PROJECT PARTNERS, EXPECTATIONS and RELATIONSHIPS

• **Owner:**
  - Project delivered on schedule, within Owners budget (internal and external) and meeting all Owner criteria (functionality, quality, etc.)
  - Contracted with EOR/CEI and Contractor

• **EOR / CEI:**
  - Project delivered on schedule, within the stated engineers estimate, all design criteria met, minimal RFIs
  - Contracted with Owner; **no privity of contract with Contractor**

• **Contractor:**
  - Project delivered on schedule, within Contractors cost budget, requests for equitable adjustments resolved
  - Contracted to Owner; **no privity of contract with EOR/CEI**
PROJECT PARTNERS RESPECTIVE RISK and EXPOSURE

- **Owner:**
  - Design does not perform
  - Contractor does not perform
  - Unforeseen conditions / change conditions
  - Schedule, budget and quality implications

- **EOR / CEI:**
  - Design negligence and or errors and omissions
  - Unforeseen conditions / change conditions
  - Excessive RFIs, responsiveness

- **Contractor:**
  - Contract terms / schedule
  - Unforeseen conditions / change conditions
  - Excessive RFIs
  - Unresolved REAs
  - Weather
ENGINEER OF RECORD - RISK and EXPOSURE

Engineer of Record (EOR)

- “A Florida professional engineer who is in responsible charge for the preparation, signing, dating, sealing and issuing of any engineering document(s) for any engineering service or creative work.”

- Errors and omissions:
  - Acts of negligence committed by EOR in performance of engineering design service or creative work
  - Acts of negligence committed by EOR in performance of construction engineering and inspection services

- Breach:
  - Failure to fulfill contractual requirement
  - Unforeseen conditions / change conditions
  - Need to document and address for Owner and Contractor

- Request for Information (RFI)
  - Excessive RFIs may indicate incomplete plans and specifications
  - Must respond timely to avoid Contractor delay claims against Owner
RELEVANT DEFINITIONS and RULES

Negligence:
• As defined in Rule 61G15-19.001(4), Florida Administrative Code: “A professional engineer shall not be negligent in the practice of engineering. The term negligence set forth in Section 472.033(5), R.S., is hereinafter defined as the failure by a professional engineer to utilize due care in performing in an engineering capacity or failing to have due regard for acceptable standards of engineering principles.”
• Florida Statute, Section 337.015 (3): To protect the public interest, the department (Transportation) shall vigorously pursue claims against contractors and consultants for time overruns and substandard work products.

Statutes of Limitation:
• Florida Statute 95.11 has two subsections regarding statute of limitation periods of two (2) years (FS 95.11(4)(a)), and four (4) years (FS 95.11 (3)(a)(c)), which may be applicable to claims for premium costs against a designer for professional malpractice, negligence, or breach of contract. Each section provides that the statute of limitations period “shall run from the time the cause of action/defect is discovered or should have been discovered with the exercise of due diligence”.

Premium Cost:
• Additional cost of a contract change that would not have been incurred if the work had been included in the original [construction] contract.
• Premium costs are dollar amounts paid for non-value added work. Delays, inefficiencies, rework, or extra work, are considered non-value added work.
WHAT IS “STANDARD OF CARE”

• **Standard of Care**
  • "Term of art"
  • Not a “fixed standard” such as ANSI or ASTM
  • Varies with the practices being examined and interrelated construction documents and circumstances unique to the project
  • American Institute of Architects (AIA) definition:
    • "The ordinary and reasonable degree of care required of a prudent professional under the circumstances. Defined as what a reasonably prudent architect, in the same community at the same time, facing the same or similar circumstances would do."
  • Chapter 61G15-30, Responsibility Rules Common to All Engineers
    • Relatively silent on standard of care
  • EOR owes a duty to perform *reasonably well* on a project – NOT perfection.
    • Demonstrate reasonable care
    • Perform with the level of skill and diligence those engaged in the same profession would ordinarily exercise under similar circumstances

• **Understand ethical aspects of the standard of care**
  • Be aware of potential practice situations you may be placed
  • Be careful with Owner furnished agreements, owner retained consultants, modifications to standard professional services
  • Failure to recognize a “red flag” could be detrimental
  • Never perform a responsibility for which you are not qualified
STANDARD OF CARE in TORT

• To be found negligent and in breach of the standard of care, several points have to be proven by the plaintiff:
  • the defendant owed a legal duty to the plaintiff,
  • the defendant breached that duty by failing to exercise reasonable care through his or her actions or non-actions,
  • there is an actual and legal cause-and-effect relationship between the alleged negligent acts and the harm, and
  • the plaintiff suffered harm.
STRATEGIES and TIPS

• As EOR you should...
  • Understand your Contract and the Contractor’s Contract provisions (General T&C) with the Owner
  • Know Contract roles and responsibilities
  • Understand the Project Scope and Schedule
  • Use RFIs with Owner during design phase
  • Understand required response time for RFIs and communicate expected response time to contractor
  • Prepare contract documents (plans and specifications) the Contractor can not misunderstand
    • Plans are a graphical description of the project work
    • Specifications are the narrative description of the project work
    • They must present the same project AND the project the Owner asked for!
    • Clear, concise and no conflict between the contract documents
  • Monitor and manage design AND contractor RFIs and utilize an RFI log
    • Be prompt with response and/or document why not
  • Don’t let paperwork languish!
REQUEST FOR INFORMATION

RFI is a communication tool to facilitate resolution of or to clarify design document issues

• Typically contractor submits and EOR responds
• Clarify a legitimate question concerning the design documents
• Keep the project moving forward and build the job
• Can lead to Change Orders
• Process will vary from project to project
• Effectively coordinate and manage RFIs
• Assist documenting the history of the project
REQUEST FOR INFORMATION (cont.)

• **Reason for RFIs – EOR**
  • Clarify with Owner Basis of Design
  • Document design changes
  • Maintain project record for Basis of Design

• **Reason for RFIs – Contractor**
  • Design documents are allegedly:
    • Faulty
    • Ambiguous
    • Inadequate
    • Incomplete
    • Conflicting, etc...

• **Contractor and or Owner Claim submitted for acts or omissions of the EOR – based on RFIs**

• **Perceived as providing a methodology to document deficiencies in the contract documents and establish a basis for additional costs and time**
A CONTRACTORs PERSPECTIVE

• Uncertainty = Risk
• How Contractors manage risk..
  • Price
    • Include contingency monies to cover unknowns
      • Incomplete or ambiguous contract documents – Plans and Specifications
      • Poor contract terms – Liquidated Damages, Schedule, Change in Condition / Change Order, Payment
  • Contract
    • Subcontract higher risk project elements
    • Spreads risk component
  • Production / Crew Size
    • Increase in response to or in anticipation of delays
QUESTIONS

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