

## Don't overlook the details in construction contracts

### Some smaller contract terms can have big impacts



#### CONSTRUCTIVE ADVICE

Stephen Kelly

When negotiating construction contracts, people tend to focus on the big stuff: the schedule, the scope of work and, of course, the price. Beyond these basic deal points,

only a few other key terms – liability limits, for example – attract most of the remaining attention. As a result, many other terms often are overlooked, but they can have a major impact on how a contract is performed and enforced. This is especially true for standard contract forms, because they don't necessarily address all of the owner's concerns. Following are five examples.

**1. Can the owner terminate for convenience?** A right to terminate for convenience can be a powerful tool. There may be many reasons to back out of a contract, and possessing the flexibility to do so without having to declare a contractor in default can be very useful.

In addition, it's important to state the contractor's compensation clearly if the contract is terminated for convenience. The contractor may seek compensation beyond payment for work performed before termination. Some contracts, for example, require the owner to pay the contractor's profit for work not performed. An owner should avoid open-ended commitments to pay costs attributed to termination. The contract, rather, should include fair but reasonable compensation if the owner terminates for convenience.

**2. If the contract is terminated for cause, are the subcontractors' contracts assignable?** An owner may want to end its relationship with a contractor, but continue with project construction. Possessing the right, but not the obligation, to have subcontracts – including supplier contracts – assigned to the owner may reduce the delay and expense that comes from terminating the contractor.

**3. What about the role of the architect or engineer?** The duties of a project's designer are commonly sprinkled throughout the construction contract. This is especially true in standard forms. But an owner shouldn't assume that the role for the designer written into the construction contract is appropriate for the owner's project. The owner may want to reserve certain duties – approval of payment applications, for example – for itself, or an owner may not want the designer involved in certain activities – the contract's dispute resolution process, for example.

The construction contract also may contain terms that limit the designer's responsibilities in a way that is unacceptable to the owner. On the flip side, the owner should make sure that,

**Negotiating contracts can be a pain. And it's easy to get lost in the details and focus only on the major issues. But paying attention to these details up front can be helpful later.**

if it's asking the designer to take on more responsibility than is usually expected under standard contract forms, the designer is OK with this enhanced role. The owner doesn't want to complete negotiations with its contractor only to find out that its architect isn't willing to perform a key function.

**4. Does the contract allow the party that prevails in litigation to recover its attorneys' fees?** These "prevailing party" terms are commonly left out of standard forms. If a prevailing party term isn't included, there's a good chance that attorneys' fees are not recoverable. In contrast, the Oregon lien statute allows the prevailing party in a lien foreclosure suit to recover its attorneys' fees. So, a contractor that successfully brings a lien claim will recover its attorneys' fees, but an owner that successfully asserts a claim against a contractor may not be able to recover its attorneys' fees in the absence of a prevailing party term.

There are pros and cons to including a prevailing party term, and there's always a chance an owner will regret allowing attorneys' fees to be recoverable. But the cost to bring a claim can be as expensive (or even more expensive) than the claim itself, and an owner should look hard at including a prevailing party term in the contract.

**5. Has the owner selected where disputes are resolved?** Litigation is very expensive, but one way to keep costs down is to limit travel time. Resolving disputes at a location convenient to the owner, its key employees and its attorneys will reduce litigation costs. Also, litigating from home rather than on the road saves time and energy. Litigation is painful, time consuming, and frustrating enough without having to travel long distances. Note also that, under Oregon law, a provision in a contract for construction work in Oregon that requires dispute resolution in another state is void and unenforceable.

Negotiating contracts can be a pain. And it's easy to get lost in the details and focus only on the major issues. But paying attention to these details up front can be helpful later.

*Stephen Kelly is a member of the construction and design practice group at Stoel Rives LLP. Contact him at 503-294-9448 or [spkelly@stoel.com](mailto:spkelly@stoel.com).*