

Opinion

SCOPE OF WORK IN CONSTRUCTION CONTRACTS.

The level of detail required in the scope of work depends on the nature of the contract. For cost-reimbursable contracts, a lot less detail is required since a dispute over whether or not an item of work is in scope is less likely, since the contractor can be expected to perform whatever scope is required and will pass through its costs. For contracts where the work is being performed on a fixed or capped basis, or for portions of the work that are subject to fixed or capped costs, the level of specificity is much more important. In these contracts, once the parties have agreed on a price, there would be a natural tendency for the owner to push to include as much scope as possible into the fixed price and for the contractor to take the opposite position. One danger of having both fixed and reimbursable components in the same contract is that the boundaries of the two elements must be clearly defined to prevent disputes over whether an element of the work is to be performed on a reimbursable or fixed-price basis.

The scope of work also looks very different depending on the type of contract. For a construction contract with no design elements, the contract would typically include a set of drawings and specifications that clearly describe the work. For design-build and other types of contracts where the design is not yet complete, there is a greater opportunity for ambiguity and therefore the need to employ contractual techniques to clarify the boundary of the scope of work. One approach to address this is to include any drawings and specifications in the contract to the extent they are available at the time of contracting, and to include general language defining the scope of work to include anything that is "reasonably inferable from" or "incidental to" what is required by the drawings.

In cases where the work is divided between multiple contracts, it can be helpful to include an interface matrix that clearly defines the boundaries between the scopes, so as to reduce the likelihood of a dispute once the contracts are struck as to whose contract contains which scope. This could, for example, specify which party is doing the finishing work where two elements of construction meet. Any ambiguity on the interface can end up costing the owner since if two contractors both think they are responsible for the same scope, they may both price it in, and if neither thinks they are responsible for it, the owner will have to issue a change order to one of them to add it to their scope.