



# National Conference & Public Power Expo

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*Explore Together*



# What Every APPA Member Needs To Know About Construction Contracts

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# What is a Contract?

- An amalgamation of multiple assumption of risk formulas
- Each project participant has its own legitimate self-interests
- The legitimate self-interests of one participant often compete/conflict with those of another
- Contract reflects the conflicting interests and allocates risk between participants

# What is a Contract?

- Risk = “exposure to the consequences of uncertainty” or “effect of uncertainty of objectives”
- Risk has 2 elements:
  - Likelihood or probability of something happening, e.g. the possibility of loss or gain; and
  - Consequences or impacts if it does happen
- Risk increases proportionately to Project challenges

# What is a Contract?

- Power and energy projects are inherently risky
  - Complex systems and equipment
  - Cost
  - Time
  - Technology



*Credit: USACE*

# Types of Contracts & Differences

1. Design-Bid-Build
2. Design-Build
3. GMP
4. EPC



# Anatomy of a Contract

- Contractor obligations
- Standard of performance
- Owner obligations
- Price and payment
- Project time and schedule
- Mechanical, Substantial, and Final Completion
- Delay and Performance LD's

# Anatomy of a Contract

- Changes
- Warranty
- Disputes
- Limitation of Liability
- Other remedy granting clauses
- Suspension, Termination, and Default



# Rule No. 1

- There is no such thing as “boilerplate”



Credit: NASA/GSFC/Tanner Hamann

# Rule No. 2

- Beware of defined terms

# DEFINITIONS

Execution Version

## APPENDIX OF DEFINITIONS

Unless otherwise required by the context in which any defined term appears, the following defined terms shall have the meaning specified in this Appendix of Definitions.

The singular shall include the plural, and the masculine shall include the feminine, as the context requires. "Includes" or "including" shall mean "including, but not limited to." Any reference to a contract or agreement shall also mean the amended, supplemented or modified

Unless otherwise required by the context in which any defined term appears, the following defined terms shall have the meaning specified in this Appendix of Definitions.

TOGETHER  
AS CONTRACTOR  
DATED: AS OF MARCH 28, 2001

Facility, and any additional funds that may be further required because of any Change.

Army Corps of Engineers Permit. U.S. Army Corps of Engineers [REDACTED]

Balance of Plant. All components of the Facility other than the Units.

Balance of Plant Capability Test. See Exhibit M, Performance and Functional Tests.

Btu. British thermal unit.

Business Day. Any day other than a Saturday, Sunday or a legal holiday in the State of New York.

1167802 v21

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# Rule No. 3

- Read all exhibits



Credit: Stuart Heath

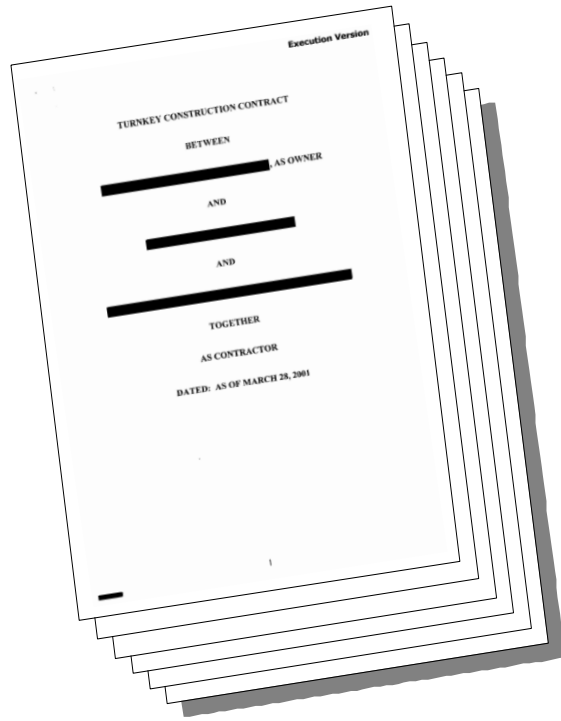
# SCOPE OF WORK

## Sample Clause

Contractor shall perform all Work specified in this Contract, including Exhibit A, Scope Book, and that can be reasonably inferred from this Contract even though not expressly mentioned herein. Contractor has inspected the Facility Site and surrounding areas for access and constructability and has reviewed Exhibit A, and represents that the scope of Work as specified therein, if properly performed by Contractor, shall yield a fully functioning and properly performing Facility capable of satisfying the Performance Guarantees operating at variable loads as set forth in Exhibit A....

# Rule No. 4

- No two contracts are the same



# STANDARD OF PERFORMANCE



## Sample Clause

Contractor shall perform and prosecute all Work in accordance with the terms and conditions of this Contract, the Milestone Schedule and Exhibit A, Scope Book, and with all Governmental Approvals and Governmental Rules applicable to the prosecution of the Work, using methods and equipment that are accepted as prudent electrical, mechanical and civil engineering practice and operations. Contractor shall design, install, test and operate electrical and mechanical equipment and systems in a safe manner, using licensed personnel where necessary. The Work shall not include the matters identified in Appendix 0, Optional Items, of Exhibit A, Scope Book, unless Owner directs Contractor to perform the referenced work in accordance with the schedule requirements, and for the values, set forth in that appendix or as otherwise agreed.

# STANDARD OF PERFORMANCE



## Sample Clause #2

The Work shall be performed by Contractor in accordance with Professional Standards.... Contractor represents and warrants that it has thoroughly familiarized itself with this Agreement, that it shall provide all engineering and design services...necessary for the achievement of the Performance Targets. All engineering and design performed as part of the Work will be, and will have been, performed in accordance with Professional Standards and Applicable Legal Requirements, and the Facility will be engineered and designed to operate in conformity with the requirements of this Agreement, Professional Standards, and Applicable Legal Requirements.... the Work will be designed, furnished, and performed (i) in accordance with Professional Standards and (ii) in compliance with the provisions of this Agreement and all Applicable Legal Requirements.

ENGINE  
AND CON

CONFIDENTIAL





# STANDARD OF PERFORMANCE



## Sample Clause #2

**"Professional Standards"** means those standards and practices used by, and the degree of skill and judgment exercised by, recognized United States engineering and/or construction firms, when performing high quality services on power plants similar to the Facility, taking into account, as appropriate, the recommendations and requirements of vendors of Equipment and Materials. It is not intended that Professional Standards as a standard of care may be used by Owner to require changes to Equipment or Materials that are described with specificity in Appendix A.

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# Rule No. 5

- Draft provisions very carefully, e.g. Mechanical Completion and Substantial Completion

# SUBSTANTIAL COMPLETION

## Sample Clause

Substantial Completion shall be deemed to have occurred when all of the following have occurred:

- a. EPC Contractor has achieved Mechanical Completion.
- b. Successful completion of the Performance Tests as described in Section 7.1 (*Performance Tests*) and Exhibit J (*Performance Guarantees and Performance Tests*) or alternatively, satisfaction of requirements for occurrence of Substantial Completion at Reduced Performance Standards pursuant to Section 9.3 (*Occurrence of Substantial Completion at Reduced Performance Standards*) and payment of any applicable Delay Liquidated Damages, Buydown Damages and Additional Liquidated Damages (or, to the extent provided in Section 9.3.2, the posting of security for the payment of such amounts) as set forth in Section 9.2 (*Payment of Delay Liquidated Damages*) and Section 9.3 (*Occurrence of Substantial Completion at Reduced Performance Standards*).

Execution Version  
ENGINEERING, PROCUREMENT  
AND CONSTRUCTION AGREEMENT  
FOR

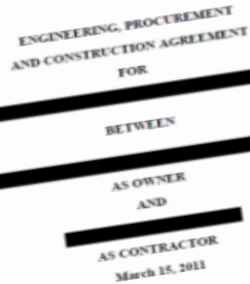
BETWEEN

AS OWNER  
AND

AS CONTRACTOR  
March 15, 2011

California

# SUBSTANTIAL COMPLETION

A document titled "ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT" with various redacted sections. The text "FOR", "BETWEEN", "AS OWNER AND", "AS CONTRACTOR", "March 15, 2011", and "California" are visible.

ENGINEERING, PROCUREMENT  
AND CONSTRUCTION AGREEMENT  
FOR  
BETWEEN  
AS OWNER  
AND  
AS CONTRACTOR  
March 15, 2011  
California

- c. Owner has received all reports and information to be provided to it by EPC Contractor as described in Section 6.1 (*Facility Start Up and System Start Up*) and Exhibit J (*Performance Guarantees and Performance Tests*).
- d. Owner has received all permits, licenses, and approvals required to be obtained by EPC Contractor under this Agreement.
- e. All O&M manuals and special tools required to operate and maintain the Facility (other than those provided by Owner Furnished Equipment suppliers) have been acquired by EPC Contractor and delivered to Owner.
- f. EPC Contractor has satisfied its obligation to provide an orientation and training program pursuant to Section 12.1 (*Orientation and Training Program*).
- g. The Punch List has been established in accordance with Section 6.1 (*Facility Start Up and System Start Up*).

# Rule No. 6

- Anticipate the unexpected

# Rule No. 7

- Claims, disputes, and litigation are good for lawyers – not for clients

