## Construction Contracts - Key Considerations

**The provisions of a contract should answer the following**

* What is the project and how do I know when it is completed?
* What **if** the project cannot be completed as defined?
* What if the project could have been, but was not completed as defined? The contract must provide the means to adjust its terms if the project cannot be or is not completed as anticipated.

**Risk Shifting Strategies**

* If a **"Fixed Price"** contract: Contractor submits a single price for completion. Here, the responsibility for design defects lies with the district's architect.
* If a **"Construction Manager"** contract: Contractor agrees to complete the work for an amount equal to or less that a guaranteed price. Possibly shared responsibility.
* If a **"Design Build"** contract: Owner provides broad requirements and contractor team designs and builds. Responsibility for design may rest with contractor.

**Standard Form Contracts**

* American Institute of Architects (AIA)
* Associated General Contractors (AGC)

**Change Clauses**

* Allows District ability to make changes in a contract's provisions and scope.
* Important to address unforeseen circumstances or errors as they arise.
* To be fair to the contractor, the clause should allow for an adjustment of time and price.
* Should always address the following:

1. An agreement of the contractor to do the work with reasonable adjustments in time or price;
2. Requirement that all changes be in writing and reflect the change **in** scope, time and price;
3. Price or method for establishing the new price;
4. Inclusion of the new work within the terms of the existing contract to ensure that bonds and warranties apply.

**What If The Project Cannot Be Completed As Designed:**

May want to include provisions in the contract that shift the risk to the contractor.

* Specify that the contractor will perform their own independent investigation of the accuracy of technical data contained in reports of the physical conditions of the site;
* This would include subsurface conditions and underground utilities;
* Require contractor to provide early notice of unanticipated site conditions, before any changes are made in the contract performance;
* "Differing Site Conditions" Clause:

1. Allows for equitable adjustments for unanticipated conditions on site;
2. If a fixed price contract, contractor generally bears the risk of unforeseen conditions.

**What If The Project Could Have Been, But Is Not, Completed As** **Defined**

* If work turns out defective, there have likely been failures during the performance of the construction process.
* If this happens, the contract must provide for an allocation for remedying such failures.

1. Correction or removal of defective work;

May need to arbitrate responsibility for additional time and costs if

contractor disputes whether failure was construction related.

1. Acceptance of defective Work; District may accept the defective work and reduce the price. May need to hire an expert to evaluate the defect.
2. Choose to correct the defective work; here, District and new contractor assumes responsibility and risk associated with repairs.

**Indemnification Clauses**

Indemnify, defend and hold harmless, are the three key terms to look for and include in any contract with an outside vendor.

* Broad Indemnification

Preferred provision from the District perspective. Places complete responsibility on the contractor. Reasonable if the contractor is performing the activity that creates the risk, while the District's only contractual duty is payment.

* Limited Indemnification

Contractor's liability extends only to loss or liability arising in whole or in part from its actions or, from its own negligent acts or omissions. Appropriate where the District has a larger role in performance of the contract.

* Mutual Indemnification

Each party indemnifies the other party for loss or liability resulting from their respective actions. If used, the District's responsibility must be subject to the limitations of the Oregon Tort Claims Act and Oregon Constitution.

**Insurance *I* Certificate of lnsurance**

Where another party is assuming risk, it is advised to contractually require, that the party provide District with a "Certificate of Insurance" naming the District as an "additional insured."

**Changes in the Contract Clause**

The OWNER may, at any time make changes in the Scope of the WORK required to be performed by the CONTRACTOR under this Agreement, including adding WORK to or deleting WORK from the Agreement. Such changes do not invalidate the Agreement or release or relieve the CONTRACTOR or its bonding company from any obligations or guarantees given under the provisions of the Agreement. The validity of the Performance, Maintenance and Warranty, and Payment Bonds and the obligations of the Surety or sureties of the bonds remain intact. Ali such work shall be executed under the terms of the original Agreement unless it is expressly provided otherwise.

Except for the purpose of affording protection against any emergency endangering life or property, the CONTRACTOR shall make no change in the work or construction of the WORK under this Agreement. The CONTRACTOR shall not provide additional work, or supply additional labor, services or materials beyond that actually required for performance under the Agreement, unless pursuant to a written order from the OWNER authorizing the change. No claim for an adjustment of the Contract Price or Contract Time will be valid unless so ordered and approved by OWNER.

Where unit prices are contained in the Agreement (established as a result of a unit price bid), the OWNER may order the CONTRACTOR to proceed with desired changes in the WORK, the value of such changes to be determined by the measured quantities involved and the applicable unit prices specified in the Agreement provided that the net value of the change would not increase or decrease the Contract Price by more than 15%.

Where unit prices are not contained in the Agreement or if total net changes increase or decrease the total amount of the Contract Price by more than 15% of the original Contract Price, the OWNER shall, before ordering the CONTRACTOR to proceed with desired changes, request an itemized proposal from him covering the work involved in the change after which the procedure shall be as follows:

**Reliance on Prior Reports or Investigations**

**Reports of Physical Conditions**

The following reports of exploration and tests of subsurface conditions at the Site have been relied upon by the DESIGN ENGINEER:

* Report dated March, 2001 prepared by...

1. A copy of this report is included as an appendix to the Contract Documents. The CONTRACTOR may rely upon the accuracy of the technical data contained in such reports and drawings, except for such physical dimension that can be field verified; however, the interpretation of such technical data, including any interpolation or extrapolation thereof, and opinions contained in such reports and drawings are not to be relied on by the CONTRACTOR.
2. Existing Structures: CONTRACTOR must familiarize itself with the physical condition in or relating to existing surface and subsurface structures (except underground Utilities referred to in Paragraph 4. 3 herein) which are at or contiguous to the Site that have been utilized in the preparation of the Contract Documents.
3. Neither the OWNER nor DESIGN ENGINEER make any representation as to the completeness of the reports or drawings referred to in Paragraph 4.2 or the accuracy of any data or information contained therein. The CONTRACTOR may rely upon the accuracy of the technical data contained in such reports and drawings. However, the CONTRACTOR may not rely upon any interpretation of such technical data, including any interpolation or extrapolation thereof, or any nontechnical data, interpretations, and opinions contained therein. The Contractor specifically waives any and all claims against the OWNER relating to the reports or drawings supplied by third party consultants.

**Underground Utilities**

The information and data indicated in the Contract Documents with respect to existing underground Utilities at or contiguous to the Site are based on information and data furnished to the OWNER or the DESIGN ENGINEER by the owners of such underground Utilities or by others. Unless it is expressly provided in the General Conditions and/or Section 01530 -Protection and Restoration of Existing Facilities, the OWNER, OWNER'S REPRESENTATIVE and the DESIGN ENGINEER will not be responsible for the accuracy or completeness of any such information or data, and the CONTRACTOR shall have full responsibility for reviewing and checking all such information and data, for locating all underground Utilities, for coordination of the WORK with the owners of such underground Utilities during construction, for the safety and protection thereof and repairing any damage thereto resulting from the WORK, the cost of which is to be included in the Contract Price.

**Notice Requirements related to Differing Site Conditions**

If an underground Utility is uncovered or revealed at or contiguous to the Site which was not indicated in the Contract Documents and which the CONTRACTOR could not reasonably have been expected to be aware of, the CONTRACTOR shall identify the owner of such underground Utility and give written notice thereof to that owner and shall notify the OWNER'S REPRESENTATIVE.

**Differing Site Conditions**

* The CONTRACTOR shall within 48 hours of discovery and before such conditions are disturbed or cause any delay in the WORK, notify the OWNER'S REPRESENTATIVE, in writing, of the following conditions, hereinafter called Differing Site Conditions:
  1. Subsurface or latent physical conditions at the Site of the WORK differing materially from those indicated, described, or delineated in the Contract Documents, including those reports discussed in Paragraph 4.2, 4.3, and 4.5; and
  2. Unknown physical conditions at the Site of the WORK of an unusual nature differing materially from those ordinarily encountered at similar sites and generally recognized as inherent in work and construction activities of the character provided for in the Contract Documents, including those reports and documents discussed in Paragraph 4.2, 4.3, and 4.5.
* The OWNER'S REPRESENTATIVE will review the conditions and consult with the OWNER and DESIGN ENGINEER and determine the necessity of obtaining additional explorations or tests with respect thereto.
* If the OWNER'S REPRESENTATIVE concludes that because of newly discovered conditions a change in the design and Contract Document s is require d, the OW N ER ' S REPRESENTATIVE shall notify CONTRACTOR who may request an extension of the Contract Time or Change Order for consideration of the OWNER.
* The CONTRACTOR's failure to give notice of differing Site conditions within 48 hours of discovery, before they cause any delay in the WORK and before they are disturbed shall constitute a waiver of all claims in connection therewith, whether direct or consequential in nature.

**Hazardous Materials**

* OWNER will not be responsible for any Asbestos, Hazardous Waste, PCB'S, Petroleum and/or Radioactive Material brought to the Site by CONTRACTOR, Subcontractors, Suppliers, or anyone else for whom CONTRACTOR is responsible.
  1. Upon discovery of any Asbestos, Hazardous Waste, PCBS, Petroleum, or Radioactive Material, located on the WORK site, the CONTRACTOR shall immediately stop all work in any area affected thereby (except in an emergency as required by Paragraph 6.12) and notify OWNER'S REPRESENTATIVE (and thereafter confirm such notice in writing). CONTRACTOR shall not be required to resume any work in any such affected area until OWNER has obtained any required permits related thereto and delivered to CONTRACTOR special written notice. Such written notice will specify that such condition and any affected area is or has been rendered safe for the resumption of the WORK or specify any special conditions under which the WORK may be resumed safely. If OWNER and CONTRACTOR cannot agree as to entitlement to or the amount or extent of adjustment, if any, in Contract Price or Contract Time as a result of such work stoppage or such special conditions under which WORK is agreed by CONTRACTOR to be resumed, either party may make a claim therefore as provided in Articles 11 and 12.
  2. If, after receipt of such special written notice, CONTRACTOR does not agree to resume such WOR K based on a reasonable belief it is unsafe, or does not agree to resume such WORK under special conditions, then OWNER may order such portion of the WORK that is in connection with such hazardous condition or in such affected area to be deleted from the WORK. If OWNER and CONTRACTOR cannot agree as to entitlement to or the amount or extent of an adjustment, if any, in Contract Price or Contract Times as a result of deleting such portion of the WORK then either party may make a claim therefore as provided in Articles 11 and 12. OWNER may have such deleted portion of the WORK performed by Owner's own forces or others in accordance with Article 7.

**Clauses Requiring the Contractor to Do His Own Investigation**

It is the responsibility of each Bidder before submitting a Bid:

* To examine thoroughly the Bid Documents and other related data identified in the Bid Documents (including 'Technical" data referred to below);
* To attend the mandatory Pre-Bid Conference;
* To visit the site and become familiar with local conditions that may affect cost, progress or performance of the WORK;
* To consider and factor into the Bid all federal, state, and local laws and regulations that may affect cost, progress or performance of the WORK;
* To investigate all licenses, permits and approvals that may be required, including those that OWNER believes it has already obtained to determine any effect on cost, progress or performance of the WORK;
* To study and carefully correlate the Bidders observations and research with the Bid Documents; and
* To notify the DESIGN ENGINEER and OWNER'S REPRESENTATIVE of all conflicts, errors, ambiguities, or discrepancies in or between the Bid Documents and other data.

**Correction or Removal of Defective Work**

A paragraph requiring the Contractor to correct defective work might read:

If required by the OWNER or OWNER'S REPRESENTATIVE, the CONTRACTOR shall promptly correct all Defective Work, whether or not fabricated, installed, or completed, or, if the work has been rejected by the OWNER'S REPRESENTATIVE, remove it from the Site and replace it with non-defective WORK. The CONTRACTOR shall bear all direct, indirect, and consequential costs and damages of such correction or removal, including but not limited to fees and charges of engineers, architects, attorneys, and other professionals made necessary thereby.

**Acceptance of Defective Work**

If, instead of requiring correction or removal and replacement of Defective Work, the OWNER prefers to accept the Defective Work, the OWNER may do so. The CONTRACTOR shall bear all direct, indirect, and consequential costs attributable to the Owner's evaluation of and determination to accept such Defective Work. If any such acceptance occurs prior to final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the WORK, and the OWNER shall be entitled to an appropriate decrease in the Contract Price.

**Owner May Choose to Correct Defective Work**

If the CONTRACTOR fails within a reasonable time, as determined by OWNER, after written notice from the OWNER'S REPRESENTATIVE to correct Defective Work, or to remove and replace Defective Work as required by the OWNER'S REPRESENTATIVE in accordance with Paragraph 13.5.A., or if the CONTRACTOR fails to perform the WORK in accordance with the Contract Documents, or if the CONTRACTOR fails to comply with any other provision of the Contract Documents, the OWNER may, after seven (7) days written notice to the CONTRACTOR and his bonding company of its right to cure the defect, correct and remedy any such deficiency.

**Broad Indemnification**

CONTRACTOR agrees to indemnify, defend, and hold harmless the COUNTY, [the State of Oregon,][and other funding sources] and its [their] officers, agents and employees against all liability, loss, and costs arising from actions, suits, claims, or demands arising from performance of this contract.

**Limited Indemnification**

CONTRACTOR agrees to indemnify, defend and hold harmless the COUNTY [The State of Oregon][and other funding sources] and its [their] officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands attributable in whole or in part to the acts or omissions of CONTRACTOR, and Contractor's officers, agents and employees, in performance of this contract.

**Mutual Indemnification**

CONTRACTOR agrees to indemnify, defend and hold harmless the COUNTY [The State of Oregon] [and other funding sources] and its [their] officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands attributable solely and exclusively to acts or omissions of CONTRACTOR, and CONTRACTOR's officers, agents and employees, in performance of this contract.

Subject to the limitations of the Oregon Tort Claims Act and the Oregon Constitution, COUNTY agrees to indemnify, defend and hold harmless the CONTRACTOR [The State of Oregon] [and other funding sources] and its [their] officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands attributable solely and exclusively to acts or omissions of COUNTY, and COUNTY's officers, agents and employees, in performance of this contract.