

RISK MANAGEMENT 101

for HIGHWAY CONTRACTORS

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A LEGAL PROFESSIONAL ASSOCIATION

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

Holding Subs to Their Bids.

- Must rely upon sub's price in securing the work.
- “Bid shopping” or “value engineering” lets sub “off the hook” on his bid.
- One-sided onerous contract language might release sub from his bid.

Risks of Mistaken Bids.

- By the Prime Contractor
 - » Can be withdrawn within 48 hours if (1) substantially low; and (2) math error or clerical mistake.

- By the Subcontractor
 - » Must be relied upon by Contractor.
 - » Contractor has duty to inquire if sub bid is significantly low.
 - » Sub can be forced to perform mistaken bid or be liable for the cost increase of going to next highest bidder.

Beware of Conditioned Bids.

- Contract Terms
- Duration
- Price Escalation
- Exclusions

“Battle of the Contract Forms” can be avoided by letting subs know “upfront” that all bid proposals must be based upon your contract form.

Cannot condition your bid (for price escalation or otherwise) when bidding Ohio public work or bid will be NON-RESPONSIVE

But can get a firm price in writing from the supplier

OR

Add more contingency to the bid

And ODOT provides some relief:

- Asphalt (Spec. 401.20 – greater than 5%)
- Fuel (Proposal Note 520 – 3/1/2006)
- Steel (Proposal Note 525 – 8/2/2004)

Can you pass on significant material cost increases?

Force majeure (floods, war and other “acts of God”).

Doctrine of Impracticability.

A significant price increase, alone, is not enough.

What about significant quantity changes?

- Cardinal change.
- ODOT spec. on “significant change” 104.02(D)
 1. character of the work differs materially from that in the original proposed construction; or
 2. when the product exceeds the limits in the table 104.02-1, which is:

<u>Contract Price</u>	<u>Contract Limits</u>
Up to \$500,000	\$25,000
\$500,001 to \$2,000,000	5% of Total Contract Price
Over \$2,000,000	\$100,000

If the decrease in quantity of any unit price exceeds 25% of the estimate (and more than \$400) unit price adjusted upward for factor in table 104.02-2.

Differing Site Conditions.

- Type One.
 - » conditions differ materially from those indicated in contract documents.
- Type Two.
 - » unknown conditions differ materially from those ordinarily encountered.

Notice:

1. Immediate oral notification
2. Written notice within 2 workdays

Are the Meeting Minutes Accurate?

If not, promptly set the record straight in writing ASAP.

“The dulllest pencil is sharper than the best memory.”

Prompt Payment.

- Federal
 - » 7 calendar days after receipt.
 - » Must pay back to government with interest if not paid to sub.
- Ohio
 - » 10 calendar days after receipt
 - » Only defense is bad work or liens
 - » Risk of 18% interest and legal fees

Insurance and Indemnity.

Specify insurance and indemnity requirements “upfront.”

Want not only indemnity, but defense.

Ohio’s anti-indemnity statute (R.C. § 2305.31) prohibits “broad form” indemnity but not shifting of defense costs and fees.

Additional Insured = Broad Form Indemnity