

How to Enhance your Contract Rights in a Troubled Economy

ASA of MW Breakfast Meeting

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Contract Provisions Every PM Should Know At Project Commencement

- ✓ Order of Precedence
- ✓ Differing Site Conditions
- ✓ Payment (Progress and Final)
- ✓ Changes and Extras
- ✓ Delays: Time Extensions and LDs

Contract Provisions Every PM Should Know At Project Commencement

- ✓ Disputes Provision
- ✓ Time Limits / Notice
- ✓ Interest and Attorney's Fees
- ✓ Notice Requirements
- ✓ Waivers and Exculpatory Provisions

Recognizing and Documenting Claims

- ✓ RFI Process
- ✓ PCOs / PCO Log
- ✓ Partial Lien Waivers
- ✓ **Letters**
 - Communications with CM, A/E, Owner's Rep
 - Communications with downstream subs
- ✓ Emails to Individuals with Authority
- ✓ Project Meeting Minutes
- ✓ Daily reports
- ✓ Superintendent Notes
- ✓ Diaries, Journals, Logs

Change Order Provisions

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

Hampton Roads Transit-Norfolk Light Rail



Change Order Provisions

- *Carolina Conduit* required to construct duct banks in 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

Commonwealth of Virginia v. AMEC Civil, LLC,
(2010)

- Must provide writing 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 prior to filing suit.
- Rejected GC's argument that meeting minutes discussing disputed issues satisfied the written notice requirement.

Written Notice Requirements – Strictly Enforced in Virginia

Comstock Potomac Yard, L.C. v. Balfour Beatty Constr.,
(E.D. Va. February 23, 2010)

- **Liquidated damages provisions are enforceable regardless of failure to comply with a contractual claims provision.**
- **Owner not required to provide Contractor notice of claim for LDs.**
- **Court held BB liable for \$8.7M in LDs, \$2.9M in direct damages, for a total award of \$11,733,002.**

Pay-When-Paid Clauses

- Distinguished from “Pay-if-Paid” clauses
 - “Condition precedent” language
 - Not enforceable in some jurisdictions (CA, NY, NV)
 - Enforceable in Virginia
 - Examples of clauses without magic language

Pay-When-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.”

Pay-When-Paid Clauses

- 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).

Pay-When-Paid Clauses

Shoring Up Conditional Payment Clauses Downstream

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

Universal Concrete Products v. Turner Constr.
(February, 2010)



Failed Granby Tower site, Norfolk, VA

Universal Concrete Products v. Turner Constr.
(July 14, 2011)

➤ Subcontract stated:

“obligation of Turner to make a payment under this Agreement, whether a progress or final payment, or for extras or change orders or delays to the Work, is subject to the express condition precedent of payment by the Owner.”

Universal Concrete Products v. Turner Constr.
(July 14, 2011)

➤ Prime Contract stated:

“Owner shall reimburse Turner for payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontract.”

No Damage for Delay Clauses

Board of Education of Worcester County v. BEKA Industries, Inc., (Feb. 26, 2010)

➤ **No-Damages-for Delay Clause unenforceable in Maryland if intentional interference with work, or gross negligence in managing project.**

MAFCO Electrical Contractors, Inc. v. Turner Construction Company, (Dec. 21, 2009)

➤ **Even if prime contractor settles certain delay claims through payment, no-damage-for delay clause in subcontract is still enforceable.**

No Damage for Delay Clauses

Costello Construction of Maryland Inc. v. J.D. Long Masonry, Inc., (June 26, 2007)

- **Court ruled that subcontractors claim against prime contractor for delay damages was barred by no damage for delay clause, even if the delays were caused by prime contractor.**
- **Prime could not recover liquidated damages from the sub when no assessment had been levied by the project owner against it.**

Delay and Disruption Claim Checklist

- ✓ Reviewing the contract for procedural issues.
 - Timely notice of claim
 - Timely submission of information

- ✓ No damage for delay clause?

- ✓ Suspension of Work clause?

- ✓ Scheduling Clause that defines how delays are proven?

Delay and Disruption Claim Checklist

- ✓ Is project schedule being used to manage work?
- ✓ Is project schedule accepted by both parties?
- ✓ Is the delay claim being submitted contemporaneously with the delaying event?
- ✓ Have you established a fragment of the activities that define delaying event?

Delay and Disruption Claim Checklist

- ✓ Have you incorporated delay fragnet into project schedule?
- ✓ Have you incorporated your own concurrent delays?
- ✓ Did you make reasonable efforts to mitigate?
- ✓ Have you established cost accounting procedures to segregate and accumulate all additional costs caused by the delaying event?

Acceleration

Directed Acceleration: When the owner provides a written directive to work overtime which acknowledges responsibility to pay for costs associated with the acceleration.

Constructive Acceleration: When the owner insists that the project be completed within the original schedule, notwithstanding his entitlement to a time extension.

-- *Wallace Process Piping v. Martin-Marietta, Corp.*

-- *Fluor International v. Department of State*

Acceleration

Proving constructive acceleration requires a showing that the contractor:

- (1) encountered an excusable delay;
- (2) made a timely and sufficient request for a time extension;
- (3) the government denied the contractor's request;
- (4) the government insisted on completion of the contract within a shorter period of time than the contractor was entitled; and
- (5) that the contractor expended extra resources to compensate for the lost time and remain on schedule

Differing Site Conditions

Type I and Type II Differing Site Conditions:

Type I: “subsurface or latent physical conditions at the site which differ materially from those indicated in the contract.” 48 C.F.R. 52.236–2.

Type II: “unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” 48 C.F.R. 52.236–2.

Differing Site Conditions

Elements of Type I Claim:

1. Conditions in the contract differ **materially** from those encountered during performance.
2. Conditions encountered were **reasonably unforeseeable** based on **all information available** to the contractor at the time of bidding.
3. Contractor **reasonably relied** upon its interpretation of the contract and contract-related documents.
4. Contractor was **damaged** as a result of the material variation between expected and encountered conditions.

Differing Site Conditions

Elements of Type II Claim:

1. Unknown physical condition was not known by contractor at time of bidding.
2. Condition encountered was of an unusual nature and could not have been anticipated based upon an inspection of the site or based upon what is **ordinarily encountered** and **generally accepted** in the area.
3. The unknown and unusual condition differed materially from that normally encountered in the type of work provided by the contract.

Differing Site Conditions – Considerations

- ❑ *Spearin* Doctrine
- ❑ Duty to Investigate Site – must make reasonable visual inspection; failure to do so waives later DSC claim
- ❑ Duty to Disclose
- ❑ Disclaimers Regarding Boring Logs and Soil Investigations
- ❑ Unit Prices subject to DSC Clause

Implied Obligation to Terminate in Good Faith

Questar Builders, Inc. v. CB Flooring, LLC
(Md. 2009)

- Upheld validity of T-for-C clauses in private contracts.
- Only enforceable subject to an implied obligation to exercise the right to terminate in good faith and in accordance with fair dealing.

Good Faith Convenience Termination

Good Faith Reasons to Support a T-for-C

- deterioration of the parties' relationship;
- impossibility of performance (e.g., discovery of unknown or concealed condition);
- delay in completing the work;
- non-responsiveness of the other party;
- insolvency or other factors impairing party's ability to perform;
- deletion of the scope of work

Good Faith Convenience Termination

Bad Faith Reasons That Do Not Support a Termination for Convenience

- Terminating a contract to obtain better pricing from another party
- Evading contractual dispute resolution provisions
- Avoiding issuing a valid change order
- Frustrating the purpose of the contract.

Practical Considerations for Terminating for Convenience

- ❑ Review the contract procedures for termination
- ❑ State the basis for the termination in writing
- ❑ Identify the risk(s) of proceeding with the contract
- ❑ Collect any written project records that support termination and maintain contemporaneous project records
- ❑ Document any attempts to resolve issues short of termination
- ❑ Balance the potential for a claim of wrongful termination against the need to terminate.

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