



Construction Contracting Basics

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Agenda

1. Basic Terms and Delivery Methods
2. Contract Components and Key Provisions
3. Sources of Legal Requirements
4. Issues and Tips

Work Related to Construction

Design - Architecture & Engineering

- Architecture = designing buildings
- Engineering = designing the structure of something

Project Management

- Overseeing design or construction
- Quality Assurance
- Testing
- Inspections
- Contract Management

Construction and Remodeling

- Physical and supervisory work to construct or remodel something
- Horizontal vs vertical

Delivery Method

- The method by which design and construction of a contract is performed
- Delivery method is the contract way to allocate risks and rewards among the owner, contractor and others
- Each delivery method has pros and cons
- Delivery method will affect your risk and project management needs as owner
- Delivery method will affect which contractors are able to propose on your project and their success

Design-Bid-Build/Hard Bid

1. Owner contracts with architect/engineer to complete design
 2. Owner uses design to solicit bids for construction
 3. Owner hires contractor to build design for a fixed price in a specified amount of time
 - CRS § 31-15-712 – requires municipalities to award construction contracts of over \$5,000 to the “lowest responsible bidder” on open bids after advertisement
 - Can use prequalification to reduce the final decision to bid responsiveness and price
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- ✓ Traditional project delivery method because the goal is to do the work for the least amount of money
 - ✓ Owner has the risk of deficient design and project changes – can lead to changes and increased costs for the owner
 - ✓ Time consuming process and not always the most efficient

Integrated Construction Contracts

- Municipalities may enter into contracts for any combination of designing, building, altering, repairing, improving, demolishing, operating, maintaining and/or financing a public project
 - Integrated Delivery Method for Public Projects Act – applies to state (C.R.S. § 24-93-101, et seq.)
 - Also provisions for municipalities (C.R.S. § 31-25-1301, et seq.), counties (C.R.S. § 30-20-1101, et seq.), and special districts (C.R.S. § 32-1-1801, et seq.)
- Allows for various forms of project delivery, including
 - CM/GC
 - Design-Build
 - Public-Private Partnerships (P3)
 - ✓ Contracts including operation and maintenance
 - ✓ “DBFOM” – Design, Build, Finance, Operate, Maintain
 - Permits using an RFQ to prequalify proposers (C.R.S. § 31-25-1305)

Construction Manager/ General Contractor (CM/GC)


1. Owner hires designer
 2. Owner hires contractor before design is complete
- ✓ Owner provides the design so has the risk of an improper design
 - ✓ Reduces owner's risk for the design by involving contractor in reviewing sufficiency of the design, constructability and cost
 - ✓ Can avoid design issues like constructability and provide value engineering
 - ✓ Contractor then manages construction
 - ✓ Uses Guaranteed Maximum Price (GMP)

Design-Build


1. Owner may do some initial design and determine specifications/budget
 2. Owner hires a contractor who is responsible for both design and construction
 - Contract has design and construction provisions
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- ✓ Can be fastest from start to finish – construction can start before design is finished
 - ✓ Owner has least amount of control
 - ✓ Owner must provide good specifications to guide design or risks getting design it doesn't want
 - ✓ Should reduce extra costs to owner because contractor is responsible for the design and making sure it can be built for the budget specified
 - ✓ Can be a two-part contract with construction price finalized after design (“progressive”) or fixed price for both design and construction

Contract Components


Contract – Standard terms and conditions, price, term, insurance requirements
Need to review non-municipal forms to revise for municipal requirements



General Conditions – set how the project will run, including terms for changes, disputes, and completion; may be standard form like City's and CDOT's standard general conditions



Special Conditions – provisions specific to the contract and modifications to the standard General Conditions



Plans and Specifications

Contract Forms

- Different delivery methods have different types of contracts and general conditions
- Can buy or license forms from organizations like the American Institute of Architects (AIA) & American Society of Civil Engineers
 - ✓ These forms are drafted from an industry perspective
 - ✓ Review these forms closely to comply with statute and code provisions
- CDOT, Denver, other large entities have form contracts and general conditions

Key Construction Provisions



Retainage

A set percent of each payment held by owner until completion of the project

Owner can hold no more than 5% of each pay application

CRS §§ 24-91-101, et seq.



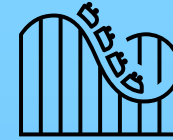
Bonds

Bid bond – guarantees Contractor's bid

Performance Bond – guarantees Contractor's performance

Payment Bond – guarantees Contractor's payment of Subcontractors

CRS §§ 38-26-105, et seq.



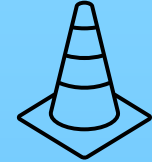
Change Orders

Contractor or Owner initiated

Changes scope, time or money without formal amendment

Can allow Owner to order contractor to start changed work and figure out price later

Authority and process should be set out in the contract



Risk Mitigation

Warranty – fix anything that breaks for a fixed period of time

Indemnification – pay for or reimburse owner for defective work, damage or losses

Insurance – Liability, Workers Compensation, Builder's Risk, Cybersecurity (if relevant), Auto, etc.

Liquidated Damages

- Contract can provide that, if the contractor does not complete work to a specified level at a specified time, then the contractor owes the owner “liquidated damages” in place of actual damages
- Must be a reasonable and related to the actual damages that would be suffered; cannot be a penalty
- CRS 24-91-103.5 allows (or does not prohibit) “reasonable liquidated damages”

Consequential Damages

- Consequential Damages are damages that are the reasonable result of the injury but do not result from the injurious act itself
- Actual Damages v. Consequential Damages
 - Actual damages include direct labor costs, materials, equipment, overhead, interest, and other costs directly attributable to the breach
 - Consequential damages are less direct damages that result including lost profits and lost rent
- Contractors often request a waiver of consequential damages and forms often contain them
- ✓ Before agreeing to waive, consider the potential damages the municipality would incur

Sources of Legal Requirements

Local Law

- Municipal Ordinances or Other Governance
- Public Funding Requirements

State Law

- Public Construction Law
- Public Works Statute/Little Miller Act
- Indemnification
- Statute of Repose
- Economic Loss Rule
- CDARA

Federal Law

- Miller Act
- Davis-Bacon Act
- Disadvantaged Business Enterprises
- Procurement Requirements

Public Funding Requirements

- Projects funded through public finance methods like tax exempt bonds may have procurement or contract requirements
- These often protect the bond holders in addition to the owner
- ✓ Check all documents that authorize issuing bonds
 - ✓ Denver's ordinances authorizing the City to issue bonds contain requirements including performance bonds and retainage

Construction Contracts with Public Entities

- CRS §§ 24-91-101, et seq.
- Contractor-friendly provisions
- Doesn't apply to contracts that are funded in whole or in part by federal government funds or another source that has requirements regarding retention or payment of funds that are inconsistent.
- Requirements Include:
- In contracts over \$150,000, the public entity must pay monthly for satisfactory work and may not withhold more than 5% in retainage
- Owner must follow CRS § 38-26-107 to make final settlement of a contract and contractor must pay subcontractor
- Owner cannot require contractor to waive, release or extinguish its rights to recover costs, damages, or an equitable adjustment for delays in performing the contract if the delay is caused in whole or in part by acts or omissions of the public entity or people acting on behalf of the public entity.
- Government cannot contract for design or construction of a public works project unless the funds are appropriated; contractor must be guaranteed that it will be paid for additional costs over the original contracted/appropriated amount
- Also disputes, security, escrow, and retainage requirements

Public Works Statute (“Little Miller Act”)

- CRS §§ 38-26-105, et seq.
 - Performance and Payment bonds required for construction contracts over \$50,000
 - Verified Statement of Claim
 - Mechanics’ liens are not permitted on public projects
 - Alternative method for contractor, subcontractor or material supplier to make a claim for non-payment
 - Not all tiers of subcontractors or suppliers can make claims
 - Final Settlement process – publication of notice and final payment process

Anti-Indemnity Statute

“Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.”

CRS § 13-21-111.5(6)

Statutes of Limitation and Repose

- Statute of Limitation – sets a time limit to file a lawsuit after becoming aware of a claim
 - 2 years for breach of contract
- Statute of Repose – CRS § 13-80-104
 - no claims against architect, contractor, builder, engineer or inspector more than 6 years after substantial completion of the improvement unless the claim arises during the 5th or 6th year, and claim can be brought within 2 years of the date it arose
 - Specific definition for when a claim arises
- ✓ Consider these for records retention, insurance, warranty, and other provisions to protect the municipality in the event of a breach

Disputes

- Actions against Licensed Professionals (CRS § 13-20-602)
 - Requires a certification of review before suing an architect or engineer for negligence
- Construction Defect Action Reform Act (CDARA) (CRS §13-20-801, et seq.)
 - Governs process for construction defect disputes
 - Requires notice and opportunity to fix
 - Can limit the plaintiff's potential recovery
 - Unclear how it applies to government projects
 - ✓ Denver's contracts require waiving CDARA
- Non-Court dispute resolution provisions are permitted
 - CRS § 24-91-103.5 expressly does not prohibit them
 - ✓ CDOT and Denver have ADR
- Owner cannot sue subcontractors for negligent or breach of contract for defective design and/or construction (*BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004))
 - ✓ Make sure your contract has everything you need to protect the municipality from improper design and construction or other issues

Federal Requirements

- Federal procurement law and regulations apply if Federally funded
 - ✓ Brooks Act, 40 USC § 1101 - Architect/Engineering services must be procured based on qualifications and not price
 - ✓ Miller Act, 40 USC § 3131 – requires performance and payment bonds
 - ✓ Disadvantaged Business Enterprise Program
 - ✓ Buy America Act and Build America, Buy America (“BABA”)– rules are in transition after BABA was passed in the Bipartisan Infrastructure Law, generally requires that certain materials and products be produced in the United States, including iron, steel, manufactured products (like equipment) and construction materials
 - ✓ Davis-Bacon Act, 40 USC § 3141 – prevailing wage for construction and related trades
 - ✓ 2 CFR § 200.300 – Federal procurement regulations
- Agencies that do a significant amount of financing of local projects might have helpful guidance and staff able to assist

Tips and Issues

- ✓ Know your procurement and contracting requirements
- ✓ Know your sources of funding because they might have additional requirements
- ✓ If you don't have a form or are using an outside form like AIA, pay close attention to the terms and conditions, as many are not legal or advisable for public owners
- ✓ Pay close attention to the skills and knowledge of your organization – can they manage a more complex delivery method? Ensure the contract gives them the power they need
- ✓ Alternative dispute resolution is permitted, including municipal processes, and have been upheld by Colorado courts



THANK YOU

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