Breaking Ground

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Legal Fundamentals in a Growing Economy

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As the economic recovery continues its deliberate pace, the prospect of new work for many contractors is a welcome site on the horizon. However, the excitement and enthusiasm for getting new work cannot be a reason to wholeheartedly accept the contract terms of your customer or vendor. While discussing contract terms can be unpopular and seen by some as a lack of appreciation for the opportunity of new revenue, getting the work simply cannot be a reason to ignore some basic fundamentals when reviewing the proposed contracts.

The goal in reviewing contract terms is to protect your company without losing the work. For the most part, a party to a construction contract wants a level playing field where each party accepts responsibility for its own actions. Of course, there are exceptions to every rule. In those instances where your customer or vendor wants you to accept risks well beyond your control, wouldn't you rather know that before you accept the job?

You are reading this article with the expectation that I will recommend that you call your attorney and have the proposed contract reviewed in detail. You are correct, to a point. In many instances, review by an attorney is the best option. However, depending on your experience and circumstances, that may not be the best, first step. Even if you refer the contract review to a lawyer, you can save time and money by reviewing the proposed terms on your own, first.

For prime contractors on competitively bid public projects, other than change orders, the terms of the contracts are typically non-negotiable. Conversely, subcontracts and supplier agreements, prime contracts on private projects and some publicly funded projects are subject to negotiation.

Set forth below is an outline of issues of which you should be aware when reviewing any contract. Certainly, the list is not exhaustive and the comments contained in this article, while not legal advice, can serve as a guide to assist you in getting to reasonable contract terms.

Read the Contract. While this may seem like a basic first step, we are all aware of circumstances when the contract itself is not fully read until after a dispute arises. If you do not understand a provision, ignoring it will not make it better. A good contract is one that everybody can understand.

Contract Documents. Make sure you understand what comprises the contract documents. If the list of contract documents is unclear, your scope of work is unclear. This is the number one cause of contract disputes.

Attorney's Fees. While lawyers may disagree as to whether you want an attorney's fees provision in your contract, the

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safest route is often to strike any language that includes the two words "attorney's fees." In most construction projects you can control your own costs and both parties generally understand the cost of doing certain types of work. However, when you agree to pay someone else's attorneys' fees, even if they agree to pay yours if you are not in default of the contract, is a cost that is beyond your control. Moreover, attorneys' fees and costs can vary widely. Agreeing to pay the other party's attorneys' fees can become a significant risk. If you must accept the risk of paying the other party's attorneys' fees, try to get them to pay yours under the same or similar circumstances. In general, if the rules are the same for both sides the parties typically agree that either including or waiving attorneys' fees, both ways, is fair and acceptable.

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Indemnity. Indemnity provisions in subcontracts and some prime contracts can be extremely burdensome. While striking them in their entirety can be a deal breaker, limiting your indemnity responsibility to only those conditions that you "solely" cause, or at most, partially cause with your responsibility being equal to the amount of damage that you "cause" allows you to control your own destiny. Any indemnity clause that requires you to indemnify another party under practically all circumstances can result in a significant expense and a surprise to the overall profitability and cash flow for the Project. Moreover, while some indemnity paragraphs limit your indemnification responsibilities to personal injury and property damage, the risk of which can be reduced by the purchase of insurance, other indemnity provisions include financial/economic damages which are typically not insurable. Often, those types of clauses are referenced as justification for withholding progress and/or final payments.

Payment. "Pay-if- Paid" clauses are routine and much more common than "Pay-when-Paid" clauses. If you do not know the difference between the two, you should. Depending on your position on the Project, one may be more preferable. Regardless, attempting to strike either clause in its entirety can end the relationship. However, if at all possible, restricting and describing the application of either clause can be helpful. By way of example, for a subcontractor, it is prudent to limit the application of the pay-if-paid mechanism to those situations where the Owner refuses to pay the prime contractor for your work, only. This can be a significant benefit if the payment on the overall project is delayed by the conduct of another subcontractor or your prime contractor, neither of whom is within your control. The justification for seeking this limitation is based on controlling your own destiny and being held accountable for your own actions

Venue of Dispute Resolution. In general, there are two primary options for the location of your dispute: 1) Arbitration; or 2) Court of Law. The first rule of thumb is that if you are a general contractor, you want the ability to bring an Owner into a dispute with a subcontractor, and vice versa. Fighting the same issue on two different fronts in two separate locations is exceedingly difficult. This is particularly true if some of the blame for the condition at issue rests with a party that is participating in a separate proceeding. While this scenario may be an advantage on some projects, in general it is inefficient and ineffective. Not only do you run the risk of inconsistent results, you will incur more attorneys' fees.

As with most contract negotiations, and particularly those in a tight economy, you do not want any position you take with respect to your contract to keep you from getting the work. The goal of this article and your goal when you need the revenue is to limit your risk and get the project. If you approach each situation with proposals that are fair to both parties with the attitude that you are willing to be held accountable for your actions, you will likely achieve your goals.

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