

How to Address Six Critical Contract Risks



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The trend in the construction industry has been to shift more risk to the contractors without a corresponding increase in price. When negotiating contracts, contractors should be mindful of the balance between removing one-sided provisions and losing work. This article covers some potential deal-breakers commonly found in construction contracts.

INCOMPLETE OR DEFICIENT DESIGN

Contractors should be entitled to rely on a complete and constructible design in bidding the work. Owner attempts to shift design risk to the contractor should be a red flag. For example, provisions requiring the contractor to achieve the “intended results” of the design should be rejected or revised to apply only to non-material work “reasonably inferable” from the design. The scope of work should not be based on the contractor’s ability to read the design professional’s mind.

CHANGES AND CLAIMS

For changes involving increased scope, an ideal contract would require the parties to execute a change order before the work begins. That is rarely the case. To avoid disputes relating to claims or change directives, contractors should negotiate agreed upon methods to calculate additional compensation and require language providing an equitable adjustment in time to cover any delay. Contractors should insist on reasonable notice provisions for changes and claims to allow enough time to evaluate and submit information from subcontractors and suppliers. Contractors should also negotiate language reserving the right to seek additional compensation and time if the full effect of the change or impact cannot reasonably be known in time to meet the notice deadline.

LIEN AND CLAIM WAIVERS

Unlike conditional lien waivers, unconditional lien waivers are enforceable even if no payment is received. Contract provisions requiring unconditional lien waivers should be rejected unless limited to amounts previously paid by the owner. Other waiver traps include (a) lien waiver language covering all work performed through an identified date, and (b) contract language re-

quiring waiver of claims upon receipt of final payment. Contractors should revise such language to exclude amounts for pending changes and pending or unknown claims.

DELAY LIMITATIONS

Contracts often include provisions that prohibit additional compensation for project delays beyond the contractor’s control and only allow for a time extension. These “no damage for delay” provisions should be rejected or revised to exclude causes within the control of the owner or its agents. Contractors should also exclude any reference to acceleration or disruption, which should be fully compensable.

LIQUIDATED DAMAGES AND WAIVER OF CONSEQUENTIAL DAMAGES

Liquidated damages should be reasonably tied to the owner’s potential losses if delays occur. Contractors should negotiate liquidated damages provisions to cover all of the owner’s potential direct and consequential damages, such as the owner’s lost income. Liquidated damages provisions should be paired with a mutual waiver of consequential damages to prevent the owner from double recovery for delays.

TERMINATION BY THE OWNER

Termination for convenience provisions allow for termination at the owner’s whim. These provisions should at least require the owner to pay the contractor for the completed work and all costs related to the termination. Contractors should also attempt to negotiate an early termination fee to discourage misuse. Termination for default provisions should only be triggered by contractor breaches that would destroy the fundamental purpose of the contract. For any curable default, the contractor should be entitled to receive written notice and a reasonable time to cure. An owner’s wrongful termination for default generally entitles the contractor to recover amounts owed for the work completed, costs related to the termination, and lost profits on remaining work. Contractors should reject contract provisions that attempt to avoid this risk by converting wrongful terminations into terminations for convenience. ●