



Problematic Contract Clauses

Minimizing risk

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IN TODAY'S volatile economic climate, risk management is critical. Problematic contract clauses can impact a company's financial and operational risks. Tariff-related unpredictability, in particular, has underscored the importance of price escalation clauses, delivery timelines, and supply chain obligations. Many contracts are inadequate to handle sudden changes in cost structures or supplier viability.

The transportation and infrastructure construction industry, in particular, presents high risks due to complex project scopes, limited margins and tight deadlines. The following is an overview of some of the most critical clauses that often go unnoticed or misunderstood by contractors, common traps, and practical steps to reduce associated risks.

Indemnity clauses. Typically require the contractor to pay another party for certain loss or damages. Some may require a contractor to compensate another, even when the contractor is not at fault. This can result in uncapped liability and claims beyond insurance coverage. Some indemnity clauses may also include an obligation for the contractor to defend the other party.

Risk mitigation: Negotiate for mutual or limited indemnities. Avoid "duty to defend" language. Attempt to cap indemnification to direct damages only, and limit obligations to what might be covered by insurance.

Liquidated damages. Usually set a predetermined amount a contractor must pay an owner for each day a project is delayed past a completion date. The purpose is to compensate an owner for losses due to delay, without requiring the owner to show proof of actual damages. However, excessive or uncapped penalties for delays can wreak havoc on a contractor's bottom line.

Risk mitigation: Look for opportunities to include exemptions for liquidated damages in instances of force majeure (which can relieve a party from contractual obligations due to circumstances beyond their control), excusable

delay (delay in performance due to circumstances beyond the control of the responsible party), or concurrent delay (where two or more parties are responsible for delay that impacts a schedule). Try to ensure liquidated damages generally reflect actual losses.

Pay-When-Paid or Pay-If-Paid clauses.

These shift the owner's payment risk onto the contractor or subcontractor.

Risk mitigation: Attempt to negotiate unconditional payment terms or include payment guarantees.

Ambiguous scope of work. Typically lacks clarity, detail, and/or consistency as to what is actually to be done. You may see terms such as "as needed" or reference to an "industry standard lack of defined responsibilities. Vague language can lead to disputes over deliverables, variations, and extras.

Risk mitigation: Ensure scope is clearly defined, with detailed specifications and exclusions. Use change order procedures for any modifications.

No damages for delay. States that an extension of time is the sole and exclusive remedy for any delay to the work or impact to the progress of work.

Risk mitigation: Request exceptions for owner-caused delays or gross negligence. Use contemporaneous documentation to support delay claims. Negotiate to provide for damages payable beyond a certain period of delay.

Price escalation. Allows for adjustments to the contract price in the event certain materials or labor costs increase beyond a certain level. However, if a contract does not contain a price escalation provision, the contractor generally bears all of the risk of rising costs. Most contracts do not automatically provide for price escalation. Public contracts may prohibit escalation clauses.

Risk mitigation: Attempt to negotiate contractual provisions allowing for an adjustment based on a specified index or a

specific material. Contractors can also utilize a shared-risk approach where both the contractor and upper-tiered contractor or owner share in cost increases.

Notice. Provides that a claim must be submitted within "x" amount of days from the occurrence giving rise to such claim. Under such provisions, the failure to submit a claim strictly in accordance with these requirements results in the claim being waived.

Risk mitigation: Negotiate reasonable terms, know exactly how the notice obligations are satisfied and confirm whether and how other contract documents affect notice requirements.

Differing site conditions. Without this protection, the contractor absorbs the risk of unknown subsurface or site conditions, despite relying on owner-provided geotechnical reports. Heavy civil projects often encounter unpredictable soils, rock formations, utilities, or water tables. Without a clear Differing Site Conditions clause, these issues can become non-compensable delays.

Risk Mitigation: Pay close attention to whether a Differing Site Conditions clause excludes "information provided by the owner" or "conditions that could have been discovered during a reasonable site visit."

Flow-Down clauses. Passes down the general contractor's obligations and risk to a subcontractor. Unless the prime contract is reviewed by the subcontractor, a subcontractor can unknowingly assume burdens such as liquidated damages, scheduling obligations, or scope ambiguities.

Risk mitigation: Request a copy of the prime contractor's schedule of obligations.

KEY TAKEAWAYS

By identifying and addressing problematic clauses upfront, contractors can reduce exposure to financial shocks. Risk mitigation is a critical business imperative given economic uncertainty and tariff-drive volatility. Before you bid, you should review these key provisions closely and negotiate protections into your contracts. 📍

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