

How to Avoid Contract Drafting Mistakes: Tailor Design and Construction Contracts to Your Project

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There are a myriad of decisions, which must be made when drafting construction and design contracts for a project. The contract documents establish the rules and framework for the design and construction of the project. Based on previous projects and conflicts, experienced construction practitioners have their own forms and, as importantly, opinions on what should typically be included in Owner-Contractor, Owner-Architect and Contractor-Subcontractor agreements. Even skilled practitioners, however, must alter or modify the contract documents to meet the needs of the specific project in order to avoid omissions or conflicts that could adversely affect both the client and the project. This presentation will focus on the principal issues a practitioner should address in tailoring design and construction contracts to a project and, specifically, the needs of the client.

1. Understand the Project

- Interview the Owner regarding projected cost, Owner's budget, and financing
- Review executed project contracts and lending agreements
- Determine Role of the Owner and level of involvement
 - Construction experience
 - In-house expertise
 - Availability of Owner's personnel
- Determine appropriate contract delivery system for this Owner and project
- Project time constraints
 - Commencement/completion dates
 - Long lead time items
- Effects of weather on construction
- Consequences of late start/finish
- Project type and site constraints/considerations
 - Topography and environmental concerns
 - Zoning, easements, and permitting

2. Value, Complexity and Urgency

- Drives the framework for the project contracts
- Consideration of manuscripted project contracts
- Dictates the level of detail and complexity of the project contracts
- Affects the type and scope of required contractual protections
- Need for CPM schedule with detailed scheduling requirements
- Bonding
- Owner Controlled Insurance Program
- Project labor agreements
- Standing disputes board

3. Coordinate all Project Contracts

- Recognize limitations of standard form contracts
- Tailor project contracts to the project
- Coordinate Owner-Architect Agreement with Owner-Contractor Agreement
- Coordinate Owner-Contractor Agreement with Contractor-Subcontractor Agreement
- Coordinate project contracts with the Owner's lender's requirements
- Review Architect's general and special conditions
- Beware of multiple drafters
- Contract negotiations can result in conflicting requirements

4. Harmonize Project Contracts with the Tone of the Project

- Address/protect client's limited finances
- Address/enforce time limitations
- Political/Public Relations considerations
- Implications of hard-ball contracts
- Time and cost consequences of over-lawyering the deal
- Necessity of reaching an agreement with key player

5. Applicable Laws

- Public versus private contracts
- Mechanic's Liens
- Licensing requirements
- Choice of Law
- Choice of Venue
- Indemnity and hold harmless provisions
- Potential pitfalls of drafting a contract for use in another state
- Potential pitfalls of drafting international contracts

6. Delineate Responsibility, Requirements and Authority

- Owner's representative
- Authorized representative of project participants
- Personnel with decision-making authority/responsibility
- Limits of each person's authority and lines of communication
- Contractual notice, mechanism and form
- Use and preservation of electronic documents and email
- Project deadlines/milestones and their importance
- Payment requirements for Contractor
 - Submit/update schedule of values and construction schedule
 - Obtain release of liens from subs and suppliers
 - Architect Approval
- Requirements for change order requests/approval
- Requirements for submittals and substitutions
- Contract administration responsibilities of design professional

- Review flow down and flow up provisions for completeness

7. Local Construction Environment:

- Union versus non-union
- Utility of project labor agreements
- Availability of sufficient skilled labor
- Rising prices of construction materials
- Potential shortages of construction materials
- Controversial construction, e.g., power plant construction

8. Insurance and Bonding

- Does the client have a risk manager or an experienced insurance agent
- Identify insurance the Owner, Architect and Contractor currently/typically carry
- Are there environmental issues that require additional or special insurance coverage
- Verify comprehensive evaluation of applicable insurance coverage
- Identify necessary additional insured
- Waiver of consequential damages
- Waiver of subrogation
- Rating and content of bonds

9. Time and Scheduling

- Long lead time items
- Time needed for site access and securing permits
- Zoning requirements and need for a variance
- Need for and timing of additional prime contracts or subcontracts
- Type of schedule and frequency of updates
- Use of schedule for change orders and requests for extensions of time

10. Dispute Provisions

- Use of mediation
- Arbitration versus litigation
- Type of arbitration and discovery limitations
- Specify arbitration up to a set amount and litigation for claims over that amount
- Architect as the first level of dispute resolution
- Choice of law
- What venue best suits the client
- Liquidated damages
- Termination for convenience
- Waiver/limitations of the right to sue
- Indemnity provisions
- No damages for delay