

Working With Owners of Large Construction Projects: Tips and Strategies for Successful Outcomes

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INTRODUCTION

Owners of large construction projects and their contractors often clash on the appropriate distribution of risk in construction contracts and the commercialization of that risk. Disputed provisions typically include the topics of consequential damages, indemnities and insurance. These topics are often vigorously negotiated and the opposing party's position is typically well understood. Less well understood are emerging and changing issues like the use of Release of Holdback Bonds and when to assign Prime Contractor obligations.

The purpose of this paper is to provide the perspective of owner's counsel on some of the less well understood issues that arise during contract negotiations and during dispute resolution. It is hoped that if owners' positions are better understood it will help all parties achieve better outcomes.

This paper will discuss issues surrounding Performance Security and Assignment of Prime Contractor Obligations that arise during contract negotiations, as well as the topics of Release of Holdback Bonds, Achieving Substantial Performance and dealing with Defaulting Contractors during performance of the Contract.

CONTRACT NEGOTIATION

Performance Security

Owners want a mechanism built into the construction contract to ensure that in the event the contractor fails to perform, the owner has a means of ensuring the project is built. In Alberta, the parties often rely upon performance bonds to fulfill this need. The practice and protocols to secure the bond, the terms of the bond, and the value of the bond (typically 50% of the contract value) are well understood, and therefore relatively easy to negotiate.

Contractors increasingly seek to pass the cost of securing the bond to the owner. Rather than the performance bond being a cost of doing business for contractors, the cost is showing up as a line item in the contractors' bids and RFP responses. Leaving aside the issue of whether contractors should make this a line item or build the cost of the bond into their overhead, owners are questioning the value and utility of bonds as performance security. The principal drawback in using a performance bond from an owner's perspective is the notice that must be given to the surety and time required to successfully prosecute a disputed claim. Where owners face hard in-service dates