

## Construction Contract Checklist and Notes

CONTRACT CLAUSE	ISSUE TO REVIEW	OK?	NOT OK?	IF NOT OKAY, SEE NOTE X
<b>Scope of Work</b>	Thoroughly written?			1
	Battery limits defined?			2
	Interfaces defined?			3
	Exceptions defined?			4
	Work by others defined?			5
<b>Terms of Payment</b>	Positive cash flow?			6
	Downpayment/early payment?			7
	Retention?			8
	Paid when paid/paid if paid?			9
	More than 30 day terms?			10
	Electronic transfer of funds?			11
	Set offs?			12
<b>Schedule</b>	Adequate time for scope of work?			13
	Realistic if LDs?			14
	Contingency (float) in schedule?			15
	Who owns the "float"?			16
<b>Letter of Intent</b>	"Commitment" only?			17
	Defined scope and payment?			18

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<b>Insurance</b> (General Liability)	Realistic amounts?			19
	Additional insured status?			20
	Contractual Liability?			21
	OCP allowed?			22
	Completed operations?			23
	Care, custody and control?			24
<b>Indemnity</b>	Broad form?			25
	Intermediate form?			26
	Limited form?			27
	Knock for Knock?			28
	Who's covered?			29
	Financial limits?			30
	Location limits?			31
	Time limits?			32
	Anti-indemnity legislation?			33
	Venue/Applicable law?			34
<b>Changes</b>	Time only?			35
	Time and money?			36
	Process to get change defined?			37
	Payment for changes?			38
	Contract rates for changes?			39

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<b>Disputes</b>	Negotiate first required?			40
	Executive solution required?			41
	Mediation required?			42
	Arbitration required?			43
	Litigation?			44
<b>Assurances of Performance</b>	On-demand bond?			45
	Surety bond?			46
	Standby Letter of Credit?			47
	Parent Company guarantee?			48
<b>Damages</b>	Direct/Actual?			49
	Liquidated?			50
	Consequential?			51
<b>Warranty</b>	Start time defined?			52
	Duration defined?			53
	Exclusions defined?			54

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- 1 Make sure the scope of work is comprehensive and very thoroughly written. Most claims and disputes arise out of poorly written scopes of work.
- 2 The battery limits define the outside limit or perimeter of your work; where your work ends and someone else's work begins.
- 3 At your battery limits--the interface between your work and someone else's--define what your scope is at that interface. For example: who hooks up the piping from your work to another contractors work?
- 4 Clearly define what work is not included in your scope. For example: construction permits and local environmental permits.
- 5 Make sure you specifically define work that you expect to be performed by others: For example: owner is providing scaffolding services for all contractors.
- 6 Analyse the proposed terms of payment. Make sure the proposed terms yield a positive cash flow. If they don't, negotiate revised terms.
- 7 Always try to negotiate a down payment or an early payment. An early payment may be something such as submission or POs for materials; submit unpriced POs along with invoice for portion of contract price assigned to materials.
- 8 Always try not to agree to retention. Provide warranty bond instead along with invoice for final payment.
- 9 If you have to agree to paid when paid/paid if paid, make sure you set some maximum time limit that your invoice is outstanding. Better yet, negotiate more favorable terms. Your client has the money to pay on time and in accordance with your preferred terms.
- 10 You do not have to agree to payment terms beyond 30 days. Try to negotiate 15 day terms. Your client has the money to pay on time and in accordance with your preferred terms.

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| 11 | Learn how to establish electronic transfer of funds for payment of your invoices.   |
| 12 | Set-offs allow your client to subtract money from your invoices for money they claim you owe them from a different project. Do not agree to set-offs.   |
| 13 | Make sure there is adequate time in your schedule to perform the work.  |
| 14 | If there are liquidated damages in the contract, it is even more important that there is adequate time in your schedule to perform the work.  |
| 15 | Make sure there is at least some contingency time in your schedule as unforeseen delays are very common.  |
| 16 | Don't ever agree to give your client ownership of your contingency time in the schedule (commonly called "float").  |
| 17 | A letter of intent that only expresses a "commitment" to award you the job, subject to some final unresolved issues is nice because it may "get the job off the street", but you are at risk if you spend money.  |
| 18 | A vastly improved letter of intent expresses the commitment to award and also defines certain scope of work to perform, like engineering and/or material supply, plus the commitment to pay you certain amounts for that work performed prior to a final contract being signed.   |
| 19 | Is the amount of GL insurance required appropriate for the work? A requirement for \$10,000,000 of GL insurance for a \$250,000 job is inappropriate.   |
| 20 | If you grant your client additional insured status on your GL policy, he has full access to the coverage and limits of the policy including the defense obligation. A claim by your client as additional insured could ruin your ability to secure GL insurance or significantly increase your premiums. Try hard not agree to this. Your client can buy his own insurance. |

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- 21 Contractual liability insurance covers your obligations under the indemnity clause in the construction contract. Make sure your broker carefully explains contractual liability coverage to you and the issues that arise when you also agree to name your client as an additional insured on your GL policy.
- 22 An Owners and Contractors Protective liability insurance policy covers an Owner--your client--against third party over lawsuits, but not any of his direct liability. This is a completely acceptable substitute for naming your client as an additional insured.
- 23 Completed operations insurance is typically a separate GL policy that starts once you have completed your work and left the jobsite. Make sure you know how long the client wants the completed operations insurance to be in place. One year is normal; three years is long--and risky.
- 24 If you accept equipment procured by your client into your care for your later installation, make sure your GL insurance has "Care, Custody and Control" included for as a rider or endorsement.
- 25 A broad form indemnity makes you responsible for the financial liability arising out personal injury, including death, and property damage caused by the negligence of your client, including his sole negligence. This is a contractual landmine. Don't agree to it. If you have to agree to it make sure you have plenty of insurance to cover the potential liability.
- 26 An intermediate form indemnity is the same as a broad form, except it only excludes the clients sole negligence. This type of indemnity is also a contractual landmine. Don't agree to it. If you have to agree to it make sure you have plenty of insurance to cover the potential liability.

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- 27 A limited form indemnity makes you and your client responsible for the financial liability arising out of personal injury, including death, and property damage but only to the extent of your negligence and your client's. You have this obligation at law absent an indemnity in a contract. This is the type of indemnity you should try to negotiate into all your construction contracts.
- 28 A "knock for knock" indemnity obligates you and your client to be responsible for the financial liability arising out of personal injury, including death of their own employees regardless of the degree of negligence of one party or the other.
- 29 Try not to cover more than your client and his employees in the indemnities you negotiate. "Agents, representatives, subsidiaries" and other third parties are dangerous additions.
- 30 If you have to agree to a broad or intermediate form indemnity try to get a financial limit, preferably one that would fall within the limits of your insurance program.
- 31 Any indemnity should be limited to covering claims arising only during the on-site presence of the contractor, nowhere else.
- 32 Any indemnity should be limited to covering claims arising during the time the contractor is physically on the construction jobsite, not before or after he leaves the site.
- 33 A number of states have legislation in place that make broad and intermediate form indemnities "against public policy and therefore unenforceable". Legislation that only prohibits broad form indemnities is worthless since it would likely allow intermediate form indemnities. Check with a professional on this as legislation varies widely from state to state. Some states have no such laws.

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- 34 Venue and applicable law clauses dictate which state laws will govern in the event of a claim or dispute. These clauses are widely used to circumvent strong state anti-indemnification laws. Make sure you understand the consequences of working in one state, but subject to the laws of another state.
- 35 Changes clauses that only allow for an extension of time should not be agreed to.
- 36 All change clauses should be negotiated to include for both time and money.
- 37 Make sure the changes clause has a well-defined and fair process to have changes reviewed.
- 38 Payment for changes should be 100%. They were not part of the original contract where other payment terms may have been agreed to.
- 39 Strongly consider adding an addendum to all construction contracts that includes for unit rates for engineering, labor, materials, subcontracts, equipment rental, etc to use when changes arise.
- 40 A disputes clause should require the parties to first try to negotiate a resolution.
- 41 A disputes clause should require the parties to nominate an executive of each party to meet and try and resolve the dispute in the event negotiation fails.
- 42 A disputes clause should require the parties to use mediation in the event negotiation and executive resolution fail.
- 43 Arbitration is a poor dispute resolution process, but it can be noted in a disputes clause as available for use by the parties. Make sure the arbitrator(s) have some practical construction experience.
- 44 Don't ever agree to a disputes clause that requires the parties to resolve by going to court without at least first trying to negotiate, executive resolve, or mediate a resolution.

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| 45 | An on-demand bond--likely issued by a bank--is not an assurance of performance nor is it a guaranty.   |
| 46 | A surety bond is an assurance of performance and a guaranty.   |
| 47 | A stand-by letter of credit is the same as an on-demand bond.  |
| 48 | A parent company guarantee is as the name implies an assurance of performance by the parent company.   |
| 49 | You are responsible for direct or actual damages caused by your construction activities. You may be able to negotiate a financial limitation of liability clause into the contract that could limit your exposure to these types of damages.   |
| 50 | Liquidated damages in a contract create an adversarial relationship between the contractor and the Owner or his General Contractor, or both. LDs should bear some reasonable relationship to how much the Owner or his GC are damaged by late or other performance related issues. LDs should always have a financial cap on them. |
| 51 | Always negotiate a written exclusion of consequential damages. It is not sufficient to be silent in a contract on consequential damages.   |
| 52 | Make sure the warranty period has a very well defined start time.  |
| 53 | Make sure the warranty duration is very well defined.  |
| 54 | Make sure your warranty defines exclusions like corrosion, poor maintenance, etc.  |

**Interested in a two day course "Understanding and Negotiating Construction Contracts"?**  
**Contact Southernstar Consultants LLC at [southernconsult@aol.com](mailto:southernconsult@aol.com)**