

DEVELOPING A CONSTRUCTION CONTRACT PLAYBOOK

DISPUTE RESOLUTION



ABSTRACT

Construction contracts are often challenging documents to use for managing construction projects, being lengthy, convoluted, and confusing. As a result, construction teams may not understand the requirements placed on them as an owner or contractor or the requirements of the other party. Project teams often refer to the contract as a document that was put in a drawer or on a shelf and rarely used. As a result, project teams may fail to follow the terms of the contract which can result in issues and disputes, putting the organization in danger of not adhering to the contract. Developing a construction contract playbook can help project teams understand the key requirements of the contract by organizing key elements in a user-friendly structure and using plain language that project team members can quickly understand. The playbook compiles the key stipulations of the contract such as the cost, schedule, requirements of each party, payment terms, change processes, notice provisions, and other elements that each member of the project management team should understand. Having a playbook of the contract can increase a project team's compliance with the contract terms, help protect against claims, and even improve project performance.



Abstract	1
Introduction	3
Current Practices	3
Legal Language & Length	3
Accessibility & Use	3
Performance & Disputes	3
How A Playbook Can Help	4
How To Develop A Playbook	4
Construction Contract Playbook Structure	4
Key Definitions	4
Key Provisions and Data	4
Scope	5
Owner Responsibilities	5
Contractor Responsibilities	6
Notice Requirements	7
Key Processes	7
Other Considerations	8
How Spire Can Help	8

INTRODUCTION

Construction contracts are typically lengthy documents including appendices, exhibits, and referenced documents. Many contracts are drafted by lawyers that may not have detailed knowledge of the development and execution of construction projects. Yet these documents define the project, key terms, and requirements of each party. However, due to how these documents are structured and the legal language used, they can be difficult for project teams to understand and apply to the execution of the project. As a result, many project team members may rarely, if ever, reference the contract requirements as they execute the work. This failure to understand the contract requirements and use it as a governing document in daily execution can expose the organization to claims and liability for failing to adhere to the contract. Contract requirements may also reference industry-leading practices. Failure to adhere to those requirements may impair performance.

While at its core a playbook is just a summary of the contract, it helps organize the terms in a user-friendly structure that is easy to understand. Project team members can quickly locate the contracts terms that apply to their work. It includes key definitions, terms, responsibilities of each party, processes to be followed, and reporting and communication requirements. Teams utilizing a playbook will be complying with the contract terms, protecting the organization from claims, and potentially improving performance.

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This paper outlines the value of having a construction contract playbook and how to develop it for construction project teams to deliver a successful project and reduce the likelihood of disputes.

Both project owners and contractors can reap the benefits from developing and using a construction contract playbook.

CURRENT PRACTICES

There are several issues with the current use, or lack thereof, of construction contracts. These issues drive the need for a construction contract playbook, as further discussed in this section.

Legal Language & Length

Construction contracts include formal and technical legal language that is often hard to fully comprehend. The excessive length of the contract can also make finding specific information challenging. Construction contracts are rarely written to be a functional tool for project teams, resulting in requirements related to a specific topic being in multiple locations in the document(s). Also copies of contracts are often scanned PDFs of poor quality making it difficult to search the document for specific information.

Accessibility & Use

Too often construction contracts are only reviewed during contract negotiations and at the start of work, and rarely thereafter as they are typically “put on a shelf or in a drawer.” Additionally, many organizations intentionally keep access to the contract restricted to upper management, and not all team members have access due to confidentiality concerns. Withholding pertinent information included in the contract from all team members hinders their ability to manage and provide their work according to the contract terms and specifications.

Performance & Disputes

Most contracts, whether entirely bespoke or based on industry standard forms, include terms intended to drive leading industry practices and the successful completion of a project. These requirements may include health and safety terms, quality assurance and control, schedule management, and progress tracking. But not every organization may be familiar with those terms and the value they provide. Failure to understand those elements of the contract and the

value they can provide can result in a missed opportunity to improve project performance. Failure of both parties to be aligned on the contract requirements and purpose for them can lead to conflicts between the parties, negatively impacting performance.

Failure to follow the contract terms can also mask the real reasons driving project impacts. If the contract requires regular updates to the schedule and a contractor fails to do so, the contractor may have challenges in demonstrating schedule impacts. Failure to give notice of changes or impacts according to the contract may limit a contractor's ability to recover damages associated with those events.

HOW A PLAYBOOK CAN HELP

A construction contract playbook can be a beneficial tool for both owners and contractors. By compiling key information from the contract in a streamlined, systematic, and codified manner, construction project teams can efficiently locate pertinent information about the project. Additionally, a playbook allows management to develop and distribute a document to all team members without the concern of confidential information in the contract being included. By distributing a playbook to the entire team, all team members are empowered to better contribute to the overall success of the project as it relates to their specific roles on the project. Lastly, a playbook promotes coordinated management of the project throughout the entire team and encourages healthy discussions with the other party to address their requirements and issues as they arise.

HOW TO DEVELOP A PLAYBOOK

Selecting the right personnel to develop a construction contract playbook is paramount. A playbook is best developed by someone or a group that has a combination of project management, project execution, and contracting or legal experience.

The other critical criterion for developing a playbook is having access to those who were a part of the contract negotiations. These people will be able to guide those developing the playbook on the intent of certain clauses, ensuring those clauses are fully understood. If possible, gather documentation from those negotiations to support any interpretations of clauses. It may be handy to have those later in the project.

CONSTRUCTION CONTRACT PLAYBOOK STRUCTURE

The construction contract playbook should capture the key components and information included in the contract in a structure that is easy for project teams to locate information.

Key Definitions

Contracts frequently reference key terms throughout the agreement whose definitions need to be stipulated. Therefore, many construction contracts include a section dedicated to establishing definitions of frequent key terms at the beginning of the contract.

Definitions of key terms in a construction contract are typically tailored to suit the needs of the specific project and therefore it is important for the construction team to become familiar with the specific meaning of common key terms regarding the project at



hand to provide clarity, remove ambiguity, and potential misunderstanding. Such terms as “Mechanical Completion,” “Substantial Completion,” “Allowance,” and “Force Majure” should be included in the playbook for easy reference by all.

Key Provisions and Data

While construction contracts come in all shapes and sizes, from one page to hundreds of pages, most contracts contain critical provisions and important information, which set the terms of the parties’ working relationship and overall project expectations. It is important to have these terms in an easy to reference location. Many of these provisions are critical to complying with the contract and drive other aspects of managing the project, as discussed below.

Contract Type

Identify the type of contract, such as fixed price or lump sum, unit price, guaranteed maximum price, or cost reimbursable. Some contracts combine two or more elements. It is critical to understand what work is fixed price versus cost reimbursable or unit price, as documentation requirements typically differ between contract types. Additionally, identify the contract delivery system covered by this contract, such as construction only, design-build, or engineering, procurement, and construction (EPC).

Contract Cost

The contract may have a single cost amount or be divided into a schedule of values, commonly referred to as “SOV,” a guaranteed maximum price, unit rates, or other cost components. If the contract includes lengthy details on the cost build-up, such as thousands of unit rates, it may make sense to just include a reference to where this detail can be found in the contract.

Schedule Duration Milestones

The contract may have a single completion date or a series of key milestones defined in the contract, including but not limited to Notice to Proceed, Mechanical Completion, Substantial Completion, and Final Completion. Any other specific dates should be included.

Liquidated Damages

Commonly referred to as “LDs,” this is a monetary amount, typically a rate per day, that the contracted party owes to the other party in the event the contracted party fails to complete the work within the required timeframe of a milestone.

Warranties

Any warranty clauses, including but not limited to the duration for notice of non-conforming warranty issues, timeframes for completing warranty repairs, the party or parties responsible for bearing the cost of warranty work, and/or other key elements to the warranty terms need to be addressed.

Scope

Arguably, one of the most important documents included in a construction contract is the scope of work or “SOW.” The SOW outlines what activities, tasks, and duties the contractor is responsible for performing to successfully complete the project or the contracted work. In short, the SOW clearly communicates where the contractor’s responsibilities start and end. While the contract’s description of the scope can be voluminous and reference other documents, the playbook would just provide a summary of that scope and include references to where team members can find all the details.

Owner Responsibilities

Construction contracts typically outline specific responsibilities on the owner’s part. Owner responsibilities should

be included in the playbook to make all members of the project team aware of what the owner's role is during the project and what procurement, construction, or other activities for which the owner is responsible. Common owner responsibilities that should be considered for inclusion in the playbook are identified below.

Access

The owner must provide contractor access to and the right to occupy the work site as required to perform the work described in the contract.

Logistics Support

Logistics that the owner agrees to provide to support the contractor in completing the work. Logistics that the owner may provide include but are not limited to procurement of equipment and/or materials, transportation, personnel, and coordination of laydown, staging, or storage areas on the job site.

Review of Submittals / RFIs

The contract may provide time limits for approval of submittals or RFIs by the owner or other specifics that need to be highlighted.

Coordination with Other Projects / Parties / Operations

Any role and responsibilities of the owner regarding coordinating the contractor's work with other projects that may be ongoing at the same time, other parties working in the area, and ongoing operations by the owner should be identified.

Utilities

The utilities, if any, that the owner agrees to furnish to support the contractor's performance of the work. Owner-provided utilities may include temporary electricity, telephone services, cable and internet, water, and waste.

Contractor Responsibilities

Similar to owner responsibilities, construction contracts outline the responsibilities of the contractor. The playbook should include details on the contractor's responsibilities so that the project team is aware of any design, procurement, construction, or other activities the contractor is responsible for providing or not. Common contractor responsibilities that should be considered for inclusion in the playbook are discussed below.

Safety

Safety practices and any safety plans the contractor is responsible for preparing and submitting should be highlighted. Any activities, monitoring, and reporting required throughout the project should be identified. Any templates for incident reports or the finalized safety plan should be included in the playbook.

Quality

Quality standards and associated criteria to measure quality performance as well as any quality plans the contractor is responsible for preparing and submitting should be addressed along with any specific forms. Any activities, tracking, and reporting required throughout the project need to be included.

Project Controls

The contract may include specific project controls functions, such as measuring and tracking the project cost, schedule development and management, and overall progress measurement. Any requirements or templates included in the contract regarding this information should be included in the playbook.

Reporting

The contractor will typically be responsible for various progress reporting documents to be prepared and issued

throughout the project. Reports may include cost reports, progress reports, daily site reports, weekly or monthly status reports, etc.

Staffing

Any staffing requirements or plans the contractor is required to maintain or provide during the project needs to be identified. This may include maintaining select key project personnel and notifying the owner of any changes to said personnel or this may also include maintaining a set labor force.

Logistics

Logistics which may include procurement of specific equipment and/or materials, transportation, personnel, inventory and laydown area maintenance, and permitting that the contractor is responsible for handling throughout the project. If the contract includes any layout specifics such as laydown, parking, trailer areas, include a copy of that diagram.

Utilities

The utilities that the contractor is required to provide in support of its performance of the work. Contractor-provided utilities may include temporary electricity, telephone services, cable and internet, and water.

Notice Requirements

Construction contracts often set forth notice requirements that the contractor must abide by to receive additional time or compensation due to impacts from events. By failing to abide by notice requirements set forth in the contract, parties expose themselves to increased legal challenges in the event of a dispute or claim. Notice requirements are very important to include in the playbook for the team to be aware of at all times. Notice requirements may include the following types.

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Changes to the Work

Any event that the contractor considers a change to the scope, means, or conditions for performing its work typically requires a notice to the owner within a specific time frame for the contractor to be eligible for compensation. These impacts may include schedule and/or cost impacts that need to be identified.

Force Majeure/Excusable Delays

Force majeure clauses are included in contracts to remove liability for unforeseeable and unavoidable catastrophic events that impact a party's ability to fulfill or meet contractual obligations. Force majeure events include natural disasters (e.g., hurricanes, tornadoes, etc.) and sometimes human actions (e.g., labor strikes). A contractor typically must provide notice to the owner within a certain number of days to reserve its rights for a contract adjustment. Some contracts also provide for other types of excusable delays where a contractor is impacted by events outside its control. Typically the contractor is required to provide notice of those events.

Other

The playbook should include any general requirements for providing notice, which may include:

- + Notice must be in writing and sent to a specific person.
- + Notice must provide the date of the event or date the notifying party became aware of said event.
- + Notice must be given as soon as the notifying party becomes aware of the impact.
- + Notice must be given within a specified time.
- + A Notice for additional time or compensation may require contemporaneous documentation to support the assertion of impact.

Key Processes

The contract will typically define certain processes that contractors and owners have to follow during the execution of the project. Summarizing these processes will help teams drive efficient operations. Development of a flow chart can be very helpful in demonstrating the steps involved in each process.

Payment Applications

The contract will include terms and conditions of submitting requests for payment, approving of requests, and any other relevant information regarding project payments and accounting. The playbook should include any instructions regarding the processes for submitting requests for payment, including backup documentation, timing, review and approval steps, payment terms, and other administrative requirements.

Schedule Development and Management

Contracts typically define the steps and requirements for the contractor to develop a project schedule and how it has to be managed throughout the life of the project, including updates to be submitted.

Submittals

Contractors typically must submit details related to its work to ensure it is complying with the contract requirements. Contractors need to understand what they have to submit, timing for each step, and requirements to request deviation. Owners need to understand their obligations for review and approval of those submittals.

Other Considerations

Other useful information that may or may not be included in the contract documents but should be considered for inclusion in the construction contract playbook is discussed below. These items may be included in a project execution plan or in other separate documents, however their inclusion in the playbook is beneficial in creating a singular document for reference.

Organizational Chart

Consider including a project organizational chart in the playbook outlining the different parties, relationships, key team members and contact information, to allow project team members to quickly identify the working relationship with other project parties and identify key project personnel and their contact information quickly.

Project Map

Consider including an area map or diagram that reflects project laydown areas, crane locations, temporary parking zones, and other useful information for reference.

The construction contract playbook should be revisited and updated throughout the project, in the event previously included information changes or additional useful information becomes available.

HOW SPIRE CAN HELP

Spire has the construction project and contract expertise to help your organization develop a construction contract playbook. Spire understands contracts and has reviewed contract terms applied across many projects to understand how they need to be applied on the project.

Spire wants every project for your organization to be successful. Helping prepare the playbook and ensuring your team understands the contract requirements is just one of the ways Spire can help you have a successful project.



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