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|  | | September 2003 |
| <p>The following is a two-part article addressing contractual claims protection.</p> | | Article 1 of 2 |
| <p>SEMINARS PinnacleOne Institute National Seminar Series begins in October!</p> <p>P1/Lorman Seminars</p> <hr/> <p>SERVICES Program & Project Management</p> <p>Dispute Avoidance & Resolution</p> <p>Real Property Advisory Services</p> <hr/> <p>Headquartered in Phoenix, PinnacleOne regional operations are located in Irvine, Los Angeles, Sacramento, and Hartford.</p> <p>To view a specific back-issue of this newsletter, please Click Here</p> | <div style="border: 1px solid black; padding: 5px; display: inline-block;"> KEY CONTRACT PROVISIONS FOR OWNERS </div> |  <p>Mr. Jeff DeFeo, Esq. Director of Claims Services for PinnacleOne's Irvine operations, is a specialist in the evaluation and resolution of construction disputes.</p> <p>With 25 years of experience in the areas of construction claims analysis and resolution, CPM scheduling, program management, contract administration and training, Mr. DeFeo's expertise is extensive, covering a broad area of construction-related work. He is a recognized expert on management and dispute resolution aspects of projects and capital improvement programs.</p> |
| <p>More and more public owners are coming to the realization that the general conditions and “front-end” documents in their construction contracts are outdated and/or do not adequately protect them from inflated construction claims by contractors. To remedy this, owners should consider retaining an expert with special experience in construction contracting when drafting their construction contracts or when using/modifying standard form contracts.</p> | | |
| <p>In this two-part article, PinnacleOne presents a “checklist” of some of the key contract provisions that we have found to be useful to owners as protection against spurious claims by their contractors. This checklist starts this month with general provisions which require the contractor to provide adequate notice and properly support their claims. Next month, it will conclude with a discussion of some of the key contract provisions addressing delay and scheduling related claims.</p> | | |
| <p>Notice Provisions – These provisions require the contractor to provide the owner with prompt written formal notice of an alleged change, delay, claim for additional compensation, or differing site condition. The purpose of notice provisions is to give the owner an opportunity to investigate the situation in order to verify (or rebut) the contractor’s contention, and to actively participate in the resolution and monitoring of the work in order to mitigate the potential costs to the owner.</p> | | |
| <p>A well-drafted clause will strive to absolutely bar claims that did not comply with the notice provisions because the owner can show that its rights were prejudiced by the lack of notice.</p> | | |

Differing Site Conditions – It is important to define differing site conditions in the contract and how they will be treated should they be encountered during construction. This clause is particularly important in projects which involve significant earthwork, tunneling, work in highly developed areas, or renovation projects because all of these types of projects are more susceptible to encountering conditions which are unknown to the designer and the bidders.

In the case of an alleged differing site condition, the notice requirement should be one of immediate notice, since an owner investigation is likely essential in order to protect evidence of the condition and to determine how the affected work will proceed.

Defined Mark-ups on Change Orders– Many disputes arise because contract provisions are not clear as to what is, and is not, included within a contractor's (and subcontractor's) mark-ups, and what is allowable under the contract. Well-defined provisions take away the guesswork and arguments associated with this common problem, and lessen the chances that an owner will pay for "double-dipped" overheads on extra or changed work

Claim Submittal Requirements – Owners are often frustrated at the end of a project when the contractor submits a disjointed omnibus claim, or a claim which contains such sparse details or support so as to be virtually "non-analyzable." A claim submittal clause formally specifies in detail the format, content, and level of back-up documentation that the contractor's claim must contain to be considered. If the contractor does not comply with these requirements, the owner has a contractual right to reject the claim until it meets the contract requirements.

Audit Provisions – General contractors have access to public owners' records by virtue of various "sunshine" laws. Owners, on the other hand, often can only get access to a contractor's records after a formal litigation process has been initiated through discovery, a legal process that can be costly and take a significant amount of time. A well-drafted audit/access to records clause will give the owner a contractual right to have access, without litigation, to all of the contractor's (and subcontractors') records at all stages of construction, including their estimate work-papers, cost records and correspondence with subcontractors. This information is usually extremely useful to owners evaluating or rebutting a contractor claim.

Escrow of Bid Documents – This is a procedure that is being used increasingly on large projects whereby the contractor is required to place all of its bid preparation materials into an escrow. Then, if a change order or claim arises which brings the contractor's bid or original plan of performance into question, the owner and contractor can jointly review the bid documents to determine whether the bid documents support the contractor's position.

SUMMARY

None of the contract provisions generally described above will prevent contractor claims. They will, however, serve to make owners aware of claim issues as their projects are being built and force their contractors to document their claims if they want them to be considered. More important, these contract provisions will lessen arguments about what has been included in the contractor's bid and overhead mark-ups and give owners the information they need to fairly evaluate claims by their contractors. Next month's article will address schedule and delay-related clauses.

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