



**CAPITAL PROJECT
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Legal and Procurement Trends: Transportation Industry

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Legal Issues – Where are the Concerns?

1. Procurement and Project Delivery
2. Responsibility for Defective RFP Documents
3. Project Delay
4. Owner Control vs. Contractor Management
5. Limitations of Liability

1. Challenges in the Procurement Processes

- Procurement statutes remain in flux and incomplete
- Small pool of qualified design-builders for larger projects
- Public distrust in using qualifications-based selection processes
- Challenges with implementing design-build selection processes
- Cost and time in developing the procurement packages
- Agency reliance on outside consultants

The Legal Issues in Procurement

- Agencies have broad discretion to run their procurements, but they get in trouble by:
 - Not following the rules they set
 - Failing to objectively evaluate proposals
- Even if the agency “wins” on a particular project, its procurement philosophy may create industry angst

Siemens Transportation v. Metropolitan Council

- LRV procurement for Hiawatha project
- BAFO request stated:
 - bids would be ranked based on final score
 - “best conforms to overall long term interests of the Council”
- Court upheld award to Bombardier even though its score was lower

Siemens Transportation v. Metropolitan Council

The evaluation panel did not just make an award to the lowest bidder, but rather determined that the difference in technology did not justify the difference in price.

2. Responsibility for Defective RFP Documents

- Traditional approach – the *Spearin* Doctrine
- Expectation by Owners that Design-Build shifts liability for defects
 - Strong contract language imposing liability
 - View of design-build as creating a "product"
- Caselaw has not supported the risk transfer

Trataros Construction (2001)

- Design-Build Renovation of post office in Old San Juan
- Mixture of performance and design specs
 - fiberglass panels replicating façade
 - location and nature of support structure identified
- System required major modifications
- Result: contractor had right to rely on design furnished by owner

Trataros Construction (cont'd)

“Trataros did not have any contractual obligation to provide engineering services in order to determine the adequacy of the design shown in the drawings before it proposed a price for performing the cornice work.”

3. Risk of Project Delay

- Major commercial concerns over who bears risk and cost of delay
 - Weather/Force Majeure may not be just excusable
 - Dealing with third parties
 - Differing Site Conditions
- Project controls are now major discussion point
 - Float ownership
 - Concurrency
 - Control over schedule information and scheduling specifications
- Calculation of liquidated damages
- Deficiency in the language of the changes clause

4. Owner Control vs. Contractor Management

- "With control comes responsibility"
- Owners continue to have a difficult time giving up control
- Pushback from contractors
 - Limiting Owner's opportunity to review design submittals
 - Short durations for review
 - Value engineering
- Little case law, but major concerns as to whether the contract language will hold up

5. Overall Limitations of Liability

- Owner's overall contract remedies have been severely changed on larger projects
 - Caps on liability
 - All remedies extinguishing after a designated period of time (2 years)
- Limitation of warranty rights
 - Shorter periods of warranty
 - Unwillingness to accept subcontractor and supplier liability

Other Major Legal Challenges

- Managing the interfaces (stakeholders, tenants)
- Subsurface conditions
- Utilities and ROW
- Sovereign immunity
- Appropriations and cash flow curves
- Terminations for convenience



Contractual Risk Allocation

- Contractor not in best position to assume all risks
- Owner should
 - assess goals, unique attributes of project
 - determine if some goals conflict with one another
- Parties need to think through the risks specific to the delivery process
- Risk matrices are a valuable tool

Risk Allocation and Abatement Report

Risk	Workshop Conclusion	Action: What? How? Who?
Acts of God/Force Majeure	Shared (cost to Contractor, time to Owner)	Include clear/complete listing; Contractor may be able to partially insure against some
Adverse Weather	Shared (cost to Contractor, time to Owner)	Reduce disputes by quantitatively defining adverse weather condition in specs.
Ambiguous Specifications	Owner	Provide sufficient design budget; provide pre-tender 3rd party review
Change Order Pricing Disputes	Owner	Provide clear, fair contract terms
Changes in Laws & Regulations After Bid Date	Owner	Include clear stmt re: responsibility
Delayed Owner Equipment	Owner	Matching vendor schedules and contracts; schedule coordination

Staying Out of Trouble

- Specifications
- Equitable Allocation of Risk
- Limitation of Liability
- Teaming Arrangements
- Partnering/ADR
- Contingencies

