**CHECKLIST – ENTERING INTO CONTRACTS FOR WORK TO BE DONE ON YOUR PREMISES**

I.PRECAUTIONS REQUIRED OVER AND ABOVE THE NORMAL PURCHASE OF GOODS TRANSACTION

A.In the request for bids or proposals, you should ask for information on the contractor's safety procedures and safety record. This is wise to consider because it avoids the appearance of taking a bid from a company that is able to offer the lowest price by risking the health or safety of its employees; however, at present, there is no such requirement (e.g., from Occupational Safety and Health Administration) that this be part of a goods transaction.

--Does the contractor have a safety officer?

--Does the contractor have established policies and practices for reviewing safety at the job site and making appropriate adjustments if necessary? Do managers investigate all accidents?

--What safety training is required for contractor's employees?

--Does the contractor have a separate safety budget?

--Exactly what is the contractor's safety record?

B.Have you clearly identified all of the contract documents to make sure they

--are specifically identified in the contract and incorporated by reference, including

--plans/drawings;

--specifications;

--your request for bid;

--the contractor's bid documents;

--other;

--are consistent; and

--include a hierarchy clause (e.g., in the event of any inconsistency, the contract governs over any drawings, etc.)?

C.Have you made sure that the contract will be signed by both parties before any work is actually commenced? (Your indemnification clauses may not be effective if you allow work to begin before the contract is signed.)

D.Mechanic's Liens

--Do you know what the procedure is in your state for preventing unpaid suppliers from filing a mechanic's lien?

--Have you made a decision as to whether or not to follow that procedure?

--Have you reflected that decision in your contract and contract administration procedures?

--If you are not following the statutory procedures, is the risk of unpaid suppliers filing for a mechanic's lien minimized by any of the following:

--The contractor's financial situation is strong enough that it is not a problem.

--The principal subcontractors have been identified and the buyer has verified that they have been paid before the contractor gets the final payment.

--There is some hold back or retention until after the period for filing mechanic's liens has expired.

--Receipts from subcontractors or suppliers are required before payment is made to the contractor.

--Does the contract require the contractor to indemnify you against any mechanic's liens?

E.Performance Bond

--Does the job require one?

--What procedures have you established to be sure you get a bond in the form required?

--Will you be obligated to pay the extra cost of the performance bond?

--Might a standby letter of credit be a substitute?

F.Workers' Compensation

--Does the contract require the contractor to have appropriate workers' compensation coverage?

--Does the contract call for the contractor to furnish you with evidence of that coverage?

--If so, what procedures have you established to be sure that

--you actually receive the evidence;

--the evidence is legally sufficient and accurate; and

--the coverages are maintained throughout the course of the work?

G.Insurance

--Does the contract require the contractor to maintain appropriate liability insurance?

--Are you satisfied with the levels of coverage required in the contract?

--Will you be asking the contractor to furnish certificates from the insurance company saying that it has the required insurance?

--Have you established procedures to make sure that you actually get these certificates?

--Will anyone review the certificates critically to ensure that they provide the coverage that the contract requires and that there is at least some assurance that the insurance will be maintained throughout the work?

--Have you made sure (through checking with your own insurance people) that your own coverage and that which you are asking the contractor to provide tie together properly?

II.PROVISIONS THAT SHOULD BE INCLUDED IN THE CONTRACT

A.Scope of the Work (sometimes called Statement of Work)

--Most important part of the contract and perhaps most difficult to draft.

--Probably requires reference to a number of documents including those mentioned above.

--Must be as clear and comprehensive as possible to avoid disputes.

--May contemplate the delivery of goods (e.g., furnaces, air conditioners, etc.). If so, such goods should be identified as clearly as possible, including

--specifications;

--part numbers;

--quantities;

--delivery schedule; and

--designation of the source.

--In addition, determine

--if the contract price includes these goods; and

--what happens if the contemplated goods cannot be obtained?

--Some questions to ask include:

--Were there any side deals or oral discussions about the work to be done that are not reflected in the contract? (Contract will include the entire agreement clause, so any such agreements outside of the final agreement will not be enforceable.)

--Have your request for proposal and the contractor's proposal been incorporated into the final agreement? If not, have you examined both of them to be sure that you understand what is not in the final agreement and why it is not included?

B.Changes (one of the major sources of disagreement)

--Has the contract clearly spelled out the procedure for changes? This would include

--identification of the owner's representative who is authorized to direct or approve changes; and

--establishment of appropriate procedures in the contract itself, and a discussion of those procedures internally to make sure they will work and be followed.

--All changes must be in writing.

--Contractor must state whether the change will increase the cost and if so by how much. Same for any increase in the time for completion which the change might cause.

--Owner's representative must approve the change.

--Only after all the above steps have been done is the actual change of work completed.

C.Unanticipated Site Conditions

--Has the contractor had a full opportunity to investigate the situation for such things as asbestos, electrical or plumbing problems, rotted or decayed materials that may need to be replaced? If so, does the contract contain a recital about this?

--Does the work involve any digging into the ground? If so, the same comment as above -- has the contractor had the opportunity to investigate soil conditions?

--Have any of your people made any representations as to site conditions of either the ground or the building? If so, these should be identified and verified, or you should be prepared to assume responsibility for any increased costs which result if the statements are not true.

D.Other Delays

--Does (or should) the contract spell out who has the responsibility for delays caused by

--strikes (either your people or the contractor's);

--severe weather (who decides if there is a weather delay? If there is a delay, is it limited to the number of days of inclement weather?);

--failure of subcontractors or suppliers to perform as contemplated; or

--other force majeure situations?

--Do you have the right to delay or interrupt the work at your option? (You should have this right, but it should be limited -- for example, thirty days or whatever other specific time seems reasonable.) If you do interrupt the work, is the contractor entitled to more money? If so, how much?

E.Provisions for dealing with disruption to your operations caused by the contractor's work or its employees.

--Have you determined whether the contract should include provisions for

--minimizing dust, debris, and noise; or

--specific hours when work is either permitted or not permitted?

--Other clauses relating to the contractor's employees?

F.Contractor's Employees

--Have you considered including a clause stating that the contractor will supply only workers qualified to do the work and that it will be responsible for enforcing strict discipline and ensuring an orderly workplace?

--Have you considered including clauses prohibiting:

--The use of alcohol and drugs on company premises by the contractor's employees?

--Should you require the contractor to read and abide by your company policy on drug and alcohol use? (If so, do you have a way of certifying that the contractor has received the policy?)

--Have you allocated resources to provide training to your own employees so they recognize the signs of impairment and can also handle the reporting of infractions of the policy in a legally sensitive manner?

--Sexual harassment committed by employees of the contractor?

--Require the contractor to read and abide by your company policy prohibiting sexual harassment. (Do you have a way of certifying that the contractor has received the policy?)

--If your facility has a government security clearance, have you spelled out exactly how the contractor's employees will be allowed to work within the plant if they do not have the same security clearances your people do?

--Is there any possibility that the contractor's employees will have access to trade secret or confidential information while they are doing their work? If so, have appropriate supplementary documents been worked into the contract, as well as procedures for their execution, so that your information is safeguarded?

--Provision in the contract itself that the contractor's employees will respect your confidential information.

--Provision in the contract itself that the contractor has included such a clause in its employment agreements with all of its people.

--Supplementary agreements with each individual calling attention to these provisions. (This is an important step which is too often omitted.)

G.Warranties

--Does the agreement with the contractor clearly spell out what warranties exist for the finished work and what your remedies are in the event the finished work does not meet those warranties?

--Are there any pass through warranties contemplated? If so, has the contract included the appropriate provisions to make sure that

--the warranties are actually passed through; and

--the contractor has the authority to pass the warranties through to the company (or, in the alternative, that the warranting company actually acknowledges that the company is now the beneficiary of the warranty)?

--Typical examples are heating, ventilating, and air conditioning equipment, and sometimes electrical fixtures.

--Sometimes roofing and other building materials also have warranties which can be passed through from the contractor/installer to the owner. Owners are well advised to check into as many of these situations as practical as it is generally easier to enforce rights against a company where you have some client/contractual relationship.

H.Plans and Specifications

--Is it clear who owns the plans and specifications?

--Is it clear who owns the copyright to the plans and specifications?

--If you are purchasing the plans and specifications from someone else, have you included appropriate warranties to assure that they own the copyrights to such plans and specifications and have the right to sell them to you? Does the contract spell out exactly what you are getting?

--Just the right to use the plans and specifications for your project?

--The copyrights to them so that you can use them in other projects and prevent others from using the design(s) reflected in the plans and specifications?

I.Permits

--Have you (or someone?) identified all the necessary permits?

--environmental (see below (Section II.M.));

--zoning;

--building code; and

--other.

--For each permit, does the contract spell out who has the responsibility to obtain it, as well as what happens if the permit is denied or delayed?

--Does the contract obligate the contractor to do all work in such a way as to comply with all permits and to fix anything which does not comply with a permit requirement at its own expense?

--Does the contractor have the right to contest any assertion that some aspect of the work does not comply with the relevant permit? If so, is there some limit on the time this can take? Do you have additional rights/damage claims if such a time period ends?

J.Payment and provisions relating to the time for completion

--Has the contract spelled out the exact payment procedures?

--In the smaller, simple jobs, the buyer would be entitled to pay for the job in full when it was done. Is this made clear in the contract?

--What types of documents would you be entitled to in order to justify this final payment?

--mechanic's lien waivers;

--indemnification agreements;

--certificates that the work has been done;

--an independent inspector's report that the work has been done;

--sign-off from all the people who issued the permits that the permits have been complied with; or

--other safeguards you may want before paying the contractor the full price.

--When progress payments are contemplated:

--What is the retention?

--For the bills that you will be paying, what documentation should accompany them?

--all outstanding bills from all subcontractors are paid;

--all wages of the contractor's employees have been paid; and

--the work described has actually been done.

--When the contractor is finished and sends the bill for the retention, what procedures should be used? (See above (Section II.J.). Basically, the same procedures should be used as you use in a simple contract calling for payment of the full price on completion.)

--Should payments to the contractor be tied into the construction schedule?

--Have you established milestone points where payment will be made when that milestone has been reached? If so, does the contract spell out clearly what the milestones are, and who determines whether they have been met?

--Should you have the no damage for delay clause (basically stating that if there is a delay, the contractor gets the time of the delay added to the contract for finishing the work, but no monetary damages)?

--Should there be an incentive to the contractor for getting the job done by a certain date?

--Should there be liquidated damages due from the contractor if the job goes past a certain date? (E.g., $1,000 per day for each day of delay past a certain date?)

--If there is a liquidated damages clause, does it have an outside limit? Is it clear that the clause is liquidated damages for delay only, and that the owner has all its rights under the contract for other problems such as breach of warranty?

K.Termination

--Does the contract contain adequate provisions for termination for default of the contractor? This would include

--failure to complete the work on time;

--failure to reach the designated milestones in the contract on time;

--important breach of any other parts of the contract; or

--failure to correct breach after notice of such breach and a reasonable opportunity to cure.

--Does the contract allow you to terminate it for your convenience? (From the owner's perspective, it clearly should.) If you terminate for your convenience, does the contract spell out what you are required to pay the contractor?

--everything the contractor spent so far?

--a certain amount for overhead?

--a certain percentage of the profit the contractor would have made, but not the whole profit?

--Are the provisions for delivering the notice of termination -- either for breach or for convenience -- clearly spelled out?

L.Subcontracting

--Are subcontractor's contemplated or allowed?

--Is the contractor required to include all of the provisions in its contract with you in any subcontracts?

--Is there an approval process where you get to approve any subcontracts?

M.Occupational Safety and Health Act (OSHA) and Environmental Concerns

--Does the contract require the contractor to do everything necessary to comply with all OSHA standards and regulations relating to the work being performed?

--Does the contract require that this provision be included in all subcontracts also and that it be monitored and enforced by the contractor?

--What procedures are contemplated for your own monitoring of safety?

--Does the contract designate a specific person in the contractor's organization who is to be called if any of your people see a safety problem?

--Have you informed the contractor of any chemicals which the contractor's people could reasonably be expected to come into contact with in your facility, and have you given the contractor the appropriate safety information about those chemicals?

--Is there any possibility that the contractor will be bringing any chemicals into the facility that may present a hazard to your people? If so, have appropriate precautions been taken?

--Have you identified any possible environmental concerns? These might include

--asbestos;

--lead; or

--PCBs.

--If there is any excavation contemplated, are you certain that the dirt is not contaminated? (If it is, excavating it and simply transferring it from one place to another -- even on your property -- can present serious Comprehensive Environmental Response, Compensation, and Liability Act problems. In addition, it may present a water pollution problem. Also, are you certain that no wetlands are involved? The definition of wetlands is quite broad. If wetlands are involved, additional permits will be required.)

--Will there be any solid waste generated by this contract? If so, will it be disposed of properly under the Resource Conservation and Recovery Act?

--Are any underground storage tanks involved? If so, the detailed laws and regulations governing the removal of such tanks must be taken into account.

--Are the regulations on storm water runoff applicable to this location? If so, you need to know how or if the contemplated construction may affect either your permit or the need to obtain a permit.

--Radon -- generally only an issue in residential situations, but if it is a potential problem, it should be identified even in commercial construction.

--Even if you have not identified any environmental problems, should the contract require the contractor to stop work immediately and notify you if there are any spills or other release of a hazardous substance, or if any other potential environmental problem is discovered?

N.Contractor's Use of Resources

--Have the parties discussed the contractor's onsite needs to be supplied by you?

--utility (electric, water, etc.) hookups or tie-ins;

--parking; and

--medical care.

O.Relationship with Contractor

--Does the contract expressly provide that the contractor and its employees are independent contractors?

P.Arbitration/Dispute Resolution

--Should the contract contain an arbitration clause

--for all disputes;

--for certain disputes; or

--should the American Arbitration Association Construction Arbitration clause and procedures be used?

--other?

--Should the contract contain some other type of alternative dispute resolution clause, such as

--escalation clause (disputes escalate up the organizational structure before arbitration or litigation);

--mediation;

--neutral advisor;

--use of the architect as the person to resolve disputes between the owner and the contractor (sometimes this makes sense);

--cooling-off period (no referral to arbitration or lawsuit for a certain period -- e.g., sixty days) during which there would be at least a certain number of formal meetings discussing a possible settlement; or

--least-favored choice-of-forum clause? (Person instituting a lawsuit must do so in the local courts of the other party.)