Achieving Risk Allocation and Sustaining Readiness in Environmental Construction Contracting

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Envision and Plan for Possible Scenarios

- Possible Scenarios
- Preventative Measures
- Incorporate Preventative Measures/Redundancies In Contract
Presentation Overview

- The Contract
- Previously Negotiated Contracts
- Legal Issues Included in Supporting Documents
- Modifications
- Insurance and Indemnity
- Liability Limits
- Bonds or Surety Insurance

- Litigation Avoidance
- Records Retention
- Flow-Down Provisions
- Liens
- Fixed Budgets
- Ownership of Plans/Reports
- Attorneys’ Fees
What’s a contract?

- Meeting of the minds
- Defines the scope of the work
- Allocates the risks
Starting Point

- Start from strongest position appropriate for deal

- Avoid using previously negotiated contracts as starting point
Avoid conflicting language or ambiguities by

- Stating legal obligations in the contract
- Reviewing documents attached to the contract and transferring obligations into contract
- Developing a hierarchy for the contract documents to be followed in resolving conflicts between documents
Modifications to the Contract

- No handshake deals
- Require written Change Orders
Insurance and Indemnity

- Determine and cover the risks posed by the project
  - Provide detailed insurance provisions
  - Include additional insureds
  - Pre-negotiate claims process with carriers
Indemnity

- Appear, defend, indemnify and hold harmless
  - Defense costs may approach or exceed indemnity
- Determine who should indemnify and for what
  - Exclude indemnitees’ sole negligence/willful misconduct
  - Contractor liable for acts/omissions of its subcontractors
  - Should owner indemnify contractor
- Insure indemnity
Consider Owner/Contractor Controlled Insurance Program

- Avoid lapses or fraud
- Maintain “tail coverage”
- Avoid depletion
- Control Claims

- Eliminate claims among carriers
- Purchase expanded lines of coverage
- Lower workers’ compensation costs
Liability limits

- Avoid limiting liability to relatively low amounts
  - Fee
  - Purchase Price
- Pay for quality coverage
  - Project-specific coverage
  - Cover insurable consequential damages
  - THEN, limit liability to insurance
Bonds or Surety Insurance

- Protect against defaults
- Bonds versus surety insurance
  - Bonds are tried and true
  - Surety eliminates some of the need for
    - Indemnity agreements and
    - Extensive underwriting.
  - May provide construction defects coverage
Litigation Avoidance

- Claims resolution strategy
  - Partnership
  - Project neutrals
  - Executive negotiations
  - Mediation
  - Arbitration
- Provide fair and final process
Records Retention

- Include records retention requirements in contract
  - Insurance policies
  - Construction documentation
  - Reports
Flow Down Provisions

- Flow down obligations, risks to lower tier subcontractors, subconsultants and suppliers
  - Insurance
  - Indemnities
  - Warranties
  - Dispute resolution process
Avoid Liens

- Obtain statutory lien releases for each progress payment
  - Suppliers
  - Subcontractors
  - Design professionals

- Added protection through payment bonds and lien releases
Fixed Budgets with Teeth

- Include Fixed Construction Budget in Contract

- Require design professionals to design within Fixed Budget
  - Redesign, at no cost to owner, if bids exceed fixed budget
Ownership of Document

- Address reservation of rights to use documents
  - Owner
    - use of documents for future related expansions, renovations
  - Contractor/Designer
    - reuse standard design, construction features
Attorneys’ Fees

- Carefully consider advantages and disadvantages

- Attorneys’ fees clauses may incentivize claims