**Construction Law Practice—Chemical Processing Plant exercise**

DBE (an engineering-led, design-build firm), was hired by O on an EPC basis (a design-build project delivery system in which the design-builder is an engineering firm) for a massive project to expand O’s existing chemical plant in Arkansas. Part of the job, as specified in detailed design criteria furnished by O, required DBE to move chemical processing equipment to O’s existing plant from a storage location in the Mohave Desert where it has been for several years, and then to install that equipment as part of the expansion project. (O purchased the equipment from a third party for this purpose.) The contract required DBE to submit its plans for disassembly, cleaning, and transportation to O for review before commencement of the work.

Everything seemed to be going well up to the point of mechanical completion, but then, during performance testing, the relocated plant equipment encountered serious operational problems. An investigation revealed the need to disassemble much of the plant to remove sludge from the main tanks that DBE had relocated. At that point, O’s project executive told DBE’s project manager that O intended to enforce the liquidated damage provision of the contract if the corrective work resulted in a delay in commercial commissioning of the plant beyond the date set in the contract for completion. As a result, DBE went from a single 8-hour shift to 3 shifts around the clock. The corrective work was completed on time, but at great additional expense to DBE.

Similar projects are rare. At meetings between representatives of DBE and O that took place during the investigation described above there were discussions about a project from about 5 years ago involving a portion of O’s existing plant that was assembled by a different contractor using other equipment that had been stored at the same site for a similar period of time. It turns out that the biggest complication with the earlier project involved the need to clean baked-in residue from the bottoms of the large reactor tanks. This is essentially the same problem DBE belatedly discovered through its investigations following the performance test fiasco. In the earlier project, unlike in the present one, the problem with residue was identified at a relatively early stage during the reassembly and installation process. No one on O’s current project team was involved in the earlier relocation project, although the company’s CFO and its CEO were both in their current positions when the other project was undertaken.

Assume that (1) the EPC contract required DBE to provide all engineering, procurement (equipment specification and ordering), and construction and installation services for the project, (2) the agreement required DBE to submit a GMP (guaranteed maximum price) proposal before any of the equipment was moved from the storage location, (3) DBE submitted, and O accepted, that GMP proposal, and (4) the agreement provided for liquidated damages at the rate of $5,000 per day of delay beyond the commercial commissioning date established in the contract. The other relevant contract terms are as set forth in ConsensusDocs 410 (posted to the “General resources and sample documents” folder on Blackboard).

Part 1 assignment: from the perspective of either DBE’s counsel or Owner’s counsel, address the following:

1. Identify and assess DBE’s potential claims for additional compensation and O’s potential defenses.
2. What expert testimony might be relevant to resolving the dispute and why might it be relevant?

**DBE’s counsel:** [list students in this group]

**Owner’s counsel:** [list students in this group]

Part 2: the two groups will come together [may be in person or virtually, depending on the course format] to explore the prospects for early dispute resolution efforts that could avoid the need for formal (and therefore time-consuming and expensive) steps, such as mediation, arbitration, or litigation.