

Managing Disputes with Contractors and Consultants

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Contract Disputes and Claims

- Expect, in any type of project or contract that you face, certain risks that can lead to disputes:
 - Delays
 - Claims for Additional Costs
 - Liens
 - Bankruptcy/Insolvency Issues
 - Defaults/Termination
 - Liabilities to Third Parties

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Managing Contracts

- The best tools to address those disputes and risks come from your selection process for the contractor or consultant, and then your form of contract
- Most important part of contract management is often in the drafting and negotiation of the contract

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Managing Contracts

- When issues arise, look back to contract and hope issues have been addressed:
 - Rules and Restrictions on Changes, Extra Costs
 - Ability to address defaults (including payment terms), or to amend or terminate the work
 - Indemnities, Insurance and Security
 - Dispute Resolution Process

Dispute Resolution Options

- Consider options for resolving dispute:
 - Mediation
 - Arbitration
 - Litigation
- Depending on the contract, then consider tips to deal with delays, claims, defaults, liens and insolvencies

Process for Selecting Consultant or Contractor

Contractor Selection

- No matter how well-drafted your contract may be, and no matter how well your team manages the contract and any disputes, a bad contractor or consultant will cause issues and cost you money
- Importance of Processes to select contractors

Procurement

- Subject to applicable trade agreements, options to consider factors beyond the lowest price:
 - RFPs with other scoring criteria
 - Prequalification/Standing Offer Arrangements
 - Procurement Policies and Disqualification of Problematic Contractors

RFPs and Non-Price Considerations

- Various ways of structuring procurement
 - RFP vs. Tender
 - Privilege Clauses
- But even if “true” RFP, must list criteria and weighting for each to comply with Canadian Free Trade Agreement (CFTA) and to limit risk of claims

Trade Agreements

- CFTA imposes a number of specific restrictions and obligations when it comes to tendering, preventing local preferences (or related items like requiring prior work for the municipality, or prior work within the municipality)

Trade Agreements

- But can certainly consider past experience and qualifications
 - Ensure clear and objective scoring (sometimes less is more)
 - Consider use of references
 - Cautious of extremely low weight to price
- Can exclude contractors based on certain legitimate criteria, such as prior litigation or documented breaches of contract over specified period

Other Kinds of Procurement Processes

- RFPQ (Request for Pre-qualification)
- Standing Offer Arrangements
 - CFTA Article 508: prequalification cannot exceed 3 years

Disqualification of Contractors

- Beyond evaluation criteria, can put in place policy to exclude contractors or consultants from even participating in future bids or proposals

Disqualification of Contractors

- *Interpaving Case*
 - Past Litigation
 - Documented poor performance
 - Record of safety infractions
 - Abuse of Staff
 - Ultimately, is it likely to affect Bidder's ability to work for municipality, or result in increased staff time and legal costs
- *J. Cote & Son Excavating Ltd. v. City of Burnaby*

Disqualification of Contractors

- Requires clear and transparent policy, with fair process to consider input from contractor
- Importance of documenting poor performance

Key Contract Clauses to Address Potential Claims and Disputes



Careful About What is a Contract

- Often a lot of care into formal contracts, but less so when it comes to purchase orders, or simple retainers
- A contract is agreement between parties, whether formal or informal
 - “meeting of the minds”

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What is a Contract

- A contract could also be:
 - A letter from one party accepted by the other
 - An exchange of emails, or texts (even an emoji!)
 - A purchase order (is it agreed to by both sides)?
 - A verbal agreement

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What is a Contract

- Contract requires an offer, acceptance, and consideration
 - Consideration need not be equal or fair, just some consideration from each party (reason you see payment of \$1 in a contract).

What is a Contract

- Consideration is also important in the context of amendments to contracts
 - Is there new consideration for any change?
 - An amendment is a contract, subject to the same requirements and considerations
 - Can't hire based on emails or letters and assume you will get a contract in place to follow

Contract Issues - Vagueness/Uncertainty

- When preparing these key clauses and the scope of work, important to avoid Vagueness or Uncertainty
 - Contract will only be enforced if terms are either "certain" or "ascertainable"
 - Courts will not enforce an "agreement to agree"

Contract Issues - Vagueness/Uncertainty

- Courts will read any ambiguity against the party that drafted the agreement (*contra proferentem*)
 - Adds to the practical concern that courts tend to be harder on public bodies in any issue of interpretation

Contract Issues - Vagueness/Uncertainty

- Courts do not look at intention, but only the words of the Agreement
 - Evidence that you separately talked about other things will not be helpful if not reflected in the agreement
 - If contractor/consultant promises something - it needs to be in the agreement!

Contract Clauses: The Price

- Lump Sum
- Cost Plus
 - Fixed Fee, percentage fee
 - Guaranteed maximum price
- Unit Price
- Something Else?

Contract Clauses: The Price

- Be careful of including “estimates” in pricing schedule
- Consider pre-approval for expenses, or at least carefully define and restrict

Contract Clauses: The Scope

- Poorly Defined Scopes of Work are one of the most common sources of disputes
- Anything not captured in the scope could be an extra
- Careful to draft broadly, using inclusive language (including but not limited to...)

Contract Clauses: The Scope

- Avoid simply including proposal from contractor/consultant as the basis for the scope
- Be very cautious of “exclusions” in any such proposal
- Ensure you have in-house or consultant knowledge in reviewing the final scope of work

Contract Clauses: Performance Security

- Firstly, consider who you are contracting with
- Contract requires “Legal Person”
 - Individual
 - Corporation
 - Parent Company? Subsidiary?
 - Non-Profit (Society, Part 9 Company, etc.)
 - Partnership; Public Body

Contract Clauses: Performance Security

- Performance Bond
- Letter of Credit
- Parent Company Guarantee
- Cash Retention
- Alternate Security (real or personal property mortgage)

Contract Clauses: Changes & Extras

- Who can request? Who must approve?
- Change Orders
- Working Under Protest
- Change Directives

Contract Clauses: Changes & Extras

- Notice Requirements
 - Must make a claim in a specified manner, in a specified period of time
 - Failing which waives right to additional compensation
- Prevents surprise costs at the end of a project, and allows you to potentially mitigate delays or impacts (consider alternatives before doing extra work)

Contract Clauses: Changes & Extras

- Critical clause given helpful case law in Alberta
 - Constructive notice not always enough (i.e., meeting minutes)
 - Can insist on strict compliance

Contract Clauses: Payment

- Payment Process
- Payment Window
- Progress Payments
- Final Payment

Prompt Payment and Construction Lien Act

- Cannot contract out of obligations, will apply even if missing
 - i.e., 28 days to pay; 14 days to object
 - Adjudication Process
- Applies to engineers or architects working on an improvement, subject to recent amendments (awaiting Regulations)

Prompt Payment and Construction Lien Act

- Consider “proper invoice”
 - Statutory Declaration
 - WCB Clearance Letter
- Phased Release of Holdback Issues

Contract Clauses: Indemnity

- General:
 - “Contractor indemnifies City for all injury, loss or damage suffered by City arising from Contractor’s actions.”
- Fault-Based:
 - “Contractor indemnifies City for all injury, loss or damage suffered by City as the result of Contractor’s negligence or breach of contract.”

Contract Clauses: Indemnity

- Reciprocal:
 - “Contractor and City indemnify each other for all injury, loss or damage each suffers as the result of negligence or breach of contract of the other party.”

Contract Clauses: Indemnity

- Legal Costs:
 - Silence
 - Legal Costs, or Reasonable Legal Fees, or Attorney’s Fees
 - Solicitor Client Costs
 - Solicitor and his own client costs

“Contractor indemnifies the County for all damages, losses and costs (including legal costs on a solicitor and own client full indemnity basis) incurred by the County...”

Contract Clauses: Insurance

- Liability Insurance
 - Comprehensive General Liability
 - Professional Error & Omissions
- Property Insurance
 - Builder’s Risk
 - Course of Construction

Contract Clauses: Insurance

- Additional Insured
- Notice of Cancellation/Material Change
- Provide Evidence of Insurance
- Use Your Insurance Advisor (AMSC, RMA, etc.)

Contract Clauses: Warranty

- Exclusive Remedy or Additional Right?
- Replace, Repair, or Pay?
- Warranty Period (term), and Warranty on Warranty (evergreening warranty)

Contract Clauses: Termination

- At expiry of Term
- For Contractor's "Default"
- For Municipality's "Default"
- At Municipality's Convenience

Contract Clauses: Limitations of Liability

- Beware and Carefully Consider Limitation of Liability Clauses
- Sometimes explicit; sometimes hidden in the document

Limitations of Liability

- Waiver of Consequential Loss
- Overall Cap on Liability
 - Amount vs. Risk
 - Exclusion of Insurance

Contract Clauses: Ownership of Intellectual Property

- Consultants seeking to retain full ownership of all documents the Municipality is paying for
- Restrictions on future use of documents
- Compare ownership of documents to ownership of IP (and licenses to use)
- Waiver of moral rights

Contract Clauses: Dispute Resolution

- Helpful to include process to deal with disputes, whether or not includes an alternative dispute resolution process like arbitration
- Contracts should require contractor to continue working through any dispute, to avoid being held hostage

Alternative Dispute Resolution

Dispute Resolution

- Mediation
 - Process
 - Mandatory vs. Optional
 - Appointment of Mediator

Dispute Resolution

- Arbitration vs. Litigation
 - Timing (is faster better as an owner)?
 - Costs
 - Expertise of decision-maker
 - Risks from poor decision (limited avenues for appeal/judicial review)

Dispute Resolution

- “Drag Along” provisions
 - Consider connection between contract and other contracts/contractors
 - Risk of duplicative dispute resolution processes, and even inconsistent results

Final Word on Contracts

- Careful thought even to standard form contracts:
 - CCDC Contracts (Construction)
 - RAIC Contracts (Design- Architecture)

Project and Dispute Management



Managing Disputes

- Again, the starting point for any dispute or issue that arises is to look back to the contract
- Do not assume the rules or requirements based on general practice or other projects – look to agreement for rules on timing and format of notices or other required steps

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Managing Disputes

- Assign internal responsibility early on to ensure compliance and consistent approach
 - Beware of contractors trying to divide and conquer between employees or between owner and consultant

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Managing Disputes

- Establish Project Controls
 - Standards, content and organizational requirements for daily reports, meeting minutes, emails and correspondence
 - Stay updated, so that you are prepared for tight timelines when dispute actually arises (not starting with extensive background to get up to speed)

Managing Disputes

- React promptly and in accordance with contractual timelines
 - Notices, payment issues, liens
 - Update Schedules

Changes

- Hope that contracts restrict ability to seek additional compensation in the absence of specific notice requirements
- Avoid any verbal promises or agreements, even if contract restricts to notice in writing

Changes

- Avoid knee-jerk agreements (i.e., is the Municipality responsible or agrees to extend time because of weather event or other unexpected issue)
 - Take the time to review the contract and analyze the issue, even if it seems obvious

Changes

- Importance of documentation to confirm where they are deviating from contract in a way you do not accept
- Formally document changes as signed amendments (helps push back on other proposed changes)

Changes

- Ensure any agreed changes are not open-ended
- Include language that compensation you are giving (or extension of time) is in full and final compensation for the event in question, including for all ripple or consequential effects of that change or impact

Claims

- Accepting a change/claim does not mean accepting the value they propose
- Carefully scrutinize proposed cost adjustments compared to contract

Claims

- What charges are actually connected to work?
- What would they have incurred anyway?
- Have they properly mitigated any impacts?

Claims

- Examples:
 - Tariff imposed (but does it impact the materials already ordered? Could they source from elsewhere?)
 - Delay in performing work (but could they perform other work? It is on the critical path of work?)

Claims

- Consider use of experts for larger claims, and seeking legal advice early on
- Agreeing to what seems like a small change without parameters can turn into a very large claim

Defaults

- Again, documentation is critical
- Often avoid sending harsh letters in trying to maintain the relationship
- But without a notice of default in writing, you have not started the process of enforcing the default

Defaults

- Be aware of and follow notice requirements in the contract
 - i.e.: if usually emailing certain person, that may not be the proper formal notice requirement in the contract
 - Can send to both the usual contact and the formal address for notice under the contract

Defaults

- Get notice out right away, even if preliminary and even if set out in reasonably friendly way (and even without thinking you would ever terminate)
- Be mindful of giving notices to sureties (bonding companies)
 - Can be effective even if not required

Payment During Dispute

- If in doubt, err on the side of withholding payment
- Advantages to holding the money in any dispute
- Risks of insolvency or difficulty/costs in collecting
- 14-day period to dispute “proper invoice” under PPCLA

4 Golden Payment Rules if PPCLA Applies

1. Holdback at least 10% from every progress payment
2. Wait 60 days from substantial and final completion before paying holdbacks
3. Search title the day of payment
4. Never pay a dime in the face of a lien

Builders' Liens

- Beware contractor needing money to pay subcontractor
- There are ways of addressing liens through payments in trust or into court (but identify the red flags in those cases)
- Negotiating holdback outside of PPCLA (i.e., road construction projects)

Bankruptcy and Insolvency

- Federal legislation can limit your rights to deal with a default where subject to creditor protection processes
- Emphasizes importance of payment security, and withholding payment
- Watch for proof of claim and other filing requirements

Dispute Resolution

- Assuming contract required contractor to continue working through any dispute, should insist on this to avoid being held hostage (do not allow resolution to determine future work)
- Recognize disputes to escalate to supervisors/managers immediately, consider seeking legal advice before taking any significant steps

Dispute Resolution

- Regardless of forum (arbitration or litigation), always assume dispute is going to court/arbitration in terms of keeping records and documenting issues
- Also true during mediation, which can be very revealing of parties' weaknesses
 - Can be used as fishing expedition by contractor or consultant

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Conclusion

- Disputes tend to cause issues and expense even where you are successful
- Focus on careful selection and appropriate contract terms
- Assume the worst when managing contracts and disputes- stick to contracts and seek advice early on

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Thank you for
attending

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