Building Schools in Oregon


- Procurement Rules for Design
- Design Contracts
- Procurement Rules for Construction
- Construction Contracts
- Claims and Insurance
Procurement Rules – Hiring Designers

- First step is selecting a qualified designer, then negotiate price.
- Establish written criteria or adopt model rules.
Procurement Rules – Hiring Designers

Districts can skip the full vetting process if

- There is an emergency.
- The anticipated fee for design services is less than $100,000.

Districts may use an “informal” process if the anticipated fee is less than $250,000.
Procurement Rules – Specifications

In school projects, architects cannot specify specific products or manufacturers

...unless...

there is only one manufacturer of a given product for a given quality or price.
Design Professional Contracts

Unlike the public contracting statutes, which schools must follow rigidly, contracts are open to negotiation. Here we focus on the American Institute of Architects form.
AIA B101-2007

Key overall concepts

- Include as much as possible in “Basic Services”.
- Make sure the designer is insured to the School’s satisfaction.
- Coordinate the Architect’s contract with the General Contractor’s contract.
AIA B101-2007, Particular Tips and Tricks

Article 3.1.5:  
Architect to design to code.

Article 3.5:  
Separate cost estimating consultant? Novel systems?

Article 3.6.2.2:  
Reject and report nonconforming work.

Article 5.10:  
Change so School can work directly with Contractor.
Procurement Rules – Hiring Contractors

- Key section: Oregon Revised Statutes Chapter 279C.

- Before you start: Become familiar with BOLI reporting requirements.
Procurement Criteria

- Schools may adopt their own procurement criteria, or follow the Oregon Attorney General’s Model Rules, at Oregon Administrative Rules, Chapter 137, Division 049. Most schools follow the Model Rules.

- Use of the “Construction Manager / General Contractor” method requires use of the Model Rules.
Competitive Bidding

- Applies to most classes of construction contracts.

- A contractor is typically bound by the bid.

- Bids must be advertised, in at least one paper, and in some cases through the Oregon Procurement Information Network.

- Consider prequalification.
Bid Solicitation Documents

- Public bid solicitations must include all of the information required by OAR 137-049-0200.

- Typical additional requirements: a bid bond, performance and payment bond, disclosure of first-tier subcontractors.
Evaluating Bids

- Contract must be awarded to the lowest responsible responsive bidder, with a public bid opening.

- Beware of bid disputes.

- Generally no negotiation, unless the lowest bid is still above budget.
Bidding Exemptions

Boards do not need to follow the bid process for
- Emergencies;
- Minor alterations;
- Repair and maintenance;
- Construction Manager / General Contractor projects; and
- Class exemptions of the public agency.

However:

If no competitive bid, then Boards **must** prepare an
evaluation, filed with a local contract review board, within 30
days after accepting the completed project.
Certain Contract Clauses Required in Bid Documents

Bid documents and contracts must expressly include several statutory and regulatory provisions. Examples:

- Make prompt payment to all workers and subcontractors;
- Not permit any liens against the public agency; and
- Pay prevailing wages and comply with BOLI rules.
Construction Contracts

AIA A101/A201


There is a short form, the A107. Other organizations publish standard forms also.
AIA 101-2007 Construction Contract

Key overall concepts:

- Integrate public contract requirements with boilerplate.
- Read the entire contract and modify as appropriate.
- Coordinate exhibits with bid documents and plans.
- Coordinate with the Architect’s contract.
- Coordinate insurance coverages.
AIA 101 Tips for Modification

Article 3.3: Set required substantial completion well before the facility must be deployed. Consider staged delivery, and liquidated damages for delay.

Article 4: Keep allowances to a minimum.

Article 5.1: Withhold retainage until the project is complete.
AIA 201 Tips for Modification

• Include an order-of-precedence provision. The architect’s plans should prevail over inconsistent contractor documents.

• Reduce or remove the boilerplate Owner obligations

• The AIA delegates most construction administration duties to the Architect. Conform to actual practice of the school facilities department. Overlay the requirement for school approval where appropriate.

• Conform engagement of subcontractors to the public contracting laws, including first-tier subcontractor rules
AIA 201 Tips for Modification, Cont’d

- Carefully compare the contractor obligations to the bid documents
  - Have the Contractor acknowledge the contract documents and plans and specifications are complete.
  - Incorporate school security and safety standards for contractor access. Include a course of construction plan for staging, parking, storage, disposal and continued access.
  - Specify any expansions to the standard contractor warranty, or any manufacturer warranties.
  - Clarify which party is responsible for which permits (building permit, street closures, etc.)

- Expand the indemnity provision beyond bodily injury and property damage.
AIA 201 Tips for Modification, Cont’d

- Clarify who, as between the school and the contractor, is responsible for coordinating installation of outside systems, equipment and furnishings.

- Clarify that change orders, once signed, are comprehensive in impact on time and compensation.

- Seek to limit excused delays, consistent with the constraints of the public contracting law.

- Conform payment provisions to the public contracting laws, funding sources (such as bonds), and the school’s internal payment protocol.
**AIA 201 Tips for Modification, Cont’d**

- Coordinate the insurance provisions with the school’s risk management program. This may require a separate exhibit. Note the requirement for the school to carry builders risk insurance, and the waiver of loss of use claims. Consider deleting the waiver of subrogation.

- Consider extending the one-year period for correction of the work.

- Regarding termination, delete the provision allowing the contractor profit on work not executed. Include a provision allowing the owner to convert a termination for cause into a termination for convenience. Have the contractor waive the right to stop work in the event of pay disputes.
AIA 201 Tips for Modification, Cont’d

• Consider whether to include a school administrative procedure as a first step toward resolving disputes, and whether to utilize arbitration or litigation as the binding dispute resolution procedure.

• Also consider inclusion of a prevailing-party attorney fee provision.
Disputes

What do you do and where do you look if a project runs into trouble?

- Contract is king.
- Does the contract include a claims process?
- Is mediation required?
- Did the parties select arbitration or litigation?
- Can all parties to the dispute be compelled to participate?
Initial Claims Procedure

What constitutes a Claim?

- Any dispute concerning the contract:
  - Scope questions
  - Requests for payment
  - Requests for additional money
  - Requests for additional time
Initial Decision

Section 15.2 of the A201 General Conditions outlines the preliminary claims procedure:

- All claims must be submitted to the architect for an initial decision, EXCEPT claims involving:
  - Hazardous Materials
  - Emergency Actions
  - Certain Insured Losses

- This decision is non-binding.
Mediation

- Section 15.3 of the A201 General Conditions requires mediation as a “condition precedent”.
  - Mediation is a settlement conference.
  - Mediation is non-binding.
  - Both sides agree on a professional negotiator, often an attorney or construction professional.
  - Out of court, the parties agree on their own timeline and process.
Selecting a Mediator

Factors to Consider:

• Construction and Construction Law Experience
  o Does claim involve complex construction disputes?

• Style
  o How strong are the legal and factual merits of the claim?

• Success Rate
  o Is your goal to settle?
Arbitration vs. Litigation

Litigation: Handled through the court system by judges and juries.

Arbitration: Out-of-court dispute resolution process.

Must Select:
- Section 8.2.4 of AIA B101
- Section 6.2 of AIA A101

Risk of Dual Track Disputes
Arbitration vs. Litigation

Factors to Consider:

- Privacy and Confidentiality
- Scheduling and Process
- Expertise of Decision Maker
- Evidentiary and Discovery Rules
- Joinder of Necessary Parties
- Costs
- Binding vs. Right to Appeal
Overview of Types of Construction Claims

- Bid Protests
- Little Miller Act
- Contract
- Tort
- *Quantum Meruit*
- Claims for additional time and money
- Termination for cause
- Termination for convenience
- Liquidated damages
- Construction defect
Bid Protests

Claims by non-successful bidders that assert that the procurement procedures were not followed.

Most Common Bases for Bid Protests:

- Nonresponsive bids.
- Untimely bids.
- Bid Modifications.
- Bid Withdrawals.
**Little Miller Act Claims**

- Security device since liens are not permitted on public projects.
- ORS 279.380 *et seq.* requires bonds on public projects to guarantee:
  - Performance of Contract
  - Payment of subcontractors and material suppliers
- Bonds typically posted by general contractor.
- Claimants must provide both the GC and Owner written notice.
Breach of Contract Claims

Look to your contract. What is required?

Most frequent breach claims involve:

- Untimely or Incomplete Payment
- Scope of Work
- Changed or Additional Work
- Improper Notice
- Late or defective Owner-furnished items
- Improper Termination
- Breach of Express Warranties
- Breach of Implied Warranties
Tort Claims

“Tort” = a wrongful act, not including a breach of contract, that results in injury to another’s person or property.

ORS 30.310-30.400 requires a Claimant provide written notice of such claim before a tort action may be maintained against a public body.
Quantum Meruit Claims

“Quantum Meruit” = Latin for what one has earned.

An alternative theory of recovery based on an implied contract.

Provides a Claimant the right to seek the “reasonable value” of the services and/or materials provided.
Claims for Additional Time and Money

- Changed or Additional Work – Article 7 of the AIA 201
- Defective Plans/Specifications – Article 15 of the AIA 201
- Concealed/Unknown Conditions – Section 3.7.4 of AIA 201
- Cardinal Change/Reasonable Value
- Impact and Delay Claims
- Acceleration and Inefficiency Claims
Termination

Termination for Cause – where one party declares the other in material breach of the contract, thereby excusing performance of the other party.

Termination for Convenience – Section 14.4 of AIA A201 grants the owner the right to terminate the contract without cause.

Notice Requirements and Remedies
Liquidated Damages

Damages whose amount the parties designate at the time of contract formation to compensate the owner for the contractor’s failure to timely deliver the project.

Calculation of liquidated damages must be a reasonable estimate of the harm to be suffered by the owner.

Not enforceable if deemed a “penalty” – a sum that is disproportionate to the actual harm.
Construction Defects

What is a construction defect?

- Many definitions – some include “damage” and some do not
- California Jury Instruction -- failure of the building or part of the building to be erected in a reasonably workmanlike manner or to perform in the manner intended by the manufacturer or reasonably expected by the buyer, which causes damage to the structure.
Construction Defects

Examples of common defects discovered after completion:

Windows
Roofs
Soil movement
Deck/balcony issues
Siding
Construction Defects

After discovering a problem, what happens?

- Assess the problem, evaluate how serious.
- Get expert advice
- Get legal advice
- Work with the builder, contractor, or architect if possible.
- Do not lose claims – think of the future.
Construction Defects

- **Who Can Bring a Claim?**
  - The owner of a building.
  - Do you have to be the original owner?
Construction Defects

What legal claims are available to an owner?
- Breach of contract – by party to the contract
- Tort claims
- Not an original owner
Construction Defects

Who can be liable for construction defects?

- Architects
- Engineers
- Contractors
- Subcontractors
- Suppliers of defective products
- Project manager
- The owner
Construction Defects

What does the law allow for recovery?

- Repair Costs – Restore the property to the condition it should be in if built correctly.
- Loss of use of the building
- Moving Storage Cleaning
- Consultant Costs
- Attorney fees
Construction Defects

- What if I just want to repair things ASAP?
- Timing of repairs is important
- Notice to everyone
  - Documentation
  - No “Spoliation of Evidence”
Construction Defects

Are there time limits after construction that I should be concerned about?

- Statute of Repose – 10 years from completion (what is completion?)
- Statutes of limitation
  - Contract claims
  - Tort claims
- Contract limitations.
Construction Defects

Design Professional Claims

- Two years from discovery to bring claim in court or arbitration.
- Need qualifying expert of the same profession.
Construction Defects

Who pays to fix the construction defects?

- Insurance.
- Contractors required to have insurance
- CGL Policies - Damage trigger
Insurance

- Builder’s Risk for Public Bodies
- Contractor’s General Liability
- Errors and Omissions for Design Professionals
Thank you

Questions and Discussion

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