

NEWS & INSIGHTS

Negotiating Construction Contracts

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Whether you are a contractor, subcontractor or owner, negotiating contract terms is necessary to succeed as a business. For construction contracts, certain clauses tend to draw the most attention during negotiations: price, scope of work, schedule and allocating risk.

Underlying business considerations, such as markup figures and a company's strengths and weaknesses, tend to drive these negotiations. Specific legal considerations, however, should also be taken into account.

Price and Payments

Price can be heavily influenced by the timing of payment, the responsibility for losses, the type of project delivery system and the contract documents used. Pay-if-paid clauses are often negotiated and allocate the risk of the owner's failure to pay. Under a pay-if-paid clause, if the owner fails to pay the contractor, the contractor is not obligated to pay the subcontractor. Other negotiations pertain to the timing of progress payments and the release of retainage. A creative negotiator will recognize that price points and pay-if-paid negotiations might differ depending on the timing of payment, release of retainage and solvency of the owner.

Also, the type of project delivery system and the type of contract documents may impact the negotiation of the price. Contract clauses may be heavily negotiated regarding contingency usage, savings, allowances and what assumptions and conditions allow for additional compensation.

Scope of Work

Scope of work negotiations tend to be driven by the specific trades at issue and the type of project delivery system. The guiding rule for negotiating scope of work is to ensure clarity and accuracy. What assumptions, conditions, plans, specifications, allowances and contingencies is your scope of work, and ultimately price, based upon? If it is a fast-track project with incomplete design, significant attention needs to be given towards identifying which scope of work is part of the original bid; which is an extra, allowance or contingency; and what qualifications apply to those future amounts.

[Why Material Breaches of Contract are So Important on a Construction Project](#)

At the intersection of price, scope and design are change orders. Negotiations frequently address the timing for noticing changes, which events are permissible changes (e.g., weather, differing site conditions) and whether the change allows for both compensation and an extension of time, or just one of the remedies. Each of these negotiations could impact your price point, as the allowance for changes is a shifting of risk in itself.

Schedule and Timeline

Pure schedule negotiations pertain to the timing of the work, such as the timing of the notice to proceed, the agreed upon duration for the work and what circumstances allow for an extension.

Several other schedule negotiations pertain to the intersection of pricing and timing. For example, if liquidated damages are present, that can be factored into the pricing to ensure adequate manpower and equipment. Depending on the negotiated schedule, additional compensation may need to be considered to cover overtime, weekend pay and expedited shipping or fabrication. Ownership of float and the allocation of concurrent delays can also be a part of negotiations.

Allocation of Risk

In many ways, all of the above negotiations are, in fact, an allocation of risk. Still, other clauses in a contract specifically address shifting risk on certain issues such as:

- Differing site conditions address the risk of unanticipated conditions on the project
- Indemnity clauses address the risk of damage to physical property or physical injury
- Insurance clauses, such as additional insured endorsements and waivers of subrogation, allocate risk of events to one party or another

Each of these clauses can be negotiated to limit the risk being accepted by a party. In turn, the allocations of risk may affect the desired price for the work.

[Tailoring Construction Contracts to Avoid Costly Repercussions](#)

Seek Trusted Legal Counsel

Redlining and negotiating contracts is an important function for all construction companies, specialty trades and developers. Prudent business owners know that a good understanding of the contract clauses is imperative for negotiating favorable terms, risk and accurately pricing the work. Having a trusted attorney, insurance representative, bonding agent and accountant on call is also essential for assisting with the various negotiations. When unforeseeable issues arise, being able to seek trusted counsel on said matters is equally crucial.

Saxton & Stump attorney [Ron Pollock](#) is available to advise and assist construction companies in their negotiation of contract terms. Please contact us to find out how our [Construction Law Group](#) can help your business review contracts and prepare for favorable negotiation outcomes.

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