

INSIGHTS

## Understand and Define Key Substantive Contract Provisions

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*Part two of a two-part series for Construction Executive on understanding pivotal dispute terms in construction contracts. The first part of this series – [“Define the Forum and Scope of Recovery in Contract Disputes”](#) – focused on provisions dealing with dispute resolution, venue, damages limitations and the recovery of attorneys’ fees.*

The following contract provisions should be clearly understood before undertaking any construction project commences.

### **Force Majeure**

Often referred to as an “Act of God,” a force majeure is an event, typically beyond the parties’ control, that prevents performance under a contract. To determine if a contractor need a force majeure clause in its contract, it should ask whether there may be instances where events beyond the contractor’s control could impact its contractual performance? If so, it will want this clause.

Courts currently treat force majeure as an issue of contractual interpretation, focusing on the express language in the contract. Consequently, the scope and applicability of a force majeure clause depends on the contract’s terms. Using broad language in a force majeure clause may help protect against unforeseen events. But to the extent possible, parties should describe with particularity the circumstances intended to constitute a force majeure.

The law relating to force majeure also fairly consistently provides that parties cannot avoid contractual obligations because performance has become economically burdensome. Courts have refused to apply force majeure clauses where an event only affects profitability. Recent attempts to categorize tariffs on construction materials as a force majeure have failed. Unless a tariff or tax is specifically listed as a force majeure event, it is unlikely to constitute a force majeure because it only affects profitability.

### **Indemnity Obligations**

Indemnity provisions are extremely important and should be scrutinized during contract negotiations. In general, indemnification requires one party to reimburse another party for damages incurred in performing a contract. Parties should try to limit their indemnity obligations to damages that are in their control and caused by their conduct. Indemnity obligations that arise from events beyond the control of a party should be avoided unless there

is an extremely compelling business interest at play. Moreover, indemnity clauses that require a party to be indemnified for losses suffered by its own negligence may not be enforceable under certain anti-indemnity laws.

### **Process for Establishing Legitimate Change Orders**

Construction contracts should detail the precise scope, cost and schedule for the contractor's work. This gives the parties certainty. Generally speaking, owners should not expect work to be done unless it is specified in the construction documents, and contractors should not expect payment for work that is outside the contract's scope of work.

The method for changing the contractor's scope, cost or schedule is customarily defined in the contract's change order provisions. To avoid change order disputes, parties should make sure they fully understand and comply with change order requirements in their contract.

Customarily, change order provisions require particular notice of the changes and a signed change order form. It is important to assess the primary change's effect on other aspects of the project—scope, cost and schedule—and request changes for all effected aspects of project. Discussions about changes should be documented (through meeting minutes or follow-up emails), and the party requesting the change should maintain documentation supporting the requested change. Timely written notice of the change order request should be provided, and the non-requesting party should provide a timely, written response to the change order request. If a dispute arises over a change, the parties will want to be able to show strict compliance with the change order process, and they will benefit from having adequate and even persuasive documentation supporting the issue in dispute.

### **Process for Establishing Legitimate Claims for Delay**

Project delays can increase costs for contractors and owners, and construction contracts ordinarily provide remedies for delays. From an owner's perspective, delay remedies often include a claim for liquidated damages. Owners wishing to make a liquidated damages claim should follow the process outlined in their contract. That process usually involves providing specified notice to the contractor. A contractor's delay claim may result from several factors, such as weather, site conditions, or interference from other contractors. Contracts ordinarily contain contractor remedies for owner-caused delays. Contractor claims for delay remedies are often handled through the change order process.

It is important for contractors to assemble evidence documenting the cause of the delay and its effect on labor costs and other expenses. Contractors should also try to mitigate losses from project delays and should retain evidence of mitigation efforts. Contractors should provide the contractually required notice—reflecting additional money owed and any schedule extension needed—together with documentation supporting the requested cost and scheduling changes.

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