

CONTRACT REVIEW - WHAT IS CRITICAL?

By David A.Scotti, Esquire

1. INDEMNIFICATION

- a. Different types of indemnity provisions - Type 1, 2, and 3
Type 1 - no ability to control the risk, not insurable
Type 2 - indemnify against all except the Owner's sole negligence
Type 3 - limited to contractor's negligence, applies to personal injury and property damage claims; which are insurable. A201 language
- b. State law regarding enforceability
-limitation on ability to agree to indemnify for their own negligence.
InPA, can be done but must be clearly stated
- c. Review the entire contract. There may be indemnity provisions included in other parts of the Contract. Ex. Patent infringement and liens filed against the property.

2. SCOPE OF WORK

- a. Contractor's
- b. Subcontractor's

3. WARRANTY

- a. Typical one year warranty
- b. Warranty related to defective construction
- c. Statute of Limitations/Statute of Repose

4. PAYMENT TERMS

- a. Timing and required documentation
- b. Retainage
-percentage
-alternatives such as escrow procedures
-reduction and elimination of retainage
- c. Withholding Payment
-for this job
-for other jobs
- d. Final Payment
-When
-Documentation required
-Release required for final payment

5. SCHEDULE OF VALUES
 - a. Front loading/mobilization
 - b. False Claims Act
6. LIQUIDATED DAMAGES
 - a. Enforceability
 - b. Is it a penalty?
.Disproportionate to the anticipated hann?
7. DAMAGES WAIVER(S)
 - a. Waiver of Consequential Damages
 - b. No Damages for Delay
 - c. Enforceability
 - d. Public vs. Private projects
8. PAY IF PAID/PAY WHEN PAID
 - a. Enforceability
 - b. Rationale
9. FINANCIAL WHEREWITHAL OF OWNER
 - a. Ability to inquire of Owner's financial arrangements
10. SCHEDULE
 - a. Construction Schedule
 - b. Milestones
 - c. Delays due to weather, force majeure
 - d. Requests for additional time
 - e. Revisions/Updates, Need for Approval
11. RFI (REQUEST FOR INFORMATION) PROCESS
 - a. Responsibility for responding
 - b. Turnaround time
12. CONSTRUCTION CHANGEDIRECTIVES
 - a. Force account work, pricing of the work
 - b. Contractor financing of the work pending owner approval/payment
 - c. Progress billing requirement for "approved" change orders

13. DIFFERING SITE CONDITIONS
 - a. Standard provisions/implied by law
 - b. Type 1 - Erroneous indications in the Contract Documents
 - c. Type 2 - Unknown site conditions and of an unusual nature

14. CLAIMS PROCEDURES
 - a. Notice requirements
 - b. Documentation requirements
 - c. Field changes
 - d. Informal deferral process
 - e. Finality of change order requests, all inclusiveness

15. DISPUTE RESOLUTION PROCEDURES
 - a. Initial Decision Maker/architect
 - b. Conditions precedent
 - c. Mediation
 - d. Binding arbitration
 - e. Choice of Venue - State law limitations
 - f. Prompt Pay Act Damages
 - g. Claims for Attorneys Fees

16. CURE NOTICES/TERMINATION

17. TERMINATION FOR CONVENIENCE
 - a. Termination Damages

18. SUSPENSION OF WORK

19. INSPECTIONS/DEFECTIVE WORK

20. INSURANCE REQUIREMENTS
 - a. Types and amounts of coverages required
 - b. E&O coverage
 - c. Environmental coverage
 - d. Waiver of subrogation
 - e. Additional Insureds

21. PAYMENT AND PERFORMANCE BOND REQUIREMENT

22. SUBMITTALS AND SUBSTITUTIONS

23. PERSONNEL SUBSTITUTIONS

- a. Replacement of subcontractor(s)
- b. Contractor management/personnel

24. GOVERNING LAW

- a. State law limitation

25. COPYRIGHT ISSUES

26. **LEED** ISSUES

27. BIM (BUILDING INFORMATION MODELING) REQUIREMENTS