2018 Forum on Construction Law Fall Meeting

It’s Lonely At The Top:
Building a Successful Team with the Owner

Tactical and Technical Concerns When Representing the Owner or the Contractor: Looking Through Different Lenses
About the Presenters

• Matthew Alter, Cassels Brock & Blackwell LLP, Toronto, Canada
• Stephen V. O’Neal, Jones Day, San Francisco, California
Overview

• Owners and Contractors: Where Interests Diverge
  • Contract Formation
  • During the Project
  • Claims and Disputes
Owner Goals

• Project built on time, on budget, with minimal changes and few defects
Contractor Goals

• Paid on time for its work, including any extras
• Move on quickly to the next job
Contract Formation: Change and Notice

• Owner
  • Clearly drafted change and notice provisions that are owner-friendly
  • Owner’s right to direct changes (change direction or site instruction) and quickly establish time and price
  • Require timely Contractor notification of cost or time changes
  • Opportunity to make informed business decision about changes

• Contractor
  • Less rigid notice provisions often required by Owners
  • Longer times for rectification
  • Include Contractor’s right to declare the Owner in default
Contract Formation: Audit Rights

• Owner
  • Extensive audit rights: Contractor’s books and records available for Owner’s inspection and copying at Owner’s expense (unless Owner prevails in dispute – then Contractor pays)

• Contractor
  • Restricted audit rights
  • Include contract clause that allows Contractor to request from Owner (before signing contract and from time to time thereafter) reasonable evidence that Owner financially able to fulfill contractual obligations
Contract Formation: For Cause Termination

• Owner
  • Contractor liable for all costs associated with termination and completion of the project
  • Owner’s right to finish work by any means necessary – take over subcontracts, materials and equipment
  • Limit cure period – where no cure possible – immediate effect

• Contractor
  • Requirement that a contested default be certified by a third party/Consultant, provided the contract includes a reserved right to ultimately challenge the termination for cause
  • The more time the Contractor has to assess and respond, the better
Contract Formation: For Convenience Termination

• Owner
  • Owner’s right to terminate all or any part
  • Limit Contractor's entitlement to additional compensation
  • Cap overall financial exposure

• Contractor
  • Owner to bear responsibility for cancelled subcontracts
  • Owner to pay demobilization costs
  • Owner to cover lost profit
Contract Formation: Dispute Resolution

• Owner
  • If DRB/DAB – recommendation only; not decision and not admissible
  • Arbitration vs. litigation
  • Ad hoc arbitration with appointing authority
  • Flow down clause
  • Parent guarantee arbitration signatory

• Contractor
  • Swift resolution of the disputed extra/changed condition claim
  • Restricting prolonged, multi-tiered dispute process, in favor of DRB, mediation or adjudication
Contract Formation: Other Important Clauses

• Owner
  • Insurance
  • Indemnity
  • Maintain set-off rights
  • Remove requirement to furnish financial information

• Contractor
  • Safety
  • Indemnification
  • Waiver
  • Limitations and exclusions of liability
During the Project: Key Considerations

- Owner
  - Follow the contract/statutory requirements
  - Document deviations
  - Promptly address claims, RFIs
  - Any material claim should be met with a demand for audit
During the Project: Key Considerations

• Contractors
  • Contractors should review the key contract requirements: change order process, non-payment, delay events, and the timing and content of claim notice requirements
• Payment
  • In project dispute resolution process
  • Delays and/or extensions of time
Claims and Disputes: Adjudication

• Resolution of short-term mid-project payment or single issue disputes
• Binding on interim basis
• “Pay now, fight later”
• Protect cash-flow during construction projects
• Determination by a third party (not always a legal professional)
• Limited procedural requirements
• Inexpensive v. liening and/or litigating
Claims and Disputes: Considerations

• Owner
  • Document preservation demand
  • Demand for audit
  • When to trigger dispute resolution processes

• Contractor
  • Tread carefully with contractual tiered or “stepped” dispute resolution
  • Tolling limitation period
Claims and Disputes: Mediation

- Mandatory or voluntary
- May become more frequent with introduction of adjudication
- Overuse resulting in the loss of time and money
- Timing - before, during, or after discovery
- Particularization of damages claim
Claims and Disputes: Arbitration/ Pre-Litigation

- Careful attention to choice of arbitrator(s) and subject matter expert witnesses
- Attention to procedural order
- Cost of arbitration vs. litigation
- Privacy
- Right to appeal
Conclusion

• Careful consideration of provisions
• Disciplined attention to contract requirements
• Resolution based on needs and circumstances of dispute