

Avoiding Preconstruction Pitfalls (from the Contractor's Point of View)

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It has become increasingly popular for private commercial construction projects to engage the contractor during preconstruction design early in the project. By doing so, the owner's team and design professionals are able to work collaboratively and receive valuable feedback on key project details, such as constructability, schedule, early cost estimates, projected budgets, long lead items, and value engineering. This is true for any project delivery system that uses design assistance, delegated design, is a true design-build, is a CM at risk or CM as an advisor, or is a version of an integrated project delivery.

But what happens if the owner tries to call an audible at the line of scrimmage and seeks to replace the contractor right before the construction phase begins? And what other pitfalls should a contractor be wary of if involved in preconstruction services?

Precon, Not Freecon

Some owners ask that preconstruction services be offered for free as a value-added customer service. Each project should be considered on a case-by-case basis. There might be projects and business reasons why that makes sense. Typically, however, it is best to avoid giving "freecon." The preconstruction work is a valuable service, and there can be risk associated with it. Proper business relations should clearly define the scope, rights, and obligations regarding the preconstruction services and have an associated fee, typically done on an hourly or stipulated sum basis.

Land Development, Design Assist, Delegated Design, or Design Build?

The role, responsibilities, and scope of preconstruction services should be clearly identified in a contract so that there is no confusion about the exact services and risks being undertaken. Sometimes (but rarely), the contractor will assist the owner with land development, acquisition, usage, and zoning. Usually, however, the contractor is not involved in land development activities but instead will only provide services in relation to the preconstruction itself. If the contractor is only assisting and commenting on the design (design assist), that limited scope should be clearly stated. If any scope is delegated design, where the contractor will be responsible for furnishing the actual sealed/stamped design, or perhaps the contractor is responsible for a performance specification, it should be clearly stated. Furnishing of design should always be done by properly licensed professionals per any statutory laws.

Intellectual Property Ownership of the Design

One of the best approaches to protect the contractor from unpleasant surprises when furnishing any design is for the contractor to expressly remain the owner of the design intellectual property. If the intellectual property rights to the design will be assigned, it should be later in the project or at the end of the project. This ensures that the owner cannot receive a discounted design, remove the contractor, and then continue with the project, still using the original contractor's design work.

Similarly, whether furnishing the design or merely assisting, termination for convenience and “buyout” clauses help to protect the contractor from being unceremoniously removed from the project. Lastly, if furnishing the design, the final seal/stamp on the design should be the last thing and done very close in time with the submission of the design to the AHJ and the buyout/procurement phase. Unintentionally having a sealed/stamped design floating around without any future involvement in the project tends to lead to issues down the road.

Clarifying the Guaranteed Maximum Price

If using a GMP, it should be clearly defined in regards to evolving, unfinished design development. Also, it should be clear whether certain work or potential work is included in the GMP. Issues can arise when owners believe that the GMP includes the reasonably inferable, developing design (e.g., incomplete lighting package, which is often developed at the end of design), but the contractor believes that the incomplete design was not included in the GMP. For developing design, any placeholders, assumptions, budgets, qualifications, and exclusions should be clearly noted, and it should be clear how they relate to the GMP.

Similarly, if using a GMP, there should always be a contingency. The contingency should be clearly defined both in terms of use and process, so that everyone is in agreement as to the type of work, issues, scope, and snafus that allow for application of the contingency. It is further recommended that the savings on the contingency be split in an agreed upon percentage ratio. By allowing the contractor to participate in the savings, it incentivizes the project to come in on budget and schedule.

Assessing the risks and properly contracting for preconstruction services can be a complicated area of construction law. Best practice is to engage trusted counsel, insurance consultants, and other professionals. Offit Kurman construction attorneys are available to advise and counsel contractors, design-builders, CMs, design professionals, developers, and specialty trades on contract matters and project disputes.