



CONSTRUCTION CONTRACTS AND DISPUTE RESOLUTION A PRACTICAL APPROACH

BY: HARVEY W. BERMAN



bodman



APPROACH TO CONTRACTS

- 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



FRONT END DOCUMENTS

- 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?

Harvey W. Berman

Ann Arbor, MI | 734.930.2493

hberman@bodmanlaw.com

bodman





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