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Important Contract Terms Beyond the Killer Clauses

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Topics

- ▶ Contract Documents and Contract Interpretation
- ▶ Notice and Electronic Communications
- ▶ Contract Breach, Termination and Assignment
- ▶ Indemnity - Negligence and Beyond
- ▶ Set Off
- ▶ Questions and Answers

Negotiating and Enforcing Construction Contracts

- ▶ Contracts = agreement on performance and obligations of each party
- ▶ Allocate risk
- ▶ Know about the contract forms
- ▶ Understand what make up the contract documents
- ▶ Know how to change - know risk if sign
- ▶ RTFC - Read the fricking contract

IF YOU WANT TO KNOW WHAT A CONTRACT REQUIRES

GET ALL CONTRACT DOCUMENTS

Contract Integration

- ▶ AIA - A-201
- ▶ 1.1.2 THE CONTRACT
- ▶ The Contract Documents form the Contract for Construction. The Contract represents **the entire and integrated agreement** between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification....

What documents make up the contract

- ▶ ConsensusDocs 200 2.4.4 “The “Contract Documents” consist of
- ▶ (a) this Agreement;
- ▶ (b) documents listed in §14.1 as existing contract documents;
- ▶ (c) drawings, specifications, addenda issued and acknowledged before execution of this Agreement;
- ▶ (d) information furnished by Owner pursuant to §3.13.4; and
- ▶ (e) Change Orders, Interim Directives, and amendments issued in accordance with this Agreement.

Flow Down Clause

- ▶ **AIA FORM A-401 MUTUAL RIGHTS AND RESPONSIBILITIES**
- ▶ The contractor and subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of the addition of AIA Document A201, current as of the date of this Agreement, apply to this Agreement pursuant to paragraph 1.2 and provisions of the Prime Contract applied to the Work of the Subcontractor,

Flow Down Cont.

- ▶ The Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor under such documents, assumes towards the Owner and Architect.
- ▶ The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor under such documents has against the Owner, insofar as applicable to the Subcontractor.

Flow Down and Subcontract Terms

Where a provision of such documents is inconsistent with a provision of this Agreement

This Agreement shall govern.

The more stringent term controls

The General Contract terms govern

ONE-WAY FLOW DOWN - Benefits Contractor Only

- ▶ The subcontractor is bound to the Contractor in the same way the Contractor is bound to the owner and shall assume toward the contractor all the obligations and responsibilities which the Contractor assumes toward the Owner and shall only have the same rights, remedies and redress against the Contractors which the Contractor has against the Owner, pursuant to the Contractor's Prime Contract with the Owner, except that this Subcontract shall govern any inconsistent provision of said Contracts.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

- ▶ In all contracts
- ▶ May be express contract term
- ▶ Consensus Docs 200 §2.1 PARTIES' RELATIONSHIP Each Party agrees to act on the basis of mutual trust, good faith, and fair dealing, and perform in an economical and timely manner. The Parties shall each endeavor to promote harmony and cooperation among all Project participants.

CJI Civil 30:16 Contract Performance—Implied Duty of Good Faith and Fair Dealing

- ▶ Every contract requires the parties to act in good faith and to deal fairly with each other in performing or enforcing the express terms of the contract. A party performs a contract in good faith when (his) (her) (its) actions are consistent with the agreed common purpose and with the reasonable expectations of the parties. The duty of good faith and fair dealing is breached when a party acts contrary to that agreed common purpose and the parties' reasonable expectations.

Wyoming Civil Jury Instructions

WJI - Civil 15.06

- ▶ Every contract includes an implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing requires that neither party commit an act that would injure the rights of the other party to receive the benefit of their agreement. Compliance with the obligation to perform a contract in good faith requires that a party's actions be consistent with the agreed common purpose and justified expectations of the other party. **A breach of the covenant of good faith and fair dealing occurs when a party interferes or fails to cooperate in the other party's performance.** The purpose, intentions, and expectations of the parties should be determined by considering the contract language, the parties' course of conduct and industry standards.

Contract Interpretation - what does a contract term mean

- ▶ If contract does not define method of interpretation
- ▶ Common law - court/judge/arbitrator - applies rules of contract interpretation

Primary Rules of Construction and Interpretation

- ▶ Favor Specific Terms Over General Terms...
- ▶ Favor Handwriting to Typing and Typing to Printing
- ▶ Favor Terms Stated Earlier in the Agreement Over Terms Stated Later
- ▶ Afford Words and Phrases Their "Plain Meaning"
- ▶ Construe the Contract as a Whole
- ▶ Construe Against the Drafting Party

Contract Interpretation Rules Cont.

- ▶ Take Words in Their Immediate Context
- ▶ Afford Each Provision Meaning and Purpose (“Boiler Plate” terms mean something)
- ▶ Require a Fair and Reasonable Construction
- ▶ Avoid Illegality
- ▶ Account for Surrounding Circumstances
- ▶ Consider the Parties' Own "Practical Construction" - and usage in trade
- ▶ MANY MORE

SAMPLE - ORDER OR PRECEDENCE AND INTERPRETATION (ConsensusDocs)

- ▶ The Contract Documents in existence at the time of execution of this Agreement are as follows:
- ▶ Drawings:
- ▶ Specifications:
- ▶ Addenda:
- ▶ Owner Provided information:
- ▶ Other:

INTERPRETATION OF CONTRACT DOCUMENTS - ConsensusDocs 200

- ▶ The drawings and specifications are complementary. If Work is shown only on one but not on the other, Constructor shall perform the Work as though fully described on both.
- ▶ In case of conflicts between the drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings, or specifications, Constructor shall immediately submit the matter to Owner for clarification. Subject to an equitable adjustment in Contract Time or Contract Price pursuant to Article 8, or a dispute mitigation and resolution, **Owner's clarifications are final and binding.**

Interpretation Clause Cont.

Where figures are given, they shall be preferred to scaled dimensions.

Unless otherwise specifically defined in this Agreement, any terms that have well-known technical or trade meanings shall be interpreted in accordance with their well-known meanings.

ORDER OF PRECEDENCE

- ▶ In case of any inconsistency, conflict, or ambiguity among the Contract Documents, **the documents shall govern in the following order:**
- ▶ (a) Change Orders and written amendments to this Agreement;
- ▶ (b) this Agreement;
- ▶ (c) subject to §14,2,2 the drawings (large scale governing over small scale), specifications, and addenda issued and acknowledged before Agreement execution or signed by both Parties;

Order of Precedence Cont.

- ▶ (d) information furnished by Owner pursuant to §3.13.4 or designated as a Contract Document in §14.1;
- ▶ (e) other Contract Documents listed in this Agreement. Among categories of documents having the same order of precedence, the term or provision that includes the latest date shall control.

Contract Administration

- ▶ Find, read and understand interpretation and order of precedence terms
- ▶ Judge/arbitrator - will rely on
- ▶ =agreement of parties - how contract to be interpreted

Contracts and Statutes - How do they work together?

- ▶ General rule
- ▶ “[i]n the absence of countervailing public policy or an express statutory provision barring waiver, parties may enter into contracts extinguishing or limiting statutory provisions which confer a right or benefit on one or both parties.

Public Policy - example

- ▶ CRS 13-21-111.5 (6)(d)(1) Any provision in a construction agreement that requires the purchase of additional insured coverage for damage arising out of death or bodily injury to persons or damage to property from any acts or omissions that are not caused by the negligence or fault of the party providing such additional insured coverage **is void as against public policy.**

Notice and Electronic Communications

- ▶ Notice - critical in construction contracts
 - ▶ Time and Method
- ▶ AIA 201 2017 “notice” 62 times
- ▶ ConsensusDocs 200 (GC - Owner - Lump Sum) - 51 times

Notice - - Example

- ▶ **2.4 Service.** The giving of written notice, where required by the terms of this Subcontract, may be accomplished by personal service of the notice upon the authorized representative of the designated party, by certified or registered letter to the party to whom such notice is intended to be given, addressed to their last known address and deposited in the United States Mail with good and sufficient postage prepaid, or by any standard form of telegraphic communication. **The notice shall become effective upon the earlier of the date of personal service, delivery to the telegraphic office, or the third day following the date upon which the notice was deposited in the United States Mail.**

AIA A 201 2017

- ▶ § 1.6 Notice
- ▶ § 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by **electronic transmission if a method for electronic transmission is set forth in the Agreement.**

- ▶ **§ 1.6.2 Notice of Claims as provided in Section 15.1.3** shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.
- ▶ **§ 1.7 Digital Data Use and Transmission**
- ▶ The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties will use AIA Document E203™-2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

Notice - ConsensusDocs 200 General Contract

- ▶ 13.5 NOTICE Unless changed in writing, a Party's address indicated in Article 1 shall be used when delivering notice to a physical address. Except for Agreement termination and as otherwise specified in the Contract Documents, **notice is effective upon transmission by any effective means, including U.S. postal service and overnight delivery service.**

ConsensusDocs - Electronic Documents

- ▶ 14.4.1 ELECTRONIC DOCUMENTS If Owner requires that Owner, Design Professional, and Constructor exchange documents and data in electronic or digital form, before any such exchange, Owner, Design Professional, and Constructor shall agree on and **follow a written protocol governing all exchanges in ConsensusDocs 200.2 or a separate addenda, which, at a minimum, shall specify:**
 - ▶ (a) the definition of documents and data to be accepted in electronic or digital form or to be transmitted electronically or digitally;
 - ▶ (b) management and coordination responsibilities;

- ▶ (c) necessary equipment, software, and services;
- ▶ (d) acceptable formats, transmission methods, and verification procedures;
- ▶ (e) methods for maintaining version control;
- ▶ (f) privacy and security requirements; and
- ▶ (g) storage and retrieval requirements.
- ▶ Except as otherwise agreed to by the Parties in writing, each Party shall bear its own costs as identified in the protocol. In the absence of a written protocol, use of documents and data in electronic or digital form shall be at the sole risk of the recipient.

Uniform Electronic Transactions Act

- ▶ C.R.S. § 24-71.3-105
- ▶ (1) This article does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.
- ▶ (2) **This article applies only to transactions between parties each of which has agreed to conduct transactions by electronic means.** Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

C.R.S. § 24-71.3-105, Cont.

- ▶ 3) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. **The right granted by this subsection (3) may not be waived by agreement.**
- ▶ (4) Except as otherwise provided in this article, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this article of the words “unless otherwise agreed”, or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

C.R.S. § 24-71.3-110

- ▶ (1) If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:
- ▶ (a) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, **the conforming party may avoid the effect of the changed or erroneous electronic record.**

C.R.S. § 24-71.3-112

- ▶ (1) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record that:
 - ▶ (a) Accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and
 - ▶ (b) Remains accessible for later reference.

Notaries - Electronic Signatures

- ▶ **C.R.S. § 24-71.3-111**
- ▶ If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.
- ▶ Colorado Secretary of State - Notary Handbook
 - ▶ Section XIV - Electronic Notarization

Contract Breach, Default and Assignment

▶ Basic Questions

- ▶ Is the breach material?
- ▶ Is termination proper under the contract?
- ▶ Have all required notices been given?
- ▶ What are the rights and claims that arise on both sides of the contract?
- ▶ What happens if the Lender takes over by assignment?

What is a Material Breach

- ▶ CJI 4TH Civ. 30:7 Substantial Performance - Defined
- ▶ A party has “substantially performed” or “substantially complied with” the terms of a contract if anything that was changed or not done according to the exact terms of the contract was minor, and the other party received substantially what he or she contracted for.
- ▶ Where there has been a “**material**” breach of contract, substantial performance has not been rendered.

Interbank Investments v Vail 12 P.3d 1224 (Colo App 2000)

- ▶ Whether there has been a material breach of contract turns upon the importance or seriousness of the breach and the likelihood that the injured party nonetheless received, or will receive, substantial performance under the contract.
- ▶ Indeed a breach that is material “goes to the root of the matter or essence of the contract,”
- ▶ In deciding whether a breach is material, the extent to which an injured party would still obtain substantial benefit from the contract, and the adequacy of compensation in damages for the breach, should be considered.

Termination and Contract Assignment

- ▶ **Black's Law Dictionary - assignment**
- ▶ “The transfer of rights or property”
- ▶ “An *assignment* is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the *act* of transfer, but also the instrument by which it is effected.”

AIA - General Contract Assignment

- ▶ **§ 13.2 Successors and Assigns**
- ▶ **§ 13.2.1**Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.
- ▶ **§ 13.2.2** The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate the assignment.

ConsensusDocs

- ▶ 14.5 ASSIGNMENT Except as to the assignment of proceeds, the Parties shall not assign their interest in this Agreement without the written consent of the other.... except that Owner may assign the Agreement to a wholly owned subsidiary of Owner when Owner has fully indemnified Constructor or to an institutional lender providing construction financing for the Project as long as the assignment is no less favorable to Constructor than this Agreement. If such assignment occurs, **Constructor shall execute any consent reasonably required.** In such event, the wholly owned subsidiary or lender shall assume Owner's rights and obligations under the Contract Documents.....

AIA - A 201 - Subcontract Assignment

- ▶ **§ 5.4 Contingent Assignment of Subcontracts**
- ▶ **§ 5.4.1** Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that
 - ▶ **.1** assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor; and
 - ▶ **.2** assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.
- ▶ When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

Lender Assignment Forms

- ▶ FOR VALUE RECEIVED, the undersigned _____ ("Borrower"), assigns to **WELLS FARGO BANK, NATIONAL ASSOCIATION** (collectively with its successors or assigns, "Lender"), its rights under all existing and future agreements and contracts, as amended, between Borrower and any other person or entity (collectively, "Construction Agreements") relating to the construction of the Improvements on the Property

- ▶ **Upon the occurrence of a Default** or event which would constitute a Default after notice or the passage of time, or both, under any of the Loan Documents, **Lender may, in Lender's sole discretion, give notice to Contractor of its intent to enforce the rights of Borrower under the Construction Agreements** and may initiate or participate in any legal proceedings respecting the enforcement of said rights. Borrower acknowledges that by accepting this Assignment, **Lender does not assume any of Borrower's obligations under the Construction Agreements.**

Indemnity - Negligence and beyond

- ▶ **Indemnify** To reimburse (another) for a loss suffered because of a third party's or one's own act or default; Hold Harmless **2.** To promise to reimburse (another) for such a loss. **3.** To give (another) security against such a loss.
- ▶ **Duty to Indemnify:** An obligation to compensate another for the other's loss.
 - The duty arises under the terms of an agreement, which governs the extent of the duty.

- ▶ **CRS § 13-21-111.5. Shifting financial responsibility for negligence in construction agreements--legislative declaration**
- ▶ (b) Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property **caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee** is void as against public policy and unenforceable.

Other indemnity terms in construction contracts

- ▶ Negligence
- ▶ Safety
- ▶ Hazardous materials
- ▶ Liens - GC and Subcontractor
- ▶ Patent infringement
- ▶ Design Errors (Patents) - Owner
- ▶ Exemption for taxes (Owner directs Constructor)
- ▶ Adjacent Property (Constructor indemnifies Owner)

▶ ARTICLE 9--INDEMNIFICATION

- ▶ To the fullest extent permitted by law, Contractor shall assume the defense of, and indemnify, protect and save harmless ABC Corp,... from all accidents, claims, judgments, liens, liabilities, losses, damages or injuries of any kind or nature whatsoever... including attorneys' fees, costs, expenses, fines, penalties and damages (collectively, "Claims"}, directly or indirectly resulting from the negligence, willful misconduct, **performance or failure to perform the Work by Contractor**, its employees, agents, laborers, or subcontractors...and Contractor will reimburse any expenditures, including attorneys' fees, which ABC Corp may incur by reason of such Claims.

Indemnity and Insurance

- ▶ Example Cont:
- ▶ **The foregoing indemnity is independent of and not limited to proceeds payable from any of the insurance policies required under this Agreement. Under no circumstances shall the insurance requirements and limits set forth in this Agreement be construed to limit Contractor's indemnification obligations or other liability hereunder. Contractor waives any rights of subrogation against ABC Corp and shall require Contractor's agents to waive subrogation against ABC Corp.**

Set Off


- ▶ “Something (such as an amount or claim) that balances or compensates for something else”.
- ▶ A debtor’s right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor
- ▶ “Set off is a mode of defense by which the defendant acknowledges the justice of the plaintiff’s demand, but sets up a demand of his own against the plaintiff, to counter-balance it either in whole or in part.”

Example - A 201 at section 14.2.4 - default

- ▶ “If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect’s services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner.”

Set Off Under Master Service Agreement

- ▶ “If Subcontractor has a payment failure, or is in default, suspension or termination for cause under this Subcontract, Contractor will have the right of offset on any Contractor project, in any location, all remaining monies due Subcontractor under this Subcontract. **Contractor may retain out of any payments due or to become due to Subcontractor on any other Project a reasonable amount to protect Contractor from any or all loss, damage or expense including attorneys' fees until the payment failure claim, default, suspension, termination for cause or lien has been satisfied by Subcontractor.**”

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- ▶ In the event of a Default, Contractor may pursue any remedies available by common law or statute, including but not limited to one or more of the following:
 - ▶ **offset and apply any amounts due Contractor as a result of such Default against any earned but unpaid amounts owing to Subcontractor by Contractor under the Subcontract Documents, including without limitation, any retainage held by Contractor, any amounts owed to Subcontractor under any other contract, including any contract between Subcontractor (or any of its subsidiaries or affiliates) and Contractor (or any of its subsidiaries or affiliates), whether related to the Project or otherwise.**