



Contract Killer Instinct: Identifying Key Clauses to Mitigate Construction Risk

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Introduction

- Preserving Margin
- Avoiding Disputes
- Avoiding Skyrocketing
Litigation Costs



Primary Learning Objectives

1. Identify key construction contract terms that require greater scrutiny.
2. Assess the financial and liability risk associated with contract terms.
3. Recognize problematic terms in construction contracts.
4. Communicate concerns regarding project risk to legal counsel.
5. Draft contract terms that minimize financial risk.
6. Negotiate strategically to reach agreement on contested clauses.



Clauses

1. Pay if paid
2. Change orders and notice
3. Schedule
4. Force majeure
5. Unforeseen conditions
6. Scope of work
7. Warranties
8. Indemnification
9. Limitation of liability
10. Waiver of damages
11. Insurance
12. Flow down provisions
13. Termination
14. Litigation
15. ADR



Other Important Considerations

- Exhibits to the contract
- Master service agreement
- Other contracts with the same entities



Top 10 Ways That Disputes Develop

1. Ignorance of what the contract states.
2. Not addressing issues on a timely basis through effective communication.
3. Not documenting the issues, thoroughly, timely and in writing.
4. Giving too much credence to the notion that you will resolve everything later.
5. Giving too much credence to legal consequences.



Top 10 Ways That Disputes Develop (cont'd)

6. Ignoring or minimizing bad facts.
7. Not understanding the entire inter-relationship of the documents.
8. Not understanding the inter-relationship of the terms and conditions.
9. Not timely consulting all relevant internal project stake holders and assuming they all have the same level of investment.
10. Not timely consulting counsel who actually knows what to do.



Practical Issues

- Unrealistic provisions
- Ambiguities
- Poorly written documents
- Provisions that if enforced may be deemed punitive
- Contracts that refer to exhibits but do not contain them
- Failing to have access to all relevant documents



What is an Effective Approach to Negotiations?

- Identifying the lead negotiator
- Creating a framework to maximize profit and minimize risk
- Preparing the proposal or bid
- Preparing the contract response
- Negotiating the contract to preserve “bid day” margin
- Mitigating problematic or non-negotiable risks through planned field management execution



Characteristics of the Lead Negotiator

- Excellent knowledge of the business
- Working knowledge of legal terms and the law
- Excellent communication skills
- A good understanding of the big picture
- An ability to make decisions for the company
- An effective ability to use knowledgeable construction counsel



Effective Use of Counsel

- Focus on contract provisions that are problematic
- Offer solutions with alternative language, not just striking language
- Making sure counsel knows what really matters
- Comments from counsel
- Can your counsel effectively communicate with opposing counsel and other project stakeholders such as insurers, lenders, subcontractors, and suppliers



Prior to Bid or Proposal Have You:

- Consulted the insurance broker as to insurance requirements
- Consulted the surety as to bond requirements and the form of bond and general indemnity agreement
- Obtained input from counsel as to key contract terms
- Reviewed the general construction agreement



For Effective Communications, the Lead Negotiator Should:



- Have a summary of discussion points
- Have a red-line of the contract, including additions, modifications, and strikes
- Have an addendum amendment or modification ready



Additional Considerations

- Is this transaction a one-time transaction or is it part of a series of transactions?
- Have you obtained the input from key internal and external players?
- Have you seen all documents and memorialized what documents you have not received?
- Do you want to add documents?



Effective Negotiations

1. Rank what terms are most important that need to be negotiated.
2. Make sure you are prepared to articulate your philosophy and understand the philosophy of the other side.
3. Know if you are talking to the key decision makers and if not why.
4. Decide on the role of counsel.
5. Make sure you are properly educated.
6. Maintain a win-win strategy.
7. Maintain control of document revisions.
8. Know what you can and cannot flow down to subcontractors.



Effective Field Management to Mitigate Problematic or Non-Negotiable, Terms and Corresponding Risks

1. Organizational discussions.
2. Assemble the key team members to review each of the terms and conditions that are problematic.
3. Evaluate ways to mitigate risk in the field.
4. Involve counsel to review terms to assess severity and probability of the risks, anticipating potential avenues for responding.
5. Safety team review to assess safety risks.
6. Negotiation of subcontracts and supply agreements, or renegotiation of the same.
7. Communication to subcontractors and suppliers as to mitigation and anticipated reactions.



An Example With Different Site Conditions Clauses

- Have a robust investigation policy and procedure plan and adhere to it.
- Spend money upfront to investigate and ensure that you know what to avoid.
- Communicate on or before bid day, so that the risks can be discussed and planned for in advance.
- Hire a third-party consultant or expert to validate your position and help arrive at solutions.
- Expect changes will occur and consider adding contingencies for riskier work.



Are There Dealbreaker Terms?

- Huge liquidated damages
- Onerous indemnification provisions
- Onerous change order provisions
- Pay if paid
- One-sided escalation clauses
- Consequential damage exposure
- Lack of proof of financing
- All of the above



Concluding Thoughts

- Effective contract negotiation skills
- Relationships up and down stream
- Respect
- Communication
- Authenticity
- An appreciation for the importance of listening and understanding each party's wants and needs
- Articulating your goals internally so that everyone is carrying out all steps necessary to achieve those goals whether it is the team in the office, team in the field, subcontractors, and suppliers, or counsel



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