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Avoid Litigation Through Careful Contract Drafting and Attentive Project Administration - Myth or Reality?

PRESENTED BY

Robert A. Korn, Esquire

Kaplin Stewart
Attorneys at Law

Union Meeting Corporate Center
910 Harvest Drive – P.O. Box 3037
Blue Bell, PA 19422
P: 610.941.2512
F: 610.684.2017
www.kaplaw.com

Peter J. Duggan

The DugganRhodes GROUP

707 Grant Street
The Gulf Tower – Suite 2930
Pittsburgh, PA 15219
P: 412.227.3670
F: 412.227.3679
www.dugganrhodes.com

The Perfect Job…



- All funding in place and on time!
- Architect completes design which fully satisfies the Owner and is on time!
- Contractor Bids come in and they are below budget, making a large contingency even larger!
- Contractor finishes on time, with no safety or quality miscues!
- Everyone celebrates…

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The BAD Job…



- Architect shortcuts design and passes risk on to contractors with exculpatory language
- Architect estimates are blown when contractors price the project
- Contractor makes claims for incomplete design and delay caused by design!
- Owner Board reviews design during the project and changes it!
- Parties celebrate 6 years later, when litigation is over…

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The Statistics

- Over 50% of Owners say design documents took longer to complete than planned
- Over 35% of Owners say construction took longer to complete than planned
- 79% of Owners say they need to improve the timeliness of their decisions

Source: FMI/CMAA Sixth Annual Survey of Owners

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Avoiding The Bad Job



- Good Contracts
- Appropriate TEAM structure
- Continuous Project Administration

Pointers on Contract Drafting

Dos and Don'ts of Contract Drafting

Contract Drafting Pointers

- Don't use an unmodified off-the-shelf AIA document
- All contracts, including design professional contracts, should have the same dispute resolution language so that claims involving design professionals can be joined or consolidated with other pending actions

Contract Drafting Pointers

- Make timely notice of claim a condition precedent to the right to arbitrate or litigate
  - Notice of claim language in the AIA contract document is flawed

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Contract Drafting Pointers

- Define, clearly, what does not constitute a notice of claim
- Clearly state that the failure to provide timely notice of claim will bar the contractor from pursuing a claim

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Should I Arbitrate or Litigate?



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Pros and Cons of Arbitration

Pros of Arbitration

- Usually fast
- Knowledgeable panel
- Less pre-hearing discovery
- Fewer pre-hearing motions
- Confidential
- Limited appellate review
- Decisions often based on practicality as opposed to legalistic

Cons of Arbitration

- Limited discovery
- May be more expensive than litigation
- Larger cases often protracted because of difficulty in scheduling hearings
- Strong legal positions tend to have less impact on the decision-making process
- Limited appellate review

How to Address Your Concerns at the Time of Contract Drafting

Addressing Contract Concerns

- Use language that enables you to decide whether to arbitrate or litigate
- If you opt for arbitration consider including language that establishes where case will be heard
- The number of arbitrators

Addressing Contract Concerns

- Whether the Federal or other rules of evidence apply
- Choice of laws
- Appellate rights

Should I Make Mediation a Condition Precedent to Arbitration or Litigation?

Pros of Mediation

- Non-binding
- Confidential
- Parties can pick the mediator and shape the process
- Cuts off the expense of arbitration or litigation
- Cap the claim sooner – claims only increase with the passage of time

Cons of Mediation

- Potential for "free" discovery
- Often the parties' lack of candor impedes a successful resolution
- Parties have already expended substantial funds when mediation occurs on the cusp of arbitration or trial
- Limits the opportunity of the court to establish legal precedence

Practice Pointers

Practice Pointers

- Resolve disputes early before they ripen
- Have the "team" in place to evaluate claims – consider a Dispute Resolution Board (DRB) or similar entity on larger projects
- Utilize change orders, with release language, to cap claims

Delayed Performance

Delayed Performance

- The only remedy for delayed performance shall be an extension of time
- Coordinate the contracts of all prime contractors so that they are interrelated and allow for the joinder and consolidation of claims
- If delayed by the actions of another prime, damages must be sought from that prime and its surety and not from the owner

Delayed Performance

- Coordinate the prime contractor so that it is clear that primes have the right to recover damages for delays from each other and their respective sureties
- The bonds forms, that are part of the up front specifications, must clearly state primes are co-obligees in all performance bonds posted by primes

The Schedule

The Schedule

- Provide for a Comprehensive Critical Path Method (CPM) construction schedule
  - The failure of primes to provide scheduling input shall be construed as an acceptance of the schedule

The Schedule

- Require in the contract frequent realistic updates
  - Do not use "plug" dates in schedule updates
  - Look ahead schedules, if consistent with the project schedule, are acceptable but CPM scheduling updates should not be abandoned
  - Set forth in the contract the requirements for scheduler

Retain the Right to Change the Schedule

Changing The Schedule

- Include language that you, the owner, have the right to unilaterally change the schedule and that the primes agree to meet the schedule at no additional cost to the owner

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Payment Terms

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Payment Terms

- Clearly define the payment terms, coupled with the right to hold more than retainage if, in the opinion of the owner, the cost to complete will exceed the amount retained
- Set the interest rate for delayed payment

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Payment Terms

- Include a contractual waiver of the right to receive prompt pay damages, such as penalties, interest and counsel fees

Counsel Fees

Counsel Fees

- Include language permitting the owner to recover counsel fees and expenses if it is the substantially prevailing party
  - Difficulty of determining who is the substantially prevailing party
  - Provide a definition of "prevailing party"
  - Problem with one-sided counsel fee clauses

The Role of the Design Professional

Role of Design Professional

- Making the design professional the sole arbiter of disputes
  - Is such a clause enforceable?

Liquidated Damages

Liquidated Damages

- Are they enforceable?
- How to apply liquidated damages
  - Failure to meet milestone dates
  - Failure to achieve substantial completion
  - Failure to achieve final completion

Waiver of Consequential Damages

Consequential Damages

- What are consequential damages?
- Should I waive the right to seek consequential damages?
- Is a unilateral waiver of consequential damages enforceable?

Risk Shifting

Risk Shifting

- Exculpatory Clauses
  - Reviewed and understood contract documents
  - Site inspection
  - Environmental

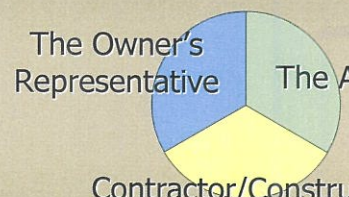
Risk Shifting

- Indemnification
  - For bodily injury and property damage claims
  - Other types of indemnification clauses

Good Contracts Have

- Bob is this a segway into your screens?

The RIGHT TEAM Structure



Administrative Failures

- Work Stoppage because Change Orders have to go through a Board
- No one takes ownership of the schedule and project finishes late, with everyone pointing the finger at someone else
- Contingency is insufficient to account for unforeseen conditions
- Architect scope is diminished in construction phase and critical answers are not timely

Administrative Successes

- 3rd Party Constructability Studies
- 3rd Party Estimates
- Master Schedulers
- Dispute Resolution Boards