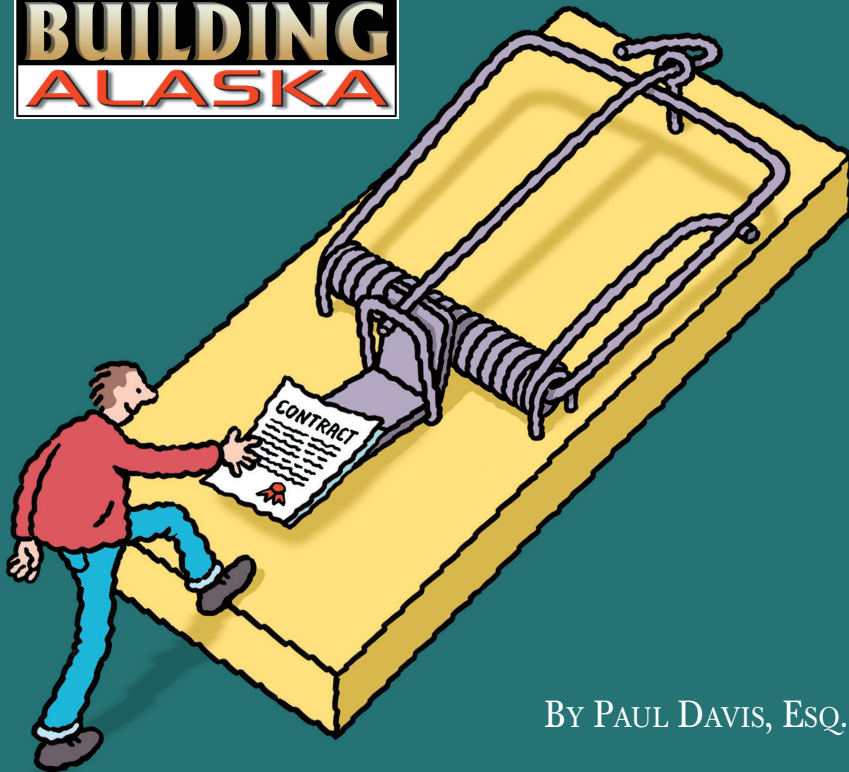


Form to Formation

The search for front-end efficiencies can derail construction project agreements.

**BUILDING
ALASKA**



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In all but the smallest construction projects, written project agreements are a necessity and, depending on the complexity of the project and number of parties involved, can evolve from a few pages to many. When anticipating construction projects, parties often spend more time visualizing the project itself, overlooking the time or money necessary to fully develop a new project agreement. The result is the frequent use of standard form agreements that are modified, many times by the parties themselves, to fit the circumstances of the new project's specifications. While this may create efficiencies, project owners may find themselves more disadvantaged by the use of standard forms than contractors and designers.

Where architects have the American Institute of Architects (AIA) and contractors have the American General Contractors Association (AGC), owners and developers lack the national organizations that help draft project agreements with their interests in mind. This is not to say that either the AIA or the AGC actually tries to take advantage of owners in their form agreements, but no one can say that architects or contractors are placed in secondary positions by their own organizations. Private owners often end up with agreements provided by someone else, frequently a project designer, project supervisor or general contractor. When you think about it, it makes sense. Where an individual owner may be involved in one construction project

in his lifetime, a contractor may build a hundred. Who is more likely to have a contract form available when the talking gets serious?

Language in standard form agreements represents compromises that have been made between unknown entities who are often committee members of organizations. The committees assigned to develop the form's language consider legal precedent when interpreting language of other contract forms in order to predict how the language in the standard form for the committee they are developing will probably be interpreted and applied by courts in the future.

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form, when it will be reviewed, or the factual circumstances of the project. The result is language which may reflect general principles of intent but does not fit to a specific project in a specific jurisdiction. Owners should understand that their feelings of comfort in seeing familiar language in an agreement provided by someone else may prove short-lived unless it is clearly understandable for all time and under all circumstances for what it actually represents.

Once a project agreement becomes a staple of a party's form files, it may stay there, dangerously subject to being dragged out for reuse on inappropriate occasions without update. Worse still, project parties sometimes patchwork the provisions, substituting a paragraph of one form for a dissimilar section of another. A recent example of this provision transplantation was a State of Alaska DOT/PF paving contract form used for a private contract. Neither of the parties to the contract was, in fact, the State of Alaska DOT/PF but the contract provisions still called for the conflict resolution process to end up before the State DOT/PF administrators. Front-end efficiencies were extinguished in the backend of the project as the parties were left with no clear and practical agreement when it came to resolving their differences.

The final arbiter of the meaning of project agreement language is a court, with the very final word being the state's Supreme Court. The legal history of construction litigation contract interpretation and enforcement has resulted in an area of law where courts treat construction contracts somewhat differently than commercial contracts. Courts reviewing commercial contracts rarely review agreed-upon provisions on the basis of fairness. In contrast, courts reviewing construction contracts play a more active role in assuring the contractor is treated fairly in specific situations during construction and under certain language in agreements.

Construction claims are rarely reviewed with an eye for assuring fairness to owners. Owners or their representatives who negotiate project agreements must be familiar with construction claim court rulings in order to

get the agreement they are bargaining for. A review of claims litigation in Alaska provides proof that there are a number of legal areas that deserve special attention.

CONSTRUCTION CONTROL

Owners understand that there is a direct relationship between the amount of control they retain over the ways and means of design and construction of the project, and the risks inherent in those activities. Once an owner decides which among the various models of control/risk relationships the owner can live with, it is critical that the language contained within the project agreement specifically and plainly informs the parties—and just as importantly a reviewing court—what the parties' agreements are on their roles and risk sharing. Any ambiguity will likely be interpreted by a court to work against the owner's interests.

CLAIMS PROCEDURES

Claims procedures have been integrated in construction agreements to provide early notice of problems developing on the job and of potential cost overruns. Many construction litigation claims involve contractor budget overruns where the owner's defense is based, in part, on the failure of the contractor to meet claims procedure requirements. Owners are surprisingly unsuccessful in defending claims on that basis. In response to owners' complaints that the contractor failed to meet claims process requirements, contractors sometimes turn the tables on the owners, claiming that they impeded the contractor's attempts to meet its obligations, or that previous actions had demonstrated that it was futile for the contractor to engage in the process or waive strict compliance with the contract's procedures. Better contract language can cure or lessen these defenses.

ALTERNATIVE DISPUTE RESOLUTION

Many construction agreements seek to avoid the higher-than-normal costs construction claim litigation is subject to by requiring mandatory alternative dispute resolution (ADR) procedures. Construction projects with governmental agencies build in hearing processes

ranging from project engineer reviews through hearings before an administrative law judge. Non-governmental party projects have to agree to engage private ADR providers, whose services, skills and costs vary widely. Often parties to agreements have no personal experience with ADR and are unaware of the factors that make one ADR provider a better fit in one type of matter than in another.

Choosing ADR should result in cost effectiveness; however, there can be trade-offs. One cost saving realized by owners comes from a discovery process that is less extensive than litigation. But, for an owner facing a bewildering set of claims from his contractor, limited discovery can set up the very real possibility of being partially blindsided at the arbitration hearing, and the realization of costs savings in arbitration can result in a substantial higher cost at the end. The rules governing procedures under ADR provisions are just as negotiable as other provisions in the contract, and owners can protect themselves with knowledgeable negotiation at the beginning of the process and still reap cost savings through ADR.

Owners and developers of construction projects should understand that form construction agreements provided to them by other parties are often created by national organizations whose members are neither owners nor developers. They should also understand that agreements provided by other parties were often not created with their jurisdiction in mind and may reflect outdated law.

To create specificity for a construction project, and to combat built-in or out-of-date legal bias, owners and developers should either develop an original agreement or carefully review and correct agreements provided to them. When creating construction project agreements, it's important to make sure that suitability and clarity of intent and law is not sacrificed for expediency. □

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