

What Owners And Contractors Should Know About Data Center Construction Contracts

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Data centers are built on more than steel and megawatts: They're built on contracts that allocate risk and keep billions of dollars humming on schedule.

During the data center construction boom, the market has become increasingly competitive, requiring developers to emphasize speed and agility. Companies will invest nearly \$7 trillion in capital expenditures on data infrastructure globally by 2030, with 40% of those expenditures expected in the U.S., according to McKinsey.

Developers who want to be in the game need to have a clear construction plan in place from the outset, including deciding on the contracting vehicle to be used for their project. To be more effective, stakeholders must know the details of their construction agreements and the common pitfalls that determine whether a data center project accelerates, stalls, or short-circuits.

TYPES OF DATA CENTER CONTRACTS

To move quickly and successfully on a data center project, a number of contracts will need to be executed in quick succession. Primarily, a developer should ensure there are agreements for the project design, construction, and infrastructure ready to go in quick succession to ensure timely delivery. Because the terms of each of these agreements can impact the others, it is crucial to negotiate them via a collective strategy, rather than in isolation.

The first decision is how much design and construction



responsibility defaults to the developer. Data centers are often built using either engineering-procurement-construction (EPC) or design-build contracts, both of which delegate some or all of the design responsibility to the construction contractor.

RISK VERSUS CONTROL

EPC and design-build contracts typically provide the quickest project delivery and put substantial responsibility – and therefore, risk – on the contractor.

EPC contracts are popular in the data center world, as they allow an owner to specify a desired outcome and rely on the EPC contractor to deliver it, handing over a turnkey facility that meets the owner's core requirements.

Design-build is similar, but includes more owner oversight

over design and may include elements outside of the design-builder's control, such as leaving procurement of certain key infrastructure systems to the owner.

The primary difference between EPC and design-build contracts is that EPC contracts are nearly hands-off for the owner, while design-build contracts involve more partnership between the owner and design-builder, including owner input on certain design elements and project completion.

Whether using an EPC or design-build contract, the partnership and trust between the owner and builder is crucial, as the owner will need to rely on the builder to design, construct, and deliver the project on time, on budget, and in the manner specified by the owner.

DESIGN AND PROCUREMENT AGREEMENTS

Key sticking points in a design agreement are likely to concern the scope of a designer's freedom and flexibility and the potential liability of a designer if a project goes wrong. Design professionals often propose contract terms that allow them maximum flexibility while limiting their potential liability. Often, designers won't bend on these limitations, so this relatively traditional approach may not be a great fit for a developer on large-scale, complex projects.

Beyond design, two key components of data center construction are procurement and the installation of specialized technology.

The price tag of cooling units, backup generators, servers and UPS systems can eclipse even the cost of some small development projects. Some purchase orders for these systems will need to be executed at the outset to ensure long-lead times don't derail the schedule.

Owners should consider early purchase orders for the limited scope of procurement and amend those purchase orders or enter into separate agreements for the full scope of services later. Owners should also consider at the start which contracting parties will procure, transport, offload, install, integrate, and test the systems. Suppliers may not be willing to provide full services, and contractors may not have the specialized equipment or training necessary to handle such a job.

COMMON PITFALLS IN DATA CENTER CONTRACTS

Given that speed is at a premium in data center construction, the contract's delay provisions will be critical. To protect against unreasonable delays, all development contracts should include a liquidated damages provision, which sets a daily rate to charge a contractor for project delays beyond a planned completion date.

The tricky aspect of these developments is setting a liquidated damages rate sufficient to protect the developer while also ensuring it is not so punitive as to lead to trade partners and suppliers artificially increasing their bids to protect against liquidated damages flowing downstream.

Because these projects often cannot afford to be delayed or suspended, the contract's dispute provisions should ensure that construction continues while a dispute is reserved or resolved between the parties.

Tariffs have been another issue. Developers and contractors need to clearly allocate the risk of unforeseen material price increases resulting from tariff impacts, as well as whether supply chain disruptions will extend the contract time. It should be clearly defined in the contract to avoid disputes down the road.

PLANNING THE PROJECT OUT

A final consideration is how the project is planned.

Many data center developments include multiple phases. Whether the general contractor is brought on for the full project, one phase or more is a crucial decision. One way to offer the best of both worlds is to enter into a master agreement with a contractor and plan for separate work authorizations for each phase of the job.

This carries the general terms and conditions with a contractor through the full project, but provides an offramp if an earlier phase goes poorly. One risk with a phased approach is that parties will surely renegotiate their pricing at each subsequent phase, which could be advantageous or disadvantageous depending on market conditions.

A successful data center development depends as much on smart contracting as on technical execution. By allocating risk clearly and planning for speed, developers can avoid costly mistakes and keep their projects on track in an increasingly competitive market. 



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