



CONSTRUCTION
COMMERCIAL REAL ESTATE
CORPORATE
EMPLOYMENT
BANKRUPTCY

Killer Contract Clauses

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Liability Considerations

- Design Defects
- Concealed Conditions
- Schedule
- Insurance
- Payment Terms



The architect says, "Coordination of details will be done on the shop drawings."

Design Defects

- Unless otherwise stated, Contractor takes responsibility for sufficiency of design
- Limit liability by exclusions
 - No liability for sufficiency of design
 - Only responsible to call to attention of owner known design defects.

Concealed Conditions

- Typical language says:
 - Contractor has visited the site and assured itself that conditions are sufficient for construction
 - Waiver of responsibility for accuracy of owner supplied information.
- This language makes contractor generally responsible for concealed conditions

Concealed Conditions

(cont'd)

- Changes you can make:
 - Only responsible for items actually noted as a result of visual observations
 - No independent testing required
 - Entitled to rely on owner supplied information
 - Assuming owner disclosed all known adverse conditions



The schedule shows the final carpet is installed before the roofing subcontractor gets to the job site.

off the mark.com

by Mark Parisi



The contractor asks you how to spell "CPM."

Schedule

- Generally includes no damage for delay
- Extension of time is sole remedy for delay
- Daily rate for liquidated damages
- Need agreed upon schedule, with input from major subcontractors
- Need copies of schedules
- Need compensation for material or unreasonable schedule changes
- Need corresponding agreed to rate for contractor's daily overhead.



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SCHEDULING MUST DO'S

1. SUBMIT YOUR OWN SCHEDULE TO THE CM EARLY ON. MANY SUBCONTRACTS REQUIRE IT.
 - This allows you to establish sequences and durations more favorable to you.
 - This informs the CM what he needs to get done for you, and when.
 - You also inform the CM of your interpretation of the Contract Time.
(Project Story)
2. UPDATE YOUR SCHEDULE PERIODICALLY TO ENSURE YOU ARE FULFILLING YOUR CONTRACT REQUIREMENTS TO THE EXTENT POSSIBLE.
3. AFTER THE PROJECT HAS STARTED, REQUEST AN ELECTRONIC COPY OF THE CM'S SCHEDULE.

Suggested Contract Language

- Our work is necessarily dependent upon the timely completion of predecessor and concurrent activities of both the general contractor as well as the other subcontractors. We reserve the right to request additional time and/or additional compensation for delays, acceleration and/or inefficiencies caused or contributed to by parties other than us.
- We shall only reimburse for direct damages that result from delays solely caused by or attributable to us. Also, need a waiver of consequential, lost profits and loss of use damages.

Indemnity

- Understand whether your project is public or private
- Understand whether your project is covered by an OCIP.
- If private and not OCIP, then Insurance Code 151 applies.
- Limits indemnity for non-employee injuries to what you cause.
- Always ask for a cap on liability
- If possible, tie cap to your insurance coverage

Insurance

- Insurance requirements:
 - Review them with your broker prior to bid
 - Know what you are buying
 - “Unmodified ISO CG 00 01 07 98 or its equivalent”
 - Need to be wary of OCIP’s.
 - Limitations on cross-claims
 - Who’s responsible for deductibles?
 - Little or no control of claim administration
 - Need copies of insurance policies, not certificates

Payment Terms

- On Texas projects (not federal), you are entitled to be paid within 30-35 days.
- The prompt pay act says:
 - For private projects, payment must be made to a contractor on or before the 35th day after the date “the owner receives” “a written payment request”.
 - For public projects, payment must be made on or before the 30th day.
- These laws cannot be waived by contract and a governmental body cannot alter the timeline.

Payment Terms

- For private projects, the interest is 1.5% per month.
- For public projects, the interest is 4.25% per year.
- Both of these statutes also provide the right to suspend work for late payments with 10 days written notice.
- Both of these laws give contractors the right to recover their attorney's fees in connection with a claim for recovering interest on late payments.
- The owner does have the right to withhold payment for a "good-faith dispute" relating to the goods or services performed; however, the owner can only withhold an amount sufficient to cover the items in dispute.

Payment Terms

- For subs on private projects, payments must be made within 7 days of the GC's receipt of payment;
- For subs on public projects, payments must be made within 10 days of GC's receipt of payment.
- Subs have the same rights as GC's to stop work and recover interest and fees.
- These rights cannot be waived by contract.

Discussion

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