

K&L GATES

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Killer Contract Clauses: 201

**Avoiding “Bad Deals” and
Identifying Leverage for Your
Company**

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Contract Negotiations: What is at Stake for Your Company?

Contract Negotiations: Pre-Game Considerations

- ✓ Who is Tasked With Doing Review?
- ✓ How Well Do You Know Standard Contract of Prime Contractor or other contracting party?
- ✓ How Do You Identify Leverage?
- ✓ What is Your Risk Philosophy?

Killer Clause #1

Flow-Down Clauses

2. **FLOW-DOWN RELATIONSHIP.** Subcontractor is bound to the Contractor in the same way and to the same extent Contractor is bound to Owner by the terms of the Contract Documents and shall bear all rights and liabilities with respect to the Contractor as the Contractor has with respect to the Owner, except that the terms of this Subcontract shall govern any inconsistent provision herein and in the Contract Documents. Subcontractor shall not deal directly with or work directly for Owner, Architect or Engineers.

Subcontractor is bound to Contractor in the same way Contractor is bound to Owner by the terms of the Prime Contract and shall bear all rights and liabilities with respect to the Owner.

Modified Killer Clause #1

Flow-Down

Subcontractor is bound to Contractor in the same way Contractor is bound to Owner by the terms of the Prime Contract...

[ADD] except that to the extent that the terms of this Subcontract shall govern any inconsistent provision.

Key Points to Negotiate

Scope of Work / Flow-Down

- ✓ Be Precise, Complete, No Conflicts
- ✓ Avoid “Open” Carve-Outs or All-Inclusive Language
- ✓ Incorporation of Your Proposal, Scope Sheet or Terms
- ✓ Incorporation by Reference (again, be precise)

Killer Clauses #2

Time-Related Issues

The Subcontractor agrees that the Subcontract amount is a fixed price not subject to adjustment because of Contractor directed changes in the scheduling or sequencing of the Subcontractor's work except for demonstrated additional Subcontractor costs due solely to the Contractor's gross negligence or willful misconduct.

Modified Killer Clause #2

Time-Related Issues

- ✓ Strike the word “not” in the second line
- ✓ Delete the balance of the clause after the word “work” in the fifth line
- ✓ Don’t give up your rights to costs and time for schedule impacts

Killer Clauses #2

Time-Related Issues

The Subcontractor shall notify the Contractor immediately if it discovers that work performed by another trade is not installed per the Contract Documents. The Subcontractor shall not continue to install its work if it is aware that this work will not allow another trade to correct its deficiencies, if any.

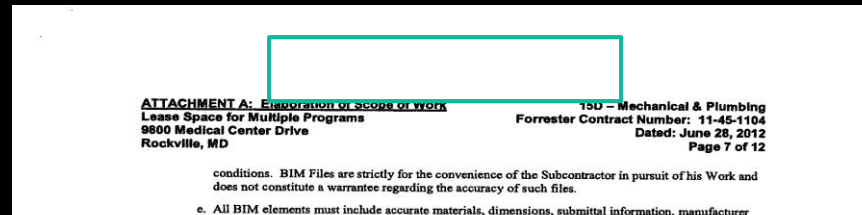
Modified Killer Clause #2

Time-Related Issues

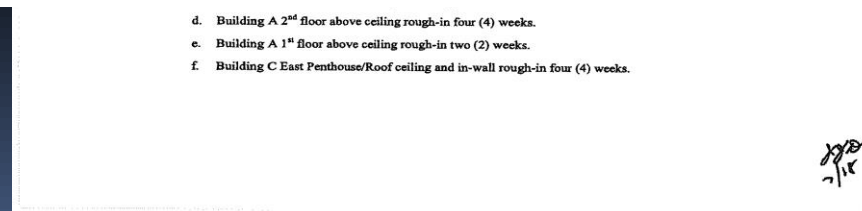
- ✓ Strike this clause if possible as you are not the judge of other subcontractors' work
- ✓ Make sure field personnel know of this notice requirement
- ✓ Seek directive from prime contractor for guidance if issue is identified (shift burden to prime contractor).

Killer Clause #2

Time-Related Issues



A. Time is of the essence in the execution of the Work of this Subcontract. Therefore, sufficient labor and materials must be provided at all times to meet Contractor's Job Progress Schedule (hereinafter "Schedule"). This Subcontractor shall take whatever steps necessary, including additional manpower, equipment, overtime shifts, etc. at its sole cost and expense, to perform its work in a time frame and sequence to meet the Schedule and the following milestones:



Killer Clause #2

Time-Related Issues

Subcontractor agrees that Subcontractor shall not be entitled to payment or compensation of any kind from Contractor or Owner for any increased costs or other direct, indirect or impact damages of any kind on account of any delay, acceleration, suspension or interference or other hindrance arising from or related to any cause whatsoever in the progress of the Work.

Key Points to Negotiate #2

Time-Related Issues

- ✓ Strike No Damages for Delay
- ✓ Performance Period
 - “Time is of the Essence”
 - Interim Milestones
 - Substantial Completion
- ✓ Delays: Time Extensions and SOW

Key Points to Negotiate #2

Time-Related Issues

- ✓ Scheduling Requirements
- ✓ Participation in Schedule Updates
- ✓ Notice Requirements on Changes
- ✓ Liquidated Damages
- ✓ Changed Work and Other Trades

Killer Clause #3

Pay-If-Paid Clauses

- “Contractor has no duty to pay Subcontractor if Contractor is not paid by Owner for Subcontractor’s Work and Subcontractor accepts the risk of the Owner’s nonpayment.”
- “Subcontractor agrees that it will not be paid until Contractor is paid by the Owner.”
- “No part of payment shall be due until 5 days after the owner shall have paid the contractor.”

Modified Killer Clause

Pay-If-Paid

- ✓ Strike clause
- ✓ Modify the clause to require payment in a reasonable time
- ✓ Delete condition precedent language

Key Points to Negotiate #3

Payment Issues

- Ensure all subcontract terms are incorporated downstream.
- Perfect your construction lien and bond rights.
- Look to prime contract clause for ambiguities. (*i.e.*, partial payment lien waivers, final payment provision).

Key Points to Negotiate #3

Payment Issues

- Avoid any ambiguities; clear drafting.
- Expressly name surety in pay-if-paid clause with downstream subs and suppliers.
- Incorporate pay-if-paid language into the payment bond.
- Include Miller Act and Little Miller Act waivers in the pay-when-paid clause.

Key Points to Negotiate #3

Payment Issues

- ✓ Retainage Strategies
 - ❑ Know the retention laws in DC/MD/VA
 - ❑ Ensure subcontracts contain same % as GC retention
 - ❑ Demand clarity in reduction procedure

Killer Clause #4

Changed Work

Subcontractor shall promptly comply with any Contractor directive with respect to performance of the Subcontractor's work, including such related work as is directed by Contractor.

Modified Killer Clause #4

Changed Work

ADD: “Subcontractor shall be entitled to any additional costs and time incurred related to complying with the Contractor’s directive to the extent it is beyond Subcontractor’s contractual scope of work.”

Key Points to Negotiate

#4 Changes

- ✓ Right to Dispute if Directed?
- ✓ Written versus Oral Directives
- ✓ Agreement on Price vs. Force Account
- ✓ Settle Time AND Cost
- ✓ Payment for Time vs. Reserving Rights
- ✓ Lien Releases

Killer Clause #5

Disputes

The Subcontractor agrees to continue work in the event of any dispute arising out of this Subcontract and not to cause any delay to the project.

Killer Clause #5

Disputes

Pending resolution as to the amount of adjustment in subcontract price, if any, the **Subcontractor shall continue its performance of such directed work without delay or interruption.**

Modified Killer Clause #5

Disputes

- ✓ Limit obligation to minor disputes
- ✓ Add language entitling

Subcontractor entitled to 50% of its estimated cost for the disputed work at the start of that work and time subject, however, to final determination

Killer Clause #5

Disputes – Venue

Regardless of the site of the Project, the laws of the State of Alaska shall govern in the interpretation of any contract-related issues, and any hearings or dispute resolution shall be held in the State of Alaska.

Key Clauses to Negotiate

#5 Disputes Clauses

- ✓ What kind of Cure Notice is required?
- ✓ What Venue /Forum is dictated?
- ✓ Participation in Disputes with Owner?
- ✓ Liquidating Agreements
- ✓ Attorney's Fees
- ✓ Tolling Agreements

Killer Clauses #6

Termination

The Contractor's determination that the Subcontractor has defaulted and the Contractor's decision as to the Subcontractor's failure to timely remedy and cure, shall be final and conclusively binding... unless... Contractor's determination was intentionally arbitrary and capricious, and made in bad faith.

Killer Clauses #6

Termination

In the event of Owner termination of the Contractor, the Contractor's liability to the Subcontractor is limited to the extent of the Contractor's recovery on the Subcontractor's behalf under the Contractor Documents.

Modified Killer Clause #6

Termination

Should all or a portion of this Prime Contract be terminated, this Subcontract may be similarly terminated to the extent necessary to reflect the changed scope in work.

Key Clauses to Negotiate

#6 Termination Clauses

- ✓ Purpose of Clause / Private vs. Public
- ✓ Prime Contract Requirements
- ✓ Wrongful Termination for Cause
- ✓ Improper Grounds for Termination for Convenience
- ✓ Suspension of Work Clauses

Key Clauses to Negotiate

#7 Consequential Damages

- ✓ Indirect Damages: Lost Profit, Rent, Bonding Capacity
- ✓ Negotiate for Waivers of CDs
- ✓ AIA vs. Consensus Doc Waivers

Killer Clause #8

Indemnification

Subcontractor will hold the indemnitees (owner, architect, and contractor) harmless, for death, injury or damage, whether or not it is due to the active or passive negligence of the indemnitees.

Modified Killer Clause #8

Indemnification

- ✓ In a perfect world, limit indemnification to your own negligence
- ✓ Subcontractor does not want to be liable for the sole negligence of the owner , the prime contractor or any other party

Killer Clause #8 - Indemnity

To the fullest extent permitted by law, the Subcontractor shall **indemnify, defend, save and hold** the Owner, the Contractor, the Architect [and others]...**harmless** from and against **all** liability, damage, loss, claims, demands, and actions of any nature whatsoever which arise out of or are connected with....:

Killer Clause #8 - Indemnity

- The performance of the Subcontractor's Work;
or
- Any incident or occurrence that is alleged to have happened in or about the place where such Work is being performed or in the vicinity thereof; or
- While any of the Subcontractor's property, equipment or personnel are in...such place...
whether or not such liability, damage, loss, claim, demand or action was caused in part or in whole by the active or passive negligence or other fault of a party indemnified hereunder.

Modified Killer Clause #8

Indemnification

- ✓ Strike hold harmless provision
- ✓ Limit obligation to specific identified parties such as the prime contractor and owner, not to other third parties
- ✓ Limit to Subcontractor's own negligence

Key Clauses to Negotiate

#8 Indemnification

- ✓ Risk Allocation
- ✓ Insurance Coverage / Waivers of Subrogation
- ✓ Indemnification for Active, Passive, Sole Negligence
- ✓ Indemnity for Contract Claims as Opposed to Property or 3rd Party

Killer Clause #9 – Protect Work

Subcontractor shall ...secure and protect its work and shall assume full responsibility for the security and condition thereof until completion of the entire project and final acceptance by Owner and Contractor.

Key Clauses to Negotiate

#10 Lien and Bond Rights

- ✓ Know your project jurisdiction.
- ✓ DC: Waivers are enforceable.
- ✓ MD: Lien waivers not enforceable.
- ✓ VA: Pre-performance lien waivers unenforceable.

Key Clauses/Phrases to Strike

- ✓ Specific Performance
- ✓ No-Damages-for-Delay
- ✓ Exculpatory Clauses, “No Right to Rely on Soils Information”
- ✓ Clauses that Seek to Put Onus on Subcontractor: “Careful” “Faithfully” “Strictly”
- ✓ Vague Terms: “Within the Meaning and Intent”
- ✓ Protection of Work

Why Change Order Provisions Matter

Carolina Conduit Systems, Inc. v. MasTec, N.A.

Hampton Roads Transit-Norfolk Light Rail



Change Order Provisions

- Carolina Conduit was required to construct duct banks in a horizontal configuration rather than the original vertical configuration specified by the design, which required the use of additional flowable fill.
- Subcontractor president met with GC PM and was told “not to worry” ...that there were plenty of funds available.
- Subcontractor contacted GC six months later, was again told “not to worry” that Carolina Conduit would be compensated for the extra costs.

Change Order Provisions

- Court emphasized the subcontract explicitly stated that fixed subcontract price would include all flowable fill.
- “Any additional work outside the original scope of work shall be handled through a change order specifying pricing and/or Unit prices approved by [Dominion Virginia Power].”
- Carolina Conduit had not submitted any COs.

Written Notice Requirements – Strictly Enforced in Virginia

- Must provide written notice of intent to file a claim at the time the disputes arose or at the beginning of the work giving rise to the claims.
- Rejected GC's argument that meeting minutes discussing disputed issues satisfied written notice.

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