

Construction Contract Pitfalls

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Whether you have a high-priced lawyer on retainer, a lawyer friend, or no legal advisor whatsoever, before you sign on any dotted line - you must personally read the contract - the *whole* contract - thoroughly understand it, and ensure you can live up to its terms. Many believe that as long as the business terms are acceptable, they do not have to pay attention to all the legal "mumbo jumbo." Nothing could be further from the truth. There are a number of boilerplate terms in construction contracts that everyone assumes are understood, when, in reality, they can be confusing, contradictory, onerous and even unconscionable. In fact, they can completely eviscerate the value of your good business terms.

Alternative Dispute Resolution Clauses (ADRs) are potential pitfalls because many people don't read them and understand them. There can be multi-step processes in the contract to address dispute resolution, starting with negotiation, then mediation and through arbitration. If so, make sure that each step has a very specific and defined start and end. That should be in the form of certain dates, like 30-days after first notice, or a specific event, like notification from one party that "negotiation" is over and mediation must begin.

ADR terms in contracts are as varied as the lawyers who draft them. Any time you agree to waive your right to go to court and submit to some type of ADR, you need to understand what that process will be. Most construction contracts have arbitration provisions. These can either save time and money or they can be onerous and burdensome. For example, if the contract calls for arbitration under "AAA Complex Commercial Arbitration Rules," you should understand that these rules are almost the same as court rules and probably will not save any time or money in the resolution of a dispute. They contain provisions for serving and responding to written questions, for obtaining and providing documents, and for pre-hearing depositions. While all of these can be good if you are the one who needs information, the provisions can be tedious and time-consuming if you are the one who has to provide information, open up your project file, or produce witnesses for deposition. It may end up costing as much and taking as long to resolve the dispute through arbitration as it would through the court.

Also, be aware that arbitrators do not necessarily have to follow the law. For example, in one arbitration dispute the contract had a liquidated damages provision. Under the provision, if my client prevailed on the merits of its claim, the exact amount of the damages were spelled out in the contract. The arbitrator found in favor of my client on the merits, but refused to award the entire amount of liquidated damages; instead, she "split the baby." While the outcome of any dispute resolution process, including traditional litigation, is unpredictable, there are many protections set up in court proceedings that mitigate some of that uncertainty.

One of those protections in the court system is the ability to appeal an adverse decision. A pitfall of arbitration is that, normally, the decision of the arbitrator is final. If the arbitrator gets the law wrong, or the facts wrong or makes a procedural mistake, unless the contract provides for court review, there is no direct review of that decision. The only claim under the law that you could take to court would be that the arbitrator was biased, or that the other side committed fraud. Arbitration is normally final and



binding; you have to live with the decision.

Choice of law and choice of forum provisions can often be surprising and expensive contract pitfalls. Look carefully at these provisions to ensure that they make sense. If the project is in Florida, it does not make sense for the contract to say that all disputes will be resolved in Alaska applying Hawaii law. The place of any dispute resolution should be logical and the state's law to be applied should usually be the same. So, if the project is in Florida, it makes sense for the forum to be Florida and Florida law should apply.

Indemnification provisions can also cause huge problems. Generally, they act as a shield against claims "arising from" the project. They can even be used to shield someone from their own mistakes. A classic pitfall provision is when you are asked to indemnify another party for their own "negligence" or to cover all claims "whether or not they arise in part or in whole from any act or omission" of the other party. Such provisions are prevalent. If you are providing the indemnification, your exposure should be limited to risks that you create by your own actions, not the actions of other parties.

In addition to being overbroad, indemnification provisions can waive protection that you would ordinarily have. For instance, a classic form of indemnification provision waives worker's compensation immunity. So, in a situation where one of your workers is hurt because of the negligence of another party, the contract could expose you to liability where you would ordinarily be protected by the worker's compensation bar.

Usually, indemnification provisions implicate insurance coverage. There are so many pitfalls in the insurance aspects of construction projects, it would take a much longer article to address them all. Two suggestions to avoid pitfalls are: (1) Make sure your limits are appropriate for the value of the project, and (2) Make sure there are no exclusions that affect coverage for the project (cross-suit exclusions or wrap up exclusions are tricky).

Be sure you can live up to your contract. One last warning: Never agree to something you can't live up to. Some contracts say, "Contractor will provide only the most highly trained workers as foremen on the project" or "Workmanship shall be of the highest quality in the industry." These subjective provisions are big gaping pitfalls; if you can't live up to them without question - avoid them.

While the legal terms (as opposed to the business terms) of a contract can be confusing, if you read the contract and understand it thoroughly, you can avoid potential problems down the line.

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