Stipulated-sum construction contracts establish a firm price for the performance and completion of a defined scope of work. The contractor bears the cost risk for the work scope and earns a profit or suffers a loss to the extent its cost of work is less or more than the fixed sum. The owner is obligated to pay the contract price, and the contractor is obligated to complete the work for the contract price, regardless of the contractor’s actual cost of completion. This checklist addresses certain essential terms for fixed-sum contracts, but it does not address all of the general and special conditions an owner may wish to include as part of the agreement.

1. **Does the contract clearly and completely identify the work the contractor is required to perform?** A well-defined scope of work is the owner’s best protection against changes in the contract price and time. Where the scope of work is not clear, disputes may arise concerning the work the contractor is obligated to perform for the contract price. Work beyond the scope is generally considered extra work for which the contractor may receive additional time and compensation.

   a. **How is the scope of work defined?** The scope of work may be defined many different ways. Most commonly, the work scope is defined by incorporating into the contract the plans and specifications, general and special conditions, bid documents, reports, and other matters. Those documents often are specially defined as the “Contract Documents” and, taken as a whole along with the contract for construction, are the integrated final agreement of the parties.

   b. **Is the contractor’s scope of supply clearly established, and are there owner-supplied items that should be excluded?** Constructing a project requires labor, materials and
equipment—and many other resources as well. The owner may want to broadly phrase the resources the contractor is obligated to supply categorically, by enumeration, or both. A categorical statement, such as “except as specifically provided herein, contractor shall provide, furnish, and supply all things necessary and incidental for the timely performance and completion of the work,” may protect the owner against later assertions by the contractor that the contractor is not responsible for procurement of certain items.

___ (c) Does the contract plug possible holes in the description of the scope of work? There are a variety of “catch-all” provisions that owners should consider to plug potential holes in the scope of work that may result from incomplete or inaccurate scope definitions. These provisions include: (i) the contractor’s representation and warranty that it has thoroughly reviewed the construction documents and there are no errors, omissions, or discrepancies; (ii) advance waivers of claims for extra time and money for conditions the contractor could have ascertained from diligent inspection of site conditions, review of construction documents, etc.; (iii) disclaimers by the owner of implied warranties, and by the contractor of reliance on owner-supplied information concerning conditions of the work; and (iv) catch-all provisions requiring the contractor to perform all work and services and supply all things reasonably related to and inferable from the construction documents.

___ (d) Does the contract clearly respond to exclusions, exceptions, qualifications, clarifications, and assumptions identified in the contractor’s bid? Contractors often identify several provisions that form the basis for their bids: exclusions, exceptions, qualifications, clarifications, and exceptions. While some of these provisions are innocuous and merely identify basic assumptions concerning the project, others may substantially undermine the scope of work or scope of supply. Such matters should be specifically addressed in negotiations and either negated by an integration clause or built into the contract documents.

___ 2. Does the contract clearly establish the terms for compensation and payment to the contractor? The compensation and payment provisions of the contract are essential to the owner’s ability to ensure budget control and to ensure that the contractor completes all work for the stated contract price.

___ (a) Does the contract make clear that the contract price is full and complete compensation for all work and services
provided by the contractor? The price term of the contract needs to be stated broadly to ensure there is no ambiguity about what payment to the contractor represents. The price term should make clear that the price represents full and complete compensation for the timely performance and completion of all work required by the contract documents strictly in accordance with the terms and conditions of the contract documents.

(b) Is the contract price subject to adjustment due to inflation? Given escalation in construction costs, many contractors are reluctant to contract on a fixed-price basis absent some form of escalator that takes into account increases in the cost of resources needed for construction. To the extent an owner must provide some relief, if only to avoid bids that are heavily laden with contingency, an owner may want to consider using a narrowly tailored price adjustment clause. The owner must be careful in identifying the prices that may be adjusted, the index to be used, the method of adjustment and the process by which the adjustment is effectuated.

c) Is the contractor required to continue work when payment disputes occur on the project? Payment disputes often arise on construction projects. It is important to the owner that the contractor not cease work when payment disputes arise. To avoid cessation of work, an owner may want to include a provision that obligates the contractor to continue work in the event of a dispute over payment.

d) Does the owner have a contractual right of setoff? An owner may want to include a contractual right to setoff amounts that a contractor owes the owner against payments due to the contractor. Such setoff provisions protect the owner from having to engage in subsequent litigation to recover money for items that are the contractor’s responsibility.

e) Will the contractor be paid on the basis of progress of its work and, if so, what measure of progress should be used? Owners often compensate the contractor on an incremental basis as the work progresses. The owner must be careful in negotiating progress payments to ensure that payments made reflect the status of completion of the work performed. A contractor may be compensated on the basis of the percentage of the work that is complete, often pursuant to a schedule of values that specifies in advance the payment to which the contractor is entitled for major components of the contractor’s work. The amount of the payment
is determined on a periodic (usually monthly) basis through inspection of the work and other methods of verification. Progress payments are also an important source of leverage for an owner to ensure that the contractor is in compliance with other terms of the contract documents. An owner may want to condition its obligation to make progress payments on the contractor’s submission, at the time of a pay application, of items required of the contractor, such as schedule updates, lien releases, and other documents required under the contract requirements.

**Does the contract permit the owner to retain funds to ensure the faithful completion of the work and do the payment provisions comply with statutes requiring prompt payment of progress payments and retention?** Especially when the owner does not require payment and performance bonds, an owner may want to hold retention to ensure the faithful performance and completion of the work and payment by the contractor to its subcontractors and suppliers. The typical retention amount is 10% of the amount otherwise due to the contractor, which retention generally is released following completion of the project and/or expiration of warranty periods. Contractors may want to negotiate alternatives to retention in order to maintain their working capital. A variety of alternatives exist, but the owner should be careful to ensure that any alternative provides comparable assurances of liquidity to the holding of cash retention, such as a demand money guarantee or a sight draft letter of credit.

**Does the contract require the contractor to pay its subcontractors and suppliers?** To avoid liens, the owner may want to require that the contractor promptly pay like amounts of charges due to its subcontractors and suppliers in conformance with the terms of their respective agreements.

**What conditions does the contract establish for making the final payment?** The owner’s obligation to make final payment should be conditioned on the contractor’s compliance with all of the contract requirements and the contractor supplying all items required in the form specified, including lien releases, as-built documentation, warranties, product manuals, in-service training, and the like.

**Is the contractor required to certify that pay applications are true and correct?** The owner may want to require the contractor to certify with each payment application, including the application for final payment, that all amounts
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requested in the pay application are due and payable in accordance with the terms of the contract documents. An owner also may wish to include a certification requirement for requests for changes and claims.

___ (j) **Does the owner have the right after payments are made to challenge the contractor’s entitlement to payments or their amounts?** The owner may also want to include a provision in the contract that payments by the owner to the contractor do not constitute a waiver or estoppel of, or otherwise preclude, the owner’s right to later contest the contractor’s right to payment of all or any part of the compensation paid to the contractor, including the retention.

___ (k) **Does the contract require the contractor to secure releases of all liens and stop notices and provide the owner with a remedy for noncompliance?** Unless mechanics liens and stop notices are released, the owner faces potential liability to subcontractors and suppliers. The owner needs protection against the impecunious contractor who receives payment but does not pay its subcontractors and suppliers. The owner may want, at a minimum, to have the right to withhold funds from the contractor to satisfy such obligations and/or require the contractor to file lien release bonds.

___ 3. **Does the contract protect the owner’s interest in the quality of the work and the timeliness of performance and completion?** Specifying the standards of care expected of the contractor in performing the work is particularly important in the context of fixed-sum contracts. The standards of care consist of numerous qualitative dimensions of performance the owner may want to make express. The existence of express standards of care provides the owner with a basis for enforcing the agreement, limiting claims, and if necessary, declaring defaults. The standards of care the owner may want to consider include those listed below.

___ (a) The obligations of trust, confidence, and loyalty.

___ (b) The obligation to perform the work in an economical and efficient manner in the best interests of the owner.

___ (c) The duty to perform the work strictly in accordance with the contract documents.

___ (d) The duty to furnish sufficient and competent business administration, planning, supervision, and staffing for all work.

___ (e) The duty to diligently prosecute the work and to complete it by the time specified in the agreement, time being of the essence in contractor’s performance and completion of the work.
(f) The duty to perform the work in a good workmanlike manner and in compliance with applicable building codes, standards, guidelines, and recommendations.

(g) The duty to correct work that is deficient or defective in workmanship, materials, and equipment. For a further discussion of defective work, see the checklist for General Conditions—Owner’s Considerations.

(h) The duty to perform the work in compliance with all applicable laws.

4. Does the contract adequately establish a deadline by which the contractor is required to complete the project? In addition to securing a firm price for budget purposes, owners also want construction completed within a definite period of time.

(a) Is the date of completion readily determined from the contract documents? In some cases, an owner is able to identify a particular date by which the work must be completed. In other situations, a contingency may exist to commencement of the work and a period of time specified for performance and completion upon the occurrence of that contingency. For example, the construction contract may be executed before the plans and specifications are final or before the owner has secured all permits. When the completion date is determined by a period of performance calculated from a date of commencement, the contract needs to specify the act, circumstance, or event that initiates the contractor’s duty to perform, such as the issuance of a notice to proceed or building permit. The owner also needs to be clear on whether the period of performance is based on work days or calendar days, and whether weekends, holidays, and/or rain days are included in or excluded from the period of performance.

(b) Should liquidated damages or reverse liquidated damages be available for delay in completion?

(c) Should the contract include incentives for early completion by the contractor? An owner for whom the completion date is critical may want to consider providing a performance bonus as an incentive for early completion of construction. Such incentives may be based on a per diem bonus for each day the work is completed early or other mechanism for determining the bonus.

(d) Does the contract contain an advance waiver of claims for delayed early completion? Contractors are increasingly asserting claims for delayed early completion. Such claims usually include claims for “extended” overhead and
increased direct costs resulting from what the contractor asserts is a prolonged period of performance. Owners may want to include advance waivers of claims for delayed early completion.

(e) Does the contract contain a no-damages-for-delay clause? Owners who have flexible time requirements, but constrained project budgets, are able to provide more time in those circumstances, but not additional money. In those situations, an owner may want to specify that in the event of an owner-caused delay, the contractor’s sole remedy is an extension of time. Statutes in some states prohibit the use of no-damages-for-delay clauses on public contracts, and even in the case of private contracts such clauses are likely to be strictly construed.

(f) Is the contractor required to prepare and submit for owner’s approval a project schedule and work plan in sufficient detail for the owner to understand how the project will be constructed and to monitor and enforce time requirements? Is the contractor required to update the work plan and schedule periodically and when significant changes occur in the planned sequence of work? For a discussion of schedule provisions, see the checklist for General Conditions—Owner’s Considerations.

(g) Does the contract identify delays that excuse the contractor’s performance and specify the remedy in the event of an excusable delay? A contractor may have no ability to control certain types of delays and typically expects additional time for performance when unexpected events beyond the contractor’s control disrupt the construction schedule. The contract should identify the circumstances under which the owner will provide the contractor with schedule relief; specify the remedy available in the case of an excusable delay; define the contractor’s obligations when a force majeure event or other excusable delay occurs, such as notice and mitigation requirements; and exclude events that are not excusable, like the contractor’s financial inability to perform.

5. Does the contract establish a process for the owner to monitor the project status on a regular basis? An owner needs the ability during the course of construction to monitor the work and should include contract provisions that enable the owner to secure information.

(a) Does the contract require the contractor to appoint and maintain a designated representative? An owner typically should require that the contractor assign a designated
representative to the project. The designated representative should have authority to act and make decisions on the contractor’s behalf, be available to the owner at all reasonable times, be competent and experienced, and have a presence at the jobsite (physically or otherwise) at all times that construction is in progress. The owner may want to limit the contractor’s ability to replace the designated representative, and may want to retain the right to demand replacement in the owner’s sole discretion.

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(b) **Does the contract contain provisions for regular communication and reporting about the status of the project?** An owner may want to include provisions requiring the contractor to schedule and attend weekly or monthly meetings and special meetings requested by the owner. The owner may also want to require the contractor to provide regular reports concerning issues of special concern and other reports concerning the project as the owner may request. The owner may also want to require the contractor to keep and make available to the owner all of the contract documents, project correspondence, and other information relating to the management and administration of the project.

(c) **Does the contract establish terms and conditions under which the contractor may subcontract the work?** An owner needs to consider the effect that subcontracting may have on the project and whether, to what extent, and on what terms and conditions subcontracting should be permitted. The owner may want to retain the right to approve subcontractors, identify specific qualifications that subcontractors must satisfy, and obtain copies of subcontracts. The owner may also want to retain the right to require the contractor to replace a subcontractor at the owner’s discretion. The owner may want to specify that the contractor is responsible for all work performed by subcontractors; is not relieved from its contractual responsibilities by virtue of owner’s approval of the use of subcontractors; and is responsible for directing, coordinating, administering, supervising, and evaluating the services provided by its consultants and subcontractors. The owner may also want to require the contractor to include certain provisions in subcontract agreements, such as flow-down requirements and the right of the owner to enforce the subcontract as a third-party beneficiary. Care must be taken, however, to consider statutory protections provided to subcontractors, such as subcontractor listing
laws that restrict the contractor’s ability to substitute subcontractors.

6. Does the contract reserve to the owner the right to make changes to the contract and establish a process for determining the cost and time impact of changes? Unless the owner has the right to make changes to the project, the contractor can refuse to perform or condition its performance on price and time concessions by the owner. Provisions for change orders, change directives, and claims relating to asserted changes are essential to the owner’s ability to maintain flexibility regarding the project.

   (a) Does the contract give the owner the right to make changes to the work? The owner needs to preserve its right to make changes without invalidating the contract. Absent the reservation of that right, a contractor may take the position it is not required to perform changes directed by the owner, and the project may be adversely affected if the owner needs to bring in another contractor to effect a change.

   (b) Is there a method in the contract by which to determine the cost impacts for changes in the work if the owner and contractor cannot agree? An owner may be able to eliminate uncertainty in the pricing of changes by specifying, in the contract, the method by which compensation for changes will be determined. The method may include unit prices for labor, materials, and construction equipment; cost-plus arrangements; stipulated overhead or general condition rates; or other methodologies.

   (c) Is there a method in the contract by which to determine the time impacts for changes in the work if the owner and contractor cannot agree? An owner may be able to eliminate uncertainty in schedule adjustments by specifying in the contract the method by which extensions or other changes will be determined.

   (d) Does the contract contain procedures requiring notification of claims and a process for resolving them? For a discussion of claims provisions, see the checklist for General Conditions—Owner’s Considerations.

7. Does the contract protect the owner from risk through appropriate insurance? Project insurance provides financial assurances to the owner against the risk of being sued and/or held liable for personal injuries to construction workers and third persons, property damage, and damage to the construction in process. The most typical types of insurance procured by contractors are worker’s compensation insurance, general liability insurance, automobile insurance, and builder’s
risk insurance. Each of these types of insurance cover different risks and have different exclusions and limitations.

__ (a) Does the contract require the contractor to provide and maintain worker’s compensation and employer’s liability insurance to protect the owner against claims by injured workers? Are the limits sufficient? Do the limits apply to each accident?

__ (b) Does the contract require the contractor to provide and maintain liability insurance to protect the owner against claims from third parties for bodily injury and property damage? Is the deductible so high that the owner is at risk if the contractor becomes insolvent? Are the limits high enough for the project on an individual and aggregate basis? Is the coverage based on occurrences or claims made? If a claims made policy is permitted, is the contractor required to supply tail coverage? Do the coverages include or exclude premises liability, completed operations, contractual liability, and other significant policy provisions?

__ (c) Does the contract require the contractor to provide automobile insurance to protect the owner against claims from third parties for bodily injury and property damage caused by the operation of motor vehicles? What deductibles, limits, and coverages should the owner require?

__ (d) Does the owner need the contractor to supply other types of insurance coverage? Other types of insurance to consider may include builder’s risk insurance, which protects inter alia against damage to the construction work itself, materials procured for the construction, and materials in transit to the construction site.

__ (e) Do the insurance provisions address other important issues? This would include whether the owner is an additional insured, the insurer waives subrogation, or the owner’s policy is noncontributing.

__ (f) Is the owner entitled to notice of nonpayment of premiums or cancellation from the insurer? Does the contract permit the owner to pay the premium and offset the premium from payments owed to the contractor or to recoupment? Does the owner have the right to request and receive the contractor’s insurance policies?

__ 8. Does the contract require the contractor to indemnify the owner against loss or damage? It is common in construction contracts for the owner to require an indemnity provision through which the contractor agrees to indemnify, defend, and hold the owner harmless against loss or damage resulting from the contractor’s acts or omissions.
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(a) What types of loss should the indemnity agreement cover? Indemnity provisions may cover bodily injury, property damage, economic loss, and other types of damage for which the owner may be liable as a result of the contractor’s acts or omissions.

(b) What acts or omissions should the contractor be responsible for under the indemnity provision? The indemnity may apply when the contractor breaches the contract, is negligent or grossly negligent, commits statutory violations, or engages in willful misconduct. The indemnity also may apply when the act or omission resulting in liability is that of the contractor, its subcontractors, or its suppliers.

(c) Who should have control over the owner’s defense? The owner may want the contractor to provide and pay counsel or to select its own counsel and have the contractor reimburse the owner for attorneys’ fees.

(d) Does the indemnity provision comply with the anti-indemnity statutes applicable in a given state or other country? Does the governing jurisdiction have other requirements for indemnity provisions, such as that they must be conspicuous?

(e) Should the owner require the contractor to secure indemnity agreements from subcontractors for the owner’s benefit through a flow-down requirement or otherwise?

9. Does the owner require payment or performance bonds? Payment and performance bonds provide the owner with additional financial assurance that the project will be completed for the contract price.

(a) Are surety qualifications defined in the contract to assure the owner that the surety is financially able to respond?

(b) Is the contractor required to substitute sureties in the event the original surety cancels the bond or becomes insolvent? The owner may want to reserve the right to withhold payment to the contractor until the surety is replaced and to terminate the contractor if the surety is not promptly replaced.

(c) What is the owner’s remedy under the performance bond if the contractor is terminated for default? The owner may want to specify in the bond that the surety will promptly cure defaults in a manner acceptable to the owner. The surety, on the other hand, will want a full range of options under its own discretion and control. These include completing the work by hiring a different contractor, reimbursing the owner for costs the owner incurs in arranging for completion, and funding completion of the work by the
terminated contractor (usually where the contractor defaulted because of financial limitations).

(d) Does the performance bond allow the surety to hire the terminated contractor to undertake the completion work? Many owners do not want the contractor they terminated performing the completion work unless the contractor was terminated due to financial inability to perform.

(e) Is the surety obligated to cure contractor defaults where the owner has not terminated the contractor? Sureties do not want to be involved in a project unless the contractor already has been terminated. However, there are circumstances in which the contractor is in default, but the owner does not want to or cannot terminate the contract, such as when the contractor has filed for bankruptcy protection.

10. Does the contract confirm the owner's basic assumptions about the contractor by means of representations and warranties? Owners frequently assume that certain representations are implicit by virtue of the fact that the contractor bid on the project. Owners may want to consider making express what they regard as implied through the use of representations and warranties. Some suggested representations and warranties include the following:

(a) The contractor is qualified to do business in the jurisdiction that is home to the project, has all required licenses to perform the work, and will maintain such qualifications and licenses for the duration of the project;

(b) The contractor is skilled and experienced with constructing projects of the same nature, size, and complexity as the current project;

(c) The contractor has reviewed and is familiar with the project, conditions under which it will be performed, and the construction documents;

(d) The contractor is knowledgeable about and familiar with the statutes, rules, regulations, and other laws applicable to the work, and the processes of all authorities whose approval is required for the project; and

(e) The contractor is financially solvent, is able to pay its debts as they mature, and has sufficient working capital and other resources to complete the services in accordance with the terms of the contract.

11. Are there other general or special conditions the owner should include as part of the contract? Construction projects are complex and there are many additional provisions the owner may want to include in the contract. Those provisions are the subject of the checklist on General Conditions—Owner's Considerations.