Killer Contract Clauses: The Devil Is in the Details

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Killer Contract Clauses

- Goals of Today’s Seminar
  - Understanding Risk
  - When should you be concerned?
- Impact of Killer Clauses
  - Do all Killer Clauses have the same weight?
  - How do you make a choice when work is slow?
- Avoidance of Killer Clauses
  - Negotiate before you sign
  - Negotiate a fair contract
  - Accept “reasonable” risks
Bidding and Contract Formation

- Construction Contracts with Contractor
  - If work begins with bid (Offer)
    - Offer may NOT be withdrawn if contractor used the Bid to form its own Bid
      - *Drennan v. Star Paving Co.*, 51 Cal.2d 409 (1958)
      - GC may include “customary” terms, which it should have “reasonably expected”
  - If work based on deliverable, include favorable terms with quote sheet
- Contracts with Owner
  - Present offer with favorable terms attached
Bidding and Contract Formation

- To Avoid Being Stuck with Unreasonable, but Customary Terms, Qualify Your Bid
  - Specific Language You Require
    - Your Terms and Conditions
    - Include favorable language in any purchase order
  - Specific Contract Forms
    - ConsensusDOCS 247 (2013)
    - AIA C103 (2015)
Liquidated Damages

- Not Common in Consultant Agreements, But Be Vigilant
- Predetermined Damages: Pros & Cons
- Must Be Reasonable
- Unenforceable if it is a Penalty
- Apportion Between Responsible Parties
- Concurrent Delays by Owner/GC
Venue Selection Clauses

- Stay in Texas!
- Stay in Texas!
- Stay in Texas!
Change Orders/Extra Work Clauses

- Writing
- Signed by Both Parties
Written Change Orders

- Does your consultant agreement require change orders to be in writing?
  - YES, It IS a good business practice
  - But, often ignored for convenience
- How can you protect yourself?
Written Change Orders

- Document your changes in a writing signed by the parties before doing the work:
  - In a formal change order
  - In a letter agreement
  - On the back of a napkin
Written Change Orders

If you cannot document in a signed writing, try to save yourself by:

- Confirming the change in your own letter/email
  - Don’t ask them to confirm if they agree
- Confirming the change in your daily reports
- Confirming the change in the weekly meeting minutes
- Confirming in some other contemporaneous record
Written Change Orders

- Proprietary Form Example.

- ADDITIONAL SERVICES. Consultant shall provide or procure additional services, within the general scope of the Services described in Exhibit A, upon the request of Owner. A written agreement between Owner and Consultant shall define the extent of such additional services and fees to be paid to Consultant before they are performed by Consultant.
Dispute Resolution Provisions

- Litigation or Arbitration
- Pre-suit Mediation
- Waive Trial by Jury
- Limit Scope of Arbitration
Industry Standard

[Level of Performance]

- Highly Skilled Manner – NO!
- First Class Manner – NO!
- Best Practices – NO!
- Top in the Industry – NO!
- Conform to Industry Standards – YES!
Owner should receive ownership rights of deliverables AFTER payment.

Transfer of IP rights: default should be consultant retains.

Use of Materials upon termination: only to extent of payment received.
SOMEONE DECIDED FOR YOU

Set by Statute
Waivers & Releases
(Texas Property Code)

- No More Negotiating Waiver Forms
- Conditional Release
- Unconditional Release
Indemnity
(Texas Insurance Code)

- Broad Form Indemnity is Out – Great!
- Everyone is Responsible for Their Own Conduct
- Almost. Indemnity for Personal Injury Remains
Indemnification

- ConsensusDOCS 247 (2013)
  - To the fullest extent permitted by law, Consultant shall indemnify and hold harmless the Owner, Owner’s officers, directors, members, consultants, agents, and employees (the Indemnitees) from all claims for bodily injury and property damage, other than property insured... But only to the extent caused by the negligent acts or omissions of the Consultant...
Incorporation by Reference

- In context of agreements with general contractors or subcontractors, contract usually contains an “Incorporation by Reference” clause, also known as “Flow-down” or “Conduit” clause.
  - Reasonably necessary to coordinate the performance of the contract work.
Timing of Payment
(Texas Property Code / Government Code)

- Establishes Mandatory Timing for Payment
- Automatically Imposes Interest Penalty for Violation
- Limits Withholding
Acceptance of Final Payment

- Be careful when accepting “final payment” where payment is tendered in full and final settlement of all claims, especially when you have outstanding or unresolved claims.
- Lots of leverage against you to keep your cash flow going, especially if your claims are relatively small.
TRUST FUNDS
(Texas Property Code)

- Trustees and Beneficiaries
- Construction Funds = Trust Funds
- Civil & Criminal Features
- Recent Conviction – 3 Years in State Prison
Out of State Venue

- DO NOT AGREE!
Cross Contract Withholding

- DOUBLE YOUR TROUBLE
Sole Control Over Dispute Resolution

- Owner Decides Litigation or Arbitration
- Owner Selects the Arbitrator
- Owner Selects the Location of the Hearing
Attorney Fees: Status Quo

- Texas Law: Prevailing Party
- Reasonable & Necessary
- Hybrids – NO!
General Contractor’s “Sole Discretion” and “In Good Faith”

- Substitute “Reasonable”
- Don’t Shift the Legal Standard
Questions & Answers