Mitigating the Legal Woes From City Construction Projects

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Construction Agreements in General

- Construction related agreements
  - Environmental (Phase I)
  - Geotechnical
  - Surveys
  - Architecture
  - Engineering
  - Construction
Primary Functions of All Agreements

- Setting out rights and obligations of parties
- Identifying and allocating risks
Industry Forms

THE AMERICAN INSTITUTE OF ARCHITECTS

ConsensusDOCS

EJCDC
ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

BASS BERRY & SIMS PLC
Use of Industry Forms

✧ A good start, but one size does not fit all
✧ Form contracts can and should be modified to fit needs of project and parties
✧ Come up with your own forms as starting point for use on all projects
✧ Try to be consistent across contracts
The “Big 3”

- Price
- Time
- Scope
Pricing Considerations

♩ What is the price?

♩ What is the pricing arrangement?
  ♦ Lump sum, cost plus (GMP), unit price, etc.

♩ What are the terms of payment?
  ♦ When, how much, conditions to payment, etc.
Timing Considerations

❖ When does the project begin and end?
❖ Accurately define “completion” (substantial and final)
   ► What does it include?
   ◼ What does it trigger?
❖ Other milestones
Substantial Completion

EJCDC C-700
Standard General Conditions of the Construction Contract

Substantial Completion—The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of Engineer, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms “substantially complete” and “substantially completed” as applied to all or part of the Work refer to Substantial Completion thereof.

Definition not adequate for every project
Timing Considerations

𫘧 Liquidated damages
  ► Used when damages are difficult to determine in advance
  ► But must be a reasonable estimate of actual damages (at time of contracting)
  ► Not a “penalty”

缏 Early completion bonus
Scope Considerations

- Completely and accurately define the scope of work
  - Define and include “Contract Documents”
- Expressly exclude other documents
  - Bids, proposals, etc.
- Anticipate and address potential conflicts and discrepancies between Contract Documents
Sample “Precedence Clause”

DISCREPANCIES AND CONFLICTS

In the event of a discrepancy or conflict within or between the Drawings, Specifications, or any of the Contract Documents, the Agreement takes precedence over all other Contract Documents. Unless otherwise specifically stated in the Specifications and Drawings, the Specifications and Drawings are of equal authority and priority; figures shall govern over scaled measurements; large scale drawings shall govern over small scale drawings; descriptive writings shall govern over legends indicating material or conditions; and the provision or interpretation that results in the greater quantity and quality of work or materials shall prevail.

► Goal is to minimize costs by eliminating change orders and disputes
Provisions Related to Quality

- Warranties and duty to correct
  - Many form contracts treat separately
  - Material and equipment warranties
- Compliance with Contract Documents
- Compliance with applicable laws, codes, industry standards, etc.
- Standard of care in design agreements
Insurance and Bonds

- Scope and limits of insurance should be appropriate for the project and stated
  - Require at least a copy of certificate of insurance
  - Require copies of applicable endorsements
    - Especially additional insured endorsement

- Bonds are contracts; forms can be modified
  - Require a bond that works for you
  - Make consistent with construction contract
Indemnification

- Protection against third-party claims
- Should provide for *both* defense and indemnity
- Tennessee law
  - Indemnity against own negligence enforced, but must be clear and unequivocal
  - Indemnity against own *sole* negligence void and unenforceable (TCA § 62-6-123)
Indemnification

Kentucky law

- Indemnity against own negligence void and unenforceable (KRS § 371.180)
- No cases interpreting statute

Indemnity by city/county

- Can you agree to indemnify others?
Dispute Resolution Provisions

- Consider “progressive” dispute resolution
  - Lower → higher management level negotiations
- Mediation
- Arbitration vs. litigation
  - Consider “home court”
  - Can you agree to ADR?
  - Consistency across all agreements is key
Retainage (Tennessee)

- Prompt Pay Act (TCA §§ 66-34-101, et seq.) limits retainage on all construction contracts to 5% of contract amount
  - Applies to public and private contracts
  - Can “front end load” (e.g. 10% retainage until 50% of contract amount paid)
Retainage (Tennessee)

- Must be deposited into a separate, interest bearing account with a third party
  - Applies to all projects where “prime contract” exceeds $500,000 (*including public projects*)
  - Cannot be waived by agreement of parties
  - Failure to comply is Class A misdemeanor subject to $3,000/day fine
  - Also, civil damages of $300/day to “owner” of funds
Retainage (Kentucky)

- Kentucky Fairness in Construction Act (KRS §§ 371.400, et seq.) limits retainage on all construction contracts to 10% until 50% of project completed.

- Thereafter, “retainage held … shall not be more than five percent (5%) of the total contract amount.”

  - What does “completed” mean?
  - Fifteen percent? Or must retainage stop after 50% of project completed?
Retainage (Kentucky)

- Retainage escrow requirement on all contracts of $500,000 or more
  - Does not apply to any
    - County
    - Charter county
    - Urban-county government
    - Municipality
    - School boards
    - Any other political subdivision, agency, or instrumentality of the Commonwealth
Things to Watch Out For

Limitations of liability

► Often limited to fee
► If must include, key limit to liability insurance

Waivers of consequential damages (CDs)

► Usually result from delay (lost revenue, outside purchase, “indirect” damages)
► Carefully consider potential delay damages
► LDs or a “cap” on CDs are alternatives
Things to Watch Out For

- Licensing issues
- During construction
  - Change order provisions
  - Claim procedures
  - Notice provisions
    - Failure to follow and enforce can result in waiver of claims
Questions / Comments

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