

Negotiating a Better Contract with your Architect – Key Strategies to Consider in Public Contracting

Laws governing public contracts require an Owner to select the lowest responsible contractor(s) with a responsive bid. There is little room for negotiation on price with the contractors. However, the services of design professionals are not subject to competitive bidding under the law. An Owner may exercise its options, but should be aware of several important considerations in choosing the appropriate design services.

Solicit interest and interview the design professional candidates. The position requirements must be publicly announced. Ask for and investigate references. The “price tag” is important, but look beyond the numbers: what services are offered? What current Projects is your candidate handling? Satisfy yourselves that the candidate has sufficient time, staff and other resources to tackle your project. Pennsylvania statutory law requires that the contract be awarded based upon the candidate’s demonstrated competence and qualifications.

The selected design professional will forward contract documents. Learn them. They are standard forms published by several organizations. The typical forms are published by the American Institute of Architects (AIA). The forms can, and in many cases, should be modified. Choose the form and provisions that reflect your goals and expectations for the project.

Enlist your Solicitor in the investigation of candidates and review of proposed contract forms. Legal counsel’s

review insures that the contract meets your needs. Communicate needs to your Solicitor at the outset of project development.

Review “basic,” “additional” and “optional additional” service provisions. Basic services are included in your contract price. All other services are additional charges. Require written approval of the Owner to perform services beyond basic. Negotiate revisions to drawings/specifications as a basic service where bids exceed the budget by 10%. Negotiate hours of claims evaluation as a basic service. Require your design professional to attend meetings to obtain permits or approvals, particularly where problems are anticipated.

Consider the compensation arrangement. Is the contract a “lump sum,” a “percentage fee of total construction cost,” or some other arrangement? Clarify the definition of “total construction cost.” Review proposed compensation for change orders, bid alternative and redesigns. Review rates for additional services. Avoid “front loading” compensation. The “design phase” is the most labor intensive. Review compensation paid upon termination by either party for convenience. Secure the right to retain design documents and enforce contract termination notice provisions.

Review “consultant” provisions. The design professional may require the Owner to contract directly with surveyors or testing agencies. Require your design professional to review and provide feedback on your consultant’s plans and to coordinate its work with the consultants.

Review the insurance and indemnity provisions. Require design professionals and contractors to supply Certificates of Insurance, as proof that insurance exists to satisfy project claims. The Owner should be a named additional insured on all policies, except professional

liability policies. Ask about claims history and pending/threatened claims prior to contract formation. Agree upon a notification period for policy cancellation and enforce it.

[Review the dispute resolution provisions.](#) Consider the forum: mediation; arbitration; or litigation through the courts. A combination of mediation and arbitration is the standard provision. Arbitrators and mediators are former judges and lawyers. Jurors in litigation are taxpayers in your county. Jurors appreciate the link between large adverse verdicts and increased taxes.

[Review with your Solicitor Pennsylvania law where your project faces claims from contractors as a result of information supplied by your design professionals.](#) In *Bilrite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, the Pennsylvania Supreme Court allowed a contractor who relied upon flawed drawings and

specifications provided by a design professional to bring a claim against the design professional directly, without involving the Owner as a party. This case significantly limited an Owner's liability in public contracting. Avoid provisions that require you to waive this protection or to indemnify the design professional against liability.

Contract negotiation with your design professional is significant. It sets the tone for the entire project and has an impact upon all other project contracts. Take steps to protect your interests and to meet project goals in order to insure successful project completion.

About the Author:

JAIME N. DOHERTY



Jaime serves as the head of the firm's Litigation and Labor & Employment Groups, with a practice that focuses on commercial and construction litigation, defense of product liability and toxic tort claims, insurance defense and coverage analysis.

Her clients include corporations, insurance companies, title agencies, municipalities, professional and recreational associations, school districts, private developers, and regional contractors and subcontractors. She has also worked on behalf of design professionals and sureties. She advises her clients on risk allocation, and risk shifting mechanisms including insurance, indemnity and bonding provisions in contract formation. She is panel counsel for several insurance companies and works with insurers and third-party administrators to defend construction defect, product liability, property and casualty losses.

Jaime has successfully represented clients in nonjury and jury trials in courtrooms across Pennsylvania. She has also litigated complex construction claims on behalf of owners, contractors and subcontractors before the American Arbitration Association.



Pittsburgh Office
Frick Building
437 Grant Street, 14th Floor
Pittsburgh, PA 15219
P: (412) 281-0587
F: (412) 281-2971

Jaime N. Doherty, Esquire
jdoherty@grblaw.com

www.grblaw.com