

A GAME PLAN

By Christopher J. Sullivan

for Successful Construction Contracts



There are many ways to avoid problem construction projects. However, an old sports metaphor best comes to mind—focus on blocking and tackling and the rest will take care of itself. In football, blocking and tackling are the fundamentals and are done down in the trenches away from the glamour of touchdowns and long pass-plays. However, success in football cannot be achieved without first excelling at blocking and tackling—the basics.

The same can be said about successful construction projects. The fundamentals in most construction projects are typically defined in each contract and include the scope of work, change orders, compensation, and schedule. While there are many other contract issues that can be important such as indemnification, insurance, warranties, termination, suspension, and dispute resolution, none of these items typically come into play if the scope of work is performed well, within the budget, and on schedule. Focusing on the fundamentals while negotiating and executing your next contract will build a solid foundation that can support a successful project.

SCOPE OF WORK

When bidding and negotiating your next project, make sure the scope of work is clearly defined. This includes making sure drawings, specifications, standards, and the division of responsibility between all parties is clearly defined. Often times, the scope of work will only focus on the work of the contractor; however, contractors should ensure that the owner's scope of work (e.g., providing site access, supplying material, etc.) is also defined. Likewise, items important to the owner, such as the right to review and approve certain drawings, the right to inspect the work, or requirements for project reporting should also be defined in the contract. Paying attention to scope control during the project is important to prevent scope creep and unnecessary changes that may delay and increase the project costs.

CHANGE ORDERS

Even the best laid out plans change. Therefore, it is advisable to include in your contract a change order provision for addressing future changes, should they arise. The starting point for change orders is a well-defined base contract scope of work. This is the scope measuring stick against which changes should be measured. In addition, it is advisable to include in the contract a mechanism for pricing future changes.

A well-defined change order clause should include fully agreed labor rates, equipment rental rates, allowable mark-ups on materials and subcontracts, site/schedule extension costs, and allowable mark-ups for overhead and profit. The time to negotiate change order rates and mark-ups is upfront when negotiating the contract, as there is typically more pressure then to be competitive than halfway through the project when the owner feels "half pregnant" with a particular contractor and changing contractors seems unlikely. Contentiousness

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on change orders can be reduced if the rules are established in the contract, thereby removing potential areas of disagreement in the heat of the battle.

COMPENSATION

It all boils down to money: how much and how or when it is paid. There are numerous payment methods from reimbursable/cost plus to lump sum to target price with a sharing of underruns/overruns, and everything in between. Each payment scheme should be well defined in the contract to remove ambiguity.

Contract disputes often result from disagreements interpreting the contract. For example, on cost plus contracts it is essential to define "cost." Does it include department and corporate overhead? Likewise, when applying a percentage mark-up for overhead and profit, does that also apply to subcontracted work, or just the main contract?

It is also important to define the payment terms, such as payment milestones or progress payments. Contractors should be careful to make sure payment milestones are clearly defined so as not to hold up payment, whereas owners should ensure that a contractor's cash flow is reasonable and not excessively cash positive.

SCHEDULE

Rare is a construction project in which schedule is not important. Therefore, it is essential that the parties fully agree on the baseline schedule, especially if damages for delay or early completion bonuses are contemplated. The schedule should be reasonable and include sufficient detail initially to define the planned start and completion dates for key activities, the work sequence, and the project float. With respect to float, experts recommend that the parties agree on the use of float. Who owns the float and who gets to use it first? This is rarely defined, but often the source of costly claims and disputes. In addition, the baseline schedule should show key work scopes of all parties, including the owner, contractor, and any other party on whom timely completion of the project rests. Time is money, so give it the same level of scrutiny when negotiating your next contract.

During project execution, it is good practice to regularly update the schedule to include progress data, actual activity completion dates, and other scheduling

data to ensure that potential delays and concerns are appropriately addressed.

Focus on the fundamentals in construction contracts, or the blocking and tackling, as this builds the foundation for a successful project. Take the time upfront to make sure the fundamentals are in place and continue to focus on the fundamentals during

project execution to minimize problems. Even the best quarterback would have trouble tossing a game-winning touchdown pass if his offensive line did not provide solid blocking. While not as exciting as a touchdown pass, focusing on blocking and tackling can help win the construction game and avoid costly claims and litigation. ■

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