



Effective Contract Negotiation for Financial Managers

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Negotiation Best Practices

- Ask or you will not receive.
- Start broad and then go narrow.
- Don't assume – instead, find out why a provision is included or requested.
- Be prepared to explain your rationale for a change.
- Strike entire provisions only where necessary – better to modify when you can.
- Do not be afraid to push back.



I never looked at the consequences of missing a big shot... when you think about the consequences you always think of a negative result.

(Michael Jordan)



Waiver of Consequential Damages: Notwithstanding any provision of this Agreement to the contrary, Contractor acknowledges and agrees that Owner shall not be liable, directly or indirectly, to Contractor under tort, contract, strict liability or any other theory for any punitive, special, incidental, indirect or consequential damages, including without limitation, lost profits on this or any other project. Contractor knowingly waives all rights to claim against Owner, directly or indirectly, for punitive, special, incidental, indirect or consequential damages under tort, contract, strict liability or any other theory.



Mutual Waiver of Consequential Damages: Notwithstanding any provision of this Agreement to the contrary, Contractor and Owner acknowledges and agrees that ~~the neither party other Owner~~ shall ~~not~~ be liable, directly or indirectly, ~~to Contractor to the other~~ under tort, contract, strict liability or any other theory for any punitive, special, incidental, indirect or consequential damages, including without limitation, lost profits on this or any other project. Contractor and Owner knowingly waives all rights to claim against ~~Owner the~~ each other, directly or indirectly, for punitive, special, incidental, indirect or consequential damages under tort, contract, strict liability or any other theory.



Waiver of Consequential Damages: Notwithstanding any provision of this Agreement to the contrary, Contractor acknowledges and agrees that Owner shall not be liable, directly or indirectly, to Contractor under tort, contract, strict liability or any other theory for any punitive, special, incidental, indirect or consequential damages, including without limitation, lost profits on this or any other project. Contractor knowingly waives all rights to claim against Owner, directly or indirectly, for punitive, special, incidental, indirect or consequential damages under tort, contract, strict liability or any other theory. Provided that, Contractor's liability for punitive, special, incidental, indirect or consequential damages shall be limited only to those damages that are covered by the Contractor's underlying or excess/umbrella general liability policies applicable to the particular claim at issue. This limitation does not apply to any liquidated damages for delay.



**KEEP
CALM
AND
EXPECT
DELAYS**



Damages for Delay: Contractor agrees that under no circumstances shall Contractor assert a claim for any damages for delay suffered by Contractor.



Damages for Delay: Contractor ~~agrees that under no circumstances shall~~
~~Contractor~~ shall be entitled to an increase in the Contract Sum for any damages
resulting from delays to the project schedule which are not caused by Contractor
or its subcontractors. ~~assert a claim for any damages for delay suffered by~~
~~Contractor.~~



Damages for Delay: Contractor ~~agrees that under no circumstances shall Contractor~~ shall be entitled to an increase in the Contract Sum for any damages resulting from delays to the project schedule caused by Owner, Architect, Architect's consultants and Owner's separate contractors. ~~assert a claim for any damages for delay suffered by Contractor.~~ As for delays resulting from any other causes, except for those caused by Contractor or its subcontractors, Contractor shall be entitled solely to additional time in the project schedule.



Claim for Increase in the Contract Sum Due to Delays: Contractor ~~agrees that under no circumstances shall Contractor~~ shall be entitled to an increase in the Contract Sum for any ~~damages~~ additional general conditions and subcontractor costs incurred that result solely from delays to the project schedule caused by Owner, Architect, Architect's consultants and Owner's separate contractors. As for delays resulting from any other causes, except for those caused by Contractor or its subcontractors, Contractor shall be entitled solely to additional time in the project schedule.



Damages for Delay (Subcontract Provisions):

For delays not caused by Contractor or Subcontractor, Subcontractor shall be entitled to recover damages resulting from a delay to the project schedule but only to the extent that Contractor recovers those damages from Owner. Contractor is entitled to this limitation on Subcontractor's recovery of delay damages only if Contractor pursues Subcontractor's claim against Owner in a timely, good faith manner.

For delays caused by Contractor, Subcontractor shall be entitled to recover damages resulting from a delay to the project schedule.





Indemnity: To the fullest extent permitted by law, Contractor waives any right of contribution and shall indemnify, defend and hold harmless Owner, Architect, Architect's consultants and Lender (the "Indemnitees") from and against all claims, damages, losses, or expenses, including, but not limited to, attorneys' fees and costs, arising out of or resulting from or in connection with the performance of the Work; provided, that any such claim, damage, loss, or expense is caused in whole or in part by any act or omission of Contractor, Subcontractors, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable. Nothing contained in this Section shall require Contractor to indemnify the Indemnitees for claims arising out of the Indemnitees own negligence or to require indemnification which would make this Paragraph deemed void or unenforceable.



Indemnity: To the fullest extent permitted by law, Contractor ~~waives any right of contribution and~~ shall indemnify, defend and hold harmless Owner, ~~Architect, Architect's consultants and Lender~~ (the "Indemnitees") from and against all claims, damages, losses, or expenses, including, but not limited to, attorneys' fees and costs ("Losses"), ~~arising out of or resulting from or in connection with the performance of the Work; provided, that any such claim, damage, loss, or expense is caused in whole or in part to the extent caused~~ by any act or omission of Contractor, Subcontractors, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable and provided that such Losses are attributable to bodily injury, sickness, disease, death or damage to tangible property, other than the Work itself. Nothing contained in this Section shall require Contractor to indemnify the Indemnitees for claims arising out of the Indemnitees own negligence or to require indemnification which would make this Paragraph deemed void or unenforceable.



Indemnity Considerations:

- 1) Limit Losses to those covered by your general liability and excess/umbrella insurance policies.
- 2) Include the following: “The Waiver of Consequential Damages provision in Article 15 of this Agreement applies to the indemnity obligations set forth in this Article.”
- 3) Mutual Indemnity Obligations – If you don’t ask, you won’t get it.



FOR EVERYONE'S CONVENIENCE, WE LIKE TO GO OVER THE EMPLOYEE WELCOME KIT AND TERMINATION PACKAGE AT THE SAME TIME.



Termination for Convenience: Owner may terminate the Agreement or any portion of the Work at any time, without cause, by written notice to Contractor *provided, however,* that Owner shall compensate Contractor for the verifiable direct cost of all Work properly performed prior to Contractor's receipt of notice less any back charges for incurred or anticipated damages from defective Work and/or Contractor's breaches of the Agreement, which amounts shall be determined by Owner in its reasonable judgment.



Termination for Convenience: Owner may terminate the Agreement or any portion of the Work at any time, without cause, by written notice to Contractor *provided, however,* that Owner shall compensate Contractor for the verifiable direct cost of all Work properly performed prior to Contractor's receipt of notice, reasonable costs incurred in demobilizing from the project and canceling material orders and equipment leases, and lost profits on the unperformed Work, less any back charges for incurred or anticipated damages from defective Work and/or Contractor's breaches of the Agreement, which amounts shall be determined by Owner in its reasonable judgment.



Termination for Convenience:

New AIA 2017 Owner-Contractor Documents – no longer give Contractor the right to lost profits on unperformed work.

Rather, they provide for a negotiated termination fee.





Retention: In response to Contractor's Applications for Payment, Owner shall retain ten percent (10%) of each amount requested by Contractor for payment to Contractor and for payments to each respective Subcontractor as additional security for satisfactory completion of the Work. Upon achieving Substantial Completion of the Work, Owner will release to Contractor the balance of the retention withheld except for a sum equal to two times the projected cost of completing the remaining Punch List items and any other incomplete or Defective Work until such time as the remaining Work is completed. Contractor represents and covenants that it shall maintain at least the same or more stringent retention policies with respect to its Subcontractors.



Retention:

- Upon reaching fifty percent (50%) completion of the Work, withheld retention shall be reduced from 10% to 5% of the amount requested in each subsequent payment application.
- Upon reaching fifty percent (50%) completion of the Work, no further retention shall be withheld from any subsequent payment applications.
- After Substantial Completion of the Work has been achieved and accepted by Owner and Architect, all previously held retention shall be released provided that Owner may withhold up to 150% of the cost to complete the remaining Work and any punchlist items.



Retention:

- Upon the following trades reaching completion of their scope of work, and their work being accepted by Owner and Architect, the retention withheld by Owner on their work shall be requested for release and paid in full as part of the payment application immediately following acceptance of that work:
 - Demolition
 - Excavation
 - Concrete Footings and Foundation
 - Etc.

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Pay If Paid:

Contractor's obligation to make a payment to Subcontractor is conditioned upon first receiving the corresponding payment from Owner, the receipt of which is a condition precedent to Contractor's obligation to make payment to Subcontractor



Pay If Paid Exceptions:

Provided that payment from Owner to Contractor is not a condition precedent to Contractor's obligation to pay Subcontractor if (1) Contractor has failed to timely submit an application for payment to Owner seeking payment for Subcontractor's Work, (2) payment is for services for which Owner is not responsible to pay Contractor, or (3) Owner is not paying Contractor due to Contractor's breach of the General Contract for which Subcontractor has no responsibility or liability.

