

Review exhibits first, avoid trouble later

Five questions that owners should ask before finalizing exhibits included in construction contracts



CONSTRUCTIVE ADVICE

Stephen Kelly

Construction-contract exhibits are too often under-considered or even ignored in the drafting and negotiation process. But because exhibits are typically incorporated into the contract,

they merit as much attention as the contract itself. Here are five good questions to ask before finalizing the exhibits.

Are the exhibits consistent with the contract?

Exhibits are commonly prepared outside of the contract negotiation process, which makes them susceptible to conflict with the contract itself. A designer, for example, may base the drawings and specs on documents prepared during the bid process that, after negotiations, are outdated. A lot can happen between the time a bid is advertised and when the contract is ready for signature. Before the contract is signed, the drawings, specs and other exhibits should be compared against the contract for consistency.

What if documents are inconsistent?

Inconsistencies in drawings and specs should prompt the owner to ask the designer for guidance – usually in the form of a request for information. But an owner also may want the contract to include an order of precedence that determines how inconsistencies in contract documents are resolved.

How contract documents are ranked is a matter of preference, but the contract itself commonly ranks above other contract documents. When deciding the order, owners should ask themselves which order of precedence will protect them the most and provide the best product?

What should be left out?

Don't forget to edit the exhibits before signing the contract. It's common for parties to attach documents that aren't necessary or consistent with the negotiated contract. Bid documents, for example, are sometimes included as exhibits even though the negotiated contract is miles from where the parties started months ago, when the project was out for bid. Or the contractor's proposal, with its own set of terms and conditions, is sometimes attached, even though these documents are quite different from the negotiated contract. Leave out exhibits that are unnecessary or inconsistent with the contract.

Should an owner note what the contractor has reviewed?

An owner should review exhibits and, to avoid trouble, include only what is necessary and consistent with the contract. And an owner may want to record that the contractor has

A lot can happen between the time a bid is advertised and when the contract is ready for signature. Before the contract is signed, the drawings, specs and other exhibits should be compared against the contract for consistency.

reviewed documents left out of the contract. Before construction, for example, the owner will commonly share information about the property with the contractor, including key documents about the site's environmental or soil conditions. As a result, the contractor is able to review the property thoroughly and advise the owner on constructability, safety and other important issues.

To make it clear that the contractor has reviewed key documents before the contract is signed, these documents should be listed in the contract. Then, if the site conditions become an issue during construction, this list will help avoid disagreement about what was shared.

Does the design address the contractor's comments?

Contractors commonly wish to include in the contract exclusions, clarifications or assumptions to the design. The design should clearly state what the contractor is promising to build; however, attaching exclusions, clarifications or assumptions, without weaving them into the design, is risky.

The best approach is to resolve the questions raised in the contractor's exclusions, clarifications and assumptions before the contract is signed. A designer should review the contractor's exclusions, clarifications and assumptions and, for each item: agree with the contractor and adjust the design consistent with the exclusion, clarification or assumption; disagree with the contractor that the exclusion, clarification or assumption is necessary; or agree with the contractor but determine that the exclusion, clarification or assumption can be included in the contract without having to adjust the design. Besides creating a better design, this exercise may highlight issues that need to be clarified, reducing the risk of disputes and errors down the road.

Parties in a construction dispute often wish that something in their contract had been worded differently. Taking care of exhibits can help avoid such moments of regret.

Stephen Kelly is a member of the construction and design practice group at Stoen Rives LLP. Contact him at 503-294-9448 or spkelly@stoel.com.