

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

Best place for legal obligations— The contract

- ➔ 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
- ⇒ Eliminate claims among carriers
- ⇒ Maintain "tail coverage"
- ⇒ Purchase expanded lines of coverage
- ⇒ Avoid depletion
- ⇒ Lower workers' compensation costs
- ⇒ Control Claims

Liability limits

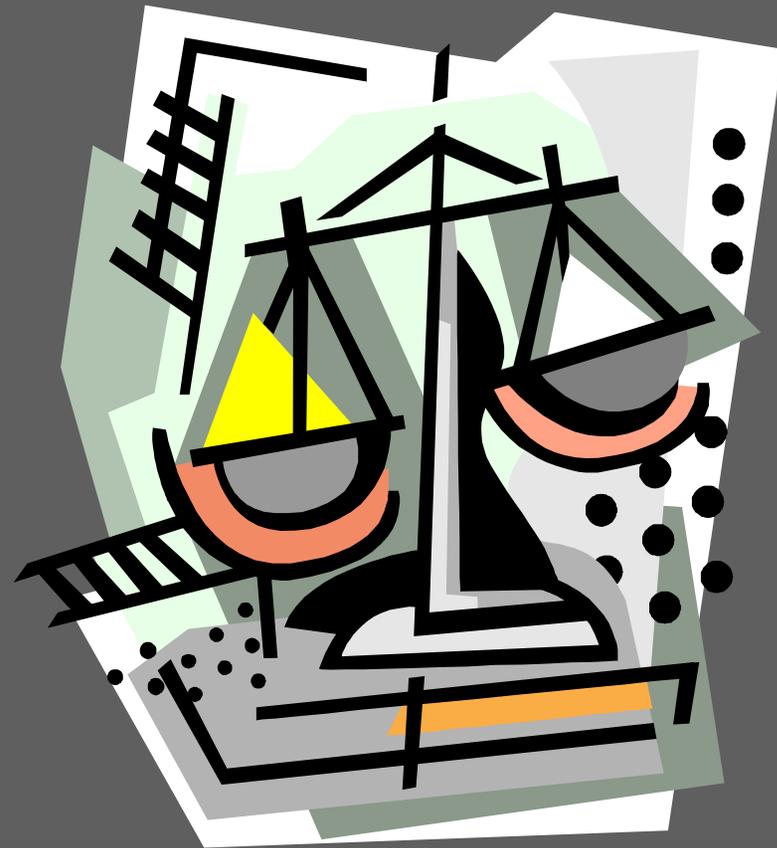
- ⇒ Avoid limiting liability to relatively low amounts
 - Fee
 - Purchase Price
- ⇒ Pay for quality coverage
 - Project-specific coverage
 - Cover insurable consequential damages
 - THEN, limit liability to insurance

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