

### CONSTRUCTION LAW

# Streamlining the Negotiation Process of Management Agreements

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The negotiation of a construction management agreement (CMA) for a project of a substantial size can be a long, arduous and costly struggle unless key business and legal terms are resolved before the owner's first draft of the CMA for the specific project is presented to the construction manager (CM) and its counsel for comment. A good way to streamline this process and save time and legal expense is to start with a Request for Proposal (RFP) from the owner to selected bidders outlining the basic contract terms the owner is anticipating will be included in the final CMA. A template form of the CMA should also accompany the RFP and bidders should be instructed to provide high level comments in memo (not redline) form.

Following the receipt of proposals and comments from the prospective CMs and the negotiation of the basic terms with the chosen bidder, a nonbinding term sheet should be prepared and a conformed CMA can be presented to the CM.

This does not end the streamlined process. In order to avoid an excessive exchange of redlines, the CM should be instructed to respond to the owner's draft by the submission of an issues list, not a redraft, consistent with the term sheet. Only after the items on the issues list are resolved should the CM propose edits to the owner's draft.

As an illustration of business terms which may be included in an RFP (in addition to the project description and other pertinent information), as well as examples of how the owner may wish to handle them, follows.

#### Form of Agreement

Owner will utilize its master form of CMA with owner's option to proceed on a cost plus or GMP delivery method. CM will provide a cost proposal to owner prior to the end of the preconstruction phase. Under a cost plus format, CM will be at risk for schedule and subcontractor performance, for which a contingency will be available. Under a GMP, CM will be at risk for cost, schedule and subcontractor performance, for which a contingency will be available. To the extent approved by owner, bonding

or subcontractor default insurance (SDI) will be provided by CM.

#### Preconstruction Fee

Preconstruction services will be set forth in the CMA and performed on the basis of an all-inclusive monthly lump sum fee for the period commencing upon the execution of the CMA. The services will continue until the commencement of the construction phase, as evidenced by owner's notice to proceed. Preconstruction services will include the preparation of a cost proposal (covering cost plus and GMP) as well as early start work, which will be performed on cost plus or GMP basis, at owner's option. The net fee portion of the preconstruction fee will be credited to owner against CM's construction phase fee upon the commencement of the construction phase.

#### Fee and Other Markups

The fee, to be expressed as a percentage, will be calculated on the cost of the work, to be defined in the CMA, exclusive of liability insurance and SDI. CM will provide its proposed fee and markups for insurance and SDI.

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## Retainage

CM's fee will be paid on the basis of the net amounts due the subcontractors, after the withholding of retainage. Except as otherwise permitted in writing by owner, each subcontract will provide for a retention of payments equal to ten percent (10%) until (subject to owner's approval), such subcontractor's work is fifty percent (50%) complete, and thereafter retention of five percent (5%) will be withheld from payments through final completion of the work.

## General Conditions And General Requirements

General conditions and general requirements costs will be paid by owner on an actual cost basis without markup, to a maximum amount to be determined, and will be identified on a general conditions cost matrix attached to the CMA. Initially, the matrix will contain only categories of costs and will be completed with actual costs on the submission of CM's cost proposal. CM will provide a staff burden rate for fringe benefits.

## CM Contingency

A contingency in an amount to be negotiated will be available to CM if there is a GMP. The contingency initially will be calculated on subcontract and general conditions/requirements costs at the time of CM's cost proposal. Trade buy savings will be transferred into the contingency. Sharing of remaining contingency will be negotiated.

## Insurance

CM will either provide a Contractor Controlled Insurance Program (CCIP)

or conventional insurance at rates to be negotiated. Conventional insurance will also cover insurance not included in the CCIP, such as automobile, professional or pollution liability insurance. The rates will be calculated on actual subcontract and general conditions/requirements costs.

## Change Orders

Change orders will include all costs associated with the change as well as CM's fee, after a "dead band" (or fee holiday) in an amount to be negotiated, and CCIP and SDI costs. CM will

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be paid its actual general conditions costs in connection with changes. Any subcontractor change order work being done on a time and material or a lump sum basis will allow for a subcontractor markup of ten percent (10%) overhead and five percent (5%) profit.

## Project Schedule

A critical path method schedule with relevant milestone dates—including Temporary Certificate of Occupancy (TCO) issuance dates—will be provided with CM's cost proposal. CM will be required to accelerate the work at its expense (but for which the contingency is available) if milestone dates are missed. The project schedule may

be adjusted for delays in accordance with the CMA

## Liquidated Damages

In lieu of consequential damages, after a grace period of 30 days, liquidated damages in an amount to be determined will be assessed until substantial completion is achieved.

## Warranty

CM will provide a general warranty of one (1) year from the date of final completion. The general warranty will be in addition to all subcontract warranties, which will be for the CM's and owner's benefit.

In addition to these business terms, there are several common legal issues that may prolong negotiations and we recommend that they be addressed during the RFP/term sheet process, before a project specific CMA is presented to the CM. Among these legal issues are indemnification, waiver of consequential damages, waivers of CM claims due to late notice, delays, continuous work during disputes, and assignment of subcontracts to owner upon termination for convenience. Rather than waiting for an exchanges of CMA drafts, these legal issues and the business issues outlined above should be resolved at the outset of negotiations.