

COAA Webinar:

OWNER'S CONTRACT RISK ANALYSIS CHECKLIST

The purpose of this checklist is to help project owners identify and address critical contract risk issues from an insurer's perspective. This is not intended to address all contractual or legal risks, and you should have your contracts reviewed by a properly licensed attorney familiar with applicable construction law and disputes to ensure the clauses are clear and enforceable in the applicable jurisdiction.

DELAY

- Notice requirements that require the contractor to expressly notify you it is seeking a contract adjustment for time, money, or other relief, and expressly waiving claims not noticed.
- Clauses limiting or eliminating your liability for excusable delays.
- Monthly schedule updates:
 - Receipt should be a condition to payment.
 - Require contractor narrative on how it expects to achieve any shortened durations.
 - Include submittals and ordering dates for major materials.
 - Add waiver of delay claims if schedule is not updated.
- Clauses allowing the owner to direct acceleration to overcome delays and limiting the amount of any contract adjustment to overcome excusable delays.
- Liquidated damages provisions that provide reasonable compensation for inexcusable delays (consider cost of interest financing, lost revenue, cost to extend Builder's Risk coverage).

INDEMNIFICATION

- General indemnity limited to personal injury and property damage (excluding damage to work) and tailored to address applicable anti-indemnity statutes.
- Separate clauses to cover liabilities for:
 - Lien claims.
 - Wage theft.
 - Patent and other IP infringement.
 - Pollution and hazardous materials.
 - Cyber.
 - Project specific issues—e.g., HIPPA liability on medical projects or disclosure of confidential information.

CONSEQUENTIAL DAMAGES

- Beware of contractor not requiring a mutual waiver.
- Reasonable carve-outs from waiver acceptable (e.g., insurance proceeds and damage due to contractor's gross negligence or willful misconduct).

INSURANCE

- Builder's Risk with "All Risk" coverage, normal exclusions, reasonable deductibles, and standard AIA "No-Fault" terms.
 - Coverage for project specific risks, such as named storms, floods, or wildfires.
- CCIP/OCIP/COCIP provide reasonable coverage.
- Adequate coverage (\$5 million minimum) for design errors and omissions, especially on delegated design.
- Proof of completed operations and Professional Liability coverage through Statute of Repose.
- Waivers of subrogation.

PAYMENT

- Legally enforceable payment cycle.
 - Incorporate state prompt payment rules regarding notice of objection to invoices.
 - Specify interest rates below statutory default if enforceable.
- Require the contractor agree to lender terms and conditions (consent agreements).
- No right to stop work based on pending claims.
- Two-step notice procedure to stop work for owner defaults.
- Limit requirements to provide proof of funding.
- Advance lien waivers if enforceable.
- Provide for reasonable use of contingency in GMP contracts.
- Allocate insurance and other recoveries to contingency.

CHANGES

- ✓ Reasonable and practical notice and change order procedures.
- ✓ Condition obligation to pay for changed work on owner's written approval.
- ✓ Condition payment on lender approval if legally enforceable.
- ✓ Use a reasonable changed and concealed conditions clause.
 - ✓ Insert separate clause requiring contractor to investigate site.
 - ✓ Do not include geotechnical reports in definition of contract documents.

CLAIMS/DISPUTE RESOLUTION

- ✓ Provide for prompt:
 - ✓ Notice and pricing of claims.
 - ✓ Review and resolution of claims.
- ✓ Stepped negotiation, followed by mediation, followed by litigation.
- ✓ Consider decision by third parties (Initial Decision Maker, Dispute Resolution Board, Independent Engineer) as a condition to institution of dispute resolution processes.
- ✓ Jury trial waiver.
- ✓ Advanced limitations on discovery (limiting electronic discovery, the number of depositions).
- ✓ Attorney fee shifting clauses:
 - ✓ Loser pays?
 - ✓ Fee shifting if a reasonable settlement offer is not accepted.

HAZARDOUS MATERIALS

- ✓ Liability for pre-existing (or migrating) conditions to the extent contractor has negligently released, discharged, or disturbed such conditions.
- ✓ Contractor to remove and remediate pre-existing hazardous material conditions.
- ✓ Mutual indemnification based on fault.

DESIGN LIABILITY

- ✓ Single point responsibility for design.
- ✓ Maximize contractor responsibility for design and design review through Design-Build contracting, preconstruction design reviews, requirements for early notification of design issues, etc.
- ✓ All design delegation must be expressly identified in the contract with responsible subcontractor carrying appropriate professional liability insurance.
- ✓ Contractor to maintain PL insurance over subcontractors with \$5 million limits so that owner can procure an OPPI.
- ✓ No cap on design liability or adequate insurance to cover any anticipated issues.

COMPLETION

- ✓ Definition of substantial completion based on what is needed to actually utilize project.
- ✓ Reasonably sufficient time between substantial and final completion with carve-outs to ensure quality work (e.g., due to weather conditions that will affect work).
- ✓ Requirement that superintendent and project manager will not be re-assigned until work is complete or authorized by owner.
- ✓ Withholding of retention for warranty items at a percentage of cost—e.g., 150% or 200%.
- ✓ Warranties start at substantial completion. All extended warranties are priced with subcontractors and included in contract price.
- ✓ Retainage released as punchlist work completed with line item for close-out documents—as-builts, O&M Manuals, LEED paperwork, etc.

SPECIAL DRAFTING ISSUES

- ✓ Eliminate or avoid ambiguous, inconsistent, and duplicative contract terms:
 - ✓ Each provision should assign responsibility for activity.
 - ✓ Avoid imprecise terms—e.g., use 21 days instead of three weeks.
- ✓ Make sure scope of work is clear as to what is in and what is out and do not use subjective standards like “best”, “highest”, or “state of the art”.
- ✓ Avoid definitions that do not match industry standard definitions as they will lead to confusion.
- ✓ Avoid clauses that are illegal or unenforceable as they will tempt your staff.

DEFAULT AND TERMINATION

- ✓ Termination for Default:
 - ✓ Have you secured a conditional assignment of subcontracts and material supply agreements?
 - ✓ Do you have the right to get materials stored by the contractor?
 - ✓ Do you have the right to keep key equipment in case of termination (e.g., tower crane).
 - ✓ Are rights conditioned on your reasonable belief?
 - ✓ Can you terminate only part of the contract?
 - ✓ Do you have the right to withhold all payment until work is completed?
- ✓ Can you terminate for convenience if you need to stop the project:
 - ✓ Have you excluded lost profits from termination for convenience remedy.
 - ✓ Is liability limited to work performed to date plus wind down/preservation cost.
 - ✓ Does an improper Termination for Cause convert to a Termination for Convenience.

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