

# Disarming Dangerous Contract Terms

PRESENTED BY:

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**SMITH  
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& HANCOCK LLP

# What Will I Learn?

- Identify potential issues caused by contract language over the course of a contract
- What **YOU** can do during the construction project to minimize disputes

# Assessing the Adequacy of Your Project Documentation System

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## ASSESSING THE ADEQUACY OF YOUR PROJECT DOCUMENTATION SYSTEM

By answering the following questions, you should obtain a better sense for the adequacy of your firm's documentation system. Look back at your "No" answers to any of these questions and consider what might be done to improve that aspect of the documentation system. If you are not responsible for the project documentation system, then pass this self-examination along to those in your firm who are in a position to implement changes. Although not an exhaustive questionnaire, this assessment should alert you to many areas in which inadequate project documentation systems often contribute to serious construction disputes.

	Yes	No	?
<b>PRE-CONTRACT RISK ASSESSMENT</b>			
Is there a system for identifying all documents made a part of your contract or affecting your contract rights and responsibilities?			
Is there a mandatory procedure to be followed in assessing the risks created by contract documents?			
Is someone specifically assigned the responsibility for assessing risks created by contract documents?			
Do you preserve that pre-contract risk assessment in a form which will be useful to your project management team?			
Do you consider needed changes to your "standard" documentation procedures in view of particular contract risks?			
Is someone specifically assigned responsibility for evaluating the adequacy of your standard documentation procedures on each project?			
Do you have a system for insuring that you have evaluated non-contractual risks (e.g., environmental hazards, poor design documents, poor site conditions, etc.) before bidding?			
Do you have a system for preserving your non-contractual risk assessment for the benefit of your project management team?			
Do you educate your project management team on documentation needs and risks?			
Do you have a system for assessing the adequacy of surety bonds?			
Do you have a system for assessing the adequacy of insurance furnished by you and furnished by others for your protection?			
<b>COMMON PROJECT DOCUMENTATION FORMS</b>			
Do you have a system for confirming and monitoring field directives and constructive changes?			
What is your system for documenting backcharges?			
What information do superintendents or foreman record in "personal" diaries?			

The full "Project Documentation" packet (30 pages) is available [here](https://liquidfiles.smithcurrie.com/message/JfEpemgCZzqdGohxJv63H4) or

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Until June 19, 2020

# Key Dangerous Contract Provisions





# Dangerous Contract Provisions



- Subcontractor prequalification
- Pre-site conditions
- Differing site conditions
- Notice
- Preserving your rights
- Contractor's right to stop work
- Termination for convenience
- Recovery of Damages
- Warranty

# Subcontractor Prequalification

## Owner's Concerns

- Competent subcontractors
- Reasonable cost
- Source of recovery for subcontractor default

## Contractor's Concerns

- Competent subcontractors
- Owner pays all costs
- Source of recovery
- Indemnity for losses



# Subcontractor Prequalification

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- Owner may require contractor to select non-prequalified subcontractors
- Contractor may require Owner to assume the risk if Owner insists that Contractor use subcontractors that are not prequalified

# Contractor: **Favorable** Prequalification Clause

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Owner has requested Contractor to contract with proposed subcontractors \_\_\_\_\_, neither of whom qualify to be included within the **Subcontractor Default Insurance program ("SDI")**, nor can they provide the necessary and required bonds for the Project.



# Contractor:

## Favorable Prequalification Clause

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As an inducement to Contractor, Owner agrees that it shall assume any and all risks, costs, expenses and increased financial exposures of any nature and any amount, which arise from, are caused by, are related to, or are in any way associated with the lack of performance or default of \_\_\_\_\_ at the Project, including, but not limited to, subcontractor replacement costs, escalation costs, material price increases, Contractor's extended general conditions, or **delay** (for which those deadlines set forth in Article III shall be extended, day for day, and any resulting liquidated damages shall be waived).

# Contractor: **Favorable** Prequalification Clause

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In addition, Owner shall immediately **defend**, with counsel reasonably acceptable to Contractor, **indemnify and hold harmless** Contractor from and against any and all Liabilities, as that term is defined in Section \_\_\_, which arise from, are caused by, are related to, or are in any way associated with the **lack of performance or default** of \_\_\_ at the Project.

*Think this is harsh?*  
*Wait for the next clause!*

# Contractor: **Favorable** Prequalification Clause

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Owner acknowledges that solely with regard to the potential subcontractor default of \_\_\_\_\_, any liabilities asserted against Contractor shall not be **covered under Contractor's SDI or Contractor Controlled Insurance Program ("CCIP")** and shall remain the sole and exclusive obligation of Owner.

***We really, really want nothing to do  
with these subs!***

# Differing Site Condition

## Owner's Concerns

- Certainty of price
- Shifting large risk: site conditions never fully known

## Contractor's Concern

- Avoiding a large risk
- Runaway liability: site conditions never fully known

# Differing Site Conditions

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- Site condition risk is one of the major risks on projects
- Full knowledge of all site conditions is never known



# Changes: Site Conditions

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## INSPECTION

### AIA A201: REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

§ 3.2.1 Execution of the Contract by the Contractor is **a representation** that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

# Changes: Differing Site Conditions

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- Watch out for Disclaimers Regarding Subsurface Conditions

## Example:

Project-Site Information: A geotechnical report has been prepared for this Project and is available for information only. The opinions expressed in this report are those of geotechnical engineer and represent interpretations of subsoil conditions, tests, and results of analyses conducted by geotechnical engineer. **Owner will not be responsible for interpretations or conclusions drawn from this data.**



# Changes: Differing Site Conditions

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**§ 3.7.4 Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) **subsurface or otherwise concealed physical conditions that differ materially** from those indicated in the Contract Documents or (2) **unknown physical conditions of an unusual nature, that differ materially from those ordinarily found** to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor **shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions.** The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

# Written Required but Verbal Accepted

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- Even when a change order must be written, a contractor can still recover if:
  - Work was orally ordered or authorized by the owner; or
  - The owner orally agreed or promised to pay additional compensation for the work in question; or
  - The parties to the contract, throughout their performance, have repeatedly or entirely disregarded the writing requirement.

# Authority to Order Changes

## Implied/Apparent Authority

- Implied Authority: Based on authority that are incidental to the express authority
- Apparent Authority: Owner's representative acts in a way that leads the contractor to reasonably believe the representative has actual authority

## Owner Ratification

- Knowledge is the essential ingredient – a change cannot be ratified without knowledge of this existence

# Sample Notice Letter: Extension of Time for Delays (and Extra Costs if Appropriate)

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## SAMPLE NOTICE LETTER: EXTENSION OF TIME FOR DELAYS (AND EXTRA COSTS, IF APPROPRIATE)

Date

SENT VIA: [U.S. Mail, Email, Overnight Delivery, Facsimile, etc.]

Addressee:  
(To Prime Contractor) or  
(Owner and Design Professional)

Dear:

We are continuing to pursue the completion of our work as rapidly as is reasonably possible under the current circumstances. We have, however, recently encountered certain delays to our performance through no fault of our own and which are beyond our control. We have continued to keep your job representatives informed of these delays and of their effect on overall job completion. You may be assured that we will diligently seek to reasonably minimize the effects of these delays on our work. Specifically, we have been delayed in the following particulars:

Accordingly, we hereby request an extension of [ \_\_\_\_ days]\* to our contract completion to take into consideration the above delays under Clause of the Contract provisions.

\*\*[The foregoing delays have also impacted our costs of performance, where it has taken additional time to perform the work. Such increased costs include, but may not be limited to: additional labor and premium time labor; additional costs for supervision; overhead; equipment; rentals; and loss of efficiency for direct labor. Accordingly, this is to place you on notice that we are entitled to additional compensation for all costs flowing from these delays and interference that have been imposed on us through no fault of our own. We will provide you with the specific amount of additional compensation covered by this notice as soon as we research this matter and have computed it.]

Sincerely yours,  
ABC Construction Company, Inc.

By (Title)

\*To be inserted where specific time of delay is known.  
\*\*To be used where extra money is claimed for delay.

The full “Project Documentation” packet (30 pages) is available [here](https://liquidfiles.smithcurrie.com/message/JfEpemgCZzqdGohxJv63H4) or

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# Sample Notice Letter: Oral Directions for Extra Work

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**SAMPLE NOTICE LETTER: ORAL DIRECTIONS OF EXTRA WORK**

SENT VIA: [U.S. Mail, Electronic Mail, Overnight Delivery, Facsimile, etc.]

DATE: \_\_\_\_\_  
SUBJECT: (Contract Name)

Dear:

On the \_\_\_\_ day of \_\_\_\_\_, 20, we received certain oral instruction (or orders, approvals, changes, as the case may be) from (insert name). These instructions were confirmed by our \_\_\_\_ 20\_\_\_\_, letter and should have been given to us in writing under the terms of our agreement. Your (insert name) has refused to confirm the oral instructions (or orders, approvals, changes, as the case may be) that we have recited in our referenced letter. Accordingly, we must advise that we will not (proceed with) (continue to follow) these oral instructions unless we receive your immediate written confirmation. In any event, we will expect reimbursement for all costs reasonably incurred in reliance upon your direction.

We understand that it may take time to go through all the steps necessary to bring about a written authorization for extra work, and that sometimes it is more practical to do the work before that written authorization can be obtained. It has been our past practice to try to recognize your need to follow this method of operation. However, in this case, and to avoid any misunderstanding, we think it appropriate that you first provide us with a formal written authorization for changed work.

Very truly yours,  
ABC Construction Company, Inc.

By \_\_\_\_\_ (Title)

**NOTE: Where the work already has been performed, it may be important to establish a prior history of reliance by the parties on oral directives. If the work has been fully performed, then the second paragraph should be deleted and the last sentence of the first paragraph replaced with the following:**

As you know, we proceeded immediately as directed to perform this additional work. We did so to minimize your extra cost, and in the same manner in which we have handled other oral directives in the past. Consistent with that past practice, we will provide you with our costs as soon as they are fully known and expect your prompt reimbursement.

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# Notice Letter: Confirming Change Directive

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SAMPLE NOTICE LETTER: CONFIRMING CHANGE DIRECTIVE

SENT VIA: [U.S. Mail, Electronic Mail, Overnight Delivery, Facsimile, etc.]

DATE: \_\_\_\_\_  
SUBJECT: (Contract Name)

Dear:

We were given instructions by (insert name) on (date) (put in time also if pertinent) to (describe work added or changed).

This change order is for work not within the scope of our present contract, and we therefore request a written modification to cover the added (material, labor, equipment, etc.) required to perform the work as ordered. (Give notice of other factors involved such as delay, acceleration, diversion of crew or equipment from contract work, material shortages, etc.).

Our proposal for the added cost resulting from this change order is being prepared and will be submitted for your approval as soon as possible. We cannot determine at this time the effect on contract completion date or other work under the Contract and will advise when a full analysis has been made.

As ordered, we (are proceeding) (have proceeded) at once to (procure materials) (perform the work) in order to complete this change order at the earliest possible time. In the event you do not approve of such action, please advise immediately in order that we may stop this effort and minimize the cost involved.

Your signature at the bottom of this letter will satisfactorily confirm the oral instructions.

Very truly yours,  
ABC Construction Company, Inc.

By \_\_\_\_\_ (Title)

Confirmation:  
The above-stated report of our instruction is confirmed.  
COMPANY: \_\_\_\_\_  
BY: \_\_\_\_\_  
Title: \_\_\_\_\_  
File No.: \_\_\_\_\_

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# Preserving your Rights: Differing Site Claims

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A good project system will *identify*, prior to contracting, the presence or absence of a differing site conditions clause.

- Request all available documents
- Knowledge of notice requirements
- Photographic or video record
- Proper authorization



# Changes: Preserving Your Rights – Documenting the Cost

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- Points to remember:
  - A claim is a change gone bad
  - Changes are inevitable
  - Read and obey your contract
  - Comply with the requirement of a written change order







NOTICE



# Notice

- Never assume that project issues are obvious to everyone
- Create a detailed record of all problems that arise on your project
- Copy all party representatives
- Require notice of all material issues from lower tiers



# NOTICE Industry Form Contracts: AIA, ConsensusDocs & EJCDC

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# AIA NOTICE REQUIREMENT

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# CONSENSUS DOCS NOTICE

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# EJCDC NOTICE REQUIREMENT

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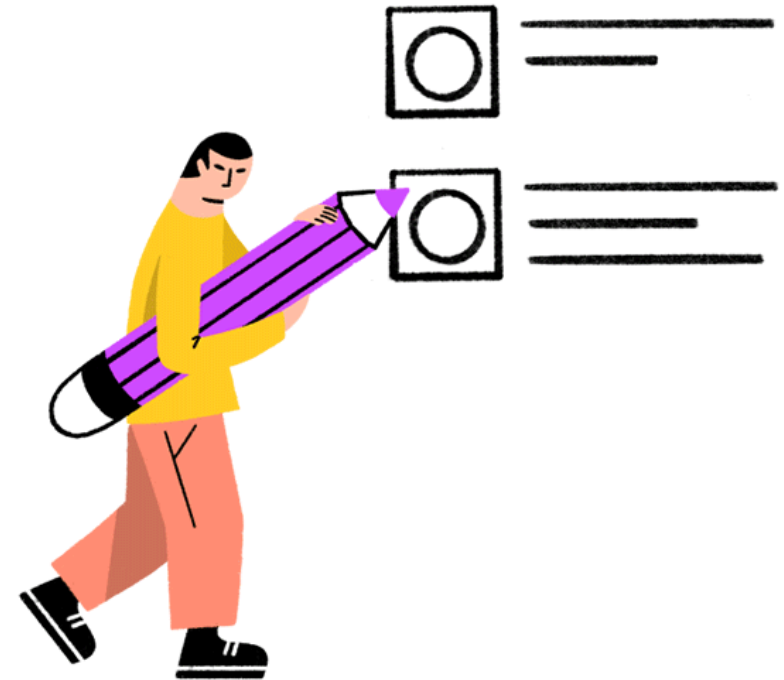




# Create Notice Checklist

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Identify the  
clause referenced,  
subject matter of the notice,  
form of the notice,  
and  
consequences for lack of notice  
in checklist form.



# Notice Checklist

# Notice Checklist

Clause Reference				
Changes ¶ __ of [ ] Contract				

# Notice Checklist

Clause Reference	Subject Matter of Notice			
Changes ¶ __ of [ ] Contract	Adjustment Proposal			

# Notice Checklist

Clause Reference	Subject Matter of Notice	Time Requisite for Notice		
Changes ¶ __ of [ ] Contract	Adjustment Proposal	_____ days  Triggering Event: _____  Other Action Required: _____		

# Notice Checklist

Clause Reference	Subject Matter of Notice	Time Requisite for Notice	Form and Date of Notice	
<p>Changes</p> <p>¶ ___ of</p> <p>[ ] Contract</p>	<p>Adjustment Proposal</p>	<p>_____ days</p> <p>Triggering Event: _____</p> <p>Other Action Required: _____</p>	<p>___ Written</p> <p>___ Certified</p> <p>___ Email</p> <p>Sent to: _____</p> <p>Response from: _____</p>	

# Notice Checklist

Clause Reference	Subject Matter of Notice	Time Requisite for Notice	Form and Date of Notice	Consequences for Lack of Notice
Changes ¶ __ of [ ] Contract	Adjustment Proposal	<p>_____ days</p> <p>Triggering Event: _____</p> <p>Other Action Required: _____</p>	<p>___ Written</p> <p>___ Certified</p> <p>___ Email</p> <p>Sent to: _____</p> <p>Response from: _____</p>	



# Notice Checklist

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NOTICE CHECKLIST				
CONTRACT:				
Clause Reference	Subject Matter Of Notice	Time Requirements For Notice	Form of Notice	Consequences of Lack of Notice
<b>Changes</b> Paragraph 4	Proposed for adjustment	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Constructive Changes</b> Paragraph 5	Order, circumstances and means of the order and that the contractor engages the order as a contract change	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Differing Site Conditions</b> Paragraph 6	Existence of unknown or reasonably different conditions affecting the contractor's cost	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Suspension of Work</b> Paragraph 7	The act or failure to act involved and the amount claimed	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Time Extensions</b> Paragraph 8	Cause of delay beyond contractor's control	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Claims</b> Paragraph 9	Notice of claim or conditions giving rise to a claim	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Termination for Default</b> Paragraph 10	Notice of intent to terminate for default	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Termination for Convenience</b> Paragraph 11	Notice of intent to exercise right to terminate for convenience	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Injury or Damage to Person or Property</b> Paragraph 12	Claim of injury or damage to property caused by act or omission of other party or agent	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Arbitration Notices and Demands</b> Paragraph 13	Demand for arbitration	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Disputes</b> Paragraph 14	Appeal of Arbitration (Final Decision Maker) or C.O. Final Decision	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____	Written Certified Registered See to: _____	
<b>Mechanic's Lien</b> Paragraph 15	Notice to be sent or filed to preserve lien rights	See(Ref) to _____ days Triggering Event: _____ Other Action Required: _____ Preservation Deadline: _____	Written Certified Registered See to: _____	

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# Preserving your Rights

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- Stop work if contract requires it or if change order is required
- Notify owner
- Decide if expert/consultant is needed
- Photograph/video conditions
- Establish a separate cost code for claim

# Contractor's Right to Stop Work

## Owner's Concerns

- Show must go on
- Need time to consider issues/impacts
- Need time to finance extra work

## Contractor's Concerns

- Indentured servitude
- Limit losses
- Limit contractor-financing of the job

# Contractor's Right to Stop Work

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## AIA form: Indentured Servanthood?

- **§ 7.3.6** Upon receipt of a Construction Change Directive, the **Contractor shall promptly proceed with the change in the Work involved** and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

# Contractor – **Favorable** Right to **Stop** Work

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If the cumulative amount of change orders and claims (including possible liquidated and/or consequential damages as applicable under the Contract Documents) that are denied or not timely determined by Owner **equals or exceeds \$\_ [or \_% of the original Contract Sum]**, Contractor may, in its **sole and absolute discretion, stop work on all or part of the Project** until the **dispute resolution procedures under the Contract Documents are exhausted** with regard to such change order requests or claims.

# Contractor – **Favorable** Right to **Stop** Work

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In addition to amounts finally determined for such change order requests or claims under the Contract Documents' dispute resolution procedures, the **Contract Time shall be increased** for the duration of the impact to the critical path caused by any work **stopped** under this provision, and the **Contract Sum shall be increased** by the amount of the Contractor's reasonable costs of shut-down, delay, and start-up, plus interest as provided for in the Contract Documents.



# Contractor – **Favorable** Right to **Stop** Work

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**This section 7.5 supersedes** any conflicting provisions in the contract documents and may be modified only by an agreement in writing between the parties.

**We really mean it!!**

# Threatened Termination

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THREATENED TERMINATION CHECKLIST	
A contractor or subcontractor with reason to believe that it may be terminated for default on a construction project should consider at least the following in assessing its legal position.	
✓	<b>ASSESSMENT OF TERMINATION RIGHTS AND RISKS</b>
	<b>Identify the Procedural Steps to Termination</b>
	Is there an express contract right to terminate?
	Have contract termination notice requirements been met?
	Does the contract provide for a “cure” period?
	If so, what is the “cure” period?
	Does the contract require an A/E finding of justification for termination?
	If so, has there been an A/E determination of grounds for termination?
	Are there other conditions precedent to the exercise of termination rights?
	<b>Identify Contract Grounds for Default Termination</b>
	Does the contract identify those circumstances justifying termination?
	Does the contract define “material” default?
	Has there been a “material” default?
	Has the default circumstance been waived by a prior course of performance or course of dealing between the parties?
	Is the default “excusable” under the contract or applicable law?
	Even if the contract defines the default event as “material,” is it realistically an “insubstantial” contract violation?
	Even if the termination is threatened on the basis of an insubstantial breach, is there a material contract breach which later could be used to justify the termination?
	<b>Invoke your Right to Cure Alleged Contract Breaches</b>
	Have you observed time limits and contract requirements for taking action to cure alleged defaults?
	Even if the contract does not provide express “cure” rights, have you provided a prompt written response to the termination notice and provided a curative plan?
	Does the contract specify the requirements of a plan to cure a default?
	Have you taken steps, prior to the termination date, to implement your plan to cure alleged breaches?
	Is your plan to cure the default a reasonable plan?
	Have you preserved your claim rights while offering a plan to cure the alleged default?
	<b>Document the Scope of Work Performed and Remaining</b>
	Have you prepared as-built plans for work completed and work in progress?
	Have you made a photographic/video record of work performed and work in progress?
	Have you made a photographic record of stored materials?
	Have you made a photographic record of equipment and tools on site?
	Have you made a record of the status of the work of other trades?
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# Termination for Convenience

## Owner's Concerns

- Flexibility – an “out” from obligations to contractor, e.g. if financing fails
- Limits amount owed to contractor
- Orderly transition

## Contractor's Concerns

- Benefit of the bargain
- Stain on reputation
- Cover general conditions

# Compensation for Termination for Convenience

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- Options:
  - No compensation beyond expenses of demobilization
  - Liquidated sum
  - All or a portion of lost profits

# Owner-Favorable Limitation on Termination for Convenience Payment

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If the Agreement is terminated by Owner pursuant to this Section, Owner shall pay Contractor for the **pro rata portion of the Contract Sum** applicable to the portion of the Work theretofore performed and any **proven loss sustained by Contractor upon any materials, equipment, tools, construction equipment and machinery**, and for reasonable **demobilization costs** (but in no event shall the total amount exceed the Contract Sum).

# Owner-Favorable Limitation on Termination for Convenience Payment

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Contractor, as a **condition of receiving payment** under this Section, shall execute and **deliver** all such papers and take all such steps, including the **assignment** of any of its contractual rights pertaining to the Work, and the **delivery** to Owner of all record documents, as Owner may reasonably request. The payment provided under this Section shall be Contractor's **sole and exclusive remedy** in the event of termination by Owner and Contractor shall be entitled to no other compensation or payment of any kind, whether for direct or indirect damages, lost profits or consequential damages.

# Damages

## Owner's Concerns

- To be made whole
- Streamline recovery
- Certainty of amount

## Contractor's Concerns

- To be made whole
- Streamline recovery
- Certainty of amount



# Proving Costs and Damages

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- Basic Elements of Damages

- Equity. The objective of any claim should be to “make the injured party whole”
- Reasonableness. The presence of even one unreasonable aspect in a claim could strain the credibility of other aspects
- Economic sense. Damages should only be based on the unique facts of the case

# Proving Costs and Damages

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- Quantifying incremental impacts
- Linking Damages to liability
- Importance of supporting documentation

# Owner's Remedies for Project Delays

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- **Actual damages**

- Expenses incurred as a direct result of delayed completion

- **Liquidated damages**

- A fixed amount agreed upon when the contract is executed

- **Consequential damages**

- Typically "big" damages incurred away from the project

# Actual Damages

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- Must flow reasonably from the breach and be within the contemplation of the parties
- Must not have been waived

# Consequential Damages

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- Unpredictable
- Large and difficult to control
- Difficult to prove with a reasonable degree of certainty
- Frequently waived by the parties

# Liquidated Damages

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- Actual damages must be difficult to predict at the time of contract signing
- Agreed upon liquidated damages must be a reasonable measure of the estimated damages for late completion based on the parties' knowledge when they signed the contract
- May be capped or graduated if in the contract
- Cannot be a penalty

# Warranties

## Owner's Concerns

- Wants contractual rights for as long as possible
- Warranty rights broader than negligence rights
- Warranty not subject to the economic loss rule

## Contractor's Concerns

- Wants limited duration
- Wants narrower obligations
- Wants right to repair before owner self-help




# Warranties:

## No time limit on A201 2017 Warranty

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**§ 3.5.1** The Contractor **warrants** to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further **warrants** that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit.



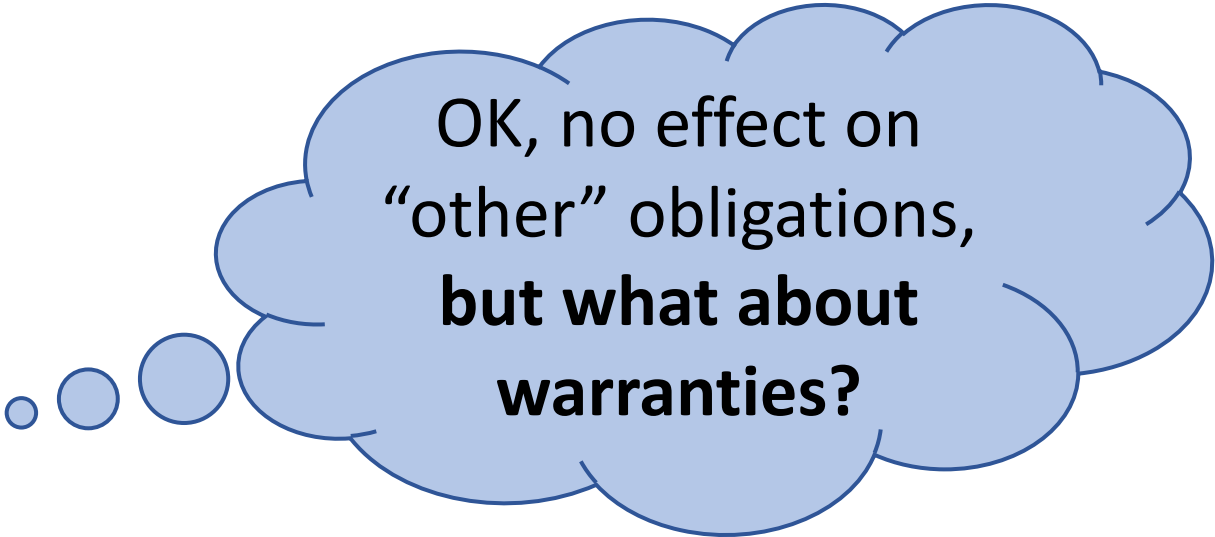
Hmmm... **no  
mention of time  
here at all!**

# Warranties:

## No time limit on A201 2017 Warranty

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**§ 12.2.5** Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents.



OK, no effect on  
“other” obligations,  
**but what about  
warranties?**

# Warranties:

## No time limit on A201 2017 Warranty

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**§ 12.2.5** (cont.) Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations

# Contractor-Favorable Changes to A201-2017 Warranty

Taketh Away

Giveth

**§ 3.5.1** *In addition to any manufacturer's warranties*, the Contractor warrants to the Owner and Architect that *for a period of one year following substantial completion* materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit.

# Questions?

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# Thank you!

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Sarah Carson is a Partner in the Raleigh office of Smith, Currie & Hancock LLP where she practices construction law, government contracts and general commercial litigation. Sarah's practice focuses on the representation of owners, contractors, subcontractors and design professionals in all phases of public and private construction and service projects throughout the United States. She routinely drafts and negotiates design, construction and service contracts on behalf of clients with a constant focus on conflict avoidance and the clear articulation of the parties' responsibilities.



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