

Keeping Proposal Promises from Becoming Contractual Obligations

Proposals often are the first step in a courtship between owners and contractors. Initially, everyone is optimistic of a successful outcome. This optimism may last the entire project and culminate in an on-time, on-schedule delivery. However, in today's construction environment, costs may rise, labor may become scarce, and equipment and materials may arrive onsite late or defective—all of which can strain relationships between owners and contractors and lead to litigation.

A recent trend in construction litigation involves owners claiming a breach of contract against contractors for failing to fulfill the “promises” contained in their technical and commercial proposals. Contractors’ proposals, referenced in or attached to the contract as an exhibit, often contain optimistic statements, sometimes with a salesmanship twist, that present the contractor in the best possible light when vying for a project.

If a project deteriorates and a dispute arises, do these so-called “proposal promises” become contractual obligations for the contractor?

Contractors’ proposals typically include an execution plan and similar write-ups describing how the contractor plans to execute the project to achieve the owner’s desired result. These write-ups often contain general, sales-focused statements, such as:

- “Our scheduling programs will eliminate schedule coordination problems.”
- “We will dedicate the best team to the project containing all the right skills.”

- “We will optimize cost and schedule.”
- “Our execution approach will minimize overall program costs.”
- “We are familiar with labor in the area and will properly manage and source skilled labor.”
- “We will utilize our tried-and-true cost-tracking and forecasting programs to ensure project success.”

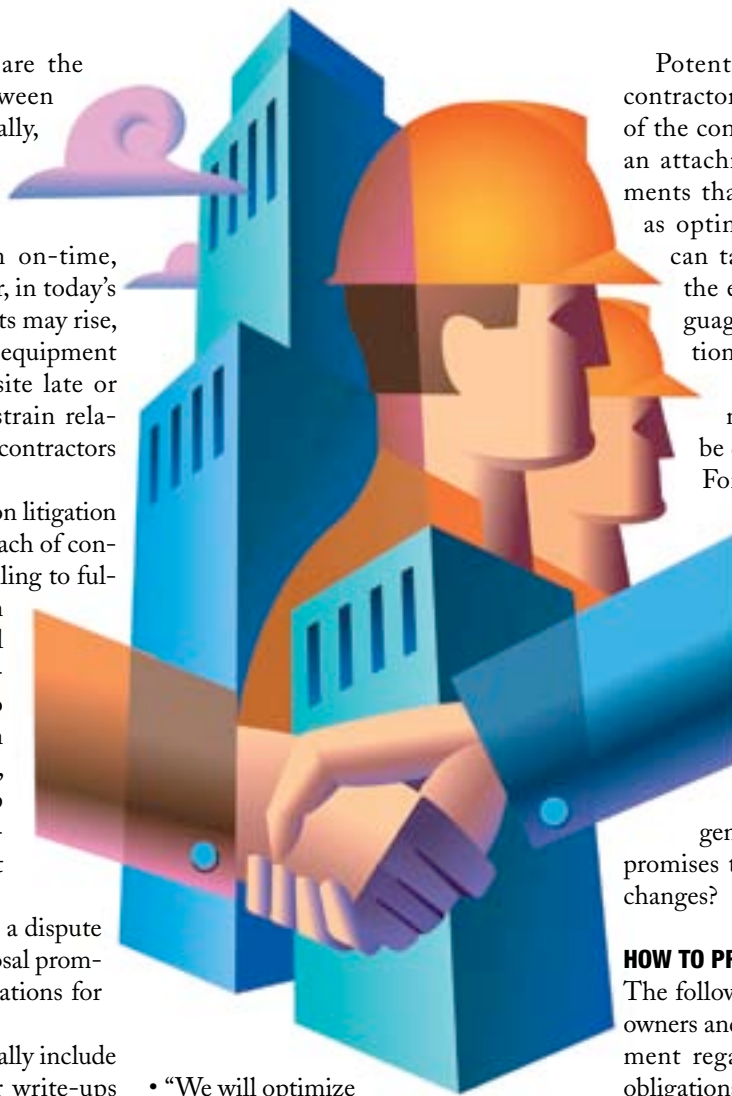
Potential problems arise when the contractor’s proposal is considered part of the contract, either by reference or as an attachment/exhibit. Proposal statements that contain vague terms—such as optimize, minimize and ensure—can take on different meanings in the eyes of a jury. Ambiguous language has no place in a construction contract.

Construction is a risky business and even the best plans can be disrupted by unforeseen events. For example, many parts of the country are experiencing a troubled construction economy resulting in rising costs, a shortage of skilled labor and tighter project schedules—all of which could increase the overall construction cost. If project costs rise higher than anticipated, does this mean the contractor was negligent or failed to fulfill its proposal promises to minimize cost and schedule changes?

HOW TO PREVENT DISPUTES

The following guidelines can help ensure owners and contractors are in better alignment regarding contractual rights and obligations. In turn, this may help prevent misunderstandings and disputes.

1. **Do not attach or incorporate the contractor’s proposals into the construction contract.** Often, the proposal is rendered obsolete by post proposal clarifications and bid addenda. As such, the proposal may not be consistent with the final agreement of the parties. Should the parties wish to preserve parts of



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the proposal, such as bid clarifications or exclusions, these should be listed separately in the contract as opposed to attaching the entire proposal to the contract. This also may prevent vague or sales-type wording from being incorporated into the contract.

2. **Clarify vague language.** The main body of the contract contains many legal terms that may be hotly negotiated, including warranties, insurance requirements and commercial terms. Technical exhibits typically do not get the same level of scrutiny; therefore, it is more likely unclear terminology may be incorporated into the contract. Review all contract attachments/exhibits to ensure all terms and potential proposal promises are defined.
3. **State the basis for proposal execution plans.** The execution plans in a typical contractor's proposal should be considered preliminary as they often are based on preliminary engineering and incomplete information. State the basis for critical sections of the proposal so when things change or evolve, the parties have an established starting point.

For example, a contractor's execution plan may state it intends to utilize certain cost or schedule control programs, but during the project a lack of data from subcontractors may render the programs useless. In addition, each party should list the data it needs to perform its work, along with the deadline, to ensure both parties understand the expectations.

4. **Document changes.** Good project management requires thorough documentation of changes—not just for the scope of work, but also regarding the manner of performance. Should the project be completed on time and under budget, questions are unlikely to be raised. However, in today's litigious environment, stakeholders and litigators will criticize the contractor if the

project turns sour due to the contractor allegedly breaking its proposal promises and not following its original plans. The owner may claim these promises were part of the reason why it originally selected the contractor. Contractors should document critical changes in their execution plans to help the parties understand that even the most carefully planned and executed project may require adjustments.

Construction is not a perfect science. More often than not, project circumstances change, resulting in changes to the project execution. A late, over-budget project leads to disappointment and increases the chances stakeholders will second-guess project decisions. By being aware of potential proposal promises, contractors can ensure only critical information is included in the contract, while preventing sales-type information from becoming an ambiguous contract obligation.

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