



Understanding and Using Contract Clauses to Protect Your Business

Panel

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Common Purposes of Specific Contract Clauses

- **Establish scope of performance and commercial terms**
- **Clarify rights and obligations of the parties**
- **Allocate risks between the parties – including by shifting risk from a party customarily responsible for the risk to the other party**

PROJECT RISKS

- Scope of work (including scope gap and scope creep)
- Changes
- Non-payment by Owner
- Delays, disruptions, interruptions, inefficiency, suspensions, acceleration
- Property damage, personal injury
- Termination – Default or convenience
- Quality/warranty
- Safety
- Hazardous materials
- Design
- Disputes

CONTRACT RISK OPTIONS

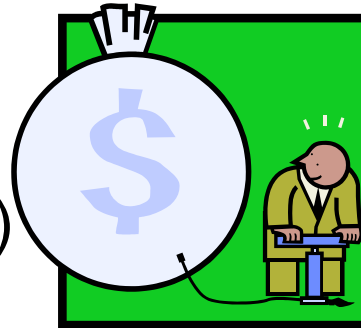
1) Change the contract?

(Shift the risk back to Contractor)



2) Increase the price?

(Try to cover the risk with money in the bid)



3) Walk away?



4) Accept the risk?



SCOPE OF WORK: CONTRACT CLAUSES

- **Scope of Work**
 - Description of work clause
 - Exhibit/attachment
 - Inclusions, exclusions, qualifications
- **Drawings and specifications**
- **Flow-down clause**
- **Conflicts clause**
- **Other contract language**
 - “reasonably inferable”
 - Assumption of risk of changed/differing site conditions
 - Proceeding = acceptance of prior work and conditions
 - Resolution of disputes between subcontractors

Flow-Down Clause

- Passes (“flows”) down to the subcontractor obligations (and often rights) the Contractor owes to the Owner

Example:

“To the extent the terms of the prime agreement apply to the Subcontract Work, Subcontractor hereby assumes toward the Contractor all the same obligations, rights, duties, and redress that the Contractor assumes toward the Owner under the prime contract.”

Flow-Down Clause (cont'd)

Example:

*“The Subcontractor shall be bound to the Contractor by all terms and conditions of this Subcontract and, except as otherwise provided herein, by **all terms and conditions of the Prime Contract between the Owner and Contractor**, which is incorporated by reference into this Subcontract and is an integral part of this Subcontract. The Prime Contract includes, but is not limited to, the Agreement between the Contractor and the Owner; all general, supplementary, special conditions; all drawings, specifications, details, and standards; all addenda, modifications, and revisions to any of the foregoing; and all other documents or requirements incorporated into or referenced by the foregoing. The Subcontractor shall **assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Prime Contract, assumes toward the Owner.**”*

Conflicts Clause

- **Establishes the hierarchy, priority, and/or interpretation of subcontract terms in the event of a conflict or ambiguity in terms**

Example:

*“If there is any conflict, ambiguity or inconsistency within or between the Prime Contract, Subcontract, and/or attachment documents, or a difference in interpretation, the terms and conditions **imposing the greatest obligation on the Subcontractor** shall take precedence.”*

Conflicts Clause (cont'd)

“In the event of an ambiguity, inconsistency, or conflict in payment or other provisions between or among the Prime Contract, this Subcontract, any bond, and/or other agreement or instrument, this Subcontract shall govern. In no event shall the Subcontractor be entitled to greater rights, higher entitlements, or more relief against the Contractor than the Contractor actually obtains from the Owner on Subcontractor's behalf with respect to the Subcontract work.”

“Reasonably Inferable”

- **Clause expands the scope of work to include not only what is specifically described in the contract or shown in the drawings and specifications.**

Example:

“The Work include all items necessary for proper execution and completion and what is reasonably inferable from the Contract Documents to be necessary to produce the intended results.”

Acceptance by Proceeding with Work

- **Clause states that Subcontractor accepts terms by proceeding with work.**

Example:

- “The Subcontractor's commencement of any part of its work or responsibilities, whether at the Project site or elsewhere, shall constitute the Subcontractor's agreement to all terms and conditions of this Subcontract, without limitations or modification, and a waiver of all objections to any of the terms and conditions of this Subcontract even if a Subcontract has not been fully executed at the time such work commences, and shall further constitute the Subcontractor's acceptance of all conditions at the Project site.”

Acceptance of Conditions

- **Subcontractor acknowledges that it understands and accepts conditions affecting the work.**

Example:

“The Subcontractor certifies that it has carefully examined the Subcontract and is fully familiar with all of the terms and conditions thereof and has fully acquainted itself with job site conditions that may affect the cost or timeliness of the Subcontractor's performance, that it has made all investigations essential to a full understanding of the difficulties which may be encountered in performing the work and that it is not relying on any opinions or representations of Contractor; and, as between the parties hereto, Subcontractor will assume full and complete responsibility for all conditions relating to the work, the site and its surroundings, and all risks in connection therewith.”

Assumption of Risk (Actual Example Clause)

*“The Subcontract amount provided herein constitutes full and complete payment to the Subcontractor for all Subcontract work to be performed, for all loss or damage arising out of the nature of the work, for **any unforeseen difficulties** or obstructions which may arise or be encountered during prosecution of the work, for all risks of every description connected with the work, for **all expenses incurred by or in consequence of suspension, interference, disruption, hindrance, or discontinuation** of the work. If the Subcontractor’s work is delayed, hindered, suspended, disrupted, interfered with, rendered less efficient or more costly, or adversely affected in any way by any cause whatsoever whether such delays or hindrances are avoidable or unavoidable, anticipated or unanticipated, reasonable or unreasonable (including, but not limited to, acts or omissions of the Contractor or the Owner, the Architect or other subcontractors, by unusually severe weather, by acts of God, by unavoidable casualties, war, strikes, picketing, boycott, lockouts, or by any other reason beyond the Subcontractor's control and without fault or contribution by the Subcontractor), the **sole and exclusive remedy** of the Subcontractor shall be to receive from the Contractor an **extension of time** for each day of proven actual, excusable, and non-concurrent delay to the Subcontractor's work which, at the time of such delay, was on the Project's critical path.”*

CHANGES : CONTRACT CLAUSES

- **Changes clauses**
 - Owner-caused
 - Contractor-caused
 - Pricing
- **Claims process clauses**
- **Disputes clause(s)**
- **Changed conditions/differing site conditions clauses**
- **Other contract language**
 - “duty to proceed”
 - Recover only if contractor recovers
 - No-damage-for-delay

Duty to Proceed

- **Requires subcontractor to proceed with changed/extra work irrespective of whether there is agreement that the work is a change.**

Example:

“Subcontractor shall proceed diligently with the performance of this Subcontract, pending execution of any change order or final resolution of any request for relief, claim, action, or appeal arising or relating to the Subcontract, and shall comply with any decision of the Contractor.”

Duty to Proceed (cont'd)

“No claim, dispute, or matter in controversy or question shall interfere with the progress of construction, and the Subcontractor shall proceed diligently with performance of this Subcontract, notwithstanding the existence of any claim, dispute, or matter in controversy or question.”



Further Discussion and Q&A