

THE PERFECT STORM

Owner Concerns

navigating construction contracts in uncertain times

By Danielle Waltz and Patrick Estill



The modern contractor is no stranger to dealing with increased building costs and delays in getting project inputs to the doorstep. Construction contracting is a continuous dance of managing these risks in order to protect the schedule and the bottom line. But with the lingering COVID-19 pandemic, continued supply chain issues, and labor shortages coupled with inflation and geopolitical uncertainties, contractors may have a “perfect storm” of such risks. While there is no reason to panic, there is cause for caution, good planning, and attention to detail in reviewing, negotiating, and drafting contract language to guide contractors through rough waters. This article outlines issues in contract negotiations and strategies to help contractors meet such owner concerns.

OVERLY BROAD SCOPE

Overly broad scope provisions can have dire consequences requiring strategies to manage this risk. First, start with clear assumptions and exclusions in your bid documents. While you should negotiate revisions to the construction contract, keep in mind that contractors already control the bid or proposal documents. Get those right on scope so there are no questions on what’s included in the “work.”

Second, follow through by incorporating the bid documents as part of the “contract documents,” which will be defined somewhere in the contract. The bid or proposal documents, should be listed and attached so there’s no question that they are part of the deal. The contract should say that these documents are “incorporated by reference.” If the owner will not agree, be sure to include the relevant parts that define or limit scope.

Third, many industry-standard form documents (e.g., American Institute of Architects (AIA)) have blank spaces for filling in assumptions or exclusions. Don’t let these spaces go to waste. Instead, reference your bid documents or note other assumptions (e.g., that the contract sum is based on market pricing at the time of your bid, which may fluctuate given market conditions).

UNFAIR CHANGE PROVISIONS

Owners must protect their investment in the project, and proper change provisions are an important way they can do so and prevent surprises. But when change order requirements are too onerous to be followed or penalize the contractor, it may be time to push back.

First, be wary of “waiver” language. Provisions may say that if the

contractor fails to follow the claims notice provisions, the claim is waived. Such waivers will be in enforced in many jurisdictions. So, try and get “waiver” or similar language removed. If unsuccessful, clarify that a waiver will only result if the owner can show material prejudice or harm.

Second, ask for reasonable time to submit change requests or claims. Make it clear that notice is not required until the contractor understands the need for submitting the change. Additionally, ask for more time to document the claim.

Third, consider clarifying that email correspondence satisfies notice requirements. Many contracts have “notice” provisions requiring formal notices to be given by other methods. Yet, if the owner is kept informed via normal channels of communication, there is no reason why this should not constitute notice of claims.

Fourth, once you have negotiated a reasonable claims process, follow it. Document everything and communicate in writing. Recognize that having things in writing could prove invaluable in defending a claim.

FORCE MAJEURE

Force majeure provisions will remain a topic of conversation. However, despite

our perfect storm of external forces on contracts in past years, owners may still be resistant to allow delays or additional costs.

First, remember that contractors are entitled to additional time for delays that are not foreseeable or within their control. Excusable delay provisions should be broad enough to cover those delays. When such provisions are modified, beware of restrictive terms that cut off rights to extend the schedule based on anything related to the pandemic (even if not foreseeable or within your control).

Second, push for compensation where reasonable, industry standard, or required by law. For example, delay attributable to owner should be compensable. If an owner takes an extreme position on these issues, find out why and be prepared to discuss these questions.

Third, if owners will not budge on compensation when delay is outside the contractor's control, insist on a materials escalation clause. Make the case that such a clause is reasonable given supply issues; also consider addressing tariffs, embargoes, or similar changes in law or import/export costs. Make the clause fair and reasonable, and be careful with overreaching. Note that one industry-standard form (ConsensusDocs) has adopted a "model" materials escalation addendum.



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CLOSING THOUGHT

The above is not a comprehensive list of the many issues that can arise in addressing project risk through contract negotiations and drafting, nor does it account for the unique business concerns of every project. There is no substitute for the advice of professional. However, this article should leave contractors better equipped to spot some of the issues, ask the right questions, and chart the right course for construction contracting in uncertain times. ■

about the authors

Danielle M. Waltz is a commercial and construction litigator and government relations specialist in Jackson Kelly PLLC's Charleston, West Virginia, office, where she is a member. She represents a variety of construction clients. She is a member of the International Association of Defense Counsel (IADC) and is active in its Construction Law and Litigation Group. She can be reached at dwaltz@jacksonkelly.com.

Patrick F. Estill is a construction lawyer in Jackson Kelly PLLC's Lexington, Kentucky, office, where he is a member. He focuses on construction transactions; drafting and negotiating contracts and other project-related documents for owners, contractors, and consultants; and advising on risk-allocation in projects. He also has extensive experience in construction litigation and procurement matters. He can be reached at pestill@jacksonkelly.com.

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