

VANTAGE POINT

Experts weigh in on industry issues



R. RUSSELL O'ROURKE, ESQ.

Hiring the Best Contractors, Subs at the Best Price

Starting with the lowest price is not necessarily the least expensive alternative. Knowing that, we still want everything our way.

As a project owner hiring a contractor and as a contractor hiring subcontractors, we have that ability with our contracts. We can always find some contractor to build our building and we can always find subcontractors to do the work and supply the materials for constructing our building. The question is, "Are we getting the best contractor and best subcontractors at the best price?"

The best contractors will walk away if they cannot get a fair contract and the rest will take your contract, if they can push the same or even worse terms on their subcontractors. Here too, the best subcontractors will walk away from a project with a bad contract or increase their prices to cover their additional risk.

What are some of the worst, yet common contract terms? Shifting Responsibility for Subsurface Conditions; No Damages for Delay/Weather; No

Liens; Excessive Retainage or Higher Retainage Held from Subcontractors than is Being Withheld from Contractor; and Pay-if-Paid clauses in Subcontracts.

As an owner, you can control both your contract with the contractor and, by requiring specific language in the subcontracts, control all of the contracts, assuring that you have the benefit of both the best contractors and subcontractors and pricing from each that does not need to include additional sums to allow for the higher risk associated with bad contract language.

Subsurface conditions

While no one wants the risk of the unknown, even with good borings there is still risk of missed conditions both natural and man-made. Either the owner will take the risk or the contractor will have to add a factor, just in case. If there



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were no adverse conditions, the owner paid too much. Even though it is possible that there are unknown adverse conditions, it is a bad gamble for the owner. The owner should keep the risk.

No damages for delay/weather

Like subsurface conditions, unexpected delays and adverse weather can impact completion dates or require the contractor to take extraordinary measures to deliver the project on schedule. Delivery dates may be vital, but placing the liability for delays and extraordinary, adverse weather on the contractor and ultimately the subcontractors adds additional costs to cover the risk. Such a gamble by a contractor would challenge Las Vegas oddsmakers. The best that they can do is to increase their fee to cover their risk. The owner should keep the risk.

No liens

The construction process is a lending transaction. Contractors, subs and suppliers perform labor and supply materials with the promise of being paid later. Much like a lending transaction with a bank, Ohio's mechanic's lien process places everyone on a level field by the owner filing a Notice of Commencement, then the subcontractors and suppliers providing the owner, and sometimes the contractor, a Notice of Furnishing to assure that it knows that the subcontractors and suppliers are being paid and will have less cause to file liens. When lending as much money as contractors, subcontractors and suppliers lend on a project, bankers want to secure their payment with a mortgage. The mechanic's lien right is the construction equivalent of a mortgage. A banker without security charges higher interest; so should every construction participant without lien rights. Owners should file their NOCs, subs and suppliers should serve their NOFs, lien rights should be preserved.

Excessive retainage

The antiquated procedure of withholding money on completed work that everyone agrees is acceptable started in the mid-1800s in response to owners' failure to properly determine percent-

age of completion. With our current procedures, withholding any money is a vestige from the past or an excuse for inspector negligence – there is no withholding by the Federal government on its projects. Retainage becomes dangerous for the owner when the contractor is allowed to withhold more from its subs than is being withheld from it. This practice increases the risk for subs, lets the contractor hold the money the owner paid to it for the subs' work, increases the likelihood that the sub will file a lien for non-payment and increases the subs' fees to cover that risk. Retainage should be eliminated. If there is retainage, it should be limited and the contractor should not be permitted to withhold a greater percentage than is being withheld.

Pay-if-paid clauses

Assuming that the owner intends to pay for the building being built, the Pay-if-Paid clause in subcontracts

unnecessarily increases the cost of construction as it increases the perceived risk of subcontractor non-payment and the likelihood that mechanic's liens will be filed against the project. The clause tells the subcontractor that the contractor does not trust that the owner intends to pay for the work and places the risk of loss on subs and suppliers. Owners should prohibit contractors from using Pay-if-Paid clauses.

Banishing these clauses will render a more fair and balanced contract, a more harmonious construction project and ultimately result in a better built construction project at reasonable prices. **P**

Russell O'Rourke is the chair of the Construction Law Practice at Meyers, Roman, Friedberg & Lewis, LPA. He focuses his practice on the representation of subcontractors and suppliers in the construction industry and is the author of the book, Ohio Mechanic's and Materialmen's Liens, 3d Edition.



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