

LEGAL PERSPECTIVE

PREPARING FOR YOUR 2023 CONSTRUCTION PROJECT PIPELINE: STREAMLINE YOUR CONTRACT MANAGEMENT

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With spring upon us, the construction industry is buzzing. As your company looks at upcoming construction projects in the pipeline, now is a great time to consider optimizing processes for efficient and effective contract management. With some planning, organization and collaboration with your project team, the process for reviewing, drafting, and negotiating contracts can be a critical component to project risk control. In this article, McNees highlights a few best practices and key considerations to help make your contracts process smoother for 2023.

Determining Who Drafts the Contract

The first consideration is which party will draft the baseline contract – a design professional (architect or engineer), general contractor or the business owner? Although there will be negotiation of certain terms in the contract, your time is best spent negotiating from a starting point that was drafted with your company's interests in mind. When beginning negotiations from a contract supplied by an opposing party, the proposed terms may be far from what is agreeable to you and may also place more liability on your organization. Producing the initial form of the proposed agreement will put your business in a more advantageous position in the vast majority of scenarios.

Whether you are initiating the contract or responding, you must determine whether the requisite expertise exists within your own company to handle what are typically rather lengthy and complicated contracts. If not, it is essential to consult with outside counsel who has expertise in commercial construction contracts to obtain a draft of a suitable contract quickly and efficiently.

One Size Does Not fit All

In the world of commercial construction contracts, there is a vast array of different types of contracts intended to address different project scenarios. For instance, a contract that is appropriate for the new construction of a \$100 million urban high-rise is not appropriate for a small conference room renovation at a company's headquarters. With that in mind, some considerations when selecting the appropriate construction contract format include:

- What is the status of the project design? Will the project be bid on full construction documents or incomplete drawings requiring multiple amendments upon completion of drawings?
- What will the project's delivery method be – traditional design-bid-build, design-build, or integrated project delivery?

- Will the design professional be hired by the owner (typical of the traditional delivery method) or by the contractor (common for the design-build delivery method)?
- What is the method by which the contractor or design professional will be compensated – fixed-fee, cost plus fee, cost plus fee with a guaranteed maximum price, time, and materials, etc.?
- Is the project subject to public procurement requirements – competitive bidding, multi-prime requirements, prevailing wage or bonding?
- Are there sustainable (aka "green building") aspirations for this project, such as LEED accreditation?
- Are all the project contracts (site civil, architectural and construction) coordinated?

Additional special consideration should be given to the following:

- Global dispute resolution to allow for all project participants in a single dispute resolution proceeding
- Mutual Indemnities from owner, contractor, and design professional
- Waiver of consequential damages
- Compliance with mechanic's lien laws
- Damages for delay – liquidated damages
- Force Majeure
- Supply chain delays and material price escalation

This list is by no means comprehensive. Your legal counsel can help you work through relevant project-specific considerations when selecting an appropriate construction contract to suit the needs of your company.

Form Contracts vs. Drafting from Scratch

The next consideration is whether a custom contract is required or whether a template-based contract is suitable. Perhaps the most common template-based construction contracts are promulgated by the American Institute of Architects (known as AIA Contracts). There are other template-based contracts that are also frequently seen in the market, including those from the Engineer's Joint Contract Documents Committee (EJCDC), ConsensusDocs and others.

Note that the term "form contract" or "template-based contract" is overly general because the "form" or "template" is merely a framework. Representatives of both parties almost always modify the provisions therein, sometimes heavily,

before the contract is executed. Very often, the resulting contract differs significantly from the default language in the “form” which provides starting point language.

The decision to utilize a template-based construction contract versus a custom one is typically a function of the controlling party's preference. Recently, there has been an emerging trend where more owners prefer to forgo “form” contracts in favor of customized construction contracts. Your legal counsel can help you decide which option is best for your company or project.

Maintaining Your Contracts

Periodically reviewing and revising construction contracts is always a sound business practice and an effective risk-management technique. Doing so has three major benefits:

1. Permitting the evolution of construction industry practices, which are often shaped by recent case law developments or socio-political impacts.
2. Reflecting the preferences and risk tolerances of your business, which evolve over time.
3. Updating for compliance with changes in applicable law.

The issuers of template-based construction contracts overhaul their documents incrementally, sometimes as infrequently as once every 10 years. From a legal standpoint, this is inadequate and it is recommended that companies review their contracts at least every other year.

Three Tips for Efficient Contract Administration

Selecting an appropriate contract is just one element of your role in navigating the construction contract process. Because of time and budgetary constraints, it is crucial to find the right balance between protecting your company and efficiently managing contract review and issuance. Best practices include the following:

1. Create templates. It is rarely advisable to start a new construction project contract from the stock language in a completely unedited industry template. Instead, determine base- and project-specific contract terms required to properly address the apportionment of risk for the project, and create a template containing those terms. This should be the starting point from which your project team begins to formalize the contract for a new construction project.

Maintain a library of contract templates for the various types of construction projects your company typically undertakes. Consider categorizing your projects into small and large designations and establish the parameters of scope or dollar value appropriate for each. By categorizing your projects and maintaining preapproved contract templates within each category, you can greatly optimize the time required to negotiate and issue a contract.

2. Develop repeatable work. Very often, an organization will have similar types of construction needs on a recurring basis. For these types of projects, consider entering a master agreement with a few preferred contractors and design

professionals. The master agreement is a delivery system in which the owner and the contractor or design professional negotiate virtually all the boilerplate-type provisions at one time and the parties agree that those terms will be effective for a prescribed term.

Upon execution of the master agreement, a contract is not formed until the subsequent execution of a work order, which typically contains the bare essential terms of the project. These include, among other things, the specific work to be done, the name of the design professional, the cost, the time for completion and an enumeration of the contract documents. All other contract terms are contained in the master agreement. This format allows the company to contract for new projects quickly and efficiently without having to duplicate performance.

3. Educate your team. Help your team understand the primary risk and pain points that are essential to your company's assessment of construction contracting and successful project management and completion. The terms included in your company's standard agreement, or which are negotiated for an individual project, will only work to your company's advantage if your team understands how to build within those terms. Comprehensive project risk training for your team is critical on issues related to project delivery systems, project documentation, mechanics' lien liability, insurance requirements, supply chain and other issues that are important to your company's risk profile. Without training your team in a focused and consistent manner, the terms that you worked so hard to develop will be underutilized in connection with the execution of the work of the project.

Partner with Legal Counsel

An experienced construction law attorney, whether in-house or outside counsel, can help you plan, manage your contracts, and train your team. With some front-end work, the selection and issuance of suitable construction contracts does not need to be a daunting task. The most important thing to remember is that one size does not fit all and the key to success is pairing the contract terms with the unique aspects of the project. **EG**

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