

TIPS FOR SUB-CONTRACTORS TO INSURE PROMPT PAYMENT ON CONSTRUCTION CONTRACTS

PRESENTATION TO THE MANITOBA SUB-CONTRACTORS ASSOCIATION

IVAN HOLLOWAY, CHAD PENNER, GANGE COLLINS HOLLOWAY, CONSTRUCTION LAWYERS



A woman wearing a yellow hard hat, a black puffer vest over a red and black plaid shirt, and grey jeans is standing in a construction site. She is looking down at a stack of white papers she is holding. The background shows a concrete wall and a white pillar. A dark grey rectangular box is overlaid on the image, containing the text 'PRE-CONTRACT CONSIDERATIONS' in white, bold, uppercase letters.

PRE-CONTRACT CONSIDERATIONS

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BEFORE YOU ENTER INTO A CONTRACT OR BID ON A PROJECT, WHAT PAYMENT RISKS CAN BE IDENTIFIED?

PRIME CONTRACTOR RISK

- What is the prime contractor's reputation in the industry?
 - “Word of mouth”
 - Court Registry Search (www.jus.gov.mb.ca)
 - Construction association memberships
 - Better Business Bureau search (www.bbb.org)
 - Corporate registry search
- What is the prime contractor's reputation in the industry?
- How long has the prime contractor been in business?

PRE-CONTRACT CONSIDERATIONS

BEFORE YOU ENTER INTO A CONTRACT OR BID ON A PROJECT, WHAT PAYMENT RISKS CAN BE IDENTIFIED?

SCOPE OF WORK RISK

- Is the proposed scope of work within your company's core competency?
- Is the proposed scope of work going to potentially stretch your company's capacity?

UNKNOWN CONDITIONS RISK

- To what extent are site conditions unknown?
- To what extent can you reasonably inquire into the nature of unknown site conditions?
- To what extent are you relying upon assessments / representations of the consultant or the Prime Contractor that cannot be independently verified?

PRE-CONTRACT CONSIDERATIONS

BEFORE YOU ENTER INTO A CONTRACT OR BID ON A PROJECT, WHAT PAYMENT RISKS CAN BE IDENTIFIED?

CONTRACT RISK (TENDERED AND OTHER NON-NEGOTIABLE CONTRACTS)

- Are the clauses standard?
- Are any clauses unreasonable or onerous?
- Are the payment terms clear, reasonable and certain?
 - Process for submitting progress payment applications
 - Timing for receiving payment
- Is there a liquidated damages clause?
- Does the contract provide a lot of discretion to the Prime Contractor or consultant?
- Is the contract attempting to unreasonably shift risk and responsibility onto your company?
- Are there clear and reasonable rules for change orders?
- Are the deeming provisions reasonable?
- Are there provisions for holdbacks and back charges beyond statutory requirements?
- Are the warranty and deficiency provisions reasonable?
- Is there a “Pay if Paid” clause?
- Does the proposed sub-contract incorporate the Prime Contract by reference? If so, have you reviewed the Prime Contract?
- Is the proposed contract a standard form CCA/CCDC contract?
- What is the dispute mechanism in the contract?
 - Arbitration v. court process
- Do you understand all clauses?

PRE-CONTRACT CONSIDERATIONS

BEFORE YOU ENTER INTO A CONTRACT OR BID ON A PROJECT, WHAT PAYMENT RISKS CAN BE IDENTIFIED?

OTHER RISKS

- What is reputation of the owner of the property in which the project is located?
- Do you have past experience with this owner?
- Is there any limitation on lien rights?
 - Hydro Contracts
 - Reserve Land
 - Crown contracts for:
 - Highways
 - Bridges
 - Air strips
 - Docks
 - Ferry Terminals
 - Other Federal contracts, based upon enabling legislation of federal agency
- Is there a payment bond?

PRE-CONTRACT CONSIDERATIONS

ECONOMIC ENVIRONMENT

SUPPLY V. DEMAND FOR WORK

- How much good work is currently available for your company?
- What is your competition?



PRE-CONTRACT CONSIDERATIONS

ULTIMATE QUESTIONS TO ASK BEFORE BIDDING OR QUOTING

BASED UPON ALL OF THE ABOVE

- What is your bargaining position?
- What is your preliminary collection risk assessment and therefore what is your 'risk premium'?
- Do you bid / quote this project or pass?
- If you do bid / quote this project, at what margin?

A photograph of three men in a construction setting. They are wearing hard hats (yellow and white) and high-visibility orange safety vests. The man on the left is holding a large roll of white paper. The man in the center is wearing a white shirt and tie under his vest and is writing on a clipboard. The man on the right is wearing glasses and holding a yellow and black tool. A semi-transparent dark grey box with white text is overlaid in the center of the image.

THE CONTRACT
(NEGOTIATED CONTRACTS)

THE CONTRACT (NEGOTIATED CONTRACTS)

NEGOTIATING A CONTRACT

STOP. HAVE YOU READ THE ABOVE? NOW READ IT AGAIN.

KEY FIRST CONSIDERATION IN NEGOTIATING THE TERMS OF A CONTRACT IS TO CORRECTLY ASSESS YOUR BARGAINING POWER

AVOID TERMS UNDER THE SECTION, CONTRACT RISKS (ABOVE)

SHORT, CLEAR, REASONABLE AND CERTAIN V. LONG, LEGALISE, AND CONVOLUTED.

FOCUS ON KEY TERMS:

- Payment terms
- Scheduling terms
- Scope of work
- Changes of scope of work
- Termination

THE CONTRACT (NEGOTIATED CONTRACTS)

THE “HANDSHAKE CONTRACT”



Balance risk of
uncertainty of terms
vs risk of offending



Where there is no risk of
offending, present your
“standard-form” contract



Where there is risk of
offending, confirm some
basic terms in a relaxed
and “friendly” email

THE CONTRACT (NEGOTIATED CONTRACTS)

THE QUOTE THAT BECOMES THE CONTRACT

Is your quote going to become your
de facto contract?

Have you inserted terms in your
standard-form quote beyond scope of
work and price?

THE CONTRACT (NEGOTIATED CONTRACTS)

TAKEAWAYS

Your contract is the foundation for everything that follows. **Build it with care.**

If you don't ask, you won't get.

Take the initiative.

Agree on terms while in the “honeymoon” phase because sure as hell you won't get any slack when things get nasty.

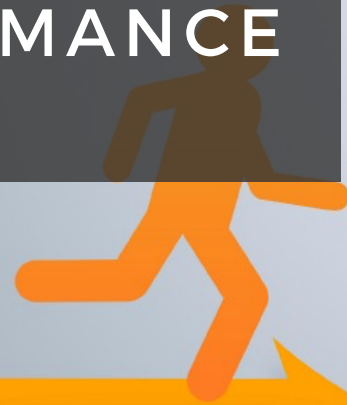
A good contract is like a good insurance policy: you hope to never need to rely upon it but you are glad to have it when you do.

Do not hesitate to ask for advice from a guy like this:



CHAD PENNER

CONTRACT PERFORMANCE



PERFORMANCE

CONTRACT PERFORMANCE**DON'T IGNORE
WARNING SIGNS**

- Late payment
- Payment shorting
- Unreasonable deficiency claims and other back charges
- Interference/managing sub-contract by the Prime Contractor
- Unrealistic and unreasonable scheduling changes
- Change of scope without proper change orders
- Incompetence on the part of the Prime Contractor's project manager
- Unreasonable denial of legitimate extras

**DOCUMENT, DOCUMENT,
DOCUMENT**

- Confirm verbal site communication with a quick email
- Have your foreman / site supervisor keep a daily diary

PERFORMANCE

CONTRACT PERFORMANCE**CONSIDER BRINGING YOUR CONSTRUCTION LAWYER IN EARLY – DO NOT WAIT UNTIL IT IS TOO LATE**

- “An ounce of prevention is worth a pound of cure”
- Going cheap is not always the cheapest way to go!

RIGHT TO INFORMATION UNDER SECTION 58 OF THE BUILDERS’ LIENS ACT

- Copy of prime contract
- Info regarding account where holdback is held
- Statement of accounts between owner and prime contractor
- Debits, Credits and Interests in of holdback account

PERFORMANCE

CONTRACT PERFORMANCE

BE PREPARED TO ESCALATE COMMUNICATIONS UP THE CHAIN OF COMMAND

IN APPROPRIATE CIRCUMSTANCES, THREATEN TO CONTACT THE PROPERTY OWNER DIRECTLY AND, IF NECESSARY, DO SO

BE PREPARED TO WALK AWAY

- You can make a million dollars on one contract and then go bankrupt on the next
- There is no shame in walking away in appropriate circumstances

A yellow excavator is shown in a state of significant damage. The cab, which is black and green, is partially submerged in muddy water. The bucket, which is yellow, is also partially submerged and appears to be damaged. The excavator's arm is visible, and the overall scene suggests a major accident or failure. The text "DAMAGE CONTROL AND LEGAL ACTION" is overlaid on the image in a dark, semi-transparent box.

DAMAGE CONTROL AND LEGAL ACTION

DAMAGE CONTROL

DAMAGE CONTROL AND LEGAL ACTION

IF YOU GET TO THIS STAGE, THERE HAS LIKELY BEEN A FAILURE AT AN EARLIER STAGE

LABOUR AND MATERIAL BONDS

- Typical on Government contracts
- Typically 50% of value of contract
- 120 days from end of work to make a claim
- Other technical requirements
- Helpful but not failsafe

LIENS

- 40 days from substantial performance or abandonment of sub-contract
- Owner's liability limited to holdback and amount owing to Prime Contractor
- If not settled, you need to sue within 2 years of filing lien or within 30 days of Notice
- May not be available in all contracts

DAMAGE CONTROL

DAMAGE CONTROL AND LEGAL ACTION

HIGHWAYS CONTRACTS

- Payment Dispute Mechanism provided for in the Highways and Transportation Construction Contracts Disbursement Act

PRE-JUDGEMENT GARNISHMENT

- Little known but potentially powerful legal remedy

DAMAGE CONTROL

DAMAGE CONTROL AND LEGAL ACTION



IVAN HOLLOWAY

IF YOU GET TO THIS STAGE, YOU
ARE GOING TO NEED THIS GUY!

DAMAGE CONTROL

DAMAGE CONTROL AND LEGAL ACTION

IF HE CAN'T HELP YOU, CALL
THIS GUY!



Myths

COMMON MYTHS

after
than

MYTHS

COMMON MYTHS

SUB-CONTRACTORS ARE ONLY ENTITLED TO BE PAID OUT THEIR HOLDBACK UPON SUBSTANTIAL PERFORMANCE OF THE PRIME CONTRACT

“PAY WHEN PAID” CLAUSES ARE LEGALLY ENFORCEABLE

STATUTORY DECLARATIONS ACTUALLY MEAN SOMETHING

PRIME CONTRACTOR BANKRUPTCY ENDS ALL REALISTIC CHANCES OF COLLECTION

The image features two incandescent light bulbs against a black background. The top bulb is unlit, while the bottom bulb is lit, casting a warm glow. A semi-transparent grey rectangular box is centered over the image, containing the text "OUT OF THE BOX IDEAS" in white, bold, uppercase letters. The bulbs are positioned diagonally, with the top bulb's base pointing towards the bottom right and the bottom bulb's base pointing towards the bottom left.

**OUT OF THE
BOX IDEAS**

CREATIVE THINKING

OUT OF THE BOX IDEAS

- PERSONAL GUARANTEES
- INCENTIVISED CONTRACTS



GCH

Barristers
& Solicitors

GANGE COLLINS HOLLOWAY



IVAN HOLLOWAY
204-953-5404
rih@gchlaw.ca



CHAD PENNER
204-953-5409
cmp@gchlaw.ca

WWW.GCHLAW.CA