



Finding and Managing the Hidden Risks in Your Contracts

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10:30 AM – 12:00 PM

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WORDS THAT MATTER (MAYBE)

Abatement
Accelerate
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Asbestos
Attorney
Attorney Fee
Backcharge
Binding
Bond
Breach
Builders Risk
Buy American Act
Cancelation
CCIP
Certified Payroll
Change
Change Order
Citation
Claim(s)
Complete operating system
Compliance
Conclusive
Condition
Condition Precedent
Consequential
Coordinate
Coordination
Cost Plus
Davis-Bacon
Day
Deductible
Default
Defend
Discrepancy
Dispute
Endorsement(s)
Escalation
Evidence
Exempt
Expedite
Extension
Extra
Extra work
Fault
Final
Final and Conclusive
Fine(s)
Guaranteed Maximum
Guaranty
Hazardous
Hour
Incident
Indemnify
Indemnity
Inefficiency
Inferable
Legal
Legal Fees
Liability
Lien
Limits
Liquidated
Liquidated Damages
MBE/DBE/SBE
Negligence
No Damage for Delay
Notice
Overtime
Pay if Paid
Precedent
Premium
Profit
Reasonably Inferable
Release
Sole
Sole Discretion
Subrogation
Terminate
Termination
Textura
Third Party
Time
Waive
Warranty/ Warranties

CONTRACT ADDENDUM – CONTRACTOR/OWNER

1. CONTRACTOR's scope of work shall be limited to items of labor, materials and equipment depicted on the plans, specifications and other Contract Documents incorporated by reference into the Contract, and items reasonably inferable therefrom.
2. CONTRACTOR shall be liable to OWNER for damages only to the extent damages incurred by OWNER are caused by CONTRACTOR or any other entity or person for whom CONTRACTOR is responsible by virtue of privity of contract. OWNER shall be liable to CONTRACTOR for damages only to the extent damages incurred by CONTRACTOR or its subcontractors and suppliers are caused by OWNER or any other entity or person for whom OWNER is responsible by virtue of privity of contract.
3. All disputes hereunder shall be resolved in accordance with the laws of the jurisdiction where the Project is located and in the appropriate courts in the jurisdiction where the Project is located.
4. Any CONTRACTOR obligation to defend liens or claims by its subcontractors or suppliers shall not apply if the claim or lien arises due to the OWNER'S wrongful non-payment. Partial lien/claim releases shall be effective only to the extent of amounts requisitioned by and paid to CONTRACTOR through the date thereof.
5. OWNER will be responsible for the costs of any extra work it directs CONTRACTOR to perform.
6. Neither party's failure to comply with notice provisions under the Contract Documents shall not result in a waiver of CONTRACTOR's claims or rights unless OWNER is actually prejudiced by CONTRACTOR's noncompliance.
7. CONTRACTOR's obligation to defend or indemnify OWNER or any other parties shall be limited to CONTRACTOR's proportionate share of liability based on CONTRACTOR'S proportionate negligence.
8. CONTRACTOR-provided insurance shall not contain any waivers of subrogation.
9. OWNER shall furnish CONTRACTOR with copies of all documents incorporated by reference into the Contract.
10. Neither party shall be liable to the other party for consequential or indirect damages unless caused by fraud, gross negligence or intentional misconduct. In no event shall CONTRACTOR'S total liability to OWNER exceed the contract price unless such liability arises out of CONTRACTOR's fraud, gross negligence or intentional misconduct.
11. In the event of any conflict between the Contract Documents, the terms of this addendum shall control.

CONTRACT ADDENDUM – SUBCONTRACTOR/CONTRACTOR

1. SUBCONTRACTOR's scope of work shall be limited to items of labor, materials and equipment depicted on the plans, specifications and other Contract Documents incorporated by reference into the Subcontract, and items reasonably inferable therefrom.
2. SUBCONTRACTOR shall be liable to CONTRACTOR for damages only to the extent damages incurred by CONTRACTOR are caused by SUBCONTRACTOR or any other entity or person for whom SUBCONTRACTOR is responsible by virtue of privity of contract. CONTRACTOR shall be liable to SUBCONTRACTOR for damages only to the extent damages incurred by SUBCONTRACTOR or its subcontractors and suppliers are caused by CONTRACTOR or any other entity or person for whom CONTRACTOR is responsible by virtue of privity of contract.
3. All disputes hereunder shall be resolved in accordance with the laws of the jurisdiction where the Project is located and in the appropriate courts in the jurisdiction where the Project is located.
4. Any "pay if paid" provision of Subcontract shall not apply if the Owner's nonpayment is due to the fault of CONTRACTOR. CONTRACTOR shall not set-off funds due hereunder under any other agreement between CONTRACTOR AND SUBCONTRACTOR. In no event shall retention exceed that which the Owner is withholding from CONTRACTOR specifically on behalf of SUBCONTRACTOR'S work.
5. Any SUBCONTRACTOR obligation to defend liens or claims by its subcontractors or suppliers shall not apply if the claim or lien arises due to the Owner's or CONTRACTOR's wrongful non-payment. Partial lien/claim releases shall be effective only to the extent of amounts requisitioned by and paid to Subcontractor through the date thereof.
6. CONTRACTOR will be responsible for the costs of any extra work it directs SUBCONTRACTOR to perform.
7. Neither party's failure to comply with notice provisions under the Subcontract Documents shall not result in a waiver of SUBCONTRACTOR's claims or rights unless CONTRACTOR is actually prejudiced by SUBCONTRACTOR's noncompliance.
8. SUBCONTRACTOR's obligation to defend or indemnify CONTRACTOR or any other parties shall be limited to SUBCONTRACTOR's proportionate share of liability based on SUBCONTRACTOR'S proportionate negligence.
9. SUBCONTRACTOR-provided insurance shall not contain any waivers of subrogation.
10. CONTRACTOR shall furnish SUBCONTRACTOR with copies of all documents incorporated by reference into the Subcontract.
11. Neither party shall be liable to the other party for consequential or indirect damages unless caused by fraud, gross negligence or intentional misconduct. In no event shall SUBCONTRACTOR'S total liability to CONTRACTOR exceed the subcontract price unless such liability arises out of SUBCONTRACTOR's fraud, gross negligence or intentional misconduct.
12. In the event of any conflict between the Subcontract Documents, the terms of this addendum shall control.



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INTRODUCTION



The Last Slide First

If you take nothing else from the next four hours,
take away these three points:

First, have a complete copy of your contract.

Second, you need to read it.

Third, do what it says to do.

The Lawyer's Hedge

Facts matter. **ALOT**. You will hear “maybe” and “probably” many times during this presentation.

State law matters. **MORE**. State law varies a great deal. A strict notice provision in a contract governed by Virginia law probably is worth a lot more than a strict notice provision in a contract governed by District of Columbia law.

In the Court's Eyes ...

You all work for “large,
sophisticated, commercial
businesses.”

Modern Mosaic v. Turner Const Co.

- “One of our country’s bedrock principles is the freedom of individuals and entities to enter into contracts and rely that their terms will be enforced.”
- “When parties, particularly sophisticated commercial entities like Turner and Modern, negotiate and enter into written agreements, they have a right to expect the provisions of those agreements will not be cast aside when a dispute arises.”
- At the time of this dispute, Turner was a ~\$14B company with ~10,000 employees and Modern was a ~\$25M company with fewer than 50 employees.

The Five Things Contract Clauses Do

1. Scope of work or services to be performed.
2. Price, payment and financial terms.
3. Time and sequence of performance.
4. Procedures to be followed by each party.
5. Substantive allocation of risk.

Scope, Price and Time

- Scope, price and time are the three most important contract provisions in every contract.
- Lawyers typically do not negotiate scope, time, and price!
- Most disputes arise out of disagreements over the scope of work or delays and disruptions. No disputes over scope, price or time = your best chance to avoid significant disputes under the contract.
- Avoid inconsistency in upstream and downstream scopes.

Procedural Provisions:

- 1. What to do.**
- 2. When to do it.**
- 3. How to do it.**

- Notice provisions
- Progress payment provisions – schedule of values; time of application; time of payment
- Submittal provisions
- BIM modeling and coordinated drawings
- Change order submission/format
- Schedule format/update
- Claim provisions
- Default provisions
- Disputes provisions

Substantive Risk Allocation Provisions:

“Who Owns the Problem?”

- Notice
- Pay-if-paid
- No damage for delay
- Differing site conditions
- Force Majeure
- Change orders
- Default
- Indemnity
- Design completion/performance guarantees
- Consequential damages & liquidated damages
- Dispute resolution & attorney’s fees
- Protection of work and warranties

Procedural Provisions vs. Substantive Risk Allocation Provisions

- Procedural requirements are ongoing – the key is to know the what/when/how and ensure compliance. Map out the processes and forms at the beginning of the project.
- Substantive risk allocation is essentially set in stone when the contract is signed – the key is to recognize when the issue has, is or might occur so that you can manage the risk as effectively as possible.
- Note: failing to abide by procedural requirements can create substantive risks: delayed payment, waiver of rights.

IDENTIFYING RISK



The Starting Point: Common Risk Factors

- Quality of the internal team
- Quality of the project team
- Scope of work
- Quality of design documents
- Time and quality/reasonableness of the schedule
- Financial (budget, creditworthiness of the owner, payment terms)
- Subcontractors and vendors (availability, capability)
- Damages for late or defective performance (yours and theirs)
- Labor
- Supply chain issues
- Site logistics
- Intangibles: business relationships, morale and attitude

Applying Common Risk Factors to Your Specific and Unique Project

- Common risk factors must be applied to the unique and specific characteristics of each project in order to create a meaningful risk analysis for each specific project.
- The result of this analysis will be a set of **project-specific risk factors**.
- The project-specific risk factors can be rank ordered.
- The project-specific risk factors can then serve as the framework to focus your review and analysis of the contract and managing the project-specific risks throughout the project.

To Find Risk, You Must Have a Complete Copy of Your Contract

- The contract form itself.
- All exhibits identified in the contract form.
- All pre-bid addenda.
- The general conditions.
- Supplemental general conditions.
- Plans and specifications (**all plans and all specifications**).
- Project schedule.
- Safety manual.
- Project procedures manual.
- OCIP/CCIP manual.
- All documents “**incorporated by reference**” (yes, including hyperlinks)

To Find Risk, You Have to Look for It. Reading is Essential

- What is the point of an open-book test if you don't read the book?
- Do I have to read every single page of every single document?
- Are there any shortcuts?
 - Key words (*see next slide*)
 - Divide and conquer
- High priorities:
 - Contract
 - General Conditions
 - Supplementary General Conditions
 - Project Procedures and Safety Manuals
 - Upstream contract documents incorporated by reference.
 - Division One of the project specifications

Build a “Key Risk Words” Library

- Build a library of key words:
 - Change
 - Conclusive
 - Condition precedent
 - Day
 - Default
 - Delay
 - Extra
 - Final and conclusive
 - Hour
 - Precedent
 - Release
 - Waive

Build a Risk Register

| Contract Reference | Subject | Requirement |
|--------------------|--------------------|---|
| | Schedule | Submit preliminary schedule NLT [what date?] |
| | Schedule | Monthly updates are due by [what date?] |
| | Schedule of Values | Broken down by _____; submitted NLT [what date?] |
| | Progress payments | Payment application due on the 15 th of the month |
| | Progress payments | Partial releases required down to second tier subs/vendors |
| | Change Orders | Notice to GC within 3 days of first occurrence |
| | Change Orders | Proposal due within 10 days of notice |
| | Change Orders | OHP 10/10 – includes project management, but not foremen |
| | Claims | Notice of dispute within 3 days after GC’s final decision |
| | Disputes | Demand for principal’s meeting at least 30 days before filing suit |
| | Default | Written response due within 3 days after receipt of notice to cure. |
| | Commissioning | Commissioning plan due by [what date?] |
| | Submittals | Submittal schedule due within 10 days after NTP |
| | Submittals | A/E has 21 days to respond to submittals |
| | Time Extensions | Time extension requests due within 7 days of onset of delay |
| | Time Extensions | All time extension requests must include a fragnet |

Build a Project Forms File

- What are the documents you know you're going to need on this project?
- Meeting Minutes
- Submittal cover sheets
- Progress payment forms
- Partial and final releases (upstream and downstream)
- Notice of change
- Notice of delay (upstream and downstream)
- Notice of dispute
- What else???

IDENTIFYING RISK - THE CONTRACT DOCUMENTS



Some (But Not All) of the Risks to Look Out For

- Notice
- Payment
- Change Orders
- Schedule, Time & Delay Damages
- Design Completion & Performance Guarantees
- Indemnity & Insurance Provisions
- Releases

Notice



Notice – Issues

- What conditions trigger an obligation to give notice?
 - Changes – actual changes issued and constructive changes.
 - Delays and disruptions to our work.
 - Damages to our work caused by others.
 - Late return of submittals.
- How long do I have to give notice? (Search “day” and “hour”)
- To whom do I have to give notice and how?
- What happens if I fail to give timely and proper notice?
 - Is there an automatic waiver of rights?
 - Can I prove the upstream party had “actual notice”?
 - Can I prove the upstream party was not prejudiced by the lack of notice?

Notice - Example

For changes ordered by CONTRACTOR independent of the Owner or the Contract Documents, Subcontractor shall be entitled to equitable adjustment in the Subcontract price. **If Subcontractor considers any action or inaction by CONTRACTOR other than a formal change order to be a change, it shall so notify CONTRACTOR within three (3) days of said action or inaction** and seek a confirmation from CONTRACTOR.

Subcontractor shall submit to CONTRACTOR any requests or claims for adjustment in the price, schedule or other provisions of the Subcontract for changes directed by the Owner, as a result of deficiencies or discrepancies in the Contract Documents, or for circumstances otherwise permitted by the Contract Documents. **Said requests or claims shall be submitted in writing by Subcontractor in time to allow CONTRACTOR to comply with the applicable provisions of the Contract Documents.**

Notice - Example

For changes ordered by CONTRACTOR independent of the Owner or the Contract Documents, Subcontractor shall be entitled to equitable adjustment in the Subcontract price. If Subcontractor considers any action or inaction by CONTRACTOR other than a formal change order to be a change, it shall so notify CONTRACTOR within three (3) days of said action or inaction and seek a confirmation from CONTRACTOR. **Failure to comply with said confirmation procedure shall constitute a waiver of the right to compensation for the action or inaction.**

Notice – Strategies

- Try to create a minimum of three business days for all notices, preferably a full business week.
- Try to negotiate out the automatic waiver and release language if you fail to give timely notice; aim for a “prejudice” standard.
- Identify and schedule out every notice provision in the contract, including (i) time it must be given, (ii) to whom, and (iii) what it must contain, and (iv) manner of delivery.
- Prepare a set of form letters at the beginning of the project for use with all notice events, especially changes, claims, delays, and disputes.

Pay-if-Paid Clauses



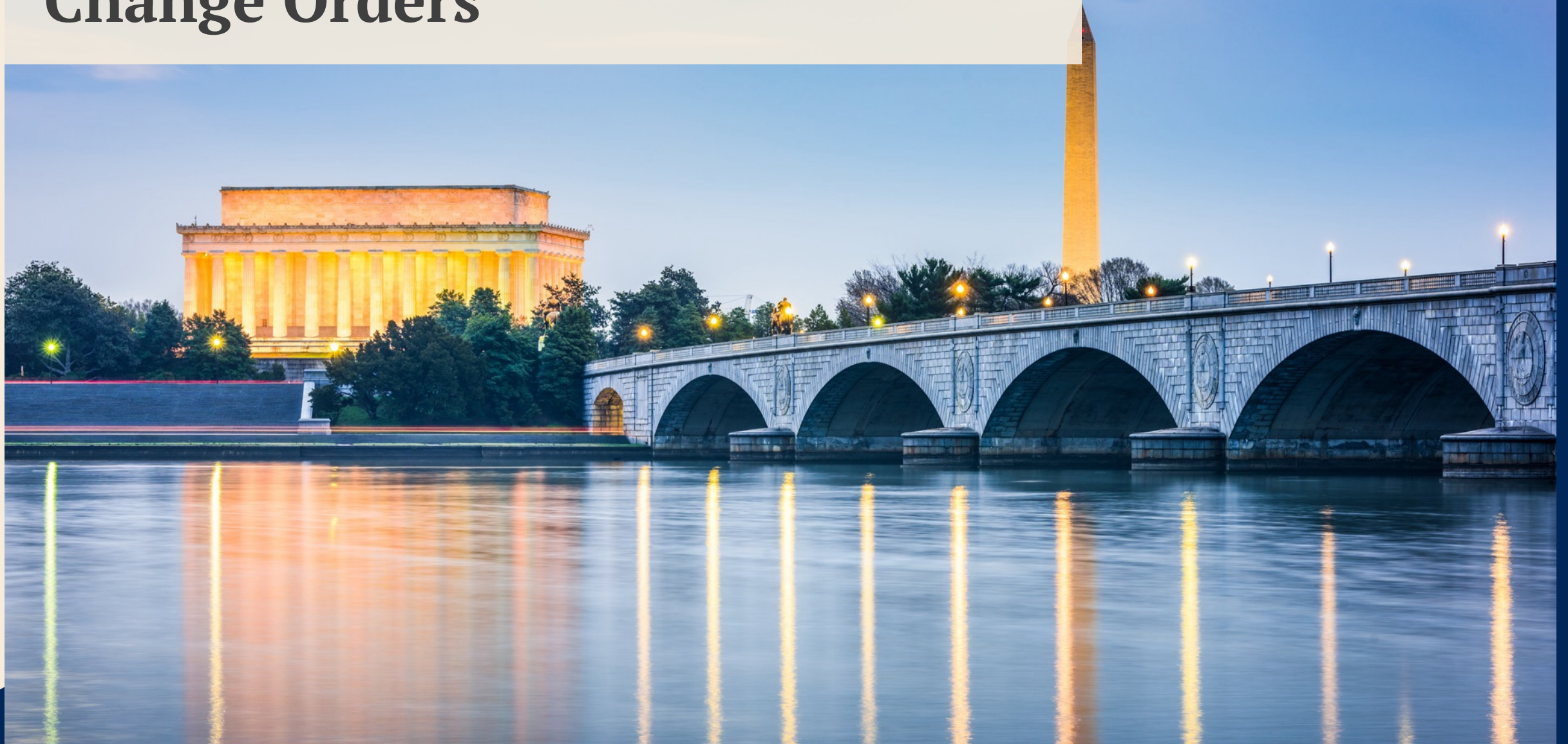
Pay-When-Paid vs. Pay-If-Paid

- Pay-When-Paid: “Contractor shall make payment to Subcontractor after Contractor receives payment from Owner for Subcontractor’s Work.”
- Pay-If-Paid: “Subcontractor acknowledges and agrees that Owner’s payment to Contractor under the Owner Contract of amounts due Subcontractor under the Subcontract is a **condition precedent** to Contractor’s obligation to pay such amounts to Subcontractor.”
- Condition Precedent: if the first thing (payment by the Owner to the GC) does not happen, then there is no legal obligation for the second thing (payment by the GC to the Subcontractor) to happen – ever.
- A majority of courts have concluded that “pay-when-paid” creates a timing mechanism, but “pay-if-paid” creates a strict condition precedent. Try to avoid or limit pay-if-paid.
- Some states make pay-if-paid clauses void by statute.
- Under some state law, pay-if-paid clauses are not a defense available to a surety in a claim against the payment bond or a defense available to the owner in a mechanic’s lien action.

Pay-If-Paid – Strategies

- Determine whether pay-if-paid is statutorily permissible.
- Eliminate pay-if-paid entirely.
- Try to limit the scope and effect of the pay-if-paid clause to eliminate performance issues by other trades as a basis for withholding your payments.
- Evaluate whether you will try to circumvent the pay-if-paid clause by pursuing a payment bond claim and/or a mechanic's lien claim.

Change Orders



Change Orders - Issues

- Procedural Issues:
 - Notice and submission requirements.
 - Specific formatting requirements.
 - OH/P – percentages and what does it cover?
 - Requirements in pricing and documenting costs.
 - Requirements to secure a time extension and related costs.
- Risk Allocation Issues:
 - Consequences for failure to comply with the procedural requirements.
 - Owner Changes vs. GC Changes.
 - Delay/Impact issues.
 - Duty to Proceed.

Change Orders - Example

CONTRACTOR may, at any time, unilaterally or by agreement with Subcontractor, without notice to the sureties, make changes in the work covered by this Subcontract. Any unilateral order or agreement under this Article 9.a. shall be in writing. Subcontractor shall perform the work as changed without delay.

Subcontractor shall submit to CONTRACTOR any requests or claims for adjustment in the price, schedule or other provisions of the Subcontract **for changes directed by the Owner,** as a result of deficiencies or discrepancies in the Contract Documents, or for circumstances otherwise permitted by the Contract Documents. **Said requests or claims shall be submitted in writing by Subcontractor in time to allow CONTRACTOR to comply with the applicable provisions of the Contract Documents.**

Change Orders - Example

CONTRACTOR's receipt of payment from the Owner on account of pending changes made by the Owner shall be a condition precedent to CONTRACTOR's obligation to make payment for changed work to Subcontractor.

For changes ordered by CONTRACTOR independent of the Owner or the Contract Documents, Subcontractor shall be entitled to equitable adjustment in the Subcontract price. If Subcontractor considers any action or inaction by CONTRACTOR other than a formal change order to be a change, it shall so notify CONTRACTOR within three (3) days of said action or inaction and seek a confirmation from CONTRACTOR. Failure to comply with said confirmation procedure shall constitute a waiver of the right to compensation for the action or inaction.

Change Orders – Delay & Impact

- Beware of subcontract requirements: “Subcontractor acknowledges and agrees that any request for an adjustment will be totally inclusive of **all additional costs and time extensions** related to the Change, whether resulting from delays, inefficiencies, interferences or other impact to Subcontractor’s performance of the Work. Subcontractor’s failure to request a cost or time adjustment in connection with a Change shall constitute a representation by Subcontractor that no such adjustment is required and shall constitute a **waiver** by Subcontractor of its right to any such adjustment.”
- Beware of change order release language.
- Reservations in change order **proposals** rarely overcome release language in the **contract** or in the **change order modification**.

Change Orders – Duty to Proceed

- Duty to Proceed (Changes Clause): “Subcontractor shall proceed with the Change and provide Contractor information and documents required under Section ____ in connection with Changed performed.”
- Duty to Proceed (Disputes Clause): “The pendency of such claim or dispute shall not suspend or stay in any manner the obligations under this Subcontract and Subcontractor shall continue the Work hereunder without interruption.”
- Refusing to Proceed:
 - Business considerations (financial capacity, business relationships, surety).
 - Legal justifications – cardinal change, impossibility (e.g., defective design that remains uncured), commercial impracticability.

Change Orders – Strategies

- Have a clear understanding of the information you must collect and submit to support your change order proposals, including what costs are recoverable.
- Ensure that your company's cost accounting system accounts for costs in a manner consistent with the requirements of the contract.
- Determine how you are going to deal with delay/impact costs.
- Creating change order forms that comply with the requirements of the contract documents.
- Can you limit the duty to proceed clause?

Schedule, Time and Delay Damages



Schedule, Time and Delay Damages – Issues

- What are our rights and obligations under the scheduling clauses in the contract? How do we participate in the process?
- What are the requirements to secure a time extension?
 - Notice requirements.
 - Content requirements (e.g., TIA, fragnet, narrative).
- Is there a no-damages-for-delay clause?
- What is our potential liability for delays?
 - Consequential damages.
 - Liquidated damages.

Time Extensions and Schedules - Example

Subcontractor agrees to commence, pursue diligently and complete the work in such sequence and order and according to such schedules as Contractor shall establish from time to time during the course of the work, and shall perform the work so as not to delay any other trades or contractors, time being of the essence of this Subcontract. No extension of completion date shall be permitted unless approved in writing by the Contractor and Owner, and Subcontractor shall be responsible for any losses or penalties incurred by Contractor as a result of delays in completing Subcontractor's work. If Contractor determines that the Subcontractor is behind schedule or will not be able to maintain the schedule, Subcontractor shall submit a remedial plan to recover, shall work overtime, shift work, or work in an altered sequence, if deemed necessary, in the judgment of the Contractor to maintain the progress of the work. Any such overtime, acceleration, shift or altered sequence work required to maintain progress or to complete the work on a timely basis shall be at Subcontractor's expense and shall not entitle Subcontractor to an extension of time or additional compensation. Contractor may supplement Subcontractor's forces, at Subcontractor's expense, if deemed necessary by the Contractor to maintain the Project schedule. Subcontractor shall be liable to the Contractor for any delay or damages, including consequential or liquidated damages, threatened or assessed against the Contractor to the extent caused by the Subcontractor.

Time Extensions and Schedules - Issues

- Duty to Reasonably Schedule and Coordinate the Work – in most states, the general contractor (or the entity controlling the schedule) has a **duty to reasonably schedule and coordinate** the work.
- Use this duty as the measuring stick for your responses to the general contractor.
- You **must participate fully** in the scheduling process:
 - Give the GC input on every schedule and schedule update, whether or not the GC requests the input.
 - Durations, sequences, activity restraints, crew restraints.
 - Don't forget about long-lead submittal approvals, BIM approvals, and prefab.
 - Deviations between the schedule and the as-built conditions.
 - Notify the GC when you are being delayed.
 - Ask for time extensions.
- You must be able to **document delays and disruptions**.
- **DAILY REPORT SOAP BOX**.

No Damage for Delay - Examples

- “To the fullest extent permitted by applicable law, Contractor shall have the right at any time to delay or suspend the work or any part thereof without incurring liability therefore. **An extension of time shall be the sole and exclusive remedy of Subcontractor for any delays or suspensions suffered by Subcontractor.**”
- “No claim for damages or any claim, other than for an extension of time shall be made or asserted against Contractor by reason of any delays. **Subcontractor shall not be entitled to an increase in the Contract Price or payment or compensation of any kind from Contractor for direct, indirect, consequential, impact or other costs, expenses or damages, including but not limited to, costs of acceleration or inefficiency, arising because of delay, disruption, interference or hindrance from any cause whatsoever,** whether such delay, disruption, interference or hindrance be reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable.”

No Damage for Delay - Issues

- Some states invalidate NDFD clauses by statute.
- Some state law will permit a subcontractor to circumvent NDFD clauses in an action against the GC's payment bond.
- Some states recognize exceptions to the NDFD clause:
 - Delays due to active interference.
 - Delays not contemplated by the parties.
 - Delays that amount to abandonment of the contract.
 - Delays caused by bad faith or intentional misconduct.
- NDFD clauses do not necessarily avoid acceleration claims and constructive acceleration claims.
- Even if the NDFD clause is legally valid and binding, you still need to request the time extensions to avoid downside liability for delays.

No Damage for Delay – Strategies

- Negotiate as many exceptions as possible for potentially responsible third parties.
- Use NDFD clause to negotiate reductions in your potential liability for delay costs.
- Seek time extensions for delays, even without compensation.
- Evaluate whether you can include delay costs as direct costs in your change order proposals.

Consequential Damages & Liquidated Damages - Example

“Subcontractor shall be liable to CONTRACTOR for all costs CONTRACTOR incurs as a result of Subcontractor’s failure to perform this Subcontract in accordance with its terms. Subcontractor's failure to perform shall include the failure of its lower-tier subcontractors to perform. Subcontractor's liability shall include but not be limited to (1) damages and other delay costs payable by CONTRACTOR to the Owner; (2) CONTRACTOR's increased costs of performance, such as extended overhead and increased performance costs resulting from Subcontractor-caused delays or improper Subcontractor work; (3) warranty and rework costs; (4) liability to third parties; (5) excess procurement costs; (6) consultants' fees; and (7) attorneys' fees and related costs.”

Consequential Damages & Liquidated Damages - Example

“If Contractor determines that the Subcontractor is behind schedule or will not be able to maintain the schedule, Subcontractor shall submit a remedial plan to recover, shall work overtime, shift work, or work in an altered sequence, if deemed necessary, in the judgment of the Contractor to maintain the progress of the work. Any such overtime, acceleration, shift or altered sequence work required to maintain progress or to complete the work on a timely basis shall be at Subcontractor's expense and shall not entitle Subcontractor to an extension of time or additional compensation. Contractor may supplement Subcontractor's forces, at Subcontractor's expense, if deemed necessary by the Contractor to maintain the Project schedule. **Subcontractor shall be liable to the Contractor for any delay or damages, including consequential or liquidated damages, threatened or assessed against the Contractor to the extent caused by the Subcontractor.**”

Consequential Damages & Liquidated Damages Waiver - Examples

- In the absence of an express waiver of liability for consequential damages, you are potentially at risk.
 - “In no event shall either party be liable to the other party for indirect, special, consequential, or punitive damages.”
 - “In no event shall Subcontractor be liable to Contractor for Contractor’s own indirect, special, consequential, or punitive damages. Subcontractor may be liable to Contractor for third party indirect, special, consequential, or punitive damages incurred by Contractor to the extent they were caused by Subcontractor’s acts or omissions, or Subcontractor’s breach of the Subcontract.”

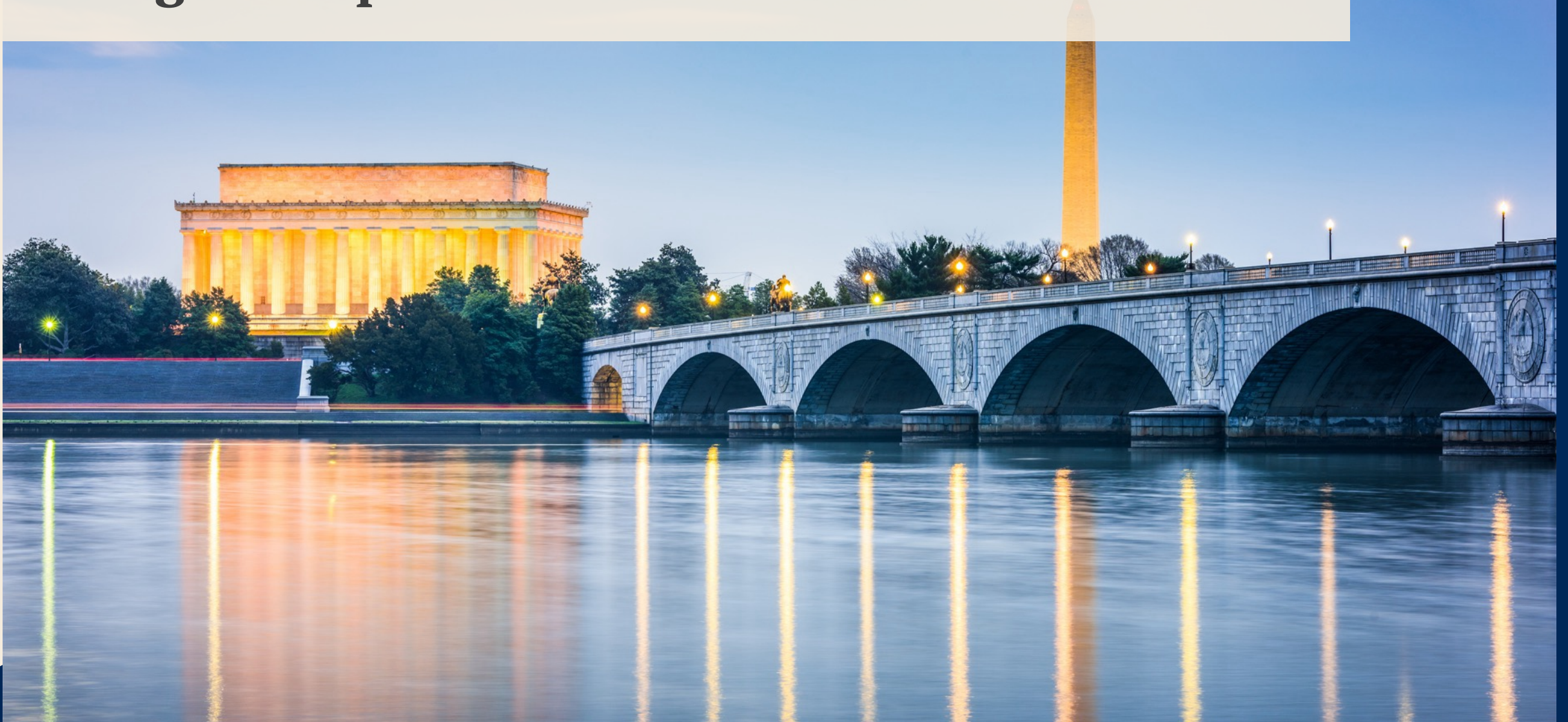
Consequential Damages & Liquidated Damages - Example

“In the event that Contractor is assessed actual damages or liquidated damages by the Owner due to delays caused by more than one party, and Subcontractor’s Work is one of the causes, **then Contractor shall allocate responsibility therefore in its sole discretion and Contractor’s allocation shall be final and conclusive on Subcontractor.** The parties agree that a proportionate allocation, based on the percentage of Subcontractor’s subcontract price to the total of the subcontract prices of all responsible parties, shall be considered a reasonable method of allocating financial responsibility.”

Consequential Damages & Liquidated Damages – Strategies

- Always seek a complete exclusion of all consequential damages.
- If a complete exclusion is not possible, seek as many limitations as possible (e.g., eliminate GC consequential damages, seek a whole dollar cap).
- Do not agree to an allocation of consequential or liquidated damages that is not based on cause and effect (e.g., a pro-ration based on percent of subcontract price to total price).

Design Completion & Performance Guarantees



Design Completion & Performance Guarantees - Example

2.1 All Items Required to Perform the Work are Included. Subcontractor and its Sub-subcontractors shall strictly comply with all requirements of the Subcontract in the performance of the Work and other activities in connection with the Subcontract. Subcontractor acknowledges and agrees that it can perform and complete the Work in strict compliance with the Subcontract requirements, including Subcontract Amount and Project Schedule, and acknowledges and agrees that it can do so even though certain drawings, specifications, addenda and bulletins, may not be fully developed at the time of contracting. Subcontractor further acknowledges and agrees that the Work includes the provision of all equipment, components, systems, materials, documentation and other services and items required to perform the Work and make it complete, functional and/or operational, notwithstanding the fact that each such service or item may not be expressly mentioned in the Contract Documents.

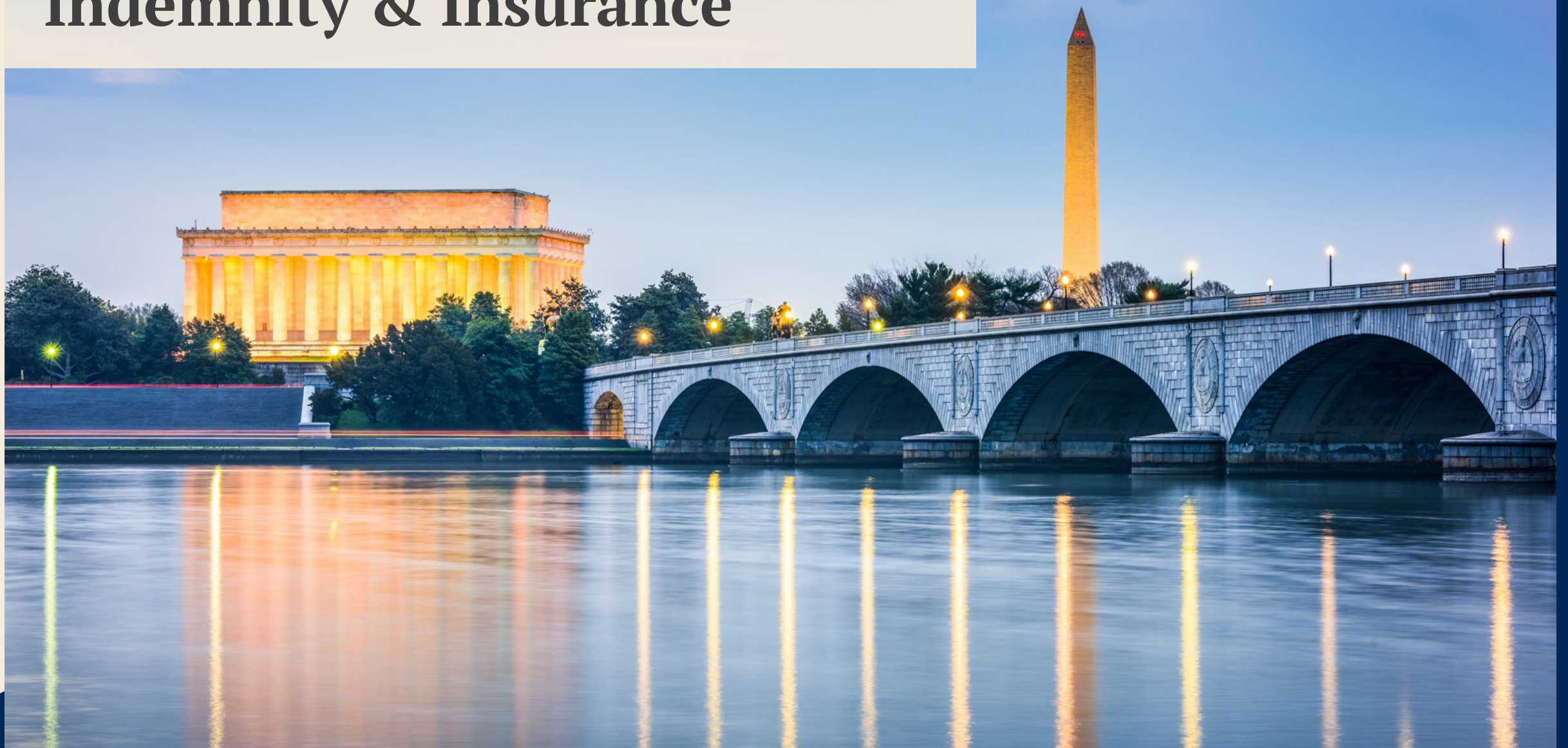
Design Completion & Performance Guarantees - Example

Subcontractor's Work shall comply with all federal, state and local laws, codes, ordinances and regulations applicable to this Subcontract, whether by reason of general law or by reason of provisions in the Contract Documents. Subcontractor and all lower-tier subcontractors shall be duly licensed to operate under the law of the applicable jurisdictions.

Design Completion & Performance Guarantees – Strategies

- Disclaim responsibility for design and engineering in your project-specific scope of work (e.g., Exclusions page).
- Limit responsibility for compliance with governing codes, regulations and laws to your “performance” of the work. Do not promise that “the Work” itself will comply with governing codes, regulations and laws.
- If you see potential performance problems, do not be an ostrich. Flag them as early as possible through RFIs and submittals.

Indemnity & Insurance



Indemnity Provisions - Example

To the fullest extent permitted by applicable law, Subcontractor agrees to **defend, indemnify and hold harmless** the Contractor and/or Owner, their officers, directors, agents and employees, from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including, but not limited to, attorney's fees, **arising in whole or in part and in any manner from the acts or omissions of the Subcontractor**, its officers, directors, agents, employees or subcontractors, in the performance of this Contract, **regardless of whether such lien, claim, suit, judgment, damage, loss or expense is caused in part by a party indemnified hereunder**. Nothing herein shall be construed to require Subcontractor to indemnify Contractor and Owner and/or their respective officers, directors, agents and employees from the **sole negligence** of Contractor or Owner, and/or their respective officers, directors, agents and employees.

Indemnity Provisions - Example

Subcontractor agrees to defend, indemnify and hold harmless GC and/or Owner and their agents and employees, from and against any claim, cost, expense or liability (including attorney's fees) attributable to bodily injury, sickness, disease or death, or damage, loss or destruction of property (including loss of use thereof), **caused by, arising out of, resulting from or occurring in connection with the Subcontractor's Work**, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder; provided, however, Subcontractor's duty hereunder shall not arise if such injury, sickness, disease, death, damage or destruction is caused by the sole negligence of a party indemnified hereunder. Subcontractor's obligation hereunder shall not be limited by the provisions of any workman's compensation or similar act, or by the provisions, scope of limitations of any insurance requirements or coverage.

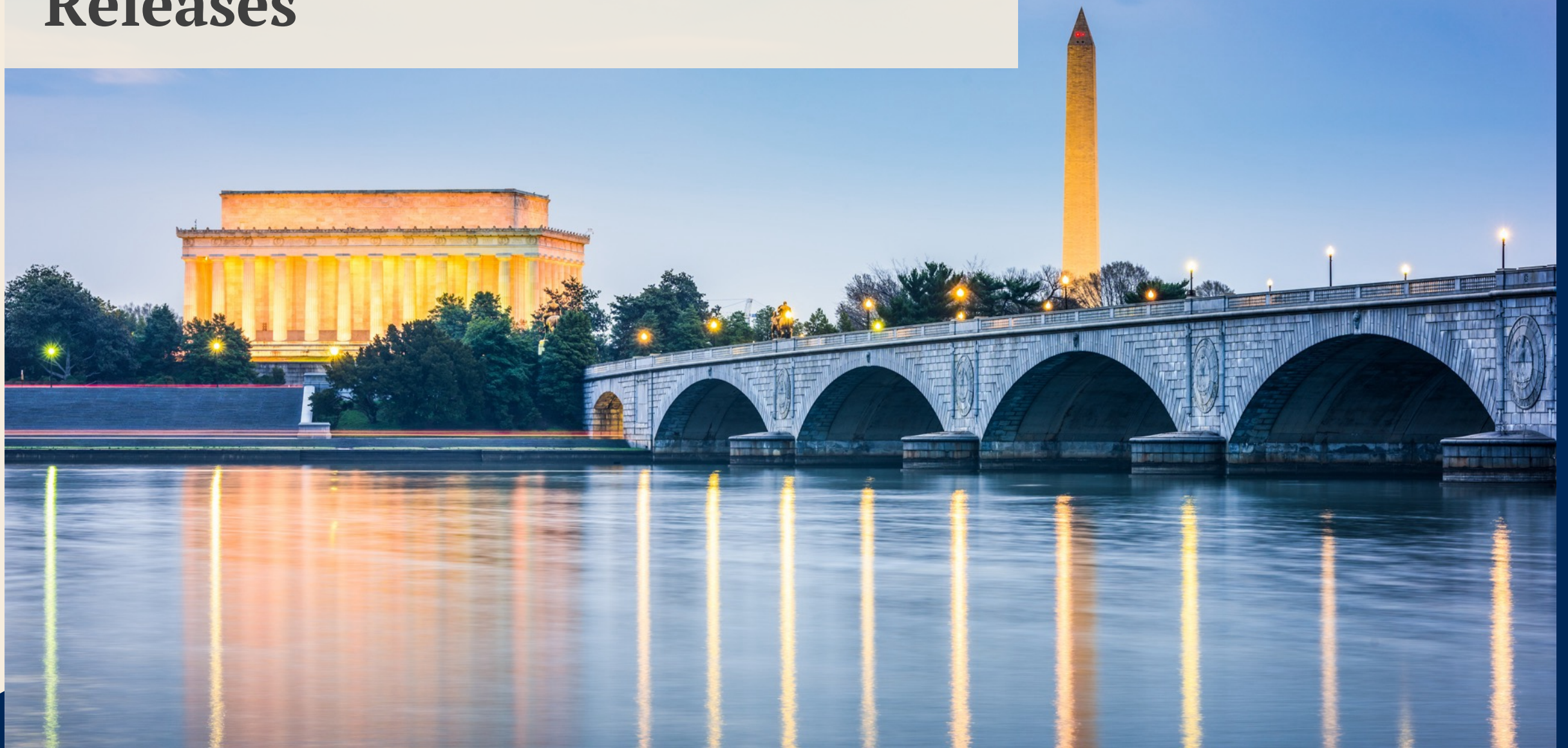
Indemnity – Strategies

- Try to limit to your defense and indemnity obligations to “the extent of your negligence” rather than “to the fullest extent of the law.”
- Try to eliminate the “sole” negligence exception in favor of a simple “other party’s negligence” exception.
- Where defense and indemnity obligations are tied to “the work” or “performance of the work” try to modify it to apply to the “negligent performance of the work.”
- If the GC insists on a waiver of subrogation, seek a mutual waiver.

Insurance – Strategies

- Ensure that your insurance program includes the types of coverages, forms, single claim and aggregate claim limits, and deductibles required by the contract documents.
- Seek to obtain a copy of the project's Builder's Risk coverage. If that is not possible, at least try to obtain the basic policy information (name of insurer, policy number, coverage limits, deductibles) and ensure that your company is a named insured under the policy.
- If the project is covered by a CIP, obtain a copy of the CIP policy and ensure that you have built-in appropriate credits into your bid pricing.
- If the GC insists on a waiver of subrogation, seek a mutual waiver.

Releases



Releases – Example of Bad Language – Progress Payments

The undersigned, upon receipt of the above-mentioned payment, has received payment in full for all deliveries of material to and/or for all work performed in the construction of the project through _____. In consideration of the above mentioned payment in full, the undersigned does hereby waive, release, and quit claim in favor of the Contractor, the Owner of the project, each and every party acquiring title to and/or making a loan on the project, any party acting as trustee, company or companies examining and/or insuring title to the project and any and all of their sureties, successors and assigns (collectively, the “Released Parties”), for work performed in the construction of the project through _____, (1) any and all rights to assert any claim or to assert a lien upon the land and improvements comprising the project by virtue of any law in the jurisdiction in which the land and improvements are situated, and (2) any and all rights to assert or bring any causes of action, claims, suits and demands which the undersigned ever had or now has against the Released Parties.

Releases – Example of Bad Language – Change Order Modifications

Subcontractor hereby acknowledges and agrees that the payment provided for herein fully and finally compensates Subcontractor for any and all costs whatsoever (including, but not limited to, costs of impacts, inefficiencies, ripple effects, acceleration, delay, extended job duration and extended overhead) **in any manner caused by, resulting from or in any way arising out of changes and/or change orders to the Work which have occurred or which were issued up to the date hereof** and Subcontractor does hereby fully release, discharge and acquit Contractor of and from the costs and agrees to indemnify and save Contractor harmless from the costs.

Releases – Example of Bad Language Built Into the Contract Terms and Conditions – Progress Payments

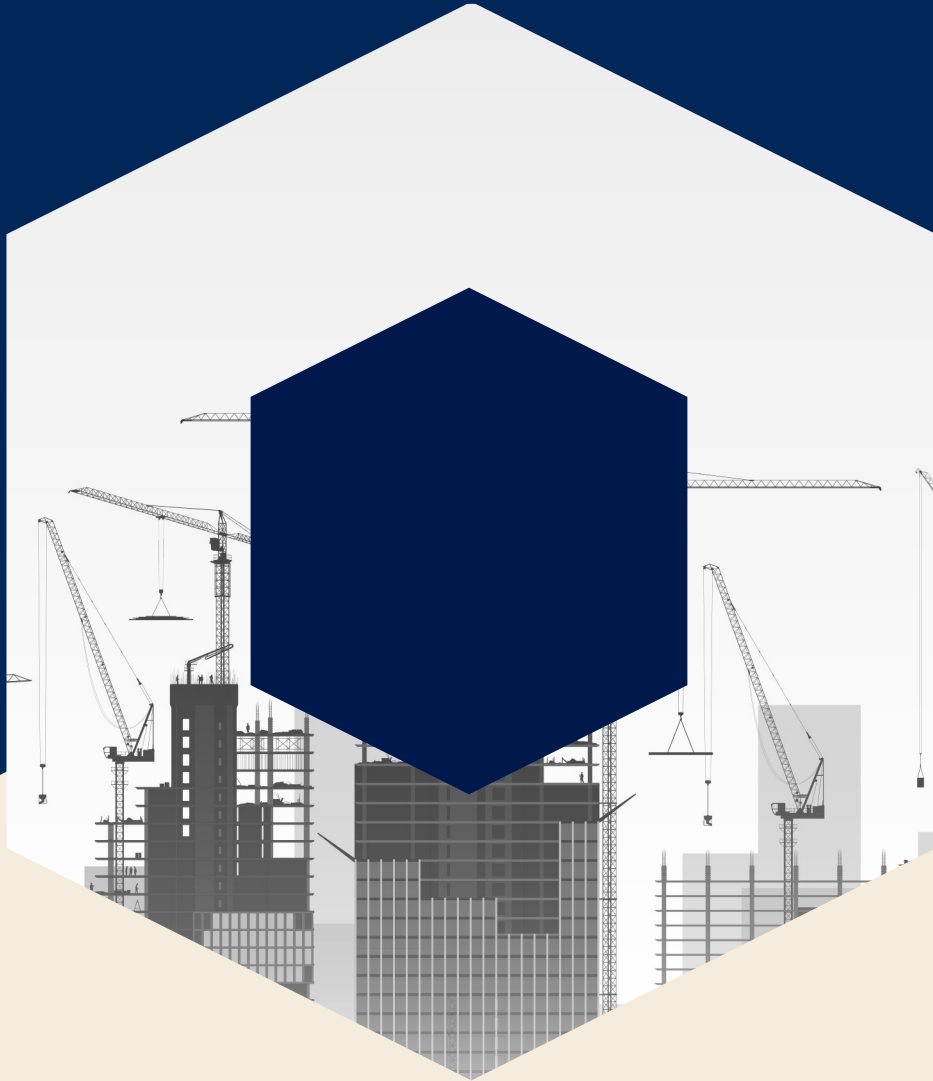
4.6 Payment is not a Release by the Contractor. No progress payment made by Contractor shall be deemed conclusive evidence that Subcontractor has satisfied its obligations in connection with all or part of the Work covered by such payment, and Contractor shall not by virtue of having made any such payment be deemed to have accepted any Work not meeting the requirements of the Subcontract or to have waived any claims against Subcontractor in connection therewith. All payments are provisional and any overpayment by Contractor to Subcontractor shall be deemed to be a mistake of fact and shall be promptly repaid to Contractor upon demand. The acceptance by Subcontractor of each progress payment from Contractor shall constitute a waiver and release by Subcontractor of all claims of any kind against the Contractor for payment for Work performed up to the date of Subcontractor's estimate for payment against which payment was made and accepted, excluding only Subcontractor's entitlement to retainage withheld in connection with such payment and any disputed amount withheld from payment by Contractor.

Releases – Strategies

- Identify all release provisions at the outset of the project.
- Negotiate exceptions and reservations before they become relevant. (Usually, the GC will at least agree to exceptions and reservations consistent with those the GC negotiated with the Owner).
- Be vigilant when creating lists of exceptions.
- Identify any technology issues (e.g., Textura) at the outset of the project and create the work-around before they become relevant.
- If you are being forced to execute releases that are potentially giving up material rights, seek help before doing so.

General Negotiating Strategies

- Negotiate concepts first, language second.
- Modify contracts with redlines, not addenda.
- Negotiate with the person who has the authority to say yes or no.
- Negotiate face-to-face, whether live or virtually.
- Negotiate to mutuality.
- Identify your deal-breakers before you negotiate, but do not tell the other side until you have already gotten as many concessions as possible.



Thank You.



Charles F. Mitchell



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Chip Mitchell



Chip Mitchell is the founder and principal of Blue Fence Advisors, and a senior level executive with more than thirty years of combined business and legal experience. He also serves as a private arbitrator and mediator, and he is a panel member with the American Arbitration Association.

Before he founded Blue Fence Advisors, Chip served as the General Counsel and Chief Administrative Officer of one of the largest privately held EPC trade construction companies in the country. He has been responsible for managing the company's legal, risk management, and human resources departments, including corporate governance, compliance, contract management, bonding and insurance relationships, labor and employment issues, and dispute resolution. He also has experience managing M&A transactions on both the buyer and seller sides, including management of the diligence process, and negotiating transaction documents.

Charles F. Mitchell

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Potential Modifications to the Clauses We Just Reviewed



Notice

For changes ordered by CONTRACTOR independent of the Owner or the Contract Documents, Subcontractor shall be entitled to equitable adjustment in the Subcontract price. If Subcontractor considers any action or inaction by CONTRACTOR other than a formal change order to be a change, it shall so notify CONTRACTOR within seven (7) ~~three (3)~~ days of said action or inaction and seek a confirmation from CONTRACTOR.

Subcontractor shall submit to CONTRACTOR any requests or claims for adjustment in the price, schedule or other provisions of the Subcontract for changes directed by the Owner, as a result of deficiencies or discrepancies in the Contract Documents, or for circumstances otherwise permitted by the Contract Documents. Said requests or claims shall be submitted in writing by Subcontractor in time to allow CONTRACTOR to comply with the applicable provisions of the Contract Documents, provided CONTRACTOR has first provided Subcontractor with a complete copy of all such Contract Documents.

Notice

For changes ordered by CONTRACTOR independent of the Owner or the Contract Documents, Subcontractor shall be entitled to equitable adjustment in the Subcontract price. If Subcontractor considers any action or inaction by CONTRACTOR other than a formal change order to be a change, it shall so notify CONTRACTOR within seven (7) ~~three (3)~~ days of said action or inaction and seek a confirmation from CONTRACTOR. Failure to comply with said confirmation procedure shall constitute a waiver of the right to compensation for the action or inaction, but only if CONTRACTOR is prejudiced by Subcontractor's failure to deliver notice within that time.

Pay-If-Paid

Subcontractor acknowledges and agrees that Owner's payment to Contractor under the Owner Contract of amounts due Subcontractor under the Subcontract is a condition precedent to Contractor's obligation to pay such amounts to Subcontractor; provided, however, that this condition precedent shall not apply if Owner's non-payment is unrelated to Subcontractor's performance.

Change Orders

CONTRACTOR may, at any time, unilaterally or by agreement with Subcontractor, without notice to the sureties, make changes in the work covered by this Subcontract. Any unilateral order or agreement under this Article 9.a. shall be in writing. Subcontractor shall perform the work as changed without delay.

Subcontractor shall submit to CONTRACTOR any requests or claims for adjustment in the price, schedule or other provisions of the Subcontract for changes directed by the Owner, as a result of deficiencies or discrepancies in the Contract Documents, or for circumstances otherwise permitted by the Contract Documents. Said requests or claims shall be submitted in writing by Subcontractor in time to allow CONTRACTOR to comply with the applicable provisions of the Contract Documents, provided CONTRACTOR has first provided Subcontractor with a complete copy of all such Contract Documents.

Change Orders

CONTRACTOR's receipt of payment from the Owner on account of pending changes made by the Owner shall be a condition precedent to CONTRACTOR's obligation to make payment for changed work to Subcontractor, provided, however, that this condition precedent shall not apply if Owner's non-payment is unrelated to Subcontractor's performance.

For changes ordered by CONTRACTOR independent of the Owner or the Contract Documents, Subcontractor shall be entitled to equitable adjustment in the Subcontract price. If Subcontractor considers any action or inaction by CONTRACTOR other than a formal change order to be a change, it shall so notify CONTRACTOR within seven (7) ~~three (3)~~ days of said action or inaction and seek a confirmation from CONTRACTOR. Failure to comply with said confirmation procedure shall constitute a waiver of the right to compensation for the action or inaction, but only if CONTRACTOR is prejudiced by Subcontractor's failure to deliver notice within that time.

Change Orders

- Subcontractor acknowledges and agrees that any request for an adjustment will be totally inclusive of all additional costs and time extensions related to the Change, whether resulting from delays, inefficiencies, interferences or other impact to Subcontractor's performance of the Work. Subcontractor's failure to request a cost or time adjustment in connection with a Change ~~may shall constitute a representation by Subcontractor that no such adjustment is required and shall~~ constitute a waiver by Subcontractor of its right to any such adjustment if CONTRACTOR is prejudiced by Subcontractor's failure to include such request in its change order proposal.

Change Orders

- Duty to Proceed (Changes Clause): Subcontractor shall proceed with the Change and provide Contractor information and documents required under Section ____ in connection with Changed performed, provided that the Change or the accumulation of Changes does not amount to a cardinal change or a material breach of contract.
- Duty to Proceed (Disputes Clause): The pendency of such claim or dispute shall not suspend or stay in any manner the obligations under this Subcontract and Subcontractor shall continue the Work hereunder without interruption, provided the dispute or the accumulation of disputes does not amount to a cardinal change or a material breach of contract.

Time Extensions and Schedules

Subcontractor agrees to commence, pursue diligently and complete the work in such sequence and order and according to such reasonable and mutually agreed upon schedules as Contractor shall establish from time to time during the course of the work, and shall perform the work so as not to delay any other trades or contractors in accordance with such schedules, time being of the essence of this Subcontract; provided, however, that Contractor shall be obligated to provide Subcontractor with complete copies of all such schedules and schedule updates in their native format. No extension of completion date shall be permitted unless justified under the terms of the Contract Documents, approved in writing by the Contractor and Owner, and Subcontractor shall be responsible for any direct costs losses or penalties incurred by Contractor as a result of Subcontractor's delays to the critical path of the approved project schedule. in completing Subcontractor's work. If Contractor determines that the Subcontractor's Work is behind schedule or will not be able to maintain the schedule, because of Subcontractor's own inexcusable delays, Subcontractor shall submit a remedial plan to recover, shall work overtime, shift work, or work in an altered sequence, if deemed necessary, in the reasonable judgment of the Contractor to maintain the progress of the work. Any such overtime, acceleration, shift or altered sequence work required to maintain progress or to complete the work on a timely basis shall be at Subcontractor's expense and shall not entitle Subcontractor to an extension of time or additional compensation, if the delay to Subcontractor's Work is because of Subcontractor's own inexcusable delays. Contractor may supplement Subcontractor's forces, at Subcontractor's expense, if deemed necessary by the Contractor to maintain the Project schedule. Subcontractor shall be liable to the Contractor for any delay or damages, including consequential or liquidated damages, threatened or assessed against the Contractor to the extent caused by the Subcontractor. In no event shall either party be liable to the other party for indirect, special, consequential, or punitive damages.

No Damage for Delay

- To the fullest extent permitted by applicable law, Contractor shall have the right at any time to delay or suspend the work or any part thereof without incurring liability therefore. An extension of time shall be the sole and exclusive remedy of Subcontractor for any delays or suspensions suffered by Subcontractor, except to the extent Contractor is entitled to recover damages from any responsible third parties.
- No claim for damages or any claim, other than for an extension of time shall be made or asserted against Contractor by reason of any delays, except to the extent Contractor is entitled to recover damages from any responsible third parties. Subcontractor shall not be entitled to an increase in the Contract Price or payment or compensation of any kind from Contractor for direct, indirect, consequential, impact or other costs, expenses or damages, including but not limited to, costs of acceleration or inefficiency, arising because of delay, disruption, interference or hindrance from any cause whatsoever, whether such delay, disruption, interference or hindrance be reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable, except to the extent Contractor is entitled to recover damages from any responsible third parties.

Consequential Damages & Liquidated Damages

Subcontractor shall be liable to CONTRACTOR for ~~all~~ reasonable direct costs CONTRACTOR incurs ~~as a result of~~ that are caused by Subcontractor's failure to perform this Subcontract in accordance with its material terms. Subcontractor's failure to perform shall include the failure of its lower-tier subcontractors to perform. Subcontractor's liability shall include but not be limited to (1) damages and other delay costs payable by CONTRACTOR to the Owner; (2) CONTRACTOR's increased direct costs of performance, such as extended field office overhead and increased performance costs resulting from Subcontractor-caused critical path delays or ~~improper~~ Subcontractor work that does not comply with the Contract Documents; (3) warranty and rework costs; and (4) liability to third parties; ~~(5) excess procurement costs; (6) consultants' fees; and (7) attorneys' fees and related costs.~~ In no event shall either party be liable to the other party for indirect, special, consequential, or punitive damages.

Consequential Damages & Liquidated Damages Waiver

In no event shall either party be liable to the other party for indirect, special, consequential, or punitive damages.

In no event shall Subcontractor be liable to Contractor for Contractor's own indirect, special, consequential, or punitive damages. Subcontractor may be liable to Contractor for third party indirect, special, consequential, or punitive damages incurred by Contractor to the extent they were caused by Subcontractor's acts or omissions, or Subcontractor's breach of the Subcontract.

Consequential Damages & Liquidated Damages

In the event that Contractor is assessed actual damages or liquidated damages by the Owner due to delays caused by more than one party, and Subcontractor's Work is one of the causes, then Subcontractor's Contractor ~~shall allocate responsibility~~ therefore shall be limited to the actual critical path delay caused solely by Subcontractor. ~~in its sole discretion and Contractor's allocation shall be final and conclusive on Subcontractor. The parties agree that a proportionate allocation, based on the percentage of Subcontractor's subcontract price to the total of the subcontract prices of all responsible parties, shall be considered a reasonable method of allocating financial responsibility.~~

Design Completion & Performance Guarantees

Subcontractor and its Sub-subcontractors shall strictly comply with all requirements of the Subcontract in the performance of the Work and other activities in connection with the Subcontract. Subcontractor acknowledges and agrees that it can perform and complete the Work in strict compliance with the Subcontract requirements, including Subcontract Amount and Project Schedule, and acknowledges and agrees that it can do so even though certain drawings, specifications, addenda and bulletins, may not be fully developed at the time of contracting. Subcontractor further acknowledges and agrees that the Work includes the provision of all equipment, components, systems, materials, documentation and other services and items reasonably required to perform the Work ~~and make it complete, functional and/or operational~~, notwithstanding the fact that each service or item may not be expressly mentioned in the Contract Documents. Nothing in this provision shall be deemed to transfer responsibility for design or engineering to the Subcontractor.

Design Completion & Performance Guarantees

Subcontractor's performance of its Work shall comply with all federal, state and local laws, codes, ordinances and regulations applicable to this Subcontract, whether by reason of general law or by reason of provisions in the Contract Documents. Subcontractor and all lower-tier subcontractors shall be duly licensed to operate under the law of the applicable jurisdictions.

Indemnity Provisions

To the ~~fullest~~ extent of its negligence ~~permitted by applicable law,~~ Subcontractor agrees to defend, indemnify and hold harmless the Contractor and/or Owner, their officers, directors, agents and employees, from and against any and all claims, suits, liens, judgments, damages, losses and expenses, ~~including, but not limited to, attorney's fees,~~ arising in whole or in part and in any manner from the negligent acts or omissions of the Subcontractor, its officers, directors, agents, employees or subcontractors, in the performance of this Contract, ~~regardless of whether such lien, claim, suit, judgment, damage, loss or expense is caused in part by a party indemnified hereunder.~~ Nothing herein shall be construed to require Subcontractor to indemnify Contractor and Owner and/or their respective officers, directors, agents and employees from the sole negligence of Contractor or Owner, and/or their respective officers, directors, agents and employees.

Indemnity Provisions

Subcontractor agrees to defend, indemnify and hold harmless GC and/or Owner and their agents and employees, from and against any claim, cost, expense or liability (including attorney's fees) attributable to bodily injury, sickness, disease or death, or damage, loss or destruction of property (including loss of use thereof), caused by, arising out of, resulting from or occurring in connection with the Subcontractor's negligent performance of its Work, ~~whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder;~~ provided, however, Subcontractor's duty hereunder shall not arise if such injury, sickness, disease, death, damage or destruction is caused by the sole negligence of a party indemnified hereunder. Subcontractor's obligation hereunder shall not be limited by the provisions of any workman's compensation or similar act, or by the provisions, scope of limitations of any insurance requirements or coverage.

Releases – Progress Payments

The undersigned, upon receipt of the above-mentioned payment, has received payment in full for all deliveries of material to and/or for all work performed in the construction of the project and included in Application for Payment No. _____ through _____. In consideration of the above mentioned payment in full, the undersigned does hereby waive, release, and quit claim in favor of the Contractor, the Owner of the project, each and every party acquiring title to and/or making a loan on the project, any party acting as trustee, company or companies examining and/or insuring title to the project and any and all of their sureties, successors and assigns (collectively, the “Released Parties”), for work performed in the construction of the project and for which payment has been made, through _____, (1) any and all rights to assert any claim or to assert a lien upon the land and improvements compromising the project by virtue of any law in the jurisdiction in which the land and improvements are situated, and (2) any and all rights to assert or bring any causes of action, claims, suits and demands which the undersigned ever had or now has against the Released Parties. This partial release does not include (i) unpaid contract balance or retention, (ii) any open change order proposals, requests for equitable adjustment, or claims, or (iii) the issues identified on Exhibit A to this partial release.

Releases – Change Order Modifications

Subcontractor hereby acknowledges and agrees that the payment provided for herein fully and finally compensates Subcontractor for any and all direct costs ~~whatsoever (including, but not limited to, costs of impacts, inefficiencies, ripple effects, acceleration, delay, extended job duration and extended overhead)~~ in any manner caused by, resulting from or in any way arising out of changes that are the subject of this Change Order, ~~and/or change orders to the Work which have occurred or which were issued up to the date hereof~~ and Subcontractor does hereby fully release, discharge and acquit Contractor of and from the costs and agrees to indemnify and save Contractor harmless from ~~the~~ such direct costs.

Releases – Built Into the Contract Terms and Conditions – Progress Payments

The acceptance by Subcontractor of each progress payment from Contractor shall constitute a waiver and release by Subcontractor of all claims of any kind against Contractor for Work covered by the payment received, ~~performed up to the date of Subcontractor's estimate for payment against which payment was made and accepted,~~ excluding only Subcontractor's entitlement to retainage withheld in connection with such payment, ~~and~~ any disputed amount withheld from payment by Contractor, and any change order proposals, requests for equitable adjustment, and claims submitted by Subcontractor to Contractor.

CONTRACT ADDENDUM – CONTRACTOR/OWNER

1. CONTRACTOR's scope of work shall be limited to items of labor, materials and equipment depicted on the plans, specifications and other Contract Documents incorporated by reference into the Contract, and items reasonably inferable therefrom.
2. CONTRACTOR shall be liable to OWNER for damages only to the extent damages incurred by OWNER are caused by CONTRACTOR or any other entity or person for whom CONTRACTOR is responsible by virtue of privity of contract. OWNER shall be liable to CONTRACTOR for damages only to the extent damages incurred by CONTRACTOR or its subcontractors and suppliers are caused by OWNER or any other entity or person for whom OWNER is responsible by virtue of privity of contract.
3. All disputes hereunder shall be resolved in accordance with the laws of the jurisdiction where the Project is located and in the appropriate courts in the jurisdiction where the Project is located.
4. Any CONTRACTOR obligation to defend liens or claims by its subcontractors or suppliers shall not apply if the claim or lien arises due to the OWNER'S wrongful non-payment. Partial lien/claim releases shall be effective only to the extent of amounts requisitioned by and paid to CONTRACTOR through the date thereof.
5. OWNER will be responsible for the costs of any extra work it directs CONTRACTOR to perform.
6. Neither party's failure to comply with notice provisions under the Contract Documents shall not result in a waiver of CONTRACTOR's claims or rights unless OWNER is actually prejudiced by CONTRACTOR's noncompliance.
7. CONTRACTOR's obligation to defend or indemnify OWNER or any other parties shall be limited to CONTRACTOR's proportionate share of liability based on CONTRACTOR'S proportionate negligence.
8. CONTRACTOR-provided insurance shall not contain any waivers of subrogation.
9. OWNER shall furnish CONTRACTOR with copies of all documents incorporated by reference into the Contract.
10. Neither party shall be liable to the other party for consequential or indirect damages unless caused by fraud, gross negligence or intentional misconduct. In no event shall CONTRACTOR'S total liability to OWNER exceed the contract price unless such liability arises out of CONTRACTOR's fraud, gross negligence or intentional misconduct.
11. In the event of any conflict between the Contract Documents, the terms of this addendum shall control.

CONTRACT ADDENDUM – SUBCONTRACTOR/CONTRACTOR

1. SUBCONTRACTOR's scope of work shall be limited to items of labor, materials and equipment depicted on the plans, specifications and other Contract Documents incorporated by reference into the Subcontract, and items reasonably inferable therefrom.
2. SUBCONTRACTOR shall be liable to CONTRACTOR for damages only to the extent damages incurred by CONTRACTOR are caused by SUBCONTRACTOR or any other entity or person for whom SUBCONTRACTOR is responsible by virtue of privity of contract. CONTRACTOR shall be liable to SUBCONTRACTOR for damages only to the extent damages incurred by SUBCONTRACTOR or its subcontractors and suppliers are caused by CONTRACTOR or any other entity or person for whom CONTRACTOR is responsible by virtue of privity of contract.
3. All disputes hereunder shall be resolved in accordance with the laws of the jurisdiction where the Project is located and in the appropriate courts in the jurisdiction where the Project is located.
4. Any "pay if paid" provision of Subcontract shall not apply if the Owner's nonpayment is due to the fault of CONTRACTOR. CONTRACTOR shall not set-off funds due hereunder under any other agreement between CONTRACTOR AND SUBCONTRACTOR. In no event shall retention exceed that which the Owner is withholding from CONTRACTOR specifically on behalf of SUBCONTRACTOR'S work.
5. Any SUBCONTRACTOR obligation to defend liens or claims by its subcontractors or suppliers shall not apply if the claim or lien arises due to the Owner's or CONTRACTOR's wrongful non-payment. Partial lien/claim releases shall be effective only to the extent of amounts requisitioned by and paid to Subcontractor through the date thereof.
6. CONTRACTOR will be responsible for the costs of any extra work it directs SUBCONTRACTOR to perform.
7. Neither party's failure to comply with notice provisions under the Subcontract Documents shall not result in a waiver of SUBCONTRACTOR's claims or rights unless CONTRACTOR is actually prejudiced by SUBCONTRACTOR's noncompliance.
8. SUBCONTRACTOR's obligation to defend or indemnify CONTRACTOR or any other parties shall be limited to SUBCONTRACTOR's proportionate share of liability based on SUBCONTRACTOR'S proportionate negligence.
9. SUBCONTRACTOR-provided insurance shall not contain any waivers of subrogation.
10. CONTRACTOR shall furnish SUBCONTRACTOR with copies of all documents incorporated by reference into the Subcontract.
11. Neither party shall be liable to the other party for consequential or indirect damages unless caused by fraud, gross negligence or intentional misconduct. In no event shall SUBCONTRACTOR'S total liability to CONTRACTOR exceed the subcontract price unless such liability arises out of SUBCONTRACTOR's fraud, gross negligence or intentional misconduct.
12. In the event of any conflict between the Subcontract Documents, the terms of this addendum shall control.

WORDS THAT MATTER (MAYBE)

Abatement
Accelerate
Acceleration
Accident
Additional Insured
Allowable
Allowance
Alternate
Arbitration
Asbestos
Attorney
Attorney Fee
Backcharge
Binding
Bond
Breach
Builders Risk
Buy American Act
Cancelation
CCIP
Certified Payroll
Change
Change Order
Citation
Claim(s)
Complete operating system
Compliance
Conclusive
Condition
Condition Precedent
Consequential
Coordinate
Coordination
Cost Plus
Davis-Bacon
Day
Deductible
Default
Defend
Discrepancy
Dispute
Endorsement(s)
Escalation
Evidence
Exempt
Expedite
Extension
Extra
Extra work
Fault
Final
Final and Conclusive
Fine(s)
Guaranteed Maximum
Guaranty
Hazardous
Hour
Incident
Indemnify
Indemnity
Inefficiency
Inferable
Legal
Legal Fees
Liability
Lien
Limits
Liquidated
Liquidated Damages
MBE/DBE/SBE
Negligence
No Damage for Delay
Notice
Overtime
Pay if Paid
Precedent
Premium
Profit
Reasonably Inferable
Release
Sole
Sole Discretion
Subrogation
Terminate
Termination
Textura
Third Party
Time
Waive
Warranty/ Warranties