

Construction Contracts - Important Provisions – Owner’s and Contractor’s Perspectives

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I. Owner's Overview

- **Current economic climate**
- **Aggressive attitude of Owner counsel**
- **Assumption of additional risks and liabilities by Contractors and Subcontractors**
- **RFP's and Project Manuals may contain “troublesome” Owner-oriented provisions**
- **List of approved subcontractors**
- **Satisfy Equity Partners/Mezzanine Lenders**
- **Satisfy Lender Requirements**

II. Contractor's Overview

- **Contractor's perception of current economic climate and evaluation of work – growth model**
- **Assumption of additional risks and liabilities by Owner and by Subcontractors for more even allocation of risks and liabilities and cooperation**
- **Contractor's concern over Subcontractor performance**
- **Contractor's use of Clarifications and Assumptions to impact business and legal terms of Contract**
- **Review of Lender Requirements as soon as possible**
- **Modification of ConsensusDocs, AIA documents and manuscript contracts to provide maximum leverage to Contractors**

III. Negotiation Strategies

- **Goal**: a contract that clearly expresses the parties' intentions – their obligations and responsibilities, and their respective rights
- **Focus on success**:
 - reasonable and realistic expectations and achievable requirements
 - incentives for collaboration and performance

- **Understanding of consequences of failure:**
 - **Potential risks and benefits of the critical clauses**
 - **Foster cooperation between the parties to share the risks and benefits**
- **Result: a balanced, fair contract setting the stage for a mutually beneficial relationship between the parties to realize a successful project – partners vs adversaries**

IV. List of Troublesome Contract Clauses

1. **Description of Work Under Contract Documents - Document Hierarchy**
2. **Site Conditions**
3. **Change Orders**
4. **Liquidated Damages**
5. **Consequential Damages, Waivers & Limitations on Liability**
6. **Owner's Right to Withhold Payment for Defects & Defaults**
7. **No Damages for Delay (Delay Claims)**
8. **Indemnification**

KEY Contract Issues – Con't.

9. Termination for Convenience and Cause
10. Warranty
11. Dispute Resolution
12. Notice Requirements
13. Design Responsibility of Contractor
14. Subcontractors
15. Cost Issues
16. Lender Requirements

1. DESCRIPTION OF WORK UNDER CONTRACT DOCUMENTS AND MEANING OF REASONABLY INFERABLE

Owner's Position

- Intended that the Contract Documents 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”
- List/attach key documents – Leases, MWBE requirements
- Contract Documents should provide a comprehensive description of the Work to be performed by Contractor by reference to incorporation of the Drawings and Specifications as well as by referring to the Contractor’s qualifications or clarifications
- Include provisions in Specifications or General Conditions for resolving discrepancies pertaining to Drawings and Specifications or dimensions – see hierarchy in Owner’s Appendix

1. DESCRIPTION OF WORK UNDER CONTRACT DOCUMENTS AND MEANING OF REASONABLY INFERABLE

Owner's Position

- **Contractor's obligation to confirm benchmarks and physical characteristics of the site and to report discrepancies to Owner/Architect for adjustment before beginning Work**
- **Definition of reasonably inferable--Non-material additional costs or material additional costs; additional design required versus minor submittals; material versus minor changes in sequencing and scheduling**

1. DESCRIPTION OF WORK UNDER CONTRACT DOCUMENTS AND MEANING OF REASONABLY INFERABLE

Contractor's Position

- **Delete “intended results” – the Contractor is only obligated to perform the Work identified in the Contract Documents. Change to “indicated results”**
- **Specifically incorporate Assumptions and Clarifications into Contract Documents – they should supersede all other terms in the Contract, except Modifications and Change Orders**
- **Specify hierarchy / precedence of Contract Documents for control of Work**

1. DESCRIPTION OF WORK UNDER CONTRACT DOCUMENTS AND MEANING OF REASONABLY INFERABLE

Contractor's Position

- **NOT “Reasonably Inferable” – look at the materiality of the change**
 - **If omitted from the Plans and Specifications, and the omission results in a material additional cost**
 - **If any additional design work is required**
 - **If any Submittal is required and such Submittal was not specified in the required Submittals**
 - **If the work requires material changes to sequencing or scheduling**
 - **Dollar cap of \$1,500 per item, \$25,000 in the aggregate**

1. DESCRIPTION OF WORK UNDER CONTRACT DOCUMENTS AND MEANING OF REASONABLY INFERABLE

Compromise Solution

- **Comprehensive description of work – list/attach key documents**
- **Reasonably inferable for indicated results with materiality standard**
- **Hierarchy of documents**
- **Clarifications/Qualifications – incorporation into Contract Documents to extent possible**

2. SITE CONDITIONS

Owner's Position

- **Contractor's obligation to study and compare Contract Documents**
- **Contractor's obligation to take field measurements and verify field conditions**
- **Contractor's obligation to review soils and other geotechnical tests, as well as any other documents delivered by Owner, without warranty from Owner**

Owner's Position

- **Contractor assumes full responsibility for site conditions including any concealed conditions, and Contractor is provided with a contingency to assume such risk**
- **Obligation for Contractor to review Contract Documents prior to performing each portion of the Work and if Contractor performs Work in conformity with any Contract Documents knowing it to be inconsistent with another Contract Document, without obtaining approval from Owner, Contractor will be responsible for correcting Work, at Contractor's expense**

2. CONTRACTOR'S RESPONSIBILITY FOR SITE CONDITIONS

Contractor's Position *Example of a Killer Clause*

- *Contractor represents that it has inspected the Project Site and has satisfied itself as to the condition thereof and that the Guaranteed Maximum Price is sufficient to cover all the Work, including all foreseen and unforeseen risks, hazards, and difficulties in connection therewith, including without limitation, any concealed or subsurface conditions at variance with the conditions indicated by the Contract Documents or other documents furnished Contractor for its information.*
- The problems with this clause from Contractor's standpoint are underlined.

2. CONTRACTOR'S RESPONSIBILITY FOR SITE CONDITIONS

Contractor's Position

- Contractor does not assume any risk for concealed or subsurface conditions – visual observation of site is sufficient
- Contractor shall report any errors / omissions discovered – actual knowledge should be the benchmark
- Contractor is not required to perform any additional testing
- Contractor has right to rely on information from the Owner. If the Owner's information is wrong, for any reason (including negligence of testing or reporting party), or is incomplete or omits any material information, Contractor shall be entitled to a Change Order for all costs resulting from change to Work, and for additional Contract Time

2. CONTRACTOR'S RESPONSIBILITY FOR SITE CONDITIONS

Compromise Solution

- Contractor obligated to study and compare Contract Documents
- Contractor's duty to report observed errors/omissions in tests and reports
- Contractor bound by visual observations
- Additional Contractor responsibility by express agreement

3. CHANGE ORDERS

Owner's Position

- **If no agreement on cost of change order, Contractor must still perform pursuant to Construction Change Directive with price to be determined pursuant to a formula**
- **Agreement on any change order to be a final settlement of all matters related to the change order**
- **Certain minor changes involving materials, color, manufacturer, dimension or other questions require Owner approval**
- **No course of conduct or dealing or implied acceptance of changes shall result in a change order**

3. CHANGE ORDERS

Contractor's Position

- **Major changes v. minor changes: limitation on Construction Change Directive work that the Contractor is expected to fund out-of-pocket until the parties reach agreement on the price of the Change Order**
- **For Change Orders over a certain percentage value of the Contract Sum (e.g. 25%), there should be special provisions**
 - **Additive changes over 25% - cardinal change to the Contract**
 - **Deductive changes over 25% - Contractor still receives overhead and profit despite reduced Scope of Work**

3. CHANGE ORDERS

Contractor's Position

- **Where the Owner is a public entity, and authorization for the Change Order is not guaranteed until given at a public meeting, the Contractor should not be obligated to perform any work until the Change Order is approved by the Owner**
 - **The doctrine of Sovereign Immunity comes into play here**
 - **Negotiate for the Contract to expressly grant identified representatives of the Owner authority to authorize Change Orders up to a threshold amount in order to avoid delays or sequencing problems**

3. CHANGE ORDERS

Contractor's Position

- **Reservation of rights to seek increase in Contract Time and additional compensation for General Conditions, Home Office Overhead and Profit**
- **Actual effect on Contract Time/Cost often cannot be evaluated within timeframe for submitting documentation for Change Order**

3. CHANGE ORDERS

Compromise Solution

- **Owner has right to require changes before agreement on price**
- **Owner should pay Owner's approved amount pending final agreement or some minimum cost of the proposed change**
- **Contractor's limited reservation of rights for up to 90 days to determine actual effect on Contract Time/Cost**

4. LIQUIDATED DAMAGES

Owner's Position

- **Liquidated damages generally include a per day amount, with or without, grace period and per day amount may increase after 30/60 days – interim milestones / substantial completion / phases – no cap on liquidated damages amount**
- **If delay exceeds specified number of days, right to seek additional damages may include a not to exceed amount**
- **LEED liquidated damages permit use of up to 50% of contingency by Contractor, but payment of \$200,000 per insufficient LEED point, plus the cost of corrections necessary to cause work to comply with LEED requirements**
- **If liquidated damages not enforceable, then actual delay damages including lost profits**
- **Sole remedy for money damages – does not preclude other rights for delay, such as acceleration and termination**

4. LIQUIDATED DAMAGES

Contractor's Position

- **Liquidated damages must be negotiated**
 - Can be tied into the value of the Contract overall
 - Can be phased
 - Provides risk control for both parties
 - Should expressly cover all direct and indirect damages
 - Partial occupancy reduction of units/square footage of non-leasable space, such as common areas
 - Cap on liquidated damages equal to Contractor's Fee (or some portion of fee)
- **Owner's right to liquidated damages waived by failure to grant reasonable request for Contract Time extension**
- **No LEED liquidated damages**
 - Generally LEED compliance is not within the control of the Contractor
 - Cap on liquidated damages equal to Contractor's Fee
- **Incentive / Bonus clause for early completion**

4. LIQUIDATED DAMAGES

Compromise Solution

- Amount of liquidated damages and trigger well-defined
- Subject to adjustments of the Contract Time
- Cap on liquidated damages
- Default to actual / consequential damages if long delay
- Bonus for early completion – ceiling on bonus

5. CONSEQUENTIAL DAMAGES & LIMITS ON LIABILITY

Owner's Position

- **Delete mutual waiver of consequential damages/one-way street for Owner**
- **Carve-out from mutual waiver to cover additional construction interest/financing costs, lost rental income, lost tax credits and abatements, among other increased costs, constitute actual damages, not consequential damages**
- **Owner should not agree to limit liability of Contractor unless amount is substantial (for example 3 or 4 times the Contractor's fee)**
- **There should be exceptions to limitation of liability for fraud, violation of law, intentional misconduct, failure to maintain required insurance or failure to pay Subcontractors and suppliers (following receipt of payment from Owner)**

5. CONSEQUENTIAL DAMAGES

Contractor's Position

- Mutual waiver of consequential damages is critical to Contractor
- If unavoidable:
 - Specify types of consequential damages that are NOT waived
 - Specify pricing / methodology
 - Limitation on exposure to consequential damages
 - Key: manage the risk
 - Check law
 - Limitation of liability must be reasonable – each party should bear appropriate risk
 - Waivers should be written

5. CONSEQUENTIAL DAMAGES

Compromise Solution

- **Mutual waiver of consequential damages with or without limited carve-outs**
- **No limitations of liability – bonds and insurance can cover some of the risks**

6. OWNER'S RIGHT TO WITHHOLD FOR DEFECTS AND DEFAULTS

Owner's Position

- **Unnecessary for Architect to approve withholding payment from Contractor, as required by ConsensusDocs & AIA**
- **Not only right to withhold based on non-conforming or defective work or failure of payment, but right to withhold for potential failure to satisfy GMP or Substantial Completion date – anticipatory breach where required performance is either extremely unlikely or impossible.**
- **No right of Contractor to suspend performance if withholding permitted by Contract**

6. OWNER'S RIGHT TO WITHHOLD FOR DEFECTS AND DEFAULTS

Contractor's Position

- This is what retainage is for – to secure performance
- Any additional amount withheld must be specified in writing
- Only the amount in dispute can be withheld
- All non-disputed amounts must be paid on a timely basis
- No withholding for “anticipatory” breach – “potential” failure to satisfy GMP or meet completion date

6. OWNER'S RIGHT TO WITHHOLD FOR DEFECTS AND DEFAULTS

Compromise Solution

- No need for Architect's approval to withhold
- Release amount withheld as soon as conditions satisfied
- Continued performance required by Contractor unless withholding is wrongful beyond notice and cure period

7. NO DAMAGES FOR DELAY CLAIMS

Owner's Position

- **Limit delay claims to time extension**
- **If not limited to time extension, then limit to direct costs and increased general conditions costs**
- **Limit adverse weather conditions as a basis for a claim for additional time based upon what is truly abnormal for a time period and must adversely affect critical path of construction**
- **Limit time period to twenty-one (21) days by which Contractor must file an extension in the Contract Time or right to seek extension for that occurrence is waived**
- **Requirement of Contractor to take Extraordinary Measures if behind schedule at no additional expense – with requirement of schedule recovery within 30 days**

7. NO DAMAGES FOR DELAY CLAIMS

Contractor's Position

- Mutual waiver of consequential damages
- Delay is not the same as acceleration, disruption, loss of efficiency, or changed conditions – these are compensable events
- Avoid or limit obligation to take Extraordinary Measures without compensation – schedule recovery must be practicable – “schedule compression” as an alternative
- Define “delay”
- Define potential damages
- Identify decision maker – third party such as Architect?
- Specify Notice requirements

7. NO DAMAGES FOR DELAY CLAIMS

Contractor's Position

- **State law prohibitions / restrictions on “no damages for delay” clauses**
- **Notice requirements are critical here – delay may not arise until some time after the expiration of Owner’s notice and cure period**
 - **Claim only barred if Owner can show actual prejudice**
 - **Claim permitted if Owner had actual or constructive notice**
 - **Alternative: phased notice**
 - (1) notice of claim for delay
 - (2) quantified, supported claim for delay damages and time extension

7. NO DAMAGES FOR DELAY CLAIMS

Contractor's Position

- **Avoid “no damages for delay” clauses**
- **If unavoidable, then....**
 - **Specify / narrow down the types of delay for which no damages will be permitted, eliminating “unforeseen delays”**
 - **Exclude delays not caused by Contractor**
 - **Exclude delays caused by omissions, errors, incorrect or incomplete information / design documents / reports etc.**
 - **Exclude delays caused by active interference of Owner or Architect / Engineer**
 - **Account for risk associated with binding “no damages for delay” clause in Contract Sum**

7. NO DAMAGES FOR DELAY CLAIMS

Compromise Solution

- **No damages for delay clause unless delay caused by Owner, Architect and others acting under Owner**
- **Timely notice or waiver – perhaps prejudice by failure of timely notice**
- **Delays vs. other compensable events causing delay**
- **Extraordinary Measure obligation of Contractor to catch-up with the schedule – compensable/non-compensable circumstances – right of Contractor to compress schedule**

8. INDEMNIFICATION

Owner's Position

- **Broad definition of Claims covered by indemnity obligation, including Contractor's default, violation of laws, negligent acts or omissions including Indemnified Party's concurrent negligence, but not sole negligence or willful misconduct of Indemnified Party**
- **Obligation to defend**
- **Need to outline detailed procedure for Contractor's defense of claims, with right of Contractor to settle claims involving no liability of Indemnified Parties or right to settle if liability is with Indemnified Parties' consent**
- **Consider limitations or special requirements under applicable state's law re: indemnification as to enforceability**
- **Indemnification obligation should survive termination and completion of Project**

8. INDEMNIFICATION

Contractor's Position

- **Contractor should indemnify Owner only for Contractor's negligence**
 - **Contractor should NOT indemnify Architect or design professionals – only indemnify those with whom Contractor has a contract and for which Contractor's insurance will cover loss**
 - **Only indemnify to extent of Contractor's percentage of fault**
 - **Establish right to defend, but not duty to defend**
 - **Confirm local laws on indemnification – e.g. Fla. Stat. 725.06 requires specific consideration for indemnification in construction contracts**

8. INDEMNIFICATION BY CONTRACTOR

Compromise Solution

- **Scope of indemnity beyond negligent acts or omissions**
- **Comparative negligence – legal trend**
- **Obligation to defend / procedure for defense of claims and settlement**
- **No indemnity against other party's negligence except for Contractor's and Subcontractors' employee's claims**

9. TERMINATION FOR CONVENIENCE

Owner's Position

- **Right to terminate for convenience at any time on seventy-two (72) hours or less written notice – cooling off period**
- **Establish step-by-step procedure for stopping work and easing transition to successor Contractor**
- **Provided certain conditions are satisfied, payment for all work done to date but no profit or overhead on unperformed work**
- **Assumption of obligations under Contractor's subcontracts and purchase orders and indemnity of Contractor against claims**
- **Continued liability of Contractor under warranty for work performed prior to termination as long as Owner can demonstrate Contractor caused the problem – assignment of warranties for post-termination warranty work**

9. TERMINATION FOR CONVENIENCE

Contractor's Position

- **Written notice at least five (5) business days in advance**
- **Payment in full for all Work in place AND payment for all profit and overhead on unperformed Work**
 - **Contractor should not take risk that Owner will arbitrarily and capriciously terminate Contractor without some reward for that risk**
- **No further obligations on part of Contractor – terminates all warranties etc.**
 - **Contractor should not be liable when it no longer has control over ability to protect and/or maintain work-in-place / materials / equipment / systems**

Compromise Solution

- **Right To Terminate on 72 hours notice**
- **Step-by-step procedure re: Contractor's stoppage/protection of existing Work and Owner's continuation with and without existing Subcontractors and suppliers**
- **If any payment for unearned profit, limit to 10-20% of unearned profit**
- **Payment procedure – lien releases**
- **Limit continuing liability of Contractor**

9. TERMINATION FOR CAUSE

The Owner's Position

- Enumerated list of Contractor defaults with reasonable notice and cure
- Right to terminate contract, stop work or perform work on behalf of Contractor
- If terminated for cause, no additional payment until completion
- Bankruptcy issue / adequate assurances

The Contractor's Position

- **Limit to materiality standard with adequate notice and cure opportunity**
- **Contractor's right to declare default and terminate for failure to pay and other enumerated events of default or events beyond control of either party**
- **Contractor's right to suspend work**
- **Contractor's right to recover for work performed,
Contractor's fee earned as to date of termination and
Contractor's fee as to the value of work not executed**
- **Contractor's lien rights**

Compromise Solution

- Reasonable notice and opportunity to cure
- Owner's right to exercise contractual remedies following Contractor's failure to cure default, no further payment until completion
- Contractor's right to exercise contractual remedies following Owner's failure to cure default, including seeking specified damages and filing a lien
- Triggering of dispute resolution procedures – effect on termination right

10. WARRANTY

Owner's Position

- **Assignment of various warranties from Contractor to Owner**
- **Specific procedures for Contractor's performance of warranty repairs within specific time periods and Owner's right to perform warranty work**
- **Right to extend one year warranty with respect to items repaired during the warranty period**
- **Right to accept defective or nonconforming work and obtain reduction from Contract Sum**

10. WARRANTY

Contractor's Position

- **No extended warranty for warranty repairs – do not warrant indefinitely**
- **Specify the warranties in the Contract Documents – express warranties only**
- **Limit to one (1) year warranty after Substantial Completion**
- **Only provide to Owner warranties provided by Subcontractors / Manufacturers – nothing more**
- **Check on statutory warranties and local laws regarding implied warranties**

10. WARRANTY

Compromise Solution

- **Assignment of warranties to Owner, particularly after initial warranty period**
- **Specific procedures for Contractor's performance of warranty obligations**
- **Limited right to extend one-year warranty for repeated warranty repairs within first year, not to exceed 18-24 months and Owner's right to accept defective or non-conforming work with credit against Contract Sum/GMP**

11. DISPUTE RESOLUTION

Owner's Position

- **Most Owners currently favor litigation over arbitration**
- **Establish a procedure for executives of all relevant parties to meet to try to resolve the dispute prior to mediation**
 - **Emphasize regular communications to develop trust / relationship**
 - **Choose the right persons**
 - **Face-saving plays a role**
- **If arbitration is an alternative, Owner will want unilateral right to approve arbitration or be able to exclude arbitration if the amount in controversy exceeds a substantial sum**
- **Continued performance by Contractor and Owner on undisputed matters**

11. DISPUTE RESOLUTION

Owner's Position

- **If agreeing to arbitration, establish additional protections or limits on cost:**
 - **No punitive or exemplary damages**
 - **Qualifications and number of arbitrators (limit to 1 if amount in controversy under a set amount)**
 - **Be specific about discovery limitations**
 - **Be specific about what issues Owner is agreeing to arbitrate and who decides whether a dispute is subject to arbitration (arbitrator or court)**

11. DISPUTE RESOLUTION

Contractor's Position

- **Alternate dispute resolution mechanisms**
 - **Specify the agreement in the Contract**
 - **Mediation prior to Arbitration / Litigation**
 - **Litigation v. Arbitration**
 - **Large projects: Dispute Review Board with regularly scheduled meetings**
 - **Consider Courts' Complex Case Division**
- **Contractors generally favor arbitration with 3-arbitrator panel over state court litigation**

11. DISPUTE RESOLUTION

Contractor's Position

- Evaluate cost, time and appeal options
- Evaluate informality and confidentiality issues
 - Disclosure of trade secrets
 - Disclosure of bidding strategy
- Evaluate legal issues
 - Rules of evidence
 - Availability of summary judgment or other dispositive motions
- Waiver of jury trial
 - Typically favorable where seeking enforcement of contract provisions

11. DISPUTE RESOLUTION

Contractor's Position

- **Parties should agree to mediate / arbitrate / litigate at time of Contract**
 - **No “discretion” for Owner**
 - **Specify what will / will NOT be arbitrated**
 - **Identify third parties who can/must be joined in arbitration or mediation proceedings**
 - **Coordinate consistent contract provisions throughout Project Documents**
- **Reasonable time limitations for submission and for resolution of claims**
 - **consistency is important**
- **Continued performance during pendency of dispute but subject to \$200,000 - \$500,000 cap depending upon contract amount**

11. DISPUTE RESOLUTION

Compromise Solution

- **Dispute resolution board with regular meetings**
- **Escalation to designated executives before mediation**
- **Mediation before litigation / arbitration**
- **Insure consistent litigation / arbitration provisions between contract and subcontracts**
- **Continued performance during pendency of dispute subject to reasonable cap on disputed items – not to exceed \$500,000**

12. NOTICE REQUIREMENTS

Owner's Position

- **Mutual notice and cure opportunity – 7-10 days before basic default**
- **Notice of extension of Contract Time within 7-15 days, instead of 20+ days offered by form contracts**
- **Owner often requires notice of certain claims to be delivered within 3-5 days for Contractor to preserve right to assert claim (i.e., concealed conditions, Owner interference or damage caused by Owner's separate contractor)**

12. NOTICE REQUIREMENTS

Contractor's Position

- **Emphasis on communication**
- **Consistency within Contract for notices for various events / claims, and specify business days**
- **Default:**
 - **Notice and opportunity to cure**
 - **Second notice**
- **Change Order / Delay Claim**
 - **Notice of claim**
 - **Submission of quantified and documented claim**
- **Response / decision times should be defined**

12. NOTICE REQUIREMENTS

Compromise Solution

- **Mutual notice and cure opportunity – 7 days before exercise of remedies**
- **Notice of extension of contract time within 20+ days, except for concealed conditions, Owner interference or damage caused by Owner's separate contractor within 5 days**
- **Define response / decision times based on specific circumstances – change orders, delayed plans...**

13. DESIGN RESPONSIBILITY

Owner's Position

- **Who should bear the risk of any inaccuracies or omissions in the drawings and specifications?**
- **Contractors know that no set of plans and specifications is perfect**
- **Contractor should have obligation to carefully review drawings and specifications and report any discovered errors, inconsistencies or omissions to Architect and Owner without delay. Owners may argue for attribution to Contractor of constructive knowledge of a defect that a reasonable and prudent Contractor would have caught**

Owner's Position

- **Compulsory disclosure of any conflicts or ambiguities of which Contractor has actual knowledge guards against gamesmanship in bidding process**
- **If Contractor performs work in conformity with any contract document knowing it to be inconsistent with any other contract document or not in compliance with laws and codes, without requesting and obtaining instructions from Owner, Contractor are obligated to correct work, at Owner's direction, without cost to the Owner**
- **Same obligation to notify Owner and Architect without delay upon discovery of problems in the drawings and specifications or compliance with laws**
- **Design-Build Obligations – Third party beneficiary rights and assignment rights; professional liability insurance**

13. DESIGN RESPONSIBILITY

Contractor's Position

- **Key provisions**
 - **Shop drawings**
 - **Submittals**
 - **Specifications**
 - **Review of Contract Documents for inconsistencies, deficiencies etc.**
- **Typically, Contractor is NOT a design professional and has no license or design errors and omissions insurance, except for design-build responsibility**

13. DESIGN RESPONSIBILITY

Contractor's Position

- **Contractor is not providing warranty for design documents**
- **Contractor should not agree to “review and approve” design documents, including shop drawings and submittals – too much risk of exposure**
- **Contractor’s actual knowledge of defect, deficiency or omission in design documents should be the criteria for assuming any risk associated with the design**

13. DESIGN RESPONSIBILITY

Compromise Solution

- **Contractor's obligation to carefully review drawings and specifications and report errors**
- **Contractor's liability for performing work knowing it to be inconsistent with other documents or not in compliance with laws or codes**
- **Specify Contractor's responsibility with respect to various types of drawings and submittals, such as shop drawings, submittals, specifications...**
- **Contractor's actual knowledge of a defect, deficiency or omission should be the standard**

14. SUBCONTRACTORS

Owner's Position

- Approval of certain Subcontractors with right to approve substitutes
- Right to require removal of Subcontractor performing deficient work – obligation of Owner to pay increased cost of replacement if Contractor not in default
- Approval of form of subcontract
- Right to review the subcontracts on cost plus projects
- Subcontracts required to contain time limit clause, waiver of subrogation provisions, insurance provisions, indemnity provisions, confidentiality, third-party beneficiary, lien waiver and termination for convenience provisions

14. SUBCONTRACTORS

Contractor's Position

- **Good faith efforts to cause Subcontractors to execute specific contract form**
- **No right of Owner to review subcontracts unless Construction Contract is a cost plus contract**
- **Limit Owner's right to act under subcontract until termination of general contract or default by Contractor**
- **Limit Owner's right to interface or direct communications with Subcontractor prior to a Contractor default or termination of Contract**

14. SUBCONTRACTORS

Compromise Solution

- **Owner's approval of list of subcontractors with limited right to approve replacement**
- **Third-party beneficiary rights limited to being exercised following default or termination of Contractor**
- **Express waiver of subrogation and insurance requirements with Owner as additional insured**

15. COST ISSUES

Owner's Position

- **Definition of Cost of the Work – costs necessarily incurred at standard rates of actual costs or fixed costs or some combination**
- **Contractor's General Conditions Cost – actual or fixed – have audit specialist verify fixed amounts**
- **Contractor's Fee – Is it really the stated percentage or higher? Based on costs containing add-on factor percentages**
- **Not to exceed amounts for equipment rentals (75% of market rates) or rentals chargeable for Contractor-owned equipment (not to exceed 75% of purchase price of equipment)**
- **Minimum number of bids with respect to subcontracts and related parties**
- **What Costs are subject to audit? Actual vs. fixed costs and determination of rates, multiplier and amounts with respect to fixed costs, but not composition of fixed cost items**
- **No double-dipping by Contractor**

15. COST ISSUES

Owner's Position (cont'd.)

- **Costs not to be reimbursed**
 - **Contractor's principal office costs and certain overhead and general expenses**
 - **Any cost not specifically and expressly described as a Cost of the Work**
 - **Costs and expenses arising from Contractor's indemnity obligations**
 - **Certain costs relating to correction of defective Work**
 - **Costs that could be prevented through Contractor's timely notice to Owner of an unsafe or other condition**

15. COST ISSUES

Contractor's Position

- **Contractor's General Conditions Costs – stipulated amounts**
- **Contractor's Contingency – total control by Contractor over contingency and no amounts have been included for unforeseen conditions, Owner-initiated changes, scope changes or design changes**
- **Contractor's share of savings – 20-30%**
- **Buy-out savings achieved through negotiation of the subcontracts is for the use of the Contractor prior to determination of savings**
- **Exclusions from GMP**
 - **Specify any excluded insurance**
 - **Exclude city, county or other municipal fees and permit costs**
 - **Construction material testing**
 - **Compliance inspections regarding local and state requirements, such as ADA or LEED requirements**
 - **Code compliance modifications not known to Contractor at time of bid**

15. COST ISSUES

Compromise Solution

- Agreement on fixed costs, multiplier and effect on Change Orders
- No double-dipping, particularly with respect to General Conditions Costs
- Contractor's Fee – agreement on costs subject to the fee
- Contractor's Contingency – Owner's reasonable approval, not useable for costs not to be reimbursed and unused portion returned to Owner at 50-75% completion of Project
- Agreement on additional costs not to be reimbursed and exclusions from GMP (clarifications and assumptions)

16. LENDER REQUIREMENTS

Owner's Position

- **Contractor subordination of liens to Lender**
- **Representations and warranties of Contractor regarding construction contract, GMP, no default and building permits**
- **Collateral assignment/consent to assignment to Lender**
- **Notice to Lender by Contractor of Borrower's default**
- **Lender's right to cure default under construction contract**
- **Lender's obligations for future payments (but not prior draws) following notice to Contractor of assumption of Borrower's position under the construction contract**

16. LENDER REQUIREMENTS

Contractor's Position

- **Contractor's right to terminate construction contract following 10-day notice and cure to Lender and Borrower**
- **Lender's obligations to Contractor for all past due payments, as well as retainage and future payments, if Lender assumes Borrower's obligations under the Construction Contract**

16. LENDER REQUIREMENTS

Compromise Solution*

- **Direct advances to Contractor by Lender**
- **Lender's obligation for past due payments and retainage if no loan proceeds advanced for such obligation and Lender elects to move forward with the construction contract**
- **Lender must decide whether to move forward with remedies under the Loan or assume construction contract within not more than 30 days following notice of default from Contractor to Lender, in which event, Lender assumes payment/performance obligations accruing after election notice to continue with the project**

* A heavily negotiated pro-Contractor Consent is also attached to the Appendix