

Protecting your company

Drafting a private works construction contract to prevent possible litigation **Interviewed by Meredith McKenzie**

Contracts for public and private works projects vary greatly. Public works projects are built for government agencies and generally require a competitive bidding process, and the project is usually designed long before the contractor first becomes involved. In the private works arena, owners have almost unlimited discretion to select their general contractor and negotiate the terms of the contract, which has benefits but also risks.

“Because private construction contracts are generally left to the discretion of the owner and the contractor, it is critical to ensure that the contract has key terms that will protect you and limit your liability,” says Kevin Dorse, senior attorney with Theodora Oringer Miller & Richman PC.

Smart Business spoke with Dorse about the differences between public and private works contracts, provisions that should be included in contracts, what to do if the provisions are not adhered to, and how a properly drafted contract can protect you during litigation.

How do public and private works differ?

There is greater room to negotiate in private contracting, while there are numerous limitations in public contracting. For public contracts, competitive bidding requires the agency to award the contract to the lowest responsive and responsible bidder. The general contractor is not free to change major subcontractors who were listed in the bid. There may also be requirements in public contracts for paying prevailing wages. There's a long list of statutes and regulations that limit the flexibility in the public contracting arena.

What are some provisions that owners should include in private works contracts?

Every project is different, but there are certain key issues that should be considered when entering into a new contract.

- Include design submittal procedures that require the contractor to provide you with specific submittals. There are going to be certain elements of work designed by the contractor as the project is built. This gives you an opportunity to see and comment on those designs before they're put in place.

- Schedule submittals and milestones. You can require the contractor to give you regular and detailed updates so that you know the project is on schedule. If it's not,



Kevin Dorse
Senior attorney
Theodora Oringer Miller & Richman PC

you can identify problems and fix them.

- Establish change order and claims procedures. There should be clearly defined steps so that any problems, overruns or delays are identified immediately, notice is given, documentation is provided, and the time, delay analysis and cost impact calculations are provided. This allows you to make any necessary adjustments.

- A 'Continuing Duty to Perform the Work' requires the contractor to continue to work, even if there is a claim, dispute or change request. Courts can also enforce this requirement.

- Termination provisions need to be included. One option is a termination for convenience, where you can terminate or suspend the project if your circumstances change. This is happening frequently due to the new economic conditions.

- Include liquidated damage and reverse liquidated damage provisions. Liquidated damages are charged when the contractor is at fault for delaying the project. Reverse liquidated damages are paid when you are at fault for delaying the project, and you would be assessed a specific price for causing the delay.

- Include a provision that addresses the impact of early completion or concurrent delays. This precludes the contractor from asserting a delay claim if the work is com-

pleted by the project deadline. Concurrent delays occur when there are multiple reasons for the delay. If you and the contractor are both at fault, these delays offset each other and the contractor would not have a claim.

- Right to audit the contractor's records, especially in the event of a claim or delay. Most job records for construction projects are created by the contractor, giving you little visibility to project details. Broad audit rights provide a more effective means to monitor performance and control project costs.

- Determine if you will require performance and payment bonds on the job. These bonds give protection by a bonding or surety company that would step in if the contractor defaults on the job. This is optional, and there is a cost to obtain this type of insurance that will be built into the contract price.

- Include contractor warranties. A 'Free of Defects' provision increases the owner's protection and states that the contractor's obligations are absolute. Also include a provision for remedying defective work. This provision gives the owner flexibility to require the correction of defective work at the contractor's expense.

What happens if these provisions are not adhered to during the project?

The terms of the contract not adhered to may be deemed waived and the owner's ability to enforce the contract may be compromised. The owner should communicate with the contractor, in writing, on a regular basis about any problems that have occurred. Good communication avoids and solves most disputes.

How does a properly drafted contract protect you during litigation?

Almost every one of the provisions mentioned above can and should provide protection if litigation arises, especially if you're vigilant during the project and require compliance with the contract along the way. Each of these provisions can limit liability, ensure flow of information to you, be an early warning system to claims, problems, delays or change orders, and limit liability for certain types of damages. <<

KEVIN DORSE is a senior attorney with Theodora Oringer Miller & Richman PC. Reach him at kdorse@tocounsel.com or (714) 549-6180.

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