INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



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Title: TOP TEN CONTRACT CLAUSES-- *The Good, The Bad, and The Ugly*

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TOP TEN CONTRACT CLAUSES--

The Good, The Bad, and The Ugly

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I. INTRODUCTION

Local governments frequently retain design professionals and other consultants in connection with construction and public works projects of all kinds. These projects include above ground facilities, such as roads and streets, buildings like city halls, police and fire stations, and parking lots and landscaped areas. These projects also include a variety of underground facilities and utility type facilities, such as water reservoirs and mains, sanitary sewers, and storm drainage facilities. While many focus their efforts on the importance of the construction contract, another important and interrelated contract is the one used to retain your architect, engineer, or other design professional This paper includes some sample provisions for some of the key provisions to be considered when retaining these consultants. These provisions are designed to be favorable to the owner of a public project and to encourage the drafter to consider a variety of issues as the agreement is negotiated.

II. MODEL CONSULTANT CONTRACT PROVISIONS

A. Scope of Services

Consultant shall, at its sole cost and expense, provide, perform, and complete all of the following services, all of which is herein referred to as the "Services":

1. Labor, Equipment, Materials, and Supplies. Provide, perform, and complete, in the manner described and specified in this Contract, all necessary work, labor, services, transportation, equipment, materials, apparatus, information, data, and other items necessary to accomplish the Project, as defined in Attachment A, in accordance with the Scope of Services attached hereto as Attachment B, the Submittal Requirements attached hereto as Attachment C, and the Special Project Requirements attached hereto as Attachment D.

2. Approvals. Procure and furnish all approvals and authorizations specified in Attachment A.

3. Insurance. Procure and furnish all certificates and policies of insurance specified in this Contract.

4. Quality. Provide, perform, and complete all of the foregoing in a proper and workmanlike manner, consistent with the highest standards of professional practice and in full compliance with, and as required by or pursuant to, this Contract.

B. Pricing and Payment

LUMP SUM CONTRACTS

For use with single phase projects or multiple phase projects with single lump sum cost:

For providing, performing, and completing all Services, the total Contract Price of:

_____ Dollars and _____ Cents
(in writing) (in writing)

_____ Dollars and _____ Cents
(in figures) (in figures)

For use with multiple phase projects with separate lump sum amounts:

For providing, performing, and completing each phase of Services, the following lump sum amount set forth opposite each such phase:

Phase	Lump Sum
Study and Report	$_____
Preliminary Design	$_____
Final Design	$_____
Bidding/Negotiation	$_____
Construction	$_____
Operational	$_____
_____	$_____

COST PLUS FIXED FEE CONTRACT

For use with single phase projects or multiple phase projects with uniform pricing:

For providing, performing, and completing all Services, a fixed fee of $_____ plus an amount equal to Consultant's Direct Labor Costs times a factor of _____% for all Services rendered by principals and employees engaged directly on the Project.

[Notwithstanding the foregoing, the total Contract Price shall not exceed $_____, except as adjusted by a Change Order issued pursuant to the Contract.]

For use with multiple phase projects with separate pricing:

For providing, performing, and completing each phase of Services, the following fixed fee set forth opposite each such phase, plus an amount equal to Consultant's Direct Labor Costs times the following factor set forth opposite each such phase, but not to exceed, in each phase of Services, the following not to exceed amount set forth opposite each such phase except as adjusted by Change Order issued pursuant to the Contract:

Phase	Fixed Fee	Direct Labor Cost Factor	Not to Exceed

Direct Labor Costs shall mean salaries and wages paid to all Consultant personnel as set forth on the list supplied by Consultant and attached hereto as Attachment A-1, including all professionals whether owners or employees, engaged directly on the Project, but shall not include indirect payroll related costs or fringe benefits.

The charge on account of the fixed fee shall be determined by Owner on the basis of Consultant's estimate of the proportion of total Services or, if separate fixed fees are provided for different phases of Services, the proportion of total Services in that phase, actually completed at the time of invoicing.

DIRECT COST CONTRACT

For use with single phase projects or multiple phase projects with uniform pricing:

For providing, performing, and completing all Services, an amount equal to Consultant's Direct Labor Costs times a factor of _____% for all Services rendered by principals and employees engaged directly on the Project, plus an amount equal to the actual costs of all Reimbursable Expenses.

[Notwithstanding the foregoing, the total Contract Price shall not exceed $_____, except as adjusted by a Change Order issued pursuant to the Contract.]

For use with multiple phase projects with separate pricing:

For providing, performing, and completing each phase of Services, an amount equal to Consultant's Direct Labor Costs times the following factor set forth opposite each such phase, plus an amount equal to the actual costs of all Reimbursable Expenses, but not to exceed, in each phase of Services, the following not to exceed amount set forth opposite each such phase except as adjusted by Change Order issued pursuant to the Contract:

Phase	Direct Labor Cost Factor	Not to Exceed

Direct Labor Costs shall mean salaries and wages paid to all Consultant personnel as set forth on the list supplied by Consultant attached hereto as Attachment A-1, including all professionals whether owners or employees, engaged directly on the Project, but shall not include indirect payroll related costs or fringe benefits.

Reimbursable Expenses shall mean the actual expenses incurred by Consultant directly or indirectly in connection with the Project, including expenses for transportation, telephone, postage, computer time and other highly specialized equipment, reproduction and similar Project related items.

PERCENTAGE OF CONSTRUCTION COST CONTRACT

For providing, performing, and completing all Services, an amount equal to _____% of the Construction Cost of the Project.

[Notwithstanding the foregoing, the total Contract Price shall not exceed $_____, except as adjusted by a Change Order issued pursuant to the Contract.]

The Construction Cost of the Project for purpose of determining payment of the Contract Price to Consultant means the total cost to Owner, as estimated by Consultant or as bid by the Contractor engaged to perform the Project, whichever is less, of all elements of the Project designed or specified by Consultant; provided, however that Construction Cost of the Project shall not include Consultant's compensation and expenses, cost of land, rights-of-way, or compensation for or damages to, properties, nor Owner's legal, accounting, insurance counseling, or auditing services, or interest and finance charges incurred in connection with the Project or other costs that are the responsibility of Owner pursuant to the Contract.

Payments for each phase of Services shall be based upon the following percentage of the total cost or estimated Construction Cost of the Project set forth opposite each such phase:

_____ Phase _____ %

Prior to completion of construction and final payment to the construction contractor, the estimated Construction Cost of the Project shall be based upon the construction contract price at the time of the award.

Prior to award of a construction contract, the estimated Construction Cost of the Project shall be based upon the lesser of (i) the most recent Consultant's opinion of probable Construction Cost of the Project submitted to, and approved by, Owner or (ii) the lowest bona fide bid received from a responsive and responsible bidder for such work or, if the work is not bid, the lowest bona fide negotiated proposal for such work from a responsive or responsible person.

Prior to submission and approval of Consultant's opinion of probable Construction Cost of the Project in the Study and Report Phase, progress payments shall be based upon salaries and wages paid to all Consultant personnel engaged directly on the Project and actual expenses incurred by Consultant directly or indirectly in connection with the Project.

Upon completion and final acceptance of each phase of Services, Owner shall pay such additional amount, if any, or be entitled to credit against future progress payments such amount, if any, as may be necessary to bring the total compensation paid on account of such phase to the foregoing percentages of the total or estimated Construction Cost of the Project, as the case may be.

C. Documentation

Drawings, plans, specifications, photos, reports, information, observations, calculations, notes and any other reports, documents, data or information, in any form, prepared, collected, or received by Consultant in connection with any or all of the Services ("Documents") shall be and remain the property of Owner. At Owner's request, or upon termination of this Contract, the Documents shall be delivered promptly to Owner. Consultant shall have the right to retain copies of the Documents for its files. Consultant shall maintain files of all Documents unless Owner shall consent in writing to the destruction of the Documents. Consultant shall make, and shall cause all of its subcontractors to make, the Documents available for Owner's review, inspection and audit during the entire term of this Contract and for three years after termination of this Contract; provided, however, that prior to the disposal or destruction of the Documents by Consultant or any of its subcontractors following said three year period, Consultant shall give notice to Owner of any Documents to be disposed of or destroyed and the intended date, which shall be at least 90 days after the effective date of such notice of disposal or destruction. Owner shall have 90 days after receipt of any such notice to give notice to Consultant or any of its subcontractors not to dispose of or destroy said Documents and to require Consultant or any of its subcontractors to deliver same to Owner, at Owner's expense.

D. Warranty of Work and Limits on Liability

Consultant warrants that the Services and all of its components shall be free from defects and flaws in design; shall strictly conform to the requirements of this Contract; shall be fit, sufficient, and suitable for the purposes expressed in, or reasonably inferred from, this Contract; and shall be performed in accordance with the highest standards of professional practice, care, and diligence practiced by recognized consulting firms in performing services of a similar nature in existence at the time of performance of the Services. The warranty herein expressed shall be in addition to any other warranties expressed in this Contract, or expressed or implied by law, which are hereby reserved unto Owner.

Consultant shall be responsible for the quality, technical accuracy, completeness and coordination of all reports, documents, data, information and other items and services under this Contract. Consultant shall, promptly and without charge, provide, to the satisfaction of Owner, all corrective Services necessary as a result of Consultant's errors, omissions, negligent acts, or failure to meet warranty.

The Services and everything pertaining thereto shall be provided, performed, and completed at the sole risk and cost of Consultant. Consultant shall be responsible for any and all damages to property or persons as a result of Consultant's errors, omissions, negligent acts, or failure to meet warranty and for any losses or costs to repair or remedy any work undertaken by Owner based upon the Services as a result of any such errors, omissions, negligent acts or failure to meet warranty. Notwithstanding any other provision of this Contract, Consultant's obligations under this Section shall exist without regard to, and shall not be construed to be waived by, the availability or unavailability of any insurance, either of Owner or Consultant, to indemnify, hold harmless or reimburse Consultant for such damages, losses or costs.

E. Insurance

Contemporaneous with Consultant's execution of this Contract, Consultant shall provide certificates and policies of insurance evidencing at least the minimum insurance coverages and limits set forth in Attachment A. For good cause shown, Owner may extend the time for submission of the required policies of insurance upon such terms, and with such assurances of complete and prompt performance, as Owner may impose in the exercise of its sole discretion. Such policies shall be in a form acceptable to Owner and from companies with a general rating of A minus and a financial size category of Class X or better in Best's Insurance Guide and otherwise acceptable to Owner. Such insurance shall provide that no change, modification in, or cancellation of any insurance shall become effective until the expiration of 30 days after written notice thereof shall have been given by the insurance company to Owner. Consultant shall, at all times while providing, performing, or completing the Services, including, without limitation, at all times while correcting any failure to meet warranty, maintain and keep in force, at Consultant's expense, at least the minimum insurance coverages and limits set forth in Attachment A.

F. Indemnities

Consultant shall, without regard to the availability or unavailability of any insurance, either of Owner or Consultant, indemnify, save harmless, and defend Owner against any and all lawsuits, claims, demands, damages, liabilities, losses, and expenses, including attorneys' fees and administrative expenses, that may arise, or be alleged to have arisen, out of or in connection with Consultant's performance of, or failure to perform, the Services or any part thereof, whether or not due or claimed to be due in whole or in part to the active, passive, or concurrent negligence or fault of Consultant, except to the extent caused by the sole negligence of Owner.

G. Delay

For any delay that may result from causes that could not be avoided or controlled by Consultant, Consultant shall, upon timely written application, be entitled to issuance of a Change Order providing for an extension of the Contract Time for a period of time equal to the delay resulting from such unavoidable cause. No extension of the Contract Time shall be allowed for any other delay in completion of the Services.

H. Remedies

1. Owner's Right to Withhold. Notwithstanding any other provision of this Contract and without prejudice to any of Owner's other rights or remedies, Owner shall have the right at any time or times, whether before or after approval of any pay request, to deduct and withhold from any Progress or Final Payment that may be or become due under this Contract such amount as may reasonably appear necessary to compensate Owner for any actual or prospective loss due to: (1) Services that are defective, damaged, flawed, unsuitable, nonconforming, or incomplete; (2) damage for which Consultant is liable under this Contract; (3) liens or claims of lien regardless of merit; (4) claims of subcontractors, suppliers, or other persons regardless of merit; (5) delay in the progress or completion of the Services; (6) inability of Consultant to complete the Services; (7) failure of Consultant to properly complete or document any pay request; (8) any other failure of Consultant to perform any of its obligations under this Contract; or (9) the cost to Owner, including attorneys' fees and administrative

costs, of correcting any of the aforesaid matters or exercising any one or more of Owner's remedies set forth in this Contract.

Owner shall be entitled to retain any and all amounts withheld until Consultant shall have either performed the obligations in question or furnished security for such performance satisfactory to Owner. Owner shall be entitled to apply any money withheld or any other money due Consultant under this Contract to reimburse itself for any and all costs, expenses, losses, damages, liabilities, suits, judgments, awards, attorneys' fees, and administrative expenses incurred, suffered, or sustained by Owner and chargeable to Consultant under this Contract.

2. Termination or Suspension for Convenience. Owner shall have the right, for its convenience, to terminate or suspend the Services in whole or in part at any time by written notice to Consultant. Every such notice shall state the extent and effective date of such termination or suspension. On such effective date, Consultant shall, as and to the extent directed, stop Services under this Contract, cease all placement of further orders or subcontracts, terminate or suspend Services under existing orders and subcontracts, and cancel any outstanding orders or subcontracts that may be canceled.

   In the event of any termination for convenience, Owner shall pay Consultant (1) such direct costs, including overhead, as Consultant shall have paid or incurred for all Services done in compliance with, and as required by or pursuant to, this Contract up to the effective date of termination; and (2) such other costs pertaining to the Services, exclusive of overhead and profit, as Consultant may have reasonably and necessarily incurred as the result of such termination. Any such payment shall be offset by any prior payment or payments and shall be subject to Owner's rights to withhold and deduct as provided in this Contract.

3. Events of Default. If it should appear at any time prior to Final Payment for all work that Consultant has failed or refused to prosecute, or has delayed in the prosecution of, the Services with diligence at a rate that assures completion of the Services in full compliance with the requirements of this Contract, or has attempted to assign this Contract or Consultant's rights under this Contract, either in whole or in part, or has falsely made any representation or warranty in this Contract, or has otherwise failed, refused, or delayed to perform or satisfy any other requirement of this Contract or has failed to pay its debts as they come due ("Event of Default"), and has failed to cure any such Event of Default within five business days after Consultant's receipt of written notice of such Event of Default, then Owner shall have the right, at its election and without prejudice to any other remedies provided by law or equity, to pursue any one or more of the following remedies:

   a. Owner may require Consultant, within such reasonable time as may be fixed by Owner, to complete or correct all or any part of the Services that are defective, damaged, flawed, unsuitable, nonconforming, or incomplete; to accelerate all or any part of the Services; and to take any or all other action necessary to bring Consultant and the Services into strict compliance with this Contract.

b. Owner may accept the defective, damaged, flawed, unsuitable, nonconforming, incomplete, or dilatory Services or part thereof and make an equitable reduction in the Contract Price.

c. Owner may terminate this Contract without liability for further payment of amounts due or to become due under this Contract.

d. Owner may withhold from any Progress Payment or Final Payment, whether or not previously approved, or may recover from Consultant, any and all costs, including attorneys' fees and administrative expenses, incurred by Owner as the result of any Event of Default or as a result of actions taken by Owner in response to any Event of Default.

e. Owner may recover any damages suffered by Owner.

4. Terminations and Suspensions Deemed for Convenience. Any termination or suspension of Consultant's rights under this Contract for an alleged default that is ultimately held unjustified shall automatically be deemed to be a termination or suspension for the convenience of Owner.

I. Disputes

No claims for equitable adjustments in the Contract Price or Contract Time shall be made or allowed unless embodied in a Change Order. If Owner fails to issue a Change Order including, or fully including, an equitable adjustment in the Contract Price or Contract Time to which Consultant claims it is entitled, or, if Consultant believes that any requirement, direction, instruction, interpretation, determination, or decision of Owner entitles Consultant to an equitable adjustment in the Contract Price or Contract Time that has not been included, or fully included, in a Change Order, then Consultant shall submit to Owner a written request for the issuance of, or revision of, a Change Order, including the equitable adjustment, or the additional equitable adjustment, in the Contract Price or Contract Time that Consultant claims has not been included, or fully included, in a Change Order. Such request shall be submitted before Consultant proceeds with any Services for which Consultant claims an equitable adjustment is due and shall, in all events, be submitted no later than two business days after receipt of such Change Order or receipt of notice of such requirement, direction, instruction, interpretation, determination, or decision. Notwithstanding the submission of any such request, Consultant shall, unless otherwise directed by Owner within two business days after receipt by Owner of such request, proceed without delay to perform the Services in compliance with the Change Order or as required, directed, instructed, interpreted, or decided by Owner and shall, pending a final resolution of the issue, keep a daily record of such Services. Unless Consultant submits such a request within two business days after receipt of such Change Order or receipt of notice of such requirement, direction, instruction, interpretation, determination, or decision, Consultant shall be conclusively deemed (1) to have agreed that such Change Order, requirement, direction, instruction, interpretation, determination, or decision does not entitle Consultant to an equitable adjustment in the Contract Price or Contract Time and (2) to have waived all claims based on such Change Order, requirement, direction, instruction, interpretation, determination, or decision.

J. Confidential Information

The term ***"Confidential Information"*** shall mean information in the possession or under the control of the Owner relating to the technical, business or corporate affairs of the Owner; Owner property; user information, including, without limitation, any information pertaining to usage of the Owner's computer system, including and without limitation, any information obtained from server logs or other records of electronic or machine readable form; and the existence of, and terms and conditions of, this Agreement. Owner Confidential Information shall not include information that can be demonstrated: (i) to have been rightfully in the possession of the Consultant from a source other than the Owner prior to the time of disclosure of said information to the Consultant under this Agreement (***"Time of Disclosure"***); (ii) to have been in the public domain prior to the Time of Disclosure; (iii) to have become part of the public domain after the Time of Disclosure by a publication or by any other means except an unauthorized act or omission or breach of this Agreement on the part of the Consultant or the Owner; or (iv) to have been supplied to the Consultant after the Time of Disclosure without restriction by a third party who is under no obligation to the Owner to maintain such information in confidence.