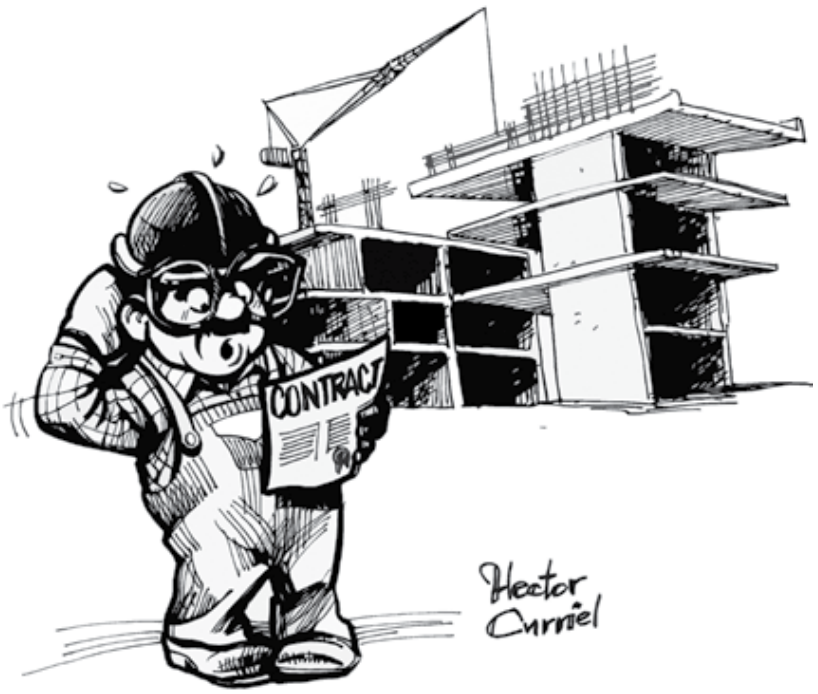
By Mark J. Rice, Esq.

TOP TEN LIST OF CONTRACT CLAUSES TO SAVE YOU, OR BITE YOU

In the disruptive model of the economy — where technology changes formats of doing business or else — the legal industry is at risk of falling behind. More than ever, it is critical to make contract language fit and anticipate the new approaches in cutting age construction agreements. Take for example the fact some hospitals insist that all drawings of record are now electronic, or the design concept recently gaining traction of "Model of Record." No, that is not a runway model, but a 3D model of a project, including its electronic data, that serves as the core design document and building recipe.

These new models of doing business require new "boilerplate", new "special conditions", and a hearty talk with the Board and risk managers. Still, the old, basic contract risk terms will remain. Now, I find myself going to Google first for contract language to fit, before the law books (which of course are on my computer). Why? It's amazing the contracts published on the web that reveal deep thinking and raw negotiations on big projects — Wynn's $1 Billion Las Vegas building, or the Princeton University Law Library Project — hundreds of pages of detailed terms on defining cost, time, and quality in very project and bargain specific ways.

Enough preamble. Here are the top ten risk terms to address in your forms, and to watch for in contract templates sent over to sign — usually same day. I recommend handy, "copy and paste"



alternates at the ready for quick turnaround, once you select which key risk terms to stick to, and which to yield on:

1. **Quality Control** – who defines it, what are reference standards, and who decides. Many contracts say what is supposed to happen but are weak on saying who has the referee's whistle to make the call. Things like "all work and material shall be free of defect and first class" — a clause I use when representing a high end homeowner — or "all work and materials shall evidence good workmanship and meet applicable contract and Code standards" — a more contractor friendly phrase — only help so much. One needs to define if the Project Manager, Owner, Inspector, Architect, or QC is charged with the duty to verify compliance and has or does not have the authority to accept or reject work. Usually there are practices that get built in at the point of a preconstruction process or approved QC submittal. Beware of sentences with passive verb tense, as they never say who does what, and to me,

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reflect incomplete project delivery instructions.

2. **Time, Delay, Time Extensions and Time Costs.** Contract clauses in the area of time have a tendency to fall into the story of Goldilocks — one extreme or the other. Either they are too complex and onerous on the contractor, pushing up bid prices needlessly for fear of liquidated damages, or too general to really act as a time management tool itself to execute the work. But a time clause in another party's form will tell you a lot if they have thought it through, and whether they intend to own time, share time, or look to the Contractor to just "get r'done" and spare me the details. It is always important here to have a clear statement of what a schedule should include, when updates are needed, and what happens if the work falls behind — who bears the cost of time recovery. What are the mechanics and deadlines for requesting time extensions, is bad weather always a time extension or only if unseasonable, who owns the float, etc.

3. **Access, Permits and Peripheral Constraints.** Many times the lead agency issuing public work plans is also the approval agency from a permit standpoint. But often, there are Army Corps and Fish & Game permits in marine or water based work areas, Water Quality Boards, Traffic Closure and Access Constraints. In projects with heavy equipment and cranes, these impact safety. Just as time is money, time and buffer space equal more safety. Often the design build elements of temporary works such as shoring are thin in

informing the contractor what permits are needed before work start. This is often dealt with by early RFI or pre-bid bidder's questions or at the pre-bid walk through. Who bears the risk of not timely getting the permit is often litigated, when some agency holds up a project start.

4. **Changes and Pricing of Changes.** Like Time Clauses, Change Order and Claim procedures, (and allowable costs) can run the gamut from "changes must be authorized and in writing" to near novels on what field office and home office overheads, burdens, and mark ups are allowed, and the approval process. Usually these lengthy change terms get ignored on a partnered, trust-based project where everyone gets along so the work is not impeded, and change order paperwork follows on as "ratification" of field directives and handshakes. Either way, both the language and the real time protocols in the field need both definition, and constant attention. Often it is said, a contract is something we read when we no longer get along. This is an area where things fall apart when distrust occurs, or the changes begin to bust the budget.

5. **Price and Contract Sum Definition.** Believe it or not, I must have litigated or arbitrated ten construction disputes where one issue was whether the contract sum or a line item in the contract was lump sum, cost plus fee, unit price, or Time & Materials. Contractors often use the term "cost" to mean "rates I charge" with inadequate explanation. In Public Works there are usually bid line items, not just a single price, so the owner can review it against its own engineer's estimate and assumptions, and compare who might be frontloading, when it comes time to prepare a schedule of values. Know the measuring stick and where you need a built in delta for more footage or quantities without having to get a change order to do it.

6. **Progress Payment, Retention, Final Payment, and Payment Approval Process.** AIA has a well-defined Certification of Payment Process and form, and many agencies adopt that model with some variation. It assumes an architect or engineer with production or contract administration responsibilities and active in oversight. Others have schedule of value requirements or milestone billings, and do not define the approval process. This always needs to be looked at, in terms of both the process, who decides, and how many layers of approval are needed to get the dough — one month, one week, or endless delay from cash starved agencies trying to balance infrastructure building with inadequate funding.

7. **Design Intent, Submittals, and Contract Document Definition.** A clear list is needed in the contract of contract documents, as well as what documents after signing become contract documents once approved. Date, pages, title block description. Too often there are disagreements over which documents are contract documents, which can be relied on even if not contract documents (geotechnical reports, subject to those disclaimers courts allow), etc. Also, a decision should be made whether the contract has a stated design intent and what that imposes in the way of risk or responsibility. A statement of purpose often is a fall back in court when a problem arises that the printed contract language fails to address well or at all — what is the fundamental bargain.

8. **When am I done? Completion, Punchlist and Final Acceptance.** This is another area where contract forms vary widely, from basic, "final payment due 35 days after acceptance, upon receipt of lien releases" to prolix requirements that are a bit outdated, like three sets of Mylar as builts instead of electronic as builts. Some owners expect the prime contract to pay all vendors and submit lien releases from them before final payment. How long will that cash be hanging out there? In some states like California, prompt pay penalties are imposed on late paying owners. But in my experience, once the owner gets that claim notice, it fires back a demand for an obscure deliverable of no value to protect itself, even if on the last ten project no one asked for it, and the spec is just outdated.

9. **Labor, Prevailing Wage, Project Labor Agreements, and Local Hire Requirements.** This area is fraught with peril, though should be defined up front if a PLA is required, Federal or State Prevailing Wages required, or Local or Disadvantaged hire requirements and certifications involved. These can bust a bid or create a manpower shortage or labor turmoil if not anticipated.

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10. Insurance, Indemnity, Damage Waivers and Subrogation Waivers. I recommend having your insurance broker, attorney and risk managers look at these clauses as a routine practice on each bid and contract signing. The anti-indemnity statutes in some states counter-act harsh one sided language in public works. In private works, those protections are often more limited. Owners will and should demand broad form additional insured protection on a contractor and its subcontractor's CGL policy. Some projects go with an Owner Controlled Insurance Policy (OCIP) or WRAP, that covers all parties to the project — often good so long as the coverage is the same. It takes time to compare that. Often, the stated insurance requirements, including AM BEST ratings or amounts may be challenging to obtain, or reflect an older contract that is out of sync with the market. Never risk signing a contract to provide more insurance than you have, then face a claim upon a casualty that you the contractor are now the insurer, having underinsured against overstated insurance requirements.

I could go on for another 10 — tolerances, BIM and protection against computer viruses, arbitration versus court dispute clauses, attorneys fee clauses, aesthetic clauses, termination clauses and notices to cure, assignment of subcontracts on termination, confidentiality, payment and performance bond requirements, consent re subcontractors, marketing rights from photographs, audit rights, and so on. But those also should be added to the list to be sure they fit your bid expectations, conform to good practices and are intrinsically fair, not "gotcha's" to bite the unsuspecting contractor or owner when things go south. ■

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