latent defects
  - Compliance with manufacturer specifications
  - Correction period v. warranty period
  - Manufacturers, suppliers, and subcontractors
  - Exclusion of latent defects
INSURANCE

- CGL, WC, Auto, Excess/Umbrella, Professional Liability, Pollution Control, Builder’s Risk
- Additional Insureds
- Primary and noncontributing
- Waiver of Subrogation
- Notice of expiration or cancelation
- A.M Best Rating and FSC
KEY CONTRACT CLAUSES

- Ownership of documents
  - Retaining perpetual irrevocable nonexclusive license to use or modify
  - Payment as condition of license
TERMINATION FOR CONVENIENCE

- Termination for convenience
  - Often avoids battle over default
  - Specification of damages
    - Overhead and profit
    - Uncompleted work
CONSTRUCTION PROJECT CLOSE-OUT

- Substantial Completion
  - Owner or A/E determines
  - What constitutes Substantial Completion

- Punch list
  - Contractor develops first
  - Owner and A/E may add to list
  - Owner acceptance
FINAL PAYMENT - CONDITIONS

- All work properly completed
- All permits obtained
- As-built drawings
- Warranties
- Operating Manuals
- No liens or claims
ADDRESSING DISPUTES

- Management of issues
  - Early action by Owner
  - Communications and notices
- Claims and deadlines
- Initial Decision-Maker
- Negotiation
ADDRESSING DISPUTES

- Mediation
- Arbitration or litigation
- Attorney’s Fee clauses
- Limitation of Damages
  - Waiver of consequential damages
QUESTIONS?

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