

EXECUTIVE INSIGHTS

FROM LEADERS IN CONSTRUCTION LAW

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BY DONALD BERRY

o help minimize the potential for project disputes, it's essential to have a seasoned construction law firm review contract documents before work begins. This is doubly important when pursuing public-private partnerships (P3s), which bring together public and private sector funding to get projects built. *Construction Executive* asked two leaders in construction law for their advice on minimizing the potential for disputes, and the special risks and considerations for contractors undertaking P3 work.

HOW CAN CONTRACTORS MINIMIZE THE POTENTIAL FOR DISPUTES?



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Contractors can minimize the potential for disputes by insisting on written contracts that clearly, accurately and specifically define the scope of work. The most common construction dispute is whether something the owner wants is part of the original scope or an "extra" that requires a change order. Hastily prepared drawings, confusing specifications and incomplete definitions of the contractor's scope usually assure the owner's and contractor's expectations for the project will differ, resulting in disputes.

It is tempting to take shortcuts when drafting contract documents. The parties are anxious to get the work started, and precisely defining the scope of work can be tedious. At the beginning of a new project, before signing a contract, the owner and contractor usually still have some flexibility to obtain additional funds, negotiate a

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—Jim Archibald, Bradley Arant Boult Cummings LLP

competitive price from a subcontractor or supplier to meet a specialized requirement, or walk away from a project that cannot be built successfully within the owner's budget. This is the best time to tackle any difficult issues that may arise out of establishing, in writing, exactly what the owner wants the contractor to build.

Conversely, allowing scope disputes to arise after work begins, when the owner and contractor may find themselves facing mounting budget and schedule pressures, often means minor disputes become major disputes that cannot be resolved easily. Unfortunately, disputes that could have been avoided by a carefully defined

scope end up being resolved, after much delay and expense, by lawyers and judges or arbitrators.

P3S ARE GAINING POPULARITY FOR GOVERNMENT PROJECTS AT ALL LEVELS. WHAT ADVICE WOULD YOU GIVE A CONTRACTOR NEW TO THIS PROCUREMENT PROCESS?



STEVEN M. CHARNEY
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Although P3s involve a "project," these engagements often involve a broader enterprise, albeit one that includes construction. The participants in a P3 project often differ substantially from more typical project delivery methods. In fact, there are roles that do not otherwise exist and the players often align differently.

A P3 engagement generally involves an enterprise—the particular revenue-producing concession being created (e.g., building and operating a highway).

Contractors must first consider the role they will play in the P3 enterprise. Is the contractor taking on the broader role of the concessionaire or maintaining a more limited role akin to a general contractor hired by an owner to build the project? Or is it something in between?

If the business is serving as the contractor, do not assume the role and risks are the same. In many ways, the exposure and responsibilities in P3s can be different.

The broader enterprise inherent in P3s presents considerably disparate risks. The issues a contractor may face can be significant, ranging from fundamentally different liability for delays or disruptions, to timing of payments, sources of funds and revenue streams, and the duration of involvement and responsibility—just to name a few.

Contractors must understand how the P3 role they are taking fits into the bigger picture of the enterprise. Even if it appears similar to a more conventional role, take a fresh and careful look beneath the surface. Do not make assumptions based on what your firm has done before.

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