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# Construction Contracting Concerns for Utilities & Municipalities: Minimizing Exposure on Construction Projects

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## Construction Agreements in General

- Construction related agreements
  - Environmental (Phase I)
  - Geotechnical
  - Surveys
  - Architecture
  - Engineering
  - Construction

## Primary functions of all agreements

- Setting out rights and obligations of parties
- Identifying and allocating risks

# Use of Industry Forms

- A good start, but one size does not fit all
- Form contracts can be modified to fit needs of project and parties
- Come up with your own forms for use on multiple projects
  - Owners have leverage in this economy
- Try to be consistent across all agreements

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# Overview of Some Important Contractual Considerations

# The “Big 3”

**TIME**

**PRICE**

**SCOPE**

## Pricing Considerations

- What is the price?
- What is the pricing arrangement?
  - Lump sum, cost plus (GMP), unit price, etc.
- What are the terms of payment?
  - When, how much, conditions to payment, etc.

## Timing Considerations

- When does the project begin and end?
- Accurately define “completion”  
(substantial and final)
  - What does it include?
  - What does it trigger?
- “Time is of the essence”

# Substantial Completion

## EJCDC C-700

### *Standard General Conditions of the Construction Contract*

Substantial Completion—The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of Engineer, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms “substantially complete” and “substantially completed” as applied to all or part of the Work refer to Substantial Completion thereof.

- *Definition not adequate for every project*

# Timing Considerations

- Liquidated damages
  - Used when damages are difficult to determine in advance
  - But must be a reasonable estimate of actual damages (at time of contracting)
  - Not a “penalty”
- Early completion bonus

# Scope Considerations

- Completely and accurately define the “Contract Documents”
  - Define scope of work within “four corners” of the agreement
- Expressly exclude any other documents
  - Bids, proposals, etc.
- Anticipate and address potential conflicts and discrepancies

# Sample “Precedence Clause”

## DISCREPANCIES AND CONFLICTS

In the event of a discrepancy or conflict within or between the Drawings, Specifications, or any of the Contract Documents, the Agreement takes precedence over all other Contract Documents. Unless otherwise specifically stated in the Specifications and Drawings, the Specifications and Drawings are of equal authority and priority; figures shall govern over scaled measurements; large scale drawings shall govern over small scale drawings; descriptive writings shall govern over legends indicating material or conditions; and the provision or interpretation that results in the greater quantity and quality of work or materials shall prevail.

*Goal is to minimize costs by eliminating change orders and disputes*

## Provisions Related to Quality of Work

- Warranties and duty to correct
  - Many form contracts treat separately
- Compliance with Contract Documents
- Compliance with applicable laws, codes, industry standards, etc.
- Standard of care in design agreements

## Insurance and Bonds

- Scope and limits of insurance should be appropriate for the project
  - Require at least a copy of Certificate of Insurance
  - Require copies of applicable endorsements
    - Especially additional insured endorsement
- Bonds are contracts and can be modified
  - Require a form that works for you
  - Make consistent with construction contract

## Indemnification

- Protection against third-party claims
- Should provide for both defense and indemnity
- Tennessee law
  - Indemnity against own negligence enforced, but must be clear and unequivocal
  - Indemnity against own sole negligence void and unenforceable (TCA § 62-6-123)

## Dispute Resolution Provisions

- Consider “progressive” dispute resolution
  - Lower • higher management level negotiations
- Mediation
- Arbitration vs. litigation
  - Consider “home court”
  - Can you agree to ADR?
  - Consistency across all agreements is key

## Retainage

- Prompt Pay Act (TCA §§ 66-34-101, *et seq.*) limits retainage on all construction contracts to 5% of contract amount
  - Applies to public and private contracts
  - Can “front end load” (e.g. 10% retainage until 50% of contract amount paid)

## Retainage

- Must be deposited into a separate, interest bearing account with a third party
  - Applies to all projects where “prime contract” exceeds \$500,000 (incl. public projects)
  - Cannot be waived by agreement of parties
  - Failure to comply is Class A misdemeanor subject to \$3,000/day fine
  - Also, civil damages of \$300/day to “owner” of funds

## Differing Site Conditions (e.g., Rock Clauses)

- Type I – conditions differ from those indicated in contract
  - Geotechnical report provided?
- Type II – conditions differ from those normally encountered
  - Not as important in some parts of state
- Risk allocation might affect bids
- Include “site inspection” clause

## Provisions to Watch Out For

- Limitations of liability
  - Often limited to fee
  - If must include, limit to liability insurance
- Waivers of consequential damages (CDs)
  - Usually result from delay (lost revenue, outside purchase, “indirect” damages)
  - Carefully consider potential delay damages
  - LDs or a “cap” on CDs are alternatives

## Miscellaneous Considerations

- “No damages for delay” clauses
- Responsibility for locating utilities
- Blasting (governed by TCA §§ 68-105-101, *et seq.*)
  - Strict liability (even for owner?)
- Quantity estimates; unit pricing
- Responsibility for obtaining easements and surveys

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Overview of Utility District  
Purchasing Procedures  
TCA §§ 7-82-801, *et seq.*

# Policy Requirements

- Board of Commissioners must adopt a policy all governing purchases that includes:
  - 1) Requirement for competitive bidding
  - 2) Competitive bidding procedures
  - 3) Appropriate exceptions to competitive bidding requirements
  - 4) Procedure for open market purchases
  - 5) Procedure for documenting compliance

# Competitive Bidding Procedures

- Need not require public advertisement if:
  - Bids for purchases in excess of \$10,000 are solicited from vendors on TAUD vendor list; or
  - District develops and maintains its own vendor list from which to solicit bids
    - Must publicly advertise for additions to the list at least annually in newspaper of general circulation in grand division

## Utility District Purchasing Procedures

### Exceptions to Competitive Bidding Requirements

- Appropriate exceptions include:
  - Dollar amount exceptions
  - “Continuous work force” for maintenance, installation and repair
  - “Single source” for goods or services
  - Unforeseen emergencies
  - Real property
  - Purchases from government units or agencies
  - Open market purchases (fuel, fuel products, etc.)

### “Local Source” Exception

- TCA § 7-82-803 permits purchase, without public advertisement or competitive bidding, of any “item” from local sources if:
  - Such item is available for purchase under the provisions of contracts or price agreements entered into by the TN Dept. of General Services
  - Such item is available at the same or lower cost from such local sources
  - District is not permitted to purchase under an existing contract established by TN Dept. of General Services
  - Item must be of equal or better specifications than the item under the competitive bid contract (seems contradictory to intent of statute)

# Minimizing Costs and Exposure

- Goal is to minimize costs and exposure by avoiding bid protests and other issues
- Implement compliant purchasing procedures and follow them in all cases
- As with many contracting issues, consistency is key
  - Statute requires “uniform procedures for the same or substantially similar purchases” and requires them to be “applied on a consistent basis to all purchases of the district.”

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# Construction Contracting Concerns for Utilities & Municipalities: Minimizing Exposure on Construction Projects

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