

Trends in Construction Contracting

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The TOP 10 LIST (5)

- 1. Alternative Delivery Methods
- 2. AIA is still King
- 3. Equitable Risk Allocation
- 4. Courts Enforce What's Written
- 5. Project Close Out Remains a Challenge

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Alternative Delivery Methods

- Chapter 2269
 - > Competitive Sealed Proposals
 - §2269.151 - .155
 - > Construction Manager At-Risk
 - §2269.251-.258
 - > Design/Build
 - §2269.301-.311

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Competitive Sealed Proposals (Use this as a Minimum)

- Provide Benefits over Traditional Bidding
 - › Selection Criteria
 - › Subjective Analysis
 - › Freedom of Negotiation
 - Value Engineering
 - Constructability Modifications
 - Scope Clarification
 - › Less Risk of Performance Default
 - Vetting Process

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Construction Manager At-Risk

- Same Benefits as CSP
- Useful for more complex projects
 - › Constructability issues
 - › Scheduling issues - Phased Construction
 - › Owner input/control
- Allows consultation between A/E & Contractor early on
 - › Lose benefits after 30-50% Design

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Design/Build

- Same Benefits as CSP
- One Entity for Contracting/Responsibility
 - › Continuing Obligations Present Problem
 - › Parental Guarantee
- Best used for fast track projects
- And - Projects requiring minimal design oversight

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AIA Documents Prevail

- Most common form contracts
 - > AIA B101,
 - > AIA A101-2007
 - > And AIA A201-2007
- Contractors are familiar with these contracts
 - > Frustrated by manipulation and customization
 - > Highlights importance of consistency

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Equitable Risk Allocation

- Risk shifting has greatly altered the playing field in contracting
- Owners have attempted to shift all risk to contractors
- That results in contractors shifting risk to subcontractors
- Many subcontractors accept risk as part of the job but they are the least prepared and able to perform

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Risk-Shifting Clauses

- Indemnity
- Acceptance of Site Conditions
- Consequential Damages
- Acceptance of Work
- Delay Damages

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Contract Interpretation

- ⦿ Courts are Finding Ways to Enforce Written Language
- ⦿ Port of Houston v. Zachry - 1st CoA (pet. Granted Aug. 2013)
 - The Contractor shall receive no financial compensation for delay or hindrance of the Work. In no event shall the **Port** Authority be liable to the Contractor or any Subcontractor or Supplier, any other person or any surety for or any employee or agent of any of them, for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance, including events of Force Majeure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE **PORT** AUTHORITY. The Contractor's sole remedy in any such case shall be an extension of time.
 - \$20MM Loss for Zachry

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Court Enforcement

- ⦿ El Paso Field Services v. Mastec North America - TxSC 2012
 - (e) That its *duly authorized representative has visited the site ...fully acquainted itself with the site. ...has made all investigations essential to a full understanding of the difficulties which may be encountered... assumes full and complete responsibility for any such conditions pertaining to the Work...*
 - Pipeline construction, metal, plastic & fiberglass crossings
 - Bid sheet 282 crossings, found 343 more
 - \$3.5M Contract, next bid \$8.1M, damages were \$4.5M

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Project Close-Out

- ⦿ Final releases and payment remain a challenge
- ⦿ Subcontractors long gone
- ⦿ Punch list performance
- ⦿ Proper Close Out Documentation
 - All Bills Paid Affidavit
 - Certificate of Final Completion
 - Consent of Surety


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Close- Out Concerns

- ⊙ Solar Applications Eng. v. TA Operating Corp. - TxSC 2010
 - > “We hold that the **lien-release** provision is a covenant, not a condition precedent to Solar’s recovery on the contract.”
 - > Substantial completion, punch list, dispute, Owner withheld payment, liens filed, Owner terminate for cause
 - > No lien releases - claim condition precedent
 - > Trial court found for contractor, CoA reversed, TxSC reinstated trial court judgment

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Questions?



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