White and Williams LLP

Five Frequently Overlooked Points of Construction Contracts

Construction and Surety Alert **| September 24, 2021**

By: Craig H. O'Neill

There is no shortage of articles addressing the key points of construction contracts. Just enter that phrase into any internet search engine and you will find plenty. It should go without saying that a construction contract should be in writing, it should clearly identify the scope of work to be performed and the sums to be paid for that work, and it should address the parties' rights and responsibilities with regard to termination or suspension of the contract, correcting defective work, and handling claims and disputes—just to name a few. Of course, these items should receive their due consideration. Too often, however, other important aspects of the construction contract get shortchanged. This article aims the spotlight on five often overlooked aspects of construction contracts.

PROJECT SCHEDULES

Surprisingly, many construction contracts pay little attention to a central component of any construction project: the project schedule. Many contracts provide the dates of commencement and substantial completion but not much else. With the frequent use of project management techniques such as the Critical Path Method (CPM) and the associated software, it is easier than ever to identify which tasks should be prioritized and identify potential areas of delay. The owner's contract with the general contractor should clearly define the scheduling methods used and provide measures to keep the parties informed of the progress of the work. By including basic scheduling requirements in the contract documents—such as the submission of "Baseline Project Schedules" (consistent with the contract time provisions), "Schedule Progress Updates" (comparing the progress of the work against the Baseline Project Schedule), and "Schedule Recovery Plans" (when Schedule Project Updates indicate projected delays)—the parties can avoid or reduce disputes over project delays that often lead to litigation.

CHANGES TO THE PROJECT SCOPE OF WORK

Most construction contracts provide for written "Change Orders" to authorize changes to the contractor's scope of work. But what happens when the parties cannot agree on the terms of a change order? Often such disputes can lead to project delays if not properly addressed in the contract. For example, the AIA A201-2017 (General Conditions) provides for the use of "Construction Change Directives," which essentially require the contractor to proceed with the owner's requested changes to the work within the general scope of the contract, and then later resolve any disputes over changes to the contract sum or time extension. Another way to handle change order disputes is to build into the contract a fast-track procedure for handling them. For example, the parties can designate a third-party (e.g., an architect, engineer, etc.) who will step in on short notice to resolve any disputes that arise regarding changes to the scope of work. Regardless of the mechanism you decide on, providing a method of resolving change order disputes in the contract will reduce the likelihood of unwanted delays when the inevitable disputes arise.

NOTICE PROVISIONS

Perhaps due to their simplicity, notice provisions are one of the more overlooked clauses in construction contracts. These provisions typically require parties to notify each other in certain circumstances to make them aware of any problems that might arise. Frequently, parties will review the notice provisions simply to ensure that the appropriate names and addresses are listed. They are then quickly forgotten once the project begins. But failing to comply with a contractual notice provision can be fatal to a potential claim. A few things worth considering: First, notices should always be given in writing, regardless of whether the notice requirements are prefaced by the word "written." Second, don't assume that electronic notice is sufficient—it typically will not be unless specifically stated in the contract. Third, certain types of notices require specialized delivery methods, such as certified or registered mail or courier. It is therefore important to be aware not only of the types of notices that are required but also how they must be delivered. The bottom line is that notice provisions come in many forms. It is important to draft custom notice provisions that suit the needs of the project and then follow those provisions to the letter.

LIEN CLAIMS

Lien claims are a primary concern of project owners on most construction projects. While many construction contracts require lien waivers from contractors and subcontractors upon payment, many do not lay out how lien claims are handled if/when such claims arise. Project owners should consider including additional protections in the event that a contractor, subcontractor or material supplier files a lien claim. For example, the owner can request language requiring the contractor to immediately take any and all steps to satisfy and/or dismiss a lien claim, or post cash or securities with the court in substitution of that claim. The contract can also specify that the owner has the right to take such steps in the event the contractor fails to do so within a specified period of time. The owner could also require the contractor to indemnify and hold it harmless from any and all claims and/or other proceedings on the lien claim and all related costs and expenses if the contractor fails to take these actions upon notice from the owner. Detailing the rights and obligations of the parties in the event of a lien claim will help to provide clarity in the event that one is later filed.

FORCE MAJEURE CLAUSES

Prior to 2020, most parties to construction contracts devoted very little time to force majeure clauses. But then 2020 brought us the global COVID-19 pandemic. Now these once overlooked clauses are taking center stage. For the uninitiated, force majeure clauses typically excuse a party's inability to perform its obligations under the contract if an unforeseeable event prevents its performance. The applicability of force majeure clauses is very fact specific and dependent on the express language of the contract. Contractors should be aware that these clauses require more than a garden-variety delay. Generally, the event alleged must have been beyond the contractor's control and not due to any fault or negligence by the non-performing party. Many contracts also require written notice of a force majeure event and provide that the contractor's delay must end once the unexpected event has ended. But when clearly drafted and properly invoked, force majeure clauses provide necessary protection for contractors faced with circumstances beyond their control that make performance of the work commercially impracticable, illegal or impossible.

If you have any questions or need more information, contact Craig O'Neill (oneillc@whiteandwilliams.com; 215.864.6309) or another member of the Construction and Surety Group.