



A PRIMER ON BIDDING FOR CONTRACTORS AND SUBS

The forecast for new construction projects in Michigan appears favorable particularly with major casino and race track projects on the horizon. Here are some general rules to follow when bidding to minimize the risk of having your bid rejected as non-responsive:

Timeliness – submit the bid on time.

Signature – the bid must be signed by someone with actual authority to bind the entity submitting the bid.

Defined Scope – make the bid consistent with the scope of work as defined on the plans and specifications.

Excepting Requirements – taking exception to any contract requirements, *e.g.*, scheduling, may render the bid objectionable.

Pricing – all items must be priced in accordance with the bid instructions.

Qualification – furnish any required licenses or evidence of other qualifying criteria.

Bid Bonds – beware of faulty bid bonds. They are a common cause of bid rejection.



OWNER'S IMPLIED WARRANTY AS TO PLANS AND SPECIFICATIONS

Generally, an owner impliedly warrants the constructability of the plans and specifications prepared by him or his agent, *e.g.*, the design professional. If a contractor is required to build according to the owner's plans and specifications, which is usually the case, the owner may be liable for the contractor's increased costs and damages caused by defects in the plans and specifications. To limit this potential liability, owners should consider including detailed waiver clauses in their contracts that exclude or limit claims relating to their own errors, including those relating to the project's design. General disclaimers such as "the contractor has inspected the job site and plans" and "contractor agrees that the plans are complete and sufficient to build" and similar boilerplate will rarely shift liability to the contractor. On the other hand, a contractor should oppose any such exclusions or limitations that may limit or eliminate claims for damages arising from owner

errors. For added protection, a contractor should include in its contracts with owners an express warranty that the plans and specifications are accurate and may be relied upon by the contractor.

Design professionals take note: Ultimately, you are likely to be responsible for any damages incurred by the owner if they arise from faulty or deficient plans or specifications that the design professional proposed.



LIENS: AVOIDING CONFUSION OVER NOTICES OF COMMENCEMENT AND NOTICES OF FURNISHING

The Notice of Commencement (NOC) is typically the first lien form used in a construction project. The NOC's purpose is to provide information about the project to potential lien claimants so they can comply with Michigan's Construction Lien Act, which details requirements for perfecting lien rights. Michigan law requires that the NOC be prepared by the owner and contain specified information about the project, the entities undertaking the project, the owner's designee, if any, and the legal description of the project site. For commercial projects, the notice must be recorded with the Register of Deeds, posted on the property, and provided to the general contractor by the owner. For residential projects, no NOC is required unless requested by a lien claimant, the NOC need not be recorded, and the NOC only needs to be posted if the owner or lessee does not live on site.

The NOC must be provided within **ten (10)** days after a written request is made by certified mail or personal delivery by a lien claimant. Failure to comply with these requirements makes the owner liable for the costs another party incurs in obtaining the information in the NOC. Parties who directly contract with other "downstream" parties also are obligated to provide the NOC upon request with similar consequences for failure to provide.

It is key that failure to record the NOC extends the time that lien claimants not directly contracting with the

owner have to provide their Notice of Furnishing, which could result in an overpayment by the owner.

Not to be confused with the NOC, the Notice of Furnishing (NOF) is required to be served upon the owner and the general contractor by every potential lien claimant **not contracting directly with the owner on the project**. The NOF must be served by certified mail or personal delivery within **twenty (20) days** after the lien claimant begins its work on the project. Failure to timely provide the NOF does not eliminate the lien claimant's lien; however, the lien claimant may not be able to recover any amounts paid by the owner to the upstream contractor prior to proper service of the NOF.

In sum, the NOC is prepared by the owner, and failure to record the NOC when required extends the time that lien claimants have to serve the NOF. The NOF is prepared by lien claimants who do not have a direct contract with the owner. Failure to timely serve the NOF may result in the lien claimant's loss of rights as to any monies paid by the owner prior to service of the NOF. Failure to use these forms properly greatly increases the risk of financial loss to the owner and lien claimants not contracting directly with the owner.



FORM CONTRACTS — RULES OF THE ROAD

Many organizations produce construction contract forms that are available to the public for a fee. The American Institute of Architects produces the most forms. Whenever you use a form, follow these critical rules:

- Be sure the form fits the project delivery method.
- Forms are just suggestions and should be customized to each job.
- Be aware of the built-in biases in each set of forms.
- Be familiar with any documents referenced in the form such as “general conditions.”
- Be sure that the terms in the form are permitted in your state.

- When making a change in the form, other terms must be coordinated to avoid inconsistencies.
- Be sure that you have read and understand the contract form (this goes for anyone who is charged with performing the contract).
- Be sure your company's practices are consistent with the requirements of the contract form.
- Call your attorney to obtain the background of unfamiliar contracts, to suggest and customize appropriate contracts, to review alternative language, to provide input regarding key terms, and to assist with negotiations.

Never assume that a form is accepted by the “Construction Industry.” Each form has its pros and cons and each one should be evaluated as to its merits and risks.

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