

Project delayed may be damage denied

The risks inherent in the construction business are numerous for both the owner and contractor. But rather than address the fundamental causes, each employs a time-honored technique for reducing construction risks – contractually shifting the risks to other parties.

Normally, an owner has the most leverage in contract negotiations and drafting – and thus in the ability to shift risk.

The owner has the right to select the contractor, control the design and establish the budget. An owner who doesn't translate these advantages into negotiating leverage isn't trying very hard.

Nevertheless, despite owners' inherent negotiating advantages, contractors are increasingly insisting on limitations of liability in construction contracts. The most common limitation sought is a waiver of the owner's right to recover for consequential damages in the event of a contractor's breach, such as late completion of the work.

One of the biggest risks for a contractor on a project is delay. Not only does a contractor face running costs when a delay occurs, but he or she is also exposed to the owner's delay claims.

Typically, an owner with a delayed project incurs increased project management and financing costs

and, more significantly, lost-profit damages due to the inability to use the completed project as scheduled. An owner's lost-profit claim can



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be catastrophic to the contractor, particularly if the project is a manufacturing or production facility.

Contract forms limit liability

In the face of these risk-related damages, contractors have recently taken a page from the book of specialty manufacturers and design professionals by limiting or barring their liability for consequential damages through contractual provisions.

This movement gained momentum from the American Institute of Architects' standard contract forms, which include boilerplate waivers of consequential damages for both design and construction.

Many owners think these forms are an industry standard and sign them without deleting the waiver of consequential damages provision. Only later, when problems arise, do these owners understand that the standard AIA forms should have

been tailored to their needs. Owners often learn, to their chagrin, that they are not well represented on the AIA's contract drafting committees.

A contractor's success in obtaining a limitation on consequential damages usually depends on whether the owner has retained its bargaining leverage. If the owner initiates a contractor selection process based on an owner-friendly contract, it is unlikely to have to accede to a contractor's demand for a waiver of damages. The contractor selected will be hard-pressed to demand contractual concessions if it knew what the contract form was at the time of the selection competition. Experience indicates that owners who nail down the contract terms when there is still an option to select another contractor are rarely forced to accept a waiver of consequential damages. On the other hand, if an owner selects a contractor and proceeds to the eve of construction without finalizing the contract, the contractor suddenly has the leverage to dictate all sorts of terms, including a limitation on its damages exposure for delay.

A broad waiver of consequential damages can leave the owner without any remedy in the event of a delay.

An owner that has its back against the wall because it

has frittered away its leverage may balk at such a contract. Sometimes, the contractor will even have pangs of conscience if it has managed to maneuver the owner into having to agree to such a waiver.

To counterbalance such a broad waiver, the parties now frequently compromise by including a liquidated damages provision that gives the owner an agreed on but limited amount of damages in the event of a delay.

Contractors are often spooked by liquidated damages clauses. But the provisions can be a reasonable balance between an owner's need for recompense in the event of delay and the contractor's need to limit or quantify its risk.

Moreover, as a practical matter, negotiated liquidated damages amounts are rarely high enough to fully compensate an owner if a project is significantly delayed.

At best, the liquidated damages provision may be a happy medium, giving a good incentive to complete a project on time without bludgeoning the contractor if a delay occurs.

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