



CONTRACTS COMMITTEE

WELCOME

to the COAA

INDUSTRIAL CONTRACTING

Seminar



INTRODUCTIONS

Seminar Presenters:

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SCHEDULE

- 8:15 – 9:00 a.m. • Breakfast
- 9:00 – 9:20 a.m. • Introductions
- COAA Overview
- Philosophy for Development of Contract Documents
- 9:20 – 10:30 a.m. • Contract Structure and Risk Allocation
- 11:00:30 – 10:45 a.m.
- 11:04:45 – 11:00 a.m. • Break
- 11:11:00 – 11:45 a.m. • Contract Structure – continued
- 11:45 – 12:00 noon • Contract Application and Key Considerations
- Wrap Up



A SHARED VISION

The Construction Owners Association of Alberta is an association of Owner companies working together to achieve construction excellence in Alberta.

COAA provides leadership in the drive towards safe, effective and productive project execution.

COAA STRUCTURE

➤ *Board of Directors*

- *comprised of senior representatives from Owner companies*

➤ *Best Practices Committee*

- *creation and promotion of best practices for heavy industrial construction*
- *Sub Committees focused on:*
 - ❖ *Safety*
 - ❖ *Workforce Development*
 - ❖ *Productivity*
 - ❖ *Contracts*
- *promotion through workshops, seminars, COAA Best Practices Conferences, and formal training programs (e.g. Workface Planning offered at SAIT)*



CONTRACTS COMMITTEE

- *a large and active committee for more than 15 years*
- *representation from the industry stakeholders – Owners, Contractors, Engineers, Lawyers, Consultants*
- *Purpose – to develop best practices that enhance the drive for efficiency and high performance for all contracting parties on heavy industrial projects in Alberta*
- *Goal – to provide tools to assist contracting parties*
 - *clarity on obligations and risks*
 - *reduce costs associated with contract formation and administration*



CONTRACT DOCUMENTS

- *Stipulated Price Contract (2003)*
- *EPC Contract (2005)*
- *EPCM Contract (2008)*
- *These documents have been declared as Best Practices for the industry by the COAA Board of Directors*
- *Philosophy Documents were drafted to guide the Committee in the development of the EPC and EPCM contracts and are available on the website*



CONTRACT PHILOSOPHY

- *documents are provided free of copyright*
- *use of these documents is encouraged as a base document and may be modified by the parties on a project-specific basis*
- *preferable that changes be made by way of supplementary conditions; care must be taken when editing specific clauses to retain the intent of referring or subsequent clauses*
- *where possible, definitions are consistent across the contract documents*
- goal was to draft contracts that provided **flexibility** for different contracting strategies, such as types of compensation, and for different company policies or mandates for contracts
- this flexibility is largely achieved through the use of Appendices for project-specific criteria

CONTRACT PHILOSOPHY

- 'blanks' in the documents need to be completed on a project-by-project basis, e.g. value for insurance coverage
- *Appendices and Forms have been developed for the Contracts; an ongoing and continuous improvement effort*
- *Philosophy Document should be reviewed in conjunction with the planned application of the respective Contract Document*
- *Philosophy Documents provide background and context on the key issues addressed by the Contracts Committee in the development of the contract documents*
- *useful guidelines and checklists that are helpful for completing some of the Appendices are also included in the Philosophy Documents*



CONSTRUCTION CONTRACTS SEMINAR

PRESENTER:

W.J. KENNY

1. Three forms of Contract to be considered

- Stipulated Price Contract
- Engineering, Procurement and Construction Contract (EPC)
- Engineering, Procurement and Construction Management Contract

2. These are forms of Contract that are intended for industrial projects
 - There is no “Consultant” role
 - There is no “Payment Certifier”
 - The Owner is in control of the Project, and assumed to have the expertise and management capability to execute the Project
 - The Contractor is likewise assumed to have the skill and resources necessary to execute the work

3. The Stipulated Price Contract includes:
- Bid Conditions
 - General Conditions
 - Schedule “A” Scope of Work
 - Schedule “B” Payment for work
 - Schedule “C” Release and Certificate of Final Payment
 - Schedule “F” Key Personnel, Confidentiality, Proprietary Information and Consent Agreement

4. What you will not find in Contract:
- The Contractor's Proposal
 - Separate Articles of Agreement
 - Exhibits and Appendices
 - Supplementary General Conditions although these are contemplated

5. Assumptions:

- The work is an industrial project
- The owner has completed the design
- The owner will provide the site
- The owner has arranged for timely delivery of owner supplied items

- The Contractor is experienced in executing this type of industrial project and has the resources and supervisory personnel to do so
- The Contractor is familiar with local conditions, including the local labour market, and can staff the Project with adequate skilled labour

6. The Bid Conditions

- Contemplates exceptions
- Warrants that the Contractor has satisfied itself of all conditions affecting the work, particularly labour
- invites alternatives
- contemplates a clarification meeting
- reserves the right to award to anyone, not necessarily the low bidder, but will review for commercial and technical merit

7. The General Conditions

GC 1-Definitions

1.1.9 *Contract* or *Contract Documents* means this Stipulated Price Contract together with the schedules listed in GC 1.2, *Change Orders*, *Bid Documents* and all drawings, plans and specifications listed therein; **[Note to Draft: *Bid Documents* have been included in this definition, but may not be appropriate in each case]**

GC 1.1.37 Work

Work means all labour, supervision, administration, materials, transportation, supplies, tools, equipment, temporary facilities, storage facilities, and such other work and materials, necessary to be performed or supplied for the work required by the *Contract Documents* including the

GC 1.1.37 – con't

work described in Schedule "A" - Scope of Work, and including any work which is not expressly described in the *Contract* but which is nevertheless necessary for the proper execution of the work required by the *Contract Documents*;

GC 5.5 Order of Precedence

5.5 In the event of a conflict or inconsistency among or between the *Contract Documents*, the following shall apply:

5.5.1 the *General Conditions*, including the attached schedules shall govern over the *Bid Documents*;

5.5.2 for documents as revised by either party and approved by the *Owner*, the latest revisions shall govern;



5.5.3 figured dimensions on drawings shall govern, even though they may differ from scaled dimensions;

5.5.4 drawings of larger scale shall govern over those of smaller scale of the same date;

5.5.4 specifications issued by the *Owner* shall govern over all drawings regardless of date; and

5.5.6 the *General Conditions* shall govern over all other *Contract Documents*, including the schedules attached hereto.

GC 6-LABOUR

6.1 The *Contractor* shall provide a sufficient number of qualified personnel to enable timely and proper execution and completion of the *Work*. All such personnel shall be competent, literate in English and qualified by education, training, experience and in all other respects capable of carrying out the tasks to which each is assigned.

Acknowledgement of Investigation

7.1 The *Contractor* accepts the *Owner's Site*, the *Work Site* and the obligation to perform the *Work* in the condition existing at the close of tenders and acknowledges that it has investigated and satisfied itself as to:

7.1.1 the nature of the *Work*;

7.1.2 the location of and all conditions relating to the *Owner's Site* and the *Work Site* including but not limited to accessibility, general character, surface conditions, utilities,

roads, uncertainties of seasonal weather and all other physical, topographical, geographical conditions;

7.1.3 the general character, quality, quantity and availability of equipment and materials required to execute and complete the *Work*;

7.1.4 all environmental risks, conditions, *Law* and restrictions applicable to the *Contractor* or the *Work* that might affect the *Work*;

7.1.5 all conditions affecting labour, including, without limitation, availability, productivity and administrative practices, including those relating to safety, prevailing at or applicable to the *Work*; and

7.1.6 the magnitude of the construction work required to execute and complete the *Work*; and any failure by the *Contractor* to discover matters which affect or could affect the *Work* shall not relieve the *Contractor* from its obligations under this *Contract* or otherwise affect the *Contract Price*.

7.3 Work by Others

The *Owner* reserves the right to award separate contracts to *Other Contractors* to be performed at the *Work Site* and to perform work with its own forces at the *Work Site*, in which case the *Owner* shall co-ordinate and schedule the *Work* with the work of the *Other Contractors* and the *Owner's* own forces, and the *Contractor* shall share access to and use the *Work Site* to accommodate the work of *Other Contractors* and of the *Owner's* own forces.

Warranty of available resources

7.5 The *Contractor* represents and warranted to the *Owner* that:

7.5.1 it has the experience, resources, personnel and capability to expeditiously and diligently perform the *Work* and this *Contract*,

GC 8 – Change mechanism

- Owner issues contemplated Change Notice to Contractor
- Contractor provides Change Quotation
- Owner accepts and issues Change Order, or issues Change Directive
- Contractor may request change through a Change Quotation
- Dispute on entitlement resolved under dispute resolution mechanism

GC 8 – Change mechanism – con't

- all changes to the Contract must be made by change Order or Directive
- all impact costs or costs of acceleration are to be included in the Change Quotation
- materially different subsurface or actual physical conditions merit a Change Order

GC 9 – Completion & Acceptance

- Owner may take partial completed work
- Functional Completion can be for the entire Work or a Component system
- Final Completion notice after all Work completed and all known deficiencies corrected.

GC 9.4 Conditions precedent to Final Completion notice and release of the holdback



GC 18-Force Majeure

- Event of Force Majeure defined 1.1.14
- *Event of Force Majeure* means any occurrence, other than the financial capability of a party or an event constituting a delay under GC 19, which is beyond the control and without the fault or negligence of the party relying on such occurrence, and which by the exercise of

reasonable diligence that party could not at the time of bidding have reasonably contemplated happening and is unable to prevent or provide against;

- If Owner does not agree, revert to change mechanism
- time extension is the remedy for Event of Force Majeure

GC 19 –Delays

- Owner caused delay warrants time and reasonable costs

GC 20 – Suspension Allowed to Owner

- payment of direct costs
- no payment for damages or loss of profit

GC 21 – Termination

- for convenience available to Owner, for all or a portion



GC 25 – Warranties

- from Functional Completion
- that the Work meets the requirement of the Contract Documents
- come back warranty for specified time
- applies to re-performed work

GC 26 – Indemnities

- to Owner for performance or non-performance
- for physical damage caused to the greater of the limit of insurance and an amount to be specified

GC 26.4 Limitation on consequential damages

26.4 Notwithstanding anything else in this *Contract*, the *Contractor*, its *Subcontractors*, *Suppliers*, and their respective officers, directors, employees, consultants and agents shall not be liable to the *Owner*, or anyone claiming through or under it, whether by way of indemnity or by reason of breach

of contract or in tort, including liability for negligence and breach of statutory duty, or on any other legal or equitable basis, for:

26.4.1 special or consequential loss or damage;

26.4.2 loss of use, whether complete or partial, of the *Work* or existing facilities of the *Owner* or third parties;

26.4.3 loss of product;

26.4.4 loss of revenue, overhead and profit; or
26.4.5 loss of any contract that may be suffered by the *Owner*, except to the extent of amounts recoverable under a policy or policies of insurance required to be maintained by the *Contractor*, or provided by the *Owner*, pursuant to the provisions of this *Contract*, provided

however that in the event of the failure by the *Contractor* to complete the *Work* by the *Contract Time* the liability of the *Contractor* under this GC 26.4 shall be limited only to the greater of the insurance recoverable and \$ _____.

GC 26.6 Owners Indemnity to Contractor

The *Owner* shall indemnify and hold harmless, including indemnity for legal costs on a solicitor and own client (indemnity) basis, the *Contractor*, its *Subcontractors*, *Suppliers*, and their respective officers, directors, employees, consultants and agents from and against all claims, demands, actions and proceedings made or

taken by persons not parties to this *Contract* and which arise on account of and are attributable to the *Owner's* obligations hereunder, including, without limitation:

26.6.1 a lack of or defect in title or an alleged lack of or defect in title to the *Owner's Site*;

26.6.2 an environmental condition at the *Work Site* which is the responsibility of the *Owner*,

26.6.3 *Hazardous Materials* supplied by the *Owner* and while under its care and control;

26.3.4 an action for which the *Owner* must indemnify the *Contractor* pursuant to GC 15.2; or

26.6.5 defective machinery, equipment, products, processes or mechanisms provided by the *Owner* to the *Contractor* for the performance of or incorporation into the *Work*.

In the event that the *Owner* accepts the responsibility to indemnify the *Contractor*, its officers, directors, employees, consultants or agents pursuant to GC 26.5, then it shall be entitled to retain and instruct counsel to act for and on behalf of those persons and to settle, compromise and pay any claim, demand, action or proceeding without first obtaining prior approval from the party in whose favour the indemnity has been

provided. The *Contractor* shall and shall cause any indemnified party to co-operate in all respects in contesting any third party claim for which the *Owner* has accepted responsibility.

GC 27 – Insurance

- Project Specific



GC 30 – Dispute Resolution

- Project mediator
- Arbitration

Schedule A – Scope of Work

- Describe Scope of Work
- Contractor's General Responsibilities
- Hours of Work
- Milestone Dates
- Work Schedule

Schedule A – Scope of Work – con't

- Drawings, Code and Standards
- Connecting Work
- QC Program
- Safety and Loss Management
- Document Submission Requirements
- Progress Reporting and Other Reporting
- Meetings and Reports

Schedule B – Payment for Work

- Invoicing procedure
- Rates for Change Directive Work

Schedule C – Release and Certificate of Final Payment

- payment of Subcontractors and Suppliers
- release of all claims in respect of which notice in writing has not been given

Schedule E – Statutory Declaration

- payment of all Subcontractors and Suppliers
- complied with all of its lawful obligations

Schedule F – Key Personnel confidentiality undertaking



ENGINEERING, PROCUREMENT AND CONSTRUCTION CONTRACT (EPC)



1. To the extent possible, definitions and terms are the same as the Stipulated Price Contract.
2. In this Contract, there are 49 Articles and 9 Appendices, as follows:

- Appendix A – Owner’s Requirements
- Appendix B – Compensation
- Appendix C – Policy and Guidelines
- Appendix D – Warranty Items Procedure
- Appendix E – Liquidated Damages
- Appendix F – Incentive Fee
- Appendix G – Forms
- Appendix H – Dispute Resolution Procedure
- Appendix I – Key Personnel [**NTD: Use if not in *Execution Plan***]

3. Definitions:

Construction Work

1.1(e) *Change Order* means a written order signed by both the *Contractor* and the *Owner* authorizing a *Change*;

1.1(s) *Engineering Services* means those services described in the *Owner's Requirements* and provided by the *Contractor* for the design, planning and engineering of the *Project*, but does not include *Construction Work* or *Procurement Services*;

1.1(rr) *Procurement Services* means the procurement of *Procured Goods* performed by the *Contractor*, which may be performed as agent of the *Owner*, or for the *Contractor* on its own account, as stipulated in the *Owner's Requirements*;

1.1(kk) *Owner's Requirements* means the description of the scope, standards, design criteria, *Performance Guarantees, Milestones* and the programme of work set out in Appendix A – Owner's Requirements, as amended by any *Changes*;

- 1.1(u) *Execution Plan* means the programme developed by the *Contractor* for the *Work* in accordance with Section 4.2 and which shall be updated from time to time as may be required by the *Owner* and which shall include, but not be limited to:

1.1(u) – cont'd

- the organisation to be established by the *Contractor* for carrying out the *Work*, including, but not limited to, the identities and curriculum vitae of *Key Personnel*, or if not yet identified, then the titles of the positions that will be held by *Key Personnel*;
- the sequences and methods for the performance of the *Work*; and
- a detailed schedule with dates for the completion of *Milestones*;

1.1(x) *Functional Completion* means that date when the *Work*, or a *System*:

- has passed the required *Performance Tests* that are stipulated in the *Owner's Requirements* to be performed before *Functional Completion*; and
- is certified by the *Owner's Representative* pursuant to Section 19.4 as being complete or ready to be put into service, or being used for the purpose intended and a *Functional Completion Certificate* is issued;

1.1(w) *Final Completion Notice* means that notice in the form contained in Appendix G – Forms issued by the *Owner* to the *Contractor* pursuant to Section 20.2 certifying completion and acceptance of the *Work* under the *Contract*;

4. Article 3 – Owner’s Requirements
 - 3.1 The Owner’s Requirements shall describe the Work.
5. Article 4 – Contractor accepts the conditions at the Owner’s Site, including surfaces, but excluding Subsurface conditions unless disclosed by the Owner. All conditions affecting labour are accepted.

6. Article 5 – Engineering Services
 - Contractor shall be responsible for the design and engineering. Owner has a right of inspection and review of design drawings and specifications.

- ## 7. Article 7 – Procurement Services
- Contractor to procure from selected vendor lists where specified and use Owner's Specified Materials and Subcontractors as directed by Owner
 - Procurement Services are performed as agent of the Owner

8. Article 8 – Construction Work

8.2 Except for those materials, services and equipment to be provided by the *Owner* and described in Appendix A – *Owner’s Requirements*, the *Contractor* shall supply or cause to be supplied all services, equipment and materials required for the proper execution and completion of the *Construction Work*.

9. Article 9 – Commissioning

9.1 The duties of the *Owner* and of the *Contractor* in relation to *Commissioning before Functional Completion* and *Commissioning after Functional Completion*, together with the *Milestones* to be reached for commissioning, are as set out in the *Owner's Requirements*.

10. Article 13 – Changes

Change is to the Owner's Requirements

Change mechanism is the same format as the Stipulated Price Contract:

- Contemplated Change Notice

- Change Quotation

- Change Order

- Change Directive

11. Article 13.6

If the *Owner* requests the *Contractor* to provide a *Change Quotation* and subsequently elects not to proceed with the *Change*, the *Contractor* shall be reimbursed in accordance with Appendix B – Compensation, or as otherwise agreed between the parties, for its reasonable costs incurred including design and engineering services, and the *Owner* shall issue a *Change Order* for these costs.

12. Article 15

- Key Personnel to be identified and not changed without consent

13. Article 17

- Inspection and Testing
- Inspection and Test Plan

14. Article 18 – Performance Tests
- specified in Owner’s Requirements

15. Article 19 – Functional Completion – by
system

16. Article 20 – Final Completion
- after all deficiencies completed

17. Warranty – begins on Functional Completion

18. Article 30 – Proprietary Information

- technology developed by Contractor is Contractor's unless resulting from Owner's Confidential Information

19. Delays, Suspension, Termination, Liability and Indemnity for Third Party Claims, Limitation on Liability follow the same concept, except for the potential of Liquidated Damages, and if no Liquidated Damages, aggregate liability of the Contractor

- 42.3 Notwithstanding any other provision of the *Contract*, the *Contractor's* total aggregate liability to the *Owner* shall be limited to \$_____.
- **[NTD: Section 42.3 is to be used only where the parties choose not to include *Liquidated Damages* in the *Contract*. In addition, if Section 42.3 is to be incorporated, the Committee suggests that the parties negotiate whether the following indemnities obligations of the Contractor should**

be carved-out of the cap: Section 28.1 (intellectual property infringement); Section 39.1 (liens); Section 41.1 (third party claims); Section 45.3 (independent contract indemnity); obligations relating to workers' compensation premiums if the *Owner* is held accountable; and any taxes payable by the *Contractor* for which the *Owner* is held accountable.]

20. Insurance includes professional errors and omissions insurance.

21. Right of audit permitted to confirm compliance with the terms of the Contract.

COAA EPCM CONTRACT



Where possible, definitions used in the COAA Stipulated Price Contract and EPC Contract have been incorporated in this EPCM Contract in an effort to use consistent terms. To accommodate a variety of projects, project-specific information is contained in the Appendices to the EPCM Contract.

The EPCM Contract is intended to serve as a starting point for negotiations and can be modified by the parties with respect to a specific project. It is preferred that changes be made to the EPCM Contract by way of supplementary conditions so that the COAA form remains as a precedent. However, care must be taken in the modification or editing of specific clauses without consideration of changing the intent of referring or subsequent clauses.



Since the COAA Contract forms are intended to be shared with and used by members of COAA, there is no copyright on these documents and members are encouraged to use these Contracts as a basis for industrial work in Alberta.

Risk in Allocation in EPCM Contracting

EPCM contracts require the EPCM Contractor to provide pre-construction to post-construction services. The services start at the front end with engineering, move to procurement and follow through with construction management, which will last to project closeout and sometimes through the construction warranty period.

The Committee recognized that, in some cases, the EPCM Contractor will provide fabrication as part of its scope. The actual construction work is provided by parties referred to as "Works Contractors". The EPCM Contractor would not provide direct-hire construction forces without the Owner's consent.

The EPCM model allows the Owner to be more involved in the design process and this relationship needs to be addressed between the Owner and the EPCM Contractor prior to project commencement. The Owner needs to be realistic as to what involvement to have and what resources are available to provide effective and timely input to the design process. The Owner's expectations and resources should be reflected in Appendix A - Owner's Requirements.

When an EPCM contract is entered into, the definition of the scope may be low though generally understood as the engineering has not yet been performed; yet the Owner is committing to construction.



Low scope definition means that a project can be kicked-off earlier than waiting for scope to be developed and defined. However, it also means that the parties need to be prepared for scope refinement, development and growth. This requires enhanced communication between the Owner and the EPCM Contractor as opposed to other types of project delivery methods. It may also require a more significant Owner team to be available and engaged, especially as compared to EPC construction.

An EPCM Contractor is agent for the Owner both in relation to procurement and Construction Management

Works Contracts

As the EPCM Contractor will be the agent of the Owner, works contracts for the performance of the construction are entered into between the EPCM Contractor, as agent for the Owner, and the Works Contractor. Works Contractors may be recommended by the EPCM Contractor to the Owner, or may be selected by the Owner.

The works contracts can be let on any basis that the contracting plan determines is appropriate for the project (for example: stipulated price, unit price, cost reimbursable, guaranteed maximum price).



CONTRACT APPLICATION: KEY CONSIDERATIONS FOR ALL PARTIES

LAUREN M. TORESON



TIPS: KEY ISSUES TO ADDRESS

- Form of Contract
- Definition of Scope
- Warranty
- Delay
- Limitation of Liability
- Consequential Damages
- Ownership of Work Product

FORM OF CONTRACT

Form of contract depends on:

Relationships between the parties

Method of payment

Common Mistake: Choosing a form of contract that does not reflect the deal made

RELATIONSHIPS BETWEEN THE PARTIES

Owner: Traditional, as a general contractor, retains a design-builder

Contractor: Traditional, one of many trade contractors, design builder, construction manager, subcontractor

Consultant: Traditional, owner's outside expert, part of design build team

METHODS OF PAYMENT

Cost Reimbursable

Lump Sum

Unit Price

COAA FORMS OF CONTRACTS

COAA (2003) Stipulated
Price Contract

COAA (2005) EPC Contract

COAA (2008) EPCM Contract



COAA (2003) STIPULATED PRICE CONTRACT

Key Features:

Fixed Price Contract between Owner and Contractor

Standard Form Industrial Construction Contract

Contractor responsible for performance and construction of Work described in contract

Not a Design Build Contract

COAA (2005) EPC CONTRACT

Key Features:

Design Build Contract

Contractor responsible for engineering, procurement and construction

Owner's Requirements sets out obligations of contractor

Schedule B – Compensation, may be fixed price, cost reimbursable, etc.

Inspection and Testing Plan to be developed by party specified in Owner's Requirements

COAA (2008) EPCM CONTRACT

Key Features:

Engineering, Procurement and Construction Management Contract

Cost Reimbursable Contract

EPCM Contractor develops Execution Plan

Execution Plan – means the program developed by the EPCM Contractor for the Services which shall include the following:

- the organization to be established by EPCM Contractor
- sequences and methods for performing Services
- a contracting plan
- a procurement plan

FORM OF CONTRACT

Things To Remember:

Be familiar with terms of standard form contract and the procedures prescribed within

Ensure procedures in contract reflect actual business procedures employed by parties

Ensure schedules to contract are complete, clear and concise

DEFINITION OF SCOPE

Areas of concern

Responsibility for design

Performance based requirements

Clarity of definition

COAA – WHERE IS SCOPE DEFINED

Stipulated Price Contract – Schedule “A” Scope of Work

EPC Contract – Appendix “A” Owner’s Requirements

EPCM Contract – Appendix “A” Owner’s Requirements,
Appendix “B” Owner’s Obligations

COAA – ISSUES TO ADDRESS IN SCOPE

Ensure Work/Services to be provided are fully defined

Ensure Definitions in scope match those in contract

EPC/EPCM Forms – Owner's Requirements Must Address:

- When is Execution Plan to be provided
- Reports to be provided by Contractor
- Contractors responsibilities to manage the Work
- Procurement, Construction, Commissioning Duties
- Who is responsible for Inspection and Test Plan
- Performance Tests (Key Performance Indicators)

CHECKLIST FOR DRAFTING KEY PERFORMANCE INDICATORS

When and how the performance will be measured?

Who or what will measure performance?

Which party will pay to measure performance?

If the project does not meet the performance criteria when will it be re-measured and at whose expense?

If the project fails to meet the performance specifications on more than one occasion, how many times does the Contractor have the opportunity to re-measure performance? 107

CHECKLIST FOR DRAFTING KEY PERFORMANCE INDICATORS

If the project cannot or does not meet the performance specifications, how will the Contractor be paid for services rendered:

No amount

An amount based on work performed

An amount without a bonus

Will the Contractor be subject to pay damages? In an amount to be determined at the time or specified liquidated damages?

WARRANTY

The standard warranty usually provides for a defined period, often one year

The contract may provide for the warranty period to re-commence once warranty work is performed, COAA contracts provide for this

Unless specifically expressed, the warranty does not exclude implied warranties and does not limit a contractor's liability for negligently performed work, or work not performed in accordance with the contract

To limit Contractor's obligations to the warranty clause, very specific language must be used

COAA contracts do not set forth Warranty Period – Parties must define

DELAY

Concerns:

What event triggers the delay clause?

Must the delay result from an event not caused by the party seeking an extension?

Does the delay entitle the innocent party to an extension without compensation, or is compensation also available?

Is the remedy provided on account of the delay the sole and exclusive remedy?

HOW IS DELAY DEALT WITH IN COAA CONTRACTS?

Delays Not Caused by Contractor (SP/EPC) – Contract Time is extended for a reasonable period of time to allow for contractor to make up the delay

Stipulated Price Contract – requires Contractor to provide Owner with a Change Quotation for delay

Delays Caused by Contractor (EPC/EPCM) – Contractor must, at no additional cost to Owner, provide a recovery plan to Owner and perform any acts required by Owner to make up the lost time

LIMITATION OF LIABILITY

Also referred to as “exclusion clauses” or “disclaimer clauses”

Must be clear and unambiguous

Limit liability to:

Amount of fee

Contract value

Specified amount

To available insurance

LIMITATION OF LIABILITY

COAA contracts provide some draft limitation of liability clauses:

Section 42.3 (EPC) – Notwithstanding any other provision of the Contract, the Contractor’s total aggregate liability to the Owner shall be limited to \$_____.

Considerations:

Should certain indemnity obligations be carved out of the cap?
Example: Intellectual Property Infringement, Liens, Third Party Claims, Independent Contract Indemnity, Workers’ Compensation Board Claims

Should limits factor in amounts recovered under insurance policies?

LIMITATION OF LIABILITY & CONSEQUENTIAL DAMAGES

Sample Clause (EPC):

“Except to the extent to which coverage is provided by a policy or policies of insurance, as applicable, the Contractor, the Subcontractors, and their respective officers and directors shall not be liable to the Owner, or anyone claiming through or under it, whether by way of indemnity or by reason of breach of contract or in tort, including liability for negligence and breach of statutory duty, or on any other legal or equitable basis for:

special, punitive, indirect, economic or consequential loss or damage;
loss of use, whether complete or partial, of the Work or existing facilities of the Owner or third parties;
loss of product;
loss of revenue, fixed fees, overhead and profit; or
loss of any contract that may be suffered by the Owner”

LIMITATION OF LIABILITY & CONSEQUENTIAL DAMAGES

Considerations:

Should consequential damages clause be mutual?

Should the parties that are protected under consequential damages clause be expanded? Example – To include employees or agents of the Owner or Contractor

Should types of damages excluded be expanded?

OWNERSHIP OF WORK PRODUCT

Who owns the design?

Is the Owner granted a license to use the design? On new projects
OR for maintenance and improvements on same project?

OWNERSHIP OF WORK PRODUCT

COAA Contracts – General Principles:

Contractor grants Owner royalty-free license to use any and all patents, trademarks, industrial designs, copyrights and technology related to the Work and to make, have made and use all equipment, machinery and materials supplied by the Contractor under the contract

Where a technology, process or work method belongs to, or is developed by the Contractor or Subcontractor and is not the result of the Owner's confidential information, then Contractor or Subcontractor retains ownership

WHAT MAKES A GOOD CONSTRUCTION CONTRACT?

Complete, clear and concise – Ensure all schedules are complete

The legal terms and conditions actually reflect the deal made

Avoid duplication of terms (in tender and in contract, in specs and in contract, etc.)

Don't skim on the scope

Not always necessary to re-invent the wheel – standard forms

QUESTIONS?





WRAP-UP

- **Benefits Review**
 - Time is money
 - Common industry terminology avoids confusion
- **Seminar Evaluation Form**
- **Seminar Certificate**
 - Contact Leanne Hawryluk at leanne@coaa.ab.ca
- Interested in joining the **Contracts Committee?**
 - Contract Promotion (includes development of Appendices, review of contract templates, website content management, seminar delivery)
 - Builder's Lien Act
 - Pre-Qualification

Co-Chairs: Jane Sidnell, Fraser Milner Casgrain LLP
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