LAW: The Contractor's Side

by Cordell Parvin

A lawyer's view of legal issues affecting the roadbuilding industry

Design-builders take on the risk

This month, I want to identify specific contract provisions which should concern design-builders. Due to space limitations, I have listed those provisions with a brief discussion. At the outset, I want to state that while some state DOTs believe harsh contract provisions attempting to shift the risk to the design-builder will avoid contract disputes, I believe the best way a DOT can protect the public is through a complete and detailed description of the scope of work and the level of performance desired. It will reduce disputes in the award of contracts as well as during construction of the project.

DOTs need to understand that the design-builder does not assume all risks of all unforeseen costs and every responsibility for seeing that the project is completed. While the design-builder is responsible for designing and constructing the scope of work specified in the contract, its responsibility is limited to that scope of work. For example, when increased quantities occur because the design-builder reasonably relied on the 35% preliminary project drawings done by the DOT, a court will likely rule in favor of the design-builder.

Cover the loop holes

Design-builders need to be concerned about the order of precedence provision that is established to deal with any inconsistencies in the contract documents. Contractors should determine that their proposal is part of the defined contract documents. Then, they should determine what takes precedence over their proposal and, if permitted, negotiate to give the proposal greater precedence.

Some state DOTs have eliminated the *Differing Site Conditions* clause found in their standard specifications. This is an attempt to place all of the risk of site conditions on the design-builder even when the DOT chose the location of the road. In other states, the DOT and the design-builder share the risk of a differing site condition.

Responsibility for environmental hazards and remediation is an important clause to determine risk. Design-builders should make sure they are not responsible for pre-existing hazardous materials. If permitted, they should seek some form of indemnification from the public agency to cover the risks associated with handling and disposing hazardous materials.

Design-builders should determine which permits they will be responsible for obtaining and whether they must identify any permits that are needed. In some design-build contracts, the design-builder is responsible for obtaining permits that would normally be obtained by the public agency. In other design-build contracts, the public agency obtains the various environmental permits and the design-builder obtains any other needed permits.

Finding and relocating utilities is an issue of importance on any transportation construction. On design-build projects, some DOTs have placed responsibility on the design-builder to identify conflicting utilities and to coordinate their relocation with the utility companies, and included no damages for delay provisions.

Most state DOT standard specifications provide that contractors are entitled to time extensions for delays beyond their control, and also many provide that the contractor is entitled to additional compensation when the state DOT suspends the work in writing for an unreasonable period of time. In some states, clauses permitting the contractor to receive compensation for DOT-caused delays have been removed from the design-build contract.

All state DOT standard specifications include indemnification provisions. In design-build projects the risk is greater. In some states, the design-builder must indemnify and hold harmless the public agency for any and all liability associated with construction of the project, even if the damage was caused by the public agency's sole negligence. In such an instance, the design-builder has not only guaranteed its design, but also has agreed to cover all risks of the public agency connected with the project. Design-builders should seek an indemnification clause which limits its indemnification to acts or omissions by the design-builder in any subcontractor's representatives or employees.

Too much to risk

Potential liability under a design-build contract is by far the greatest risk concern due to the changing standard of case and potential unlimited liability.

Historically, engineers and other professionals have been held to the standard of care customary in the industry. Essentially, that means the engineer must exercise the ability, skill and care customarily used by engineers on similar projects. The design engineer must be found negligent to create liability. Additionally, it appears some design-build contracts expand liability to the point where there is potentially "strict" liability. This is particularly true of "performance"-based specifications. Among many concerns for the design-builder is that strict liability may not be covered by insurance. Design-builders should make sure the liability for design is no different than in the standard DOT-designer contract.

One of the most important subjects of negotiation for the design-builder in finalizing any design-build prime contract is obtaining limitations on overall liability for any damages the public agency might incur as a result of the project and indemnification. Because potential losses can be great, limitations on liability to a fixed sum, with no liability for consequential damages for the design-build contractor, is extremely important.

I hope the points raised in this column will be considered by design-builders as they move forward. R_B