



RHarper Consulting Update

More Thoughts to Consider for Your Next Construction Contract



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Our last issue of the newsletter addressed a few areas which you should consider as you enter your next construction contract. We only had space for a limited number of suggestions, though, so I will continue the list this month.

Before we get into the specific items, I will mention that I have noticed an emerging trend in the past few years toward Contractors creating additional profit centers that are less transparent than Fee and General Conditions. These costs are often hard to recognize – some of the most often used examples include information technology costs, high insurance modifiers, and personnel benefit costs. The best medicine is to just say “no” to these additional costs which strictly benefit the Contractor as additional revenue. Keep a sharp eye out for these new revenue generators.

Other thoughts to consider:

- Shared Savings - This clause can often be abused by creating contingency in line items during pre-construction and then, as actual costs are established, the Contractor collects a share of “savings.” Instead, Owners should consider an establishing a “floor” on savings, with participation beginning once the floor is exceeded.
- Termination Provisions - No one ever wants to think about a contract being terminated while they are still negotiating it, but paying attention to details like limiting overhead and profit to only work completed can prevent ugly surprises in what is typically a very tense situation anyway. The standard A201 language regarding termination for convenience provides for the Contractor getting full overhead and profit as if the project were complete - very few Owners are aware of this provision.
- Consequential Damages - This provision seems to create more angst for the parties than any other. However, creating carve-outs to the typical waiver of Consequential Damages is a workable approach. At a minimum, Owners should be able to collect on any consequential damages that may be provided by the Contractor’s insurance. Depending upon the magnitude of the risks to the Owner in a specific project, reasonable protections and reimbursement for certain consequential damages should be acceptable.
- Embedded Neutral - Spurious and retaliatory claims can be costly and divisive over the course of the Project. Having an independent neutral provide review and initial decision on claims provides a level of “adult supervision” that causes all parties to be more objective and reasonable in how they submit and react to claims. Even smaller projects can afford a neutral on an hourly basis to provide these services - this yields good value by significantly reducing or eliminating post-completion claims and litigation.
- Repair of Defective Work - Another unpleasant surprise for many Owners is the inclusion of the cost of repair of defective work as a reimbursable Cost of the Work. In other words, the Owner has to pay for doing it wrong and then repairing it! Eliminating this provision is typically easy, but almost always overlooked.

The suggestions above are not meant as legal advice, and the most important and effective component for any contract negotiation is an experienced, competent attorney. The points made here hopefully provide the parties some points to consider as they develop a set of clear and fair contract documents.

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RHarper Consulting Group provides development consulting, program management, and owner representation services focused on the senior living and mixed use sectors. In addition, Mr. Harper is also a listed mediator and arbitrator providing dispute resolution services for the construction and real estate industries.