Standard Construction Contract Clauses From the Perspective of the Owner, Contractor and Design Professionals

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• Who are we and why are we here?
  - Tyrone Holt
  - Jeffery B. Stalder
  - Charlotte Wiessner

• How do we approach the negotiation of construction contracts?
“The Profession functions within a matrix of laws intended to provide a level of consistency and predictability for all involved in design and building”, -- Ava Abramowitz, Esquire
In every contract negotiation that I am involved with, my goals are to:

- Make a reasonable business deal for my client
- Assist my client in its understanding of the potential business risks of the contract terms
- Get the “spikes” out of the deal for everyone
- Identify and address any unusual risks
- Make every effort to have the language of the final agreement accurately set forth the business deal of the parties.
- Address and provide any ancillary or related documents
- Complete the deal, with a fully executed agreement as soon as possible and as cost effectively as possible consistent with the realities of the deal
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- Lawyers’ Roles – vary from deal to deal – be flexible
  - Every deal is different
  - The lawyer’s role may be different from deal to deal
    - Technical Advisor
    - Scrivener
    - Negotiator on key provisions
    - Technical Advisor, Negotiator and Member of Group Negotiating/Drafting Team

*In every role, my job is to get a reasonable deal done – not to kill the deal*
Evaluate Project Risks

- Type and Expectation of Owner
- Size and Complexity of Project
- Role of Your Client and Size of Fee
- Each Party shall a different type of concern and exposure to the project risks
Evaluate Project Risks

- $500,000 House vs. $5,000,000 House
- $2,500,000 Office Bldg. vs. $50,000,000 Office Bldg.
TRADITIONAL PROCUREMENT - DESIGN - BID/NEGOTIATE - BUILD

1: Solid Line=Contract between entities
2: Dotted Line= Oversight/Administrative responsibilities without contract between entities
3: GMP= Entity responsible for guaranteed maximum price
4: FIN= Entity responsible for short and long-term financing
OWNERSHIP

Design
Construction
Land Acquisition
Financing
Planning
Use

Input into design
Input into construction
Which site is appropriate
Loan, cash, lease, etc.
Configuration of site
Can I use it for this?
DESIGN

Licensed professional services
Building permit requirements
Code requirements
Code, guidelines & standards
Lender requirements
Production of drawings
Contract Administration
Specifications
Responds to RFI’s
Construction observation

Mechanical Engineer
Electrical Engineer
Mechanical Engineer
Civil Engineer
Structural Engineering

Planning, land use
Architecture
Engineering
Code Compliance
Life Safety
Specialty Designs

Roofing
Security
Landscaping

Code Consulting
Elevators
Interiors

Life Safety
Signage/Graphics
Spec Writer

No construction provided
No warranty or guarantees
No bonds – professional liability insurance
Safety and safety procedures for workers
Estimates of probable construction costs – no estimate or GMP’s
No schedules
Work product in paper or graphic form – drawings, specification
CONSTRUCTION

Cost estimating
Scheduling
Construction means, methods, sequences and techniques
Obtain permit when ready
Building standards
Materials
Safety
Form of compensation
Quality control and assurance

Bonding-No
Guarantee's-No
Express and implied warranties
“Constructability” issues
Value engineering
Identification, selection and management of trades
Performance of punch lists
Issues RFI’s
Issues Change Orders
Prices changes

Architecture
Engineering
Planning
Code Compliance
Land Use
Life Safety
Specialty Designs

Foundations
Electrical
Excavation

Plumbing
Mechanical
Steel Erection

Curtain Wall
Roofing
Framing/Carpentry

Flat Work

Window Cleaning
Security
Landscaping

Fire Protection
Drywall
Glass

Masonry
Wood Work
TRADITIONAL: DESIGN - BID/NEGOTIATE - BUILD w/GMP

OWNER

ARCHITECT/ENGINEER

MEEKANICAL DESIGN CONSULTANT

ELECRICAL DESIGN CONSULTANT

PLUMBING DESIGN CONSULTANT

SUBCONTRACTOR: MECHANICAL

SUBCONTRACTOR: ELECTRICAL

GENERAL CONTRACTOR

GMP

SUBCONTRACTOR: PLUMBING
DESIGN-BUILD
GENERAL CONTRACTOR AS DESIGN-BUILDER W/ GUARANTEED MAXIMUM PRICE

DESIGN-BUILDER

OWNER

ARCHITECT/ENGINEER

Mechanical Design Consultant

Electrical Design Consultant

SUBCONTRACTOR: MECHANICAL

SUBCONTRACTOR: ELECTRICAL

SUBCONTRACTOR: PLUMBING
DESIGN - BUILD
JOINT VENTURE OP PRIME DESIGNER AND GENERAL CONTRACTOR AS DESIGN-BUILDER

ARCHITECT/ENGINEER

GENERAL CONTRACTOR

GMP

SUBCONTRACTOR: MECHANICAL

SUBCONTRACTOR: ELECTRICAL

SUBCONTRACTOR: PLUMBING

Mechanical Design Consultant

Electrical Design Consultant

OWNER
DESIGN-BUILD WITH GENERAL CONTRACTOR POSSESSING REQUIRED DESIGN CAPABILITIES IN-HOUSE (ENGINEER PROCURE & CONSTRUCT "EPC")
ARCHITECT ENGINEER (STRUCTURAL & CIVIL)

OWNER

DESIGN BUILDER

GMP

Performance Criteria

DESIGN - NEGOTIATION - BUILD WITH MEP SUBCONTRACTOR DESIGN BUILD

ARCHITECT ENGINEER (STRUCTURAL & CIVIL)

OWNER

DESIGN BUILDER

GMP

Design - Negotiation - Build with MEP Subcontractor Design Build
OWNER PROCURED DESIGN WITH MULTIPLE - PRIME CONTRACTORS

ARCHITECT / ENGINEER

Mechanical Design Consultant

Electrical Design Consultant

SPECIALTY CONTRACTOR MECHANICAL

SPECIALTY CONTRACTOR ELECTRICAL

SPECIALTY CONTRACTOR PLUMBING
CONSTRUCTION/PROJECT MANAGER [OWNER’S REPRESENTATIVE (AGENCY CM)] WITH GUARANTEED MAXIMUM PRICE

OWNER

CONSTRUCTION MANAGER

ARCHITECT/ENGINEER

GENERAL CONTRACTOR

GMP

SUBCONTRACTOR: MECHANICAL

SUBCONTRACTOR: ELECTRICAL

SUBCONTRACTOR: PLUMBING

Mechanical Design Consultant

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Typical Projects

• Solar Energy Research Institute – 1979
• Tenth Circuit Court Building Remodel - 1998
• Aurora Municipal Center - 2002
• Webb Civic Center Office Building - 2000
• Denver Convention Center Hotel – 2003
• $500,000 Single Family Residence - 2004