

# Preventing Disputes in the Contracting Phase

***Note: The opinions shared in this post are practical business strategies, not legal advice.***

In the prior section I shared a philosophy about why and how decisions made in the pricing phase relate to the likelihood of dispute later in the project. In that section I explained that the best strategy in the pricing phase to avoid a future dispute is to ensure effective communication of the scope of work and demonstrate agreement that the scope can be done for the price. The idea here is that if the price is correct, it should also be achievable. This is important in the contracting phase for two reasons:

1. If you already did the work to demonstrate alignment on scope and pricing, the contract will be much easier to negotiate, execute and interpret when necessary.
2. If you cannot get the contractor that priced the work to sign a contract, you have a much better chance of getting a replacement contractor to sign a contract for a similar price.

If those goals were not achieved in the pricing phase, do not pass go! it is critical that the scope and price are aligned prior to signing a contract - even if you feel the contract is iron-clad (in your favor).

## ***The bid and contract both say "per plans and specs"- what could go wrong??***

Spoiler alert: even a perfectly structured or punitive contract cannot compel performance, nor will it make you whole for the money and time lost in a dispute. Why?

- Contracts are not performance bonds and even when performance bonds are included, they are difficult to enforce and will still incur delays.
- Contracts necessarily include notice requirements and cure time before you are entitled to charge for supplemental labor, take over the work or enforce liquidated damages. You won't get that time back.
- Liquidated damages, by design, do not mitigate the entire cost of any delay. They are more motivation than mitigation. Actual damages are almost impossible to agree to and even more difficult to document and collect.
- Writing formal notices, tracking cure periods and making contingency plans / agreements to augment or take over work robs you and your team of their most valuable asset - bandwidth.

**What could go wrong/ Continued...**

Don't get me wrong, written contracts are required by the Oregon Construction Contractor's Board (and most others) and the terms agreed to will be important when prosecuting dispute resolution through any lawsuit - they just aren't effective at mitigating delays or fairly compensating damaged parties. And remember, the goal here is to prevent the dispute before the carnage ensues. So, let's explore a couple of options:

There are two schools of thought I want to highlight about how to best document the scope for a lump sum contract. The approach I was first taught is to use the broadest definition of scope and strictest terms for procedure. In that approach, the scope is a list of specification sections, all of the plans, code requirements and all laws. The contract terms include detailed claim documentation, short deadlines to file and a waiver of all claims if deadlines are not met. However, this strategy effectively becomes a "Where's Waldo" way of defining the scope and combines to create a virtual petri dish of dispute potential - comprised of inherent optimism / opportunism, variable sophistication and limited bandwidth.

The second school of thought is the approach I have been advocating in this Guide; strategic preconstruction practices that result in a clear scope of owner requirements and related improvements, a well-defined price and agreement, complemented by clearly communicated and practical change procedures. This strategy does not eliminate risk but illuminates it so that informed business decisions are made and documented. These elements produce a predictable and structured path to reduce risk and earn profits for work done well.

***Key Strategy #1 - Talk (and write) it out...***

The best way to make sure both parties to the agreement are on the same page is to conduct a formal interview with the pricing entity to confirm the scope is included and demonstrate agreement between the price and scope. Best practice even if the pricing phase included these efforts but is absolutely crucial if the pricing documents were not steeped in this strategy. Not only will an effective interview clear up miscommunications and bad assumptions, but it can also be used to get a bidder to include work that was not specifically included, get important commitments for the level of effort and resources the project requires and establish a rapport between decision makers on both sides of the table.

***Here are the basic components to ensure a formal interview is effective at reducing the risk of disputes:***

- At a minimum, include the estimator from both parties to confirm the scope and pricing and an owner or project manager from both parties to confirm the agreement. Try to keep the meeting small with equal participants for both parties.
- Prepare a formal agenda, list the participants in the meeting and take notes. This will help keep the meeting on track, make sure you cover everything and help you establish trust.
- Your agenda should include a review of your written instructions, documents that define the scope, pricing detail, pricing clarifications, scope exclusions, special conditions or specifications, approximate mobilization date, supervision requirements, production rates, site logistics, and last but not least - company / project capacity & experience on similar projects.
- Ask the contractor what they think the most common source of cost increases and delays are. Talk about how you could work together to avoid those pitfalls.

### ***Key Strategy #2 - Plan for changes***

The one thing you can count on in a project is change. Projects almost never start when anticipated, the scope of work changes. Weather happens. Sequencing changes. Staff members come and go. And now pandemics, wildfires, global supply chain interruptions?!?!?

Amongst the most common sources of disputes are change orders and delays. In both cases, the term "time kills all deals" applies. The nature of the agreement is based in time. When a change in price or duration is not timely processed or executed, the agreement is placed in jeopardy. While we cannot accurately anticipate the timing or magnitude of changes in the contracting phase, we can reduce the risk of these changes creating a dispute by documenting our baseline assumptions and optimizing procedures so that we can efficiently react to changes as they arise.

***Plan for Changes Continued...***

- Document baselines. Each contractor's scope has a predictable or discoverable work progression that usually starts with mobilization and ends with cleanup and corrections. Based on the contract scope, establish the crew size for each work progression and number of days it should take that crew to complete it. Use this data to prepare schedules, and revisit as necessary to validate a change in price or delay.
- Establish scheduling procedures and policies. Review initial schedule expectations and establish how and when schedules will be updated. Review how production delays will be communicated and mitigated.
- Confirm change procedures and policies. Most contractors struggle to comply with the format and timing of change claim requirements. But regardless of the efforts to document (or lack thereof), if a contractor does extra work, they are going to want, and are likely to get extra money. Establish the minimum procedures to communicate and document changes and a fail-safe way to mop up or keep your foot in the door for change claims that comply with the contract.

***Key Strategy #3 - A good back up plan***

Despite the practical limitations of contract remedies, it is still a good idea to refine the mechanisms in your contract that deal with delays, defaults and dispute resolution. Like all businesses, contracting includes good and bad actors, involves unforeseen circumstances and sometimes, "Murphy" shows up. But if the prices are achievable and the contract terms are actionable, you are in a good position to move through a dispute efficiently and with considerably less emotional expense.

***Here are 4 specific tips to make your contract more actionable:***

1. Include contract exhibits for change request templates that include the level of information detail you need to process a change request upstream. Set a day each month for all claims to be filed or specifically waived.
2. Leverage your production schedule to double as mitigation notice and response request.

***4 specific tips to make your contract more actionable continued...***

3. Allow electronic methods (email) for official delay and default notices. Copy the business owner on these communications (not just the project manager).
4. Revise the dispute resolution section of your contract to allow motions for summary judgement, show cause obligation for liens and time limits for discovery, deposition and hearing.

If the pricing phase is like dating, the contracting phase is like marriage. Extending the same metaphor, you don't want to marry under false pretense.

If we followed all of the steps in this Guide, getting both parties on the same page as to the scope and price was largely achieved in the pricing phase. A successful contracting phase puts this agreement into a document that can be easily interpreted, managed and, if necessary, enforced.

Contracts suffer a bad reputation as enforcement documents when they really should focus on their function as revenue conduits. After all, both parties sign contracts because they expect to make a profit by completing the work. That is also the goal of the operations team charged with executing under those terms. In the rare circumstance that a dispute must be formally resolved, all parties benefit from a clearly defined scope and price with a process that expedites resolution and limits exposure to legal expenses.

**END OF SECTION**



#### 4R **Contracting Phase Resources:**

An effective contracting effort demonstrates agreement and provides procedures to administer the work while avoiding root causes of delays, change orders and disputes. A superior agreement with actionable terms efficiently resolves disputes that are unavoidable.

- **Sample Interview Agenda** - Example structure and best practices for confirming agreement and establishing important expectations between parties. [Click here](#)
- **Plan(s) for Changes** - Best practices and templates to document and codify schedule, production and change procedures. [Click here](#)
- **Sample Dispute Resolution Terms** - Best practices and example terms to limit the cost and duration of formal disputes. [Click here](#)
- **Technical Support** - Get 3cd to help your team incorporate and facilitate these strategies and procedures for your project. [Click here](#)