BROUSE McDowell
A Legal Professional Association

Construction & Coverage Law Seasonal Newsletter

Perilous Provisions in Construction Agreements

You've completed an accurate take-off. You've priced all the material and equipment needs. You've estimated your general conditions. You've lined up the necessary subcontractors. And now you've been awarded the contract. What comes next often seems like just a formality—finalizing the agreement and executing the contract. However the drafting, negotiating, and approval of certain provisions in construction contracts can have significant consequences for each contracting party. It is imperative that the contracting parties critically consider the consequences of each contract provision and diligently review changes to any negotiated provisions. While the following list includes several key provisions project owners and their contractors should carefully consider when beginning a new project, it is not exhaustive.

1. **Scope of Work.** The Scope of work is arguably the most important provision in any construction contract. This clause makes explicit what it is that the general contractor has agreed to provide. A well-defined scope of work is your first opportunity to reduce the risk of a dispute arising in the course of the construction project.

   One key phrase in particular that invites assumptions is "reasonably inferred." While this phrase was meant to summarize the small miscellaneous work items generally performed in all projects, today this phrase is often a point of contention and used to incorporate work that was overlooked during contract negotiations. By carefully and completely defining the work to be performed in the final contract and avoiding generalized language, parties can avoid disputes. This benefits project owners, who wish to avoid the "change order" game, and contractors, who wish be compensated if there is "scope creep" throughout the course of construction.

Construction Law and Insurance Recovery Experts

With comprehensive construction and insurance recovery practices, Brouse McDowell is uniquely suited to help its clients navigate the complex world of construction contracting and claims.

Our attorneys provide a full complement of legal resources to help at all stages of the construction project, from project conceptualization, design, contract drafting, implementation, monitoring and scheduling, to claims resolution.

And, with five Certified Specialists in Insurance Coverage Law, Brouse McDowell's Insurance Recovery group is one of the most experienced in the nation.

Our attorneys work collaboratively to better shift risk at the contracting stage, and to devise claim and litigation approaches that minimize liability and maximize insurance recovery in the event of a loss.

2. **Payment Provisions.** The terms of payment in a typical construction contract are often spread across several different provisions. In order to get the full picture of payment provisions, parties should consider the timing of payments, conditions of payment, the amount of retainage, and the events that justify withholding.

   Under Ohio's Prompt Payment Act, contractors must pay subcontractors, material suppliers and laborers within 10 days of receipt of payment from the project owner. However the timing of payment from the project owner is determined by the contract. Therefore parties should specify the frequency of billing as well as any parameters to payment such as ties to financing.

   Similarly any conditions precedent to the project owner's obligation to pay should be spelled out. One common requirement is the certification of payment that must be signed by a design professional. This provision requires a design professional to review and approve payment applications, thereby certifying (or not, based on what the contract provides as for the meaning of the design professional's approval) that the work performed and completed in a satisfactory fashion.

3. **Retainage.** Another provision worth reviewing is the clause on retainage. Retainage is the amount of money an owner or contractor will withhold from a progress payment as security for performance. The withheld payment is usually deferred until completion or at least until the contractor substantially completes their scope of work. Though certain terms are required on public contracts, the amount of retainage on a private project can be modified to suit the circumstances.

4. **Schedule and Delay Provisions.** Parties can also avoid disputes by clearly defining the schedule. The language in your scheduling terminology should clarify the sequence of work as well as define the stages of construction. Parties should also avoid clauses that permit either party to revise the schedule without good reason.

   As discussed in the first Construction & Coverage Law newsletter, the contract should specify the method by which any change to the project and schedule must occur. This includes requirements for documenting the cause and giving notice. Both contracting parties should seriously consider mandates requiring signed changes orders prior to performing extra work. For contractors the failure to comply may constitute a waiver of any claim for such extra work. For project

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owners such provisions can increase delays. For more information on handling changes after the contract has been signed see the newsletter article "Documenting Changes in Your Project."

Contractors should also be sure that all performance is contingent on "weather permitting" and absent other factors beyond your control that may potentially delay or hinder progress of the work. Contracting parties should include language regarding compensation for acceleration costs necessitated by delays or disruptions.

For questions or comments regarding this article, please contact James T. Dixon at jdixon@brouse.com or Amanda P. Parker at aparker@brouse.com.

"Lunch and Learn" Opportunities. Brouse McDowell collaborates with its clients and business partners to provide unique opportunities for in-person seminars.

Experienced attorneys from our **Construction Law and Insurance Recovery Group** will meet with individuals in your organization in an informal group setting to provide a legal overview on a variety of topics crucial to your business, including maximizing insurance coverage for your projects, project planning and contracting issues, and dispute avoidance and resolution. Prior to meeting, we will provide a "menu" of options on specific sub-issues within these broad topics for you to select. Feel free to select as many or as few as you like. We can travel to your place of business, meet in a conference room at our office, or reach you over the internet through our unique "webinar" service.

The seminar and lunch are on us! Please contact Amanda Leffler (aleffler@brouse.com) or Jim Dixon (jdixon@brouse.com) to get on the schedule or for more information.