

# Winning Negotiation Strategies for Critical Service Agreements

## Construction Contracts

Neal J. Sweeney

Kilpatrick Townsend & Stockton LLP



[nsweeney@kilpatricktownsend.com](mailto:nsweeney@kilpatricktownsend.com)  
(404) 815-6616



- Equitable risk allocation
- Your statutes, regs, standard contracts and established procedures
  - Beware of ad hoc or wholesale additions or changes to clauses without due consideration AND careful implementation and training
- Contract defenses
  - Potential protection when needed, not bulletproof
  - Not a substitute for responsible contract administration or to encourage reckless behavior
  - Know when to hold ‘em, and when to fold “em
  - Non-waiver clause

- Contract clauses and scheduling specs
  - Baseline schedule & update requirements
  - How extension must be calculated
  - Concurrent delay and float ownership
  - Recovery schedule requirements
  - Owner capability to administer!
  - Tool (not weapon) to benefit the project
- Schedule & update approval tied to payments?
- No damages for delay clause?
- Early completion bonus & time extensions
- Contractor stipulation of daily delay costs

- Efforts to override the implied warranty of the plans & specifications (Spearin Doctrine)
  - Disclaimers about the plans & reverse warranties
  - Duty to identify design errors: Known (patent) or “should have” known
- Impact & delay costs automatically covered in change orders (contract & change order forms)
- Fixed percentage mark-up for overhead & profit. Scope of mark-up?
- Right to deductive changes (partial T4C)

# Notice & Claim Procedures

- Timed notice requirement with content and a stipulation about prejudice from lack of notice
- Beyond initial notice, specific requirements for the timing and content of additional claim submissions
- Express warnings that failure to comply with the submission requirements will result in waiver and complete bar to the claim
- The owner must be prepared to fulfill its obligations under the claim specified process<sub>5</sub>

**No claim** by the Contractor against the City for additional compensation related to the Biosolids Management Services **shall be valid unless** a notice of claim is filed with the City within ten (10) days after occurrence of the event upon which the claim is based, and, . . .

in addition, unless a detailed written statement of the claim, accompanied by vouchers and other supporting data, shall have been filed with the City by the Contractor within thirty (30) days after the occurrence of said event.

. . . the City shall review same promptly. In conducting this review, the City shall have the right to require the Contractor to submit such additional or supporting documents, data and other information as the City may require. Failure to submit such additional documents, data or other information within fifteen (15) days following a written request therefor shall be deemed a waiver of the claim.



**Failure of the Contractor to file any claim within the time limits prescribed herein or in the precise form or manner required hereby shall be deemed a material prejudice to the interests of the City and shall constitute an absolute waiver of the claim** and the right to file or thereafter prosecute the same.

Waiver of consequential damages

Liquidated damages for delay

- Scope? All time related costs. Any carve outs should be expressly stated.
- Contractor limitation of liability!
  - Make sure the price is right?
  - Project specific consideration and calculation
- Run until substantial completion or final completion? Resume: final completion delay

- Termination for convenience
  - Basis of compensation: costs and % markup
  - Partial termination for convenience
- Termination for default
  - Alternatives: Right to supplement
  - Constructive termination for convenience!!!
  - Reprourement costs and liquidated damages
- Assignment of subcontracts and PO's
  - At owner's option
  - Express flow down into subcontracts & PO's

- Partnering: A tool, not a panacea
- Dispute resolution ladder:
  - Encourage early resolution
  - Potentially tied to notice & claim procedures
- DRB/ Project Neutral
- Arbitration vs. Litigation
  - Optional Arbitration?
  - If arbitration, consider consolidation and how much “procedure”
- Mediation
  - As an express option during performance
  - As a prerequisite for litigation or arbitration

# Multi-Prime Contracting

- Owner's implied duty to coordinate
- Owners' success in disclaiming implied duty to coordinate (except Federal Govt)
- Requires strong, express contract disclaimers
- Contract require contractors to
  - Coordinate among themselves
  - Sue each other for delays or interference
  - Indemnify owner
  - Makes each prime third party beneficiary on other contracts and bonds

# Winning Negotiation Strategies for Critical Service Agreements

## Construction Contracts Thank You

Neal J. Sweeney

Kilpatrick Townsend & Stockton LLP



# Acceptance & Warranties

- Warranties: When do they begin to run?  
Beneficial occupancy? Substantial completion? Final completion?
- Acceptance excludes latent defects