

Southernstar Consultants LLC

Practical Business Solutions for Engineers and Constructors

Name of training course/seminar:

“Understanding and Negotiating Construction Contracts”

Description: A very strong two day course focusing on how to evaluate, analyze and negotiate much better contractual commercial terms and conditions. The course is designed specifically for private sector construction companies, material suppliers/fabricators and field services providers.

Course Outline

1. What do we want to accomplish?

- a. Create much better awareness and understanding of certain risky commercial terms and conditions typically found in construction and construction related contracts (material supply and/or fabrication, field services).
- b. Present ways to lessen or eliminate the risk found in certain risky commercial terms and conditions in construction contracts.

2. What do we really want to do?

- a. Improve contracting risk management skills.
- b. Improve negotiation skills for lessening or eliminating the risk in commercial terms and conditions.
- c. *Protect the hard earned assets of your company.*

3. Some preliminaries

- a. Basic elements of good contracting
- b. Order of precedence.
- c. Worst word in contracting
- d. Best word in contracting
- e. Concept—misconception—of “standard terms and conditions”
- f. Risk issues with pre-printed “standard terms and conditions”, like AIA, AGC, Consensus Docs, EJCD.
- g. The three foundation stones of a construction contract.
- h. The concept of a “Business Decision” with respect to acceptable commercial terms and conditions.

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4. Scope of Work

- a. *Most important section of the contract.*
- b. Poorly written scopes - one of the main sources of claims and disputes.
- c. Scope of work matrix

5. Schedule

- a. Presentation
- b. Float – what is it? Who owns it?
- c. “Time is of the essence”. What does this mean?

6. Terms of Payment and Cash Flow

- a. Cash flow – what is it?
- b. Terms: Progress, milestone, reimbursable, cost plus, etc.
- c. Positive, negative or neutral cash flow.
- d. Downpayment or early payment
- e. Retention. Get rid of it. Replace with warranty bond.
- f. Electronic funds transfer
- g. Set offs
- h. Paid when paid and paid if paid terms and how to deal with them.
- i. Negotiating better terms of payment.

7. Indemnity

- a. Extremely serious risk transfer obligation.
- b. Contractor responsible for the liability arising out of claims for bodily injury, death or persons, property damage attributable to the negligence of others.
- c. Contractor responsible for reimbursing client for client’s legal defense costs.
- d. The concept of an uninsurable obligation.
- e. What’s a “tort” and “tort liability”.
- f. Broad form indemnity.
- g. Intermediate form indemnity.
- h. Limited form indemnity.
- i. Knock for knock indemnity.
- j. Vicarious liability

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- k. Risk transfer for personal injury, damage to property and legal defense costs.
- l. Review various typical indemnity clauses for construction contracts.
- m. Anti-indemnity legislation and the “insurance loophole”.
- n. Review various state anti-indemnity statutes
- o. The four legs of good anti-indemnity legislation
- p. Negotiating limitations on indemnities.

8. Insurance and Additional Insured Status

- a. Insurance is highly technical and often poorly understood and managed by contractors and owners alike.
- b. Introduction to insurance.
- c. Some insurance terminology.
- d. Insurance definitions for contractors.
- e. Common types of insurance for contractors.
- f. Evidence of insurance certificate. Is it worth anything?
- g. The high risk of providing additional insured status: is your company in the construction business or the insurance business?
- h. The high risk of providing contractual liability insurance along with additional insured status.
- i. Review handouts on additional insured status.
- j. Waiver of subrogation.
- k. Self-insurance, self-insured retainer, high deductible.
- l. Review a typical insurance clause for a construction contract.
- m. Contractor’s insurance program is a corporate asset.
- n. Negotiating improved insurance requirements.

9. Changes

- a. Some basic ground rules.
- b. Time and money for changes.
- c. 100% payment for changes.
- d. No verbal changes, all in writing.
- e. Review typical changes clause for a construction contract.
- f. Negotiating more favorable change clauses.

10. Damages

- a. Breach of contract and failure to perform.
- b. Actual damages.
- c. Liquidated damages and their adversarial effect.

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- d. Consequential damages.
- e. Negotiating damages clauses
- f. Review typical damages clause for a construction contract.
- g. Negotiating less risky damages clauses.

11. Disputes and Dispute Resolution

- a. How to manage disputes
- b. Negotiation
- c. Mediation
- d. Arbitration
- e. Litigation
- f. Key executive involvement.
- g. Review typical disputes clause for a construction contract.
- h. Negotiating improved dispute resolution clauses.

12. Force Majeure

- a. What is it?
- b. Why is it important? Is it important?
- c. Force majeure is highly location dependent
- d. Review typical force majeure clause for a construction contract.

13. Assurances of Performance

- a. Guaranty and surety.
- b. On-demand bonds. How dangerous is this? They are not guarantees.
- c. Surety bonds. A true guaranty.
- d. Stand-by letter of credit.
- e. Parent company guaranty.
- f. How to add limitations or restrictions to guarantees and bonds to restrict the client's ability to cash in.
- g. Review text of typical on-demand bond used as an assurance of performance.

14. Warranty

- a. Definition
- b. Warranty issues: time, evergreen clauses.
- c. Review typical warranty clause for a construction contract.
- d. Negotiating improved warranty clauses.

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15. Termination and Suspension

- a. Termination for cause
- b. Termination for convenience
- c. Suspension
- d. Review typical termination clause for a construction contract.
- e. Negotiating termination and suspension clauses.

16. Venue and State Law

- a. Why is this issue a serious hidden risk?
- b. The concept of “contractual rendition”.
- c. Understand how this relates to anti-indemnity legislation.

17. Negotiating

- a. General construction contract negotiating strategies for contractors.

The course also has over 40 different handouts related to contracting issues that supplement the visual and verbal presentation. All handouts are thoroughly reviewed and discussed.

All attendees will be asked to bring with them several actual contracts their companies have been asked to agree to. Risky conditions in these contracts will be shared as examples with other attendees, discussed, and suggestions for negotiating less risky terms will be submitted and analyzed.

There is no price for bad terms!
