



CONSTRUCTION SERIES
(PT 4 OF 4): CONSTRUCTION
LAW, LIENS, & DISPUTE
RESOLUTION

MARCH 2, 2021

—

PROGRAM 9:00 AM – 10:30 AM



Driving growth to every corner of Philadelphia

PRESENTERS



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**HORN
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Contractor Toolkit: Risk Avoidance from Inception to Closeout

Jennifer M. Horn
Carter N. Williamson

Outline

- Pre-bid and pre-qualification
- Negotiating the contract
 - Critical contract provisions
 - Know your lien rights
 - Know your bond rights
 - Know applicable payment statutes
 - Know the applicable law
 - Know your dispute resolution provisions
- Essential preliminary documents
- Project documentation
- Project communications
- Claims avoidance
- Project closeout

Pre-Bid and Prequalification

- Estimating
 - Managing a Contractor's financial risk starts here:
 - Subcontractor/Materials Buy Outs
 - General Conditions Costs
 - Logistics
 - Labor issues (wage rate increases, etc.)
 - Construction Contingencies (ties to a contingency clause in the owner contract)

Pre-Bid and Prequalification

- There is always going to be tension between the pressure of estimating a project in a way that gets the job completely performed for the estimated cost,

AND

- Preparing a bid that is competitive with the other bids or attractive to an owner that issued an RFP.

Pre-Bid and Prequalification

- If a Contractor is awarded a project with a bid that is too low it hurts everyone involved.
 - Owners expect (and deserve) quality for price;
 - May not survive the de-scope;
 - Could affect relationships with subcontractors;
 - Contractor could be locked into a long term, losing proposition.

NOBODY IS IN BUSINESS TO LOSE MONEY

Subcontractor Prequalification

- All Contractors of any size should have a Subcontractor prequalification process.
- There are companies that will collect data from subcontractors, create a database and prompt subcontractors to update their information periodically.
- Subcontractors can complete forms containing the necessary information.

Subcontractor Prequalification

- Information needed to prequalify a subcontractor:
 - Company Information
 - Name, address, incorporation info., D&B number, Federal EIN, years in business, names of principals, officers, owners, etc.
 - Current and past experience;
 - A detailed list with the project, dates of performance, identification of the PM and owner references for the past 5 years.

Subcontractor Prequalification

- Information needed to prequalify a subcontractor:
 - MBE/WBE Certification
 - Certification numbers;
 - Copies of certificates/letters confirming certifications
 - Licensing
 - List all licenses/states

Subcontractor Prequalification

- Information needed to prequalify a subcontractor:
 - Subcontractor experience:
 - Type of work/projects performed;
 - Has subcontractor failed to complete any project in the past 5 years? Are there any lawsuits, judgments, claims or arbitration proceedings pending against the company or its principals? Details for the last 5 years.
 - Has the subcontractor filed any lawsuits or requested arbitration in the last 5 years?
 - Have any principals been convicted of a crime?
 - Has any contractor or owner terminated any subcontract for cause?

Subcontractor Prequalification

- Information needed to prequalify a subcontractor:
 - Typical size of subcontract;
 - Typical size of Project;
 - What work does the subcontractor typically subcontract out?
 - Surety information:
 - Bonding capacity
 - Letter from Surety saying they will bond

Subcontractor Prequalification

- Information needed to prequalify a subcontractor:
 - Safety information (including name of company safety representative);
 - OSHA 300 Information:
 - OSHA Recordable Incident Rate
 - Lost Time Incident Rate
 - Number of Recordable Injury Cases
 - Number of Lost Time Incidents/Illnesses
 - Number of Days Away from Work
 - Number of Fatalities
 - Total Employee Hours

Subcontractor Prequalification

- Information needed to prequalify a subcontractor:
 - Workers Compensation experience modification rate (EMR) for past 3 years;
 - Description of safety training programs;
 - Drug free workplace and drug testing protocols;
- Insurance information

Subcontractor Prequalification

- Information needed to prequalify a subcontractor:
 - Financial information:
 - Accountant should review;
 - Can sign a non-disclosure agreement if requested to do so.

Subcontractor Prequalification

- Subcontractor should sign the application and certify that all information is true and correct to the best of his/her knowledge and that the Contractor is relying upon the accuracy in awarding work to the Subcontractor.

Negotiating the contract:

Know your lien rights

- PA Mechanic's Lien Statute
 - Deadlines
 - Notices
 - Complaint to Foreclose
 - Different than Complaint for breach of contract

Negotiating the contract:

Know your bond rights

- What is a surety bond?
 - How do you know you have a bond claim?
 - Read the bond!
 - Deadlines:
 - Notice;
 - One year to file suit on a payment bond from the date of last work.

Negotiating the contract:

Know applicable payment statutes

- CASPA
 - Contractor and Subcontractor Payment Act
 - Not applicable to any public Projects.
- Public Prompt Payment Act
 - Applies to Public Projects.
 - Requires the public entity to have acted in bad faith.

Negotiating the contract:

Know the applicable law

- It is usually, but not always, the State in which the project is located
- War Stories
- Cross State Borders At Your Own Risk

Negotiating the contract:

Know your dispute resolution provisions

- Mediation
- Arbitration
- Litigation

- The Pros and Cons of Each
- Differences and Distinctions

Project documentation

- Essential Preliminary documents
- Blame your accountants and lawyers
- Ask for these in the honeymoon phase
- Documentation During the Project

Project communications

- Within Your Company
- Outside Your Company
- To the Owner/Contractor
- You tell people different things according to who they are on the Project and their need to know

- Daily Reports
- Meeting Minutes
- Correspondence

Claims avoidance

- Know the Provisions
- Notice Notice Notice Notice
- Did we mention your notice provision?
- Timelines and Scheduling is Paramount
- Don't forget the Doctrine of Spoilation

Project closeout

- Let's make nice
- Certificate of substantial completion
- Punchlist
- Owner Withholding
- Warranty Work
- Final Acceptance

Summary

- Lessons Learned
- Always Be Marketing FOR YOUR NEXT PROJECT
- It's a small, small town
- Relationships Matter



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Horn Williamson LLC

UPCOMING ZOOM WEBINAR

SBA PPP & FUNDING FOR AIRPORT VENDORS & CONCESSIONAIRES

Session 1

MAR 2 • 1 PM

Session 2

MAR 3 • 12 PM



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MAR 25 • 5:30 PM

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MAR 9 • 5:30 PM

Info Session #1

MAR 25 • 10:00 AM

Info Session #2



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