

ConvolutEd Contracts: Emerging Trends in Construction Contracts

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1. Pay-If-Paid Clauses

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- ◆ True pay-if-paid clauses condition payment to the subcontractor on the general contractor's receipt of payment from the owner
- ◆ Pay-when-paid clauses
- ◆ The Owner's insolvency

Pay-if-Paid Examples

Payment by the Owner to Contractor shall be a condition precedent to Contractor's obligation to make any interim progress payment to Subcontractor.

Receipt of payment by the Contractor from the Owner for the Subcontract Work is an express condition precedent to payment by the Contractor to the Subcontractor. The Subcontractor hereby acknowledges that it accepts the risk of nonpayment by the Owner.

Responses

Payment by the Owner to Contractor shall be a condition precedent to Contractor's obligation to make any interim progress payment to Subcontractor, **unless Owner's nonpayment is due to Contractor.**

Receipt of payment by the Contractor from the Owner for the Subcontract Work is an express condition precedent to payment by the Contractor to the Subcontractor, **unless Owner's nonpayment is due to Contractor.** The Subcontractor hereby acknowledges that it accepts the risk of nonpayment by the Owner **due to Owner's insolvency. Subcontractor does not accept the risk of Owner nonpayment to Contractor due to the Contractor.**

Insert: If Subcontractor has performed its work but Owner does not make payment to Contractor for some reason unrelated to Subcontractor such as a problem or dispute with Contractor or another trade, Subcontractor shall be entitled to payment.



2. Indemnification

2. Indemnification

- ◆ Arguably the most important provision
- ◆ We want to avoid accepting liability for the negligence of others
- ◆ Seek to limit liability to insurance covered damages
- ◆ The Duty to Defend

AIA A401 Example



To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

My Suggested Inserts



Subcontractor shall not be obligated to indemnify a party from their own negligence.

Subcontractor is not obligated to provide indemnification for damages, losses or claims to the extent due to the negligence of indemnitees or others for whose conduct Subcontractor is not responsible.

Similarly, Contractor shall indemnify and hold harmless Subcontractor from all damages, losses, or expenses, including attorney's fees, arising from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to the extent due to the negligence of Contractor or the fault of any of its agents, representatives or employees.

Response to Duty to Defend

Subcontractor's liability for defense costs shall not apply to the extent that the claim is due to the negligence of others for whose conduct Subcontractor is not responsible. If the Subcontractor has been called upon to defend an indemnified party and it is found that the Subcontractor was not responsible for the loss, the Subcontractor is entitled to reimbursement of a prorated portion of the defense costs incurred by the Subcontractor corresponding to the fault of the indemnified party.



3. Additional Insured

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- ◆ Right behind the indemnity provision in terms of importance
- ◆ The loophole issue
- ◆ The CG2010 (11/85) endorsement form
- ◆ Delete waivers of subrogation

My Suggested Insert



Naming Contractor and Owner as additional insureds on Subcontractor's liability insurance policy and making that coverage primary is intended to apply only to the extent that a negligent act or omission by Subcontractor causes a claim to be asserted or a loss to be sustained by Contractor or Owner. This additional insured endorsement is not intended and shall not be construed to cause Subcontractor's insurer to be liable either to defend or to indemnify Contractor or Owner for claims against or losses sustained by Contractor or Owner that are not due to the fault of Subcontractor.

Waivers of Subrogation Claims

- ◆ What is it?
- ◆ Acceptable compromise?
- ◆ Seek a reciprocal waiver of subrogation



4. Waivers and Releases

4. Waivers and Releases

- ◆ Watch for prospective lien waivers
- ◆ Revise contract language that seeks to require a release of *all* claims in exchange for final payment
- ◆ Change Order forms and payment applications
- ◆ Condition releases and waivers on receipt of payment

Be on the lookout!

Contractor “does hereby ... further remise, release and forever discharge [Owner] ... of and from any and all manner of claims, demands and causes of action whatsoever against [them] which contractor ... may have for, upon or by reason of any matter, cause or thing whatsoever arising under or out of the contract, as of release date. [OR relating to payment].

Response?

Contractor “does hereby ... further remise, release and forever discharge [Owner] ... of and from any and all manner of claims, demands and causes of action whatsoever against [them] which contractor ... may have for, upon or by reason of any matter, cause or thing whatsoever arising under or out of the contract, as of release date, **but excepting those claims previously identified in writing which remain unresolved.**

Watch out!



The undersigned Contractor for and in consideration of the Sixty-nine thousand thirteen dollars and 11/100, \$69,013.11 and other good and valuable consideration, the receipt for which is hereby acknowledged, does hereby waive, release and relinquish any and all claims, demands and rights of lien for work, labor and/or materials furnished through the 30th day of August, 2012 on the above described project.

The undersigned further deposes and says that all labor, materials, supplies, equipment, etc., furnished by the undersigned, have been fully paid for and discharged through the above date.

The Fix



The undersigned Contractor **upon receipt of** Sixty-nine thousand thirteen dollars and 11/100, \$69,013.11 and other good and valuable consideration, the receipt for which is hereby acknowledged, does hereby waive, release and relinquish any and all claims, demands and rights of lien for work, labor and/or materials furnished through the 30th day of August, 2012 on the above described project, **but excepting claims for retainage and those claims previously identified in writing which remain unresolved.**

The undersigned further deposes and says that all labor, materials, supplies, equipment, etc., furnished by the undersigned, have been fully paid for and discharged **through the last progress payment received from Contractor.**

Responsibility for lien claims?

Subcontractor shall defend, indemnify and safe harmless Contractor, Contractor's sureties and the Owner from any lien or claim of lien or any claim on any payment or performance bond supplied by Contractor filed or maintained by any laborer, materialman or other person or entity directly or indirectly acting for, through, or under Subcontractor, against the Project or any part thereof or any interest therein or against any monies due or to become due from Owner to Contractor or from Contractor to Subcontractor.

Only if we are paid

Subcontractor shall defend, indemnify and safe harmless Contractor, Contractor's sureties and the Owner from any lien or claim of lien or any claim on any payment or performance bond supplied by Contractor filed or maintained by any laborer, materialman or other person or entity directly or indirectly acting for, through, or under Subcontractor, against the Project or any part thereof or any interest therein or against any monies due or to become due from Owner to Contractor or from Contractor to Subcontractor, **provided Subcontractor is paid.**



5. Scheduling

5. Scheduling

- ◆ Identify the days needed with conditions suitable for your work to achieve substantial completion.
- ◆ Have input on scheduling
- ◆ Delay damages and liquidated damages
- ◆ Coordination clauses

Response

Contractor agrees to perform the work and all parts thereof promptly and diligently within the time allotted and in such sequence and order as Owner may direct, **in consultation with Contractor.**

My Suggested Inserts

Subcontractor shall be entitled to a minimum of ____ work days with conditions suitable for its work within which to achieve substantial completion.

Liquidate damages shall only be assessed against the Subcontractor to the extent caused by the Subcontractor.

While Subcontractor will seek to coordinate its work with other subcontractors, the parties recognize that Subcontractor has no contract with or ability to control or direct or sequence the work of other subcontractors. Contractor has the primary responsibility to coordinate the work of subcontractors and trades and to sequence the work to facilitate construction.



6. Backcharges

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- ◆ Concern is unilaterally assessed backcharges, well after the fact
- ◆ Look for right of offset clauses
- ◆ Security interest clauses

My Suggested Insert

No backcharge or claim for services rendered or equipment furnished by Contractor to Subcontractor shall be sought to be imposed by Contractor unless previously authorized in writing or unless written notice is given to Subcontractor within five (5) days of the event, act or omission that is the basis of the backcharge.



7. Change Order Issues

7. Change Order Issues

- ◆ Look for waiver language
- ◆ Avoid language that does not include reasonable contemporaneous compensation for changes
- ◆ Look for limits on “mark-ups” for overhead and profit that are unreasonable
- ◆ Avoid clauses that do not clearly permit and specify the method for preserving claims

My Suggested insert

Owner and Contractor recognize that Contractor may be called upon to perform extra or changed work to respond to field conditions or in response to a verbal request prior to execution of a formal change order. The parties agree to work in good faith with each other so that Contractor does not proceed with changed work without authorization and Contractor receives fair compensation for authorized, change work.



8. Design Responsibility

8. Building Code and Design

- ◆ Do not accept design responsibility!
- ◆ Look for “compliance with laws” provisions
- ◆ Look for clauses requiring compliance with code or specifications, “whichever imposes the greater duty.”

Examples with revisions

Subcontractor shall comply with all applicable federal, state and local laws, statutes, regulations, ordinance and building codes, provided the Contract Documents are in compliance therewith.

Provide and install the work as specified per plans and local codes, provided the Contract Documents are in compliance therewith.

Subcontractor warrants that it has included everything of any type required for a complete project, in accordance with all applicable codes and ordinances, provided the Contract Documents are in compliance therewith.

My Suggested Insert

If Subcontractor discovers that the prescribed Work is not in accordance with codes, Subcontractor will promptly notify Contractor and await direction from Contractor and Design Professional. The Design Professional is responsible to design the Work to be in compliance with applicable codes and regulations and to specify or show the work that is to be performed. Subcontractor is not responsible for design, including design errors or omissions.



9. Damages to Work

9. Damages to Work

- ◆ Look for contract clauses holding you responsible for the work until project completion
- ◆ Look for contract provisions which have you accepting all risks and responsibility for all damages the work
- ◆ Review the subcontract to determine who is responsible for providing builders' risk insurance

My Suggested revision

Subcontractor shall be responsible for protecting the Work until the Work shall have been installed and accepted by owner. Except to the extent of any proceeds received for the benefit of Subcontractor under a policy of builders' risk or fire insurance, Subcontractor shall be solely responsible for any loss or damage to the Work **due to causes within its reasonable control** until is has been installed and accepted by owner.

My Suggested Insert

Contractor shall coordinate the Project so that the Project proceeds in an orderly and customary manner. If Subcontractor's work is damaged by other trades, Contractor agrees to backcharge the trades causing the damage. Contractor will purchase or arrange with Owner to maintain Builder's Risk insurance.



10. Price Escalation

10. Escalation

- ◆ Look for contract clauses which provide your pricing is firm for the duration of the contract
- ◆ Address the issue with your bid or proposal

My Suggested Insert

In the event significant delay or price increase of material, equipment, or energy occurring during the performance of the contract through no fault of the Contractor, the contract sum, time of completion, or contract requirements shall be equitably adjusted by change order in accordance with the procedures of the contract documents. A change in price of an item of material, equipment, or energy will be considered significant when the price of an item increases _____ percent between the date of this contract and the date of installation.

Thank You!

ANY QUESTIONS?

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