Canadian Construction Association
Best Practices Services

Mastering risk management in construction contracts

Published September 2024

Introduction

The construction industry has a successful history of managing project risk in construction contracts. For the last several decades, the use of standard agreements published by the Canadian Construction Documents Committee (CCDC) has contributed to a balanced sharing of project risk between Owners and Contractors. Placing risk with the party that is best able to manage it has been a principle that CCDC has applied consistently. CCDC's standard agreements have been routinely updated over the years to recognize and adapt to changing market conditions.

However, the construction industry also regularly uses non-standard agreements and supplementary conditions. These agreements often result in a greater transfer of risk to Contractors and their sub-trades. Contractors are generally willing to take on increased risks, but only those which they can control and manage. Non-standard contracts that impose risks that Contractors are not able to control and manage can create significant risks for construction companies at an enterprise level.

This document is intended to serve as a reference for Contractors as they bid and negotiate work. Its purpose is to ensure that the associated contractual risks are understood and properly addressed to avoid significant financial loss.

This document is not intended to be an exhaustive list of all matters Contractors should consider before entering a contract and does not constitute legal advice. This checklist is organized to follow the flow of Canadian Construction Association (CCA) standard contract documents (CCDC 2, 3, 5A, 5B, 14, 15,17 & CCA1). Items specific to Design Build (DB) and/or Public-Private Partnerships (P3) are noted. The concepts in each section are not listed in order of importance.

Agreement articles (including contract documents, price, fees, schedule)

Inflation/escalation relief: In the post-COVID marketplace, the construction industry experienced significant inflation and cost escalation in the supply chain.

Contracts should include the ability to manage this risk equitably by:

- Including a price escalation clause for materials on the project that are subject to inflation risk;
- If this is not possible, ensuring there is adequate relief available elsewhere in the contract to address supply chain issues (e.g., force majeure or change in law relief provisions); and/or
- Creating a cash allowance for the material or sub-trade at risk.

Definitions

Appropriate defined terms: The "Definitions" section of the contract is intended to provide clarity to the parties and reduce ambiguity by establishing a common understanding of key concepts, roles, and responsibilities. Failure to define terms appropriately can create serious risks for Contractors.

For example:

- Terms that are defined too narrowly can render the relief provided in other sections of the contract illusory. For example, a contract may appear to provide the Contractor with appropriate schedule and cost relief upon the occurrence of a “Relief Event.” However, if the contract defines “Relief Event" too narrowly, it will limit the circumstances in which the Contractor can effectively invoke the clause.
- Terms that are defined too broadly can impose greater obligations on the Contractor than the parties originally intended. For example, if the definition of the “Work” is too broad, the Contractor may become liable for work that is outside the scope of its original proposal.
- Failure to appropriately define terms, or to use them consistently throughout the contract, can create ambiguity and internal contradictions within the document. This can lead to costly disputes between the parties.

General provisions

Assignment: Owners sometimes insist on the right to assign contracts to any party without the Contractor’s consent and, in some cases, without even proper notice. This leaves Contractors exposed to financial risk in the event that the Owner assigns the contract to a new entity with unknown financial capabilities. Contractors should avoid agreeing to such terms, especially if the Owner has not provided adequate payment security.

Administration of the contract

Inappropriate transfer of design risk: Increasingly, terms from design-build contracts purporting to transfer design risk to Contractors are finding their way into contracts in which Contractors are not responsible for the design. This imposes significant risk on Contractors because they are not in a position to effectively manage design-related risk. It also creates the risk of Contractors being required to pay the costs of fixing poor-quality drawings, design issues, code misses, errors, and omissions.

The following are examples of concepts for Contractors to be mindful of:

- Terms that make the Contractor responsible for errors or omissions in drawings and specifications, or include warranty requirements that the work be “fit for purpose” or “fit for intended use.” While this language is common when the Contractor has assumed design risk, it is inappropriate in bid-build contracts because the Contractor is not in a position to determine whether a component meets the design intent. Contractors without a design mandate must have clear standards to be met and cannot be held to standards that require an interpretation of the design intent. Responsibility for ensuring that a component meets design intent should be the express responsibility of the designer.
- Terms that impose a duty on Contractors to review the Owner’s design documents and warn the Owner of any errors. This poses several problems for Contractors, including:
    - Insurance coverage implications;
    - Cost consequences of having to conduct a peer review of the Owner’s design documents; and

- Stranded risk (because the Contractor does not have a contract with the Owner's designer).

For these reasons, any terms imposing a duty on Contractors to review design documents and warn the Owner of any errors should be limited to what those errors the Contractor discernibly observes, not what the Contractor should have noticed.

Responsibility for third party approvals: Contractors should avoid accepting responsibility for third-party stakeholder approvals. For example, a project may require the Owner to conduct a design review to comment on the design's compliance with output specifications but may also require proponents to seek and obtain discretionary approval from the local municipality or other agencies operating on the site/facility.

It is reasonable for Owners to impose responsibility for satisfying building code and local by-law requirements on Contractors. However, where other stakeholders have discretionary approval rights, Owners must acknowledge that Contractors have limited or no ability to expedite design review by those parties, and no ability to impose an approval or to resolve conflicting requirements between agencies.

Possible solutions include:

- Bifurcating responsibility for third-party stakeholders – e.g., allocating coordination and design development responsibility to Contractors, with approvals/timeframes and conflicting requirements reconciliation risk remaining with Owners;
- Owners coordinating in advance with third-party stakeholders to reconcile design requirements and reflect a unified set of output specifications; and
- Owners assuming responsibility for third party stakeholders meeting design review timelines.

Owner discretion: Where the contract gives the Owner the ability to exercise discretion (e.g., approval of certain submittals), it is important to qualify that such discretion must be exercised reasonably and avoid leaving it to the Owner's "sole discretion." This is because an Owner's failure to exercise discretion in a reasonable manner could have serious cost and schedule implications for Contractors. Ultimately, Owners should be held to the same reasonable and timely standards as Contractors.

Performance of the services, execution of the work, responsibilities

Standard of care: Contractors should avoid language that imposes a higher standard of care than that required at common law (e.g. language such as "Contractor will perform its services to the highest industry standard" is problematic). Such language exposes the Contractor to a risk which is often uninsurable (because insurance policies typically exclude liability arising from a higher than ordinary standard of care). It also exposes Contractors to uncertain liability as it implies a standard somewhere between industry standard and perfection.

Performance specifications: Subjective and ambiguous performance specifications create uncertainty for both parties and risk that Contractors will be required to complete additional scope without compensation. Therefore, it is important for Contractors to identify any unclear Owner criteria and issue RFIs seeking clarification if necessary.

Means and methods: Typically, Contractors are responsible for construction means, methods, techniques, sequences, and procedures and for coordinating the various parts of the work. However, the industry is seeing additional language purporting to make the Contractor responsible when the Owner dictates means, methods, techniques, sequences, or procedures. This is problematic because it makes the Contractor responsible for items outside of its control. Contractors should consider excluding this type of language altogether, or including appropriate carveouts to ensure they are only responsible for their own operational choices, and not those set by the Owners.

Development approvals (DB/P3): In some contracts, Owners often assign the Contractor responsibility for obtaining development and environmental approvals from municipalities and other authorities. Especially in today's heated construction market, these approvals can take an exceptionally long time to obtain and are subject to the discretion of the applicable authorities.

It is appropriate for Contractors to prepare the materials necessary to apply for such permits. However, provided those materials comply with submission requirements, any subsequent delays in receiving permits or discretionary conditions attached to them should entitle Contractors to cost and schedule relief. Because Contractors cannot compel authorities to provide the necessary approvals in a timely manner or at all, the Owner should manage this risk.

Utility upgrades (DB/P3): Responsibility for upgrading the utility-side capacity of existing utilities (e.g., generation station works to provide adequate power) should be an Owner's responsibility, or otherwise clearly included in the Contractor's scope of work.

As with development approvals, selecting a site for a facility and determining the performance criteria are entirely within the Owner's control. While on-site works (e.g., transformers, tie-ins, onsite upgrades) can be identified and priced by Contractors, the need for "behind the line" upgrades is often not discernable at a proposal stage, and in many circumstances contact with utility companies is expressly prohibited.

Unachievable compliance criteria (DB/P3): Unachievable compliance criteria (e.g., scheduled service commencement constraints and affordability ceilings) hamper the ability of proponents to submit compliant proposals during the RFP phase.

Contractors understand that Owners must have the freedom to establish compliance criteria that best meet their requirements. However, proponents often incur extensive design development and other upfront bid costs before they are able to determine whether a project bid will comply with imposed schedule and affordability constraints. Potential solutions for Contractors to suggest include:

- Removal or relaxation of schedule and affordability caps;
- Retention of risk for time-uncertain responsibilities by Owners, in particular, development, environmental, and other "at risk" permits;
- Limited scoring implications for non-compliance with schedule/affordability constraints instead of disqualification; and

- Increased honorariums and clarification that such honorariums are payable even if schedule/budget constraints are not met.

Proceeding at risk (P3): In P3 contracts, terms that allow Owners to dictate that Contractors are "proceeding at risk" impose an unproductive procedural burden on Contractors. Since the bar is often low, Owners are able to escalate almost any matter to a "proceeding at risk" matter. This initiates a series of events that require the Contractor, Owner, and Independent Certifier to spend considerable time and money determining if the Owner "acted reasonably" in declaring a matter a "proceeding at risk" matter. Much work is performed, but almost none of it benefits the project. Therefore, Contractors must ensure that the circumstances in which Owners can exercise this right are appropriate.

Overly broad facilities maintenance obligations (DB): In several design-build projects, Owners have begun introducing open-ended long-term facilities maintenance requirements, such as mandating a 15 to 25-year design life for components.

While design development and equipment selection can accommodate longer-term design-life solutions, these performance requirements cannot be achieved on a "blanket" basis without an acknowledgement from Owners that operations, maintenance, and life cycling will be required to achieve the stated design life requirements, and that facilities maintenance and proper operation are exclusively Owner responsibilities in a bid-build, design-build or design-build financed project. Accordingly, these requirements should be appropriately caveated or broken down into more prescriptive requirements to avoid subject disputes after handover of a project.

Inappropriate time restrictions (P3): Increasingly in P3 contracts, construction contracts include restrictions on the amount of time an area may be available for construction activities (e.g., three windows of time equal to eight hours each being provided for fencing during construction) without a means to increase those times/periods. This creates the risk of a "hair trigger" default that cannot be remedied. These types of provisions should be excluded.

Allowances

Cash allowances and relief: Cash allowances can form a key part of a Contractor's risk allocation strategy when pursuing work. However, this risk allocation can be significantly disrupted if the contract fails to appropriately specify the circumstances in which the Contractor is entitled to access a cash allowance or imposes unduly onerous requirements before it can do so. Similarly, it is important that the contract expressly states whether the Contractor is entitled to relief if costs exceed the value of the cash allowance for a given item. Failure to do so can lead to disputes with the Owner and potentially erode the Contractor's fee.

Payment

Payment terms: Whereas a net 30-day payment cycle used to be commonplace, payment terms are increasing towards a net 60 days or greater. This can impose a significant financial burden on Contractors, especially when Owners refuse to provide adequate payment security. Improved payment terms and clear Owner commitments to pay (including guarantees from balance sheet entities) are necessary to ensure that Contractors can effectively manage credit risks.

While this concern has largely been addressed in jurisdictions with prompt payment legislation, it remains an important consideration in jurisdictions without the legislation. Further, for Contractors operating in jurisdictions with prompt payment legislation, it is important to ensure that the contractual payment terms comply with the legislation.

Additional holdbacks: There is a growing trend of Owners seeking to add additional holdbacks to contracts in addition to traditional builders' lien holdbacks.

Examples include:

- A Warranty Security holdback, typically set at two per cent;
- An Operations Manual holdback, often for mechanical and electrical trades, typically one to five per cent of the sub-trade contracts;
- A Deficiencies holdback, typically set at one to three per cent of the contract.

It is important for Contractors to consider how such additional holdbacks impact both Contractor and subcontractor cashflow on projects.

Application of deductions to deficiency work (P3): The concept of minor deficiencies is well-established in the industry. As a project reaches substantial performance the Owner and Contractor create a list of minor deficiencies. These must be rectified, but the parties agree they do not prevent the project from achieving substantial performance. In P3 projects, once substantial performance is achieved, the project moves into the operations phase.

During operations, certain deficiencies result in service payment deductions for the month in which the deficiency existed. Generally, this is not an issue, but at times, Owners attempt to apply service payment deductions to deficiencies that should not attract them. To avoid this, it is essential that P3 contracts specifically define the type of deficiencies that attract deductions and those that the Contractor is entitled to complete without penalty

Excessive unavailability deductions (P3): The severity of operational unavailability failures and payment deductions significantly impacts post-construction warranty regimes and costs.

The severity arises in two manners, often occurring simultaneously:

- The threshold for assessing an unavailability occurrence or a deduction is lower, with higher standards of performance, lower rectification times, and less time for proper inspection and temporary repairs; and
- The penalties being assessed are often excessive, sometimes up to $500K for a single occurrence.

While the imposition of an availability/deduction regime is conventional on P3 projects, the increasing severity of the risk transfer and penalties is eroding the ability of facilities maintenance providers and operators to function in the P3 space and is resulting in significant long-term operational exposure being pushed to Contractors.

Substantial/Total completion criteria: It is important to ensure that the definitions of, and criteria to achieve substantial and/or total completion are reasonable and achievable. This is especially true if there are liquidated

damages, payment adjustments, or holdback releases tied to these milestone dates under the contract. Criteria that are unduly onerous or in the Owner's sole discretion should be avoided. If possible, the criteria should mirror those in the standard form of CCDC documents.

Changes

Concealed conditions: Contractors should avoid clauses requiring them to accept all sites on an "as-is, where-is" basis, including "latent defects." These clauses turn the typical unknown conditions, concealed conditions, and subsurface risk models (which allocate risk to the party best able to handle them) on their heads, as it pushes these risks almost entirely onto Contractors with limited or no relief and usually without any reasonable opportunity for the Contractor to determine the true nature of any site conditions in advance of bidding. The solution to this is to revert to a risk allocation whereby the Owner accepts risk for pre-existing conditions and conditions which differ materially from those disclosed to the Contractor, which increases the reliability of Owner-provided reports for the Contractor.

Force majeure relief: In an environment of increasing volatility, it is imperative that contracts provide Contractors with appropriate and accessible relief when circumstances arise that are beyond the control of the parties (commonly referred to as "force majeure events"). Without such relief, unforeseen events could have catastrophic impacts on Contractors.

The following are some factors to consider when determining whether force majeure relief is appropriate:

- The list of events that give rise to relief;
- The degree of impact required to give rise to relief (e.g. does the clause require that the Contractor be "prevented" from carrying out the work, or merely "hindered"?);
- The mitigation requirements imposed on the Contractor;
- The relief provided (i.e. time, money or both);
- The notice requirements imposed; and
- Whether there is an ability to terminate if the event persists for an extended period of time.

Restrictions on time relief (P3): Many P3 contracts, including those in Ontario, unnecessarily restrict the time relief available to Contractors for damage that occurs because of the negligence of the Project Co/Contractor even where there is insurance available. For example, if a fire is started through the negligence of a sub-trade's craft worker, no time relief is granted even if there is insurance available to pay the costs of recovery.

If such risks are insured, Contractors should be entitled to time relief where insurance proceeds are available, regardless of whether the damage/destruction is due to a supervening event or Project Co/Contractor negligence.

Restrictions on supervening event relief (P3): Contractors are seeing an increasing number of supervening event clauses containing problematic caveats, thresholds and deductibles for relief, including:

- Restrictions on any claims until the project schedule is approved;
- Caveats that a supervening event must cause a critical path delay before a time extension is granted; and
- Time and dollar thresholds for supervening event claims set on a per incident and aggregate basis and, in some instances, reset on an annual basis.

While Contractors can address such restrictions to some degree through increased contingency pricing and/or schedule float, they still create an increased risk profile for Contractors because it is difficult to predict the frequency of events. Especially when combined with increasing penalties for late delivery, such restrictions constitute a significant risk for Contractors.

This can be addressed by reverting to a more traditional formulation of these provisions without caveats and with an emphasis on relief, placing the parties in a "no better/no worse" position.

Default notice

Suspension and termination: It is common for contracts to contain provisions that allow Owners to suspend or terminate the work in certain circumstances. However, given the potential consequences of such events, is important for Contractors to ensure that the circumstances in which these rights can be exercised are reasonable.

For example:

- If the termination or suspension is for cause, ensure that the trigger for those rights is reasonable and have an appropriate cure period to give the Contractor the opportunity to address the default before formal suspension or termination can be triggered;
- If the termination or suspension is for Owner default or convenience, ensure that the contract allows the Contractor to recover reasonable costs and, where appropriate, lost overhead and profit the Contractor expected to earn on the terminated contract; and
- If an Owner-directed suspension of work lasts for an extended period, ensure that the Contractor is allowed a reasonable time to remobilize on the site and an equitable adjustment in the contract time and price to account for the work being performed later than anticipated.

Dispute resolution

Dispute resolution processes: Excessive or unduly complicated dispute resolution processes can pose significant challenges to Contractors. These include increased administrative burdens on project teams, increased legal spending, and delays in receiving a final determination. It is important to ensure that both the interim (e.g., negotiations, mediation, etc.) and final steps (e.g., litigation or arbitration) in the dispute resolution process strike an appropriate balance between procedural protection and expediency based on the circumstances of the project in question.

Refusal to pay undisputed amounts: The refusal of Owners to pay Contractors undisputed amounts in the context of claims and changes is an increasingly regular occurrence, even in cases where there are clear

contractual provisions requiring the payment of such undisputed sums. Non-payment can significantly strain cash flow for Contractors, and it unnecessarily increases the risk profile for Contractors and sub-trades. This could be solved with a "fast track" dispute resolution process to validate undisputed amounts and ensure payments are made promptly without having to wait for an arbitrator or court to render a final determination.

As with the Payment commentary above, this has largely been addressed in jurisdictions with prompt payment legislation, as the adjudication mechanisms contained therein allow the parties to resolve disputes over non-payment expeditiously. However, it remains an important consideration for jurisdictions without prompt payment legislation in place.

Inappropriate liability waivers (DB/P3): Recently, Owners on P3 projects have introduced limitations on Project Co/Contractors' rights to seek equitable relief in the event of a dispute. While it is common for P3 contracts to include a waiver of tort claims, this waiver is reciprocal and does not limit the ability of either party to seek other relief for a breach.

While no party wishes for a contract disagreement to result in a legal claim, attempting to remove legal protections altogether via contract severely erodes the balance of fairness and spirit of partnering, especially when those restrictions are imposed exclusively on the Contractor.

Protection of persons and property

Utility risk: Contractors should avoid accepting utility identification and relocation risk in the context of brownfield sites, particularly when they are congested sites or lack clear background utility data. This risk can be addressed in several ways:

- Is the Contractor responsible for utility identification or relocation? If so, limit responsibility for utilities to the information disclosed in the background information.
- Is the Owner-supplied background information adequate? If not, is it possible to obtain more comprehensive background information?
- Is the Contractor entitled to relief (time and costs) for undisclosed or mislocated utilities?

Contamination risk: Contractors should be wary of accepting responsibility for contamination that is "inferable" from background reports or that could be inferable from "reasonable" investigation beyond what is provided as part of proposal background information (e.g., soil reports, contaminated building material reports, environmental reports). This is especially dangerous in situations where:

- Geotechnical reports lack sufficient detail regarding the presence and levels of contaminants;
- The project site and surrounding areas are not greenfield sites and are likely to have unspecified and/or unquantified levels of contaminants;
- There are elevated levels of pre-existing contamination (or risk of neighbouring contamination), such as on sites currently or previously used for industrial purposes; and/or

- The project site will be subjected to continuing works by other parties between bid and award where external fill may be provided or the risk of migration of contamination exists.

Solutions to this unreasonable risk allocation include:

- Obtaining more prescriptive environmental reports that align with the contractual model and reduce ambiguities/generic overarching statements;
- Limiting existing contamination responsibility to quantities and types actually identified in environmental reports;
- Use of a cash allowance in the contract for the unknown contamination risk;
- Where site conditions are not greenfield, treating contamination as a cash allowance (both time and money);
- Where enabling works are being performed prior to a contract award, update environmental investigations and ensure proponents are granted relief if site conditions change; and
- Allowing the Contractor to be able to rely on the reports.

Governing regulations

Changes in law - Contractors should avoid assuming risks associated with changes in law, particularly where such changes could have a material impact on the Contractor's cost or schedule to perform the work. Contractors have no way to anticipate such changes or price the risk associated with such changes.
Therefore, they should give rise to relief under the contract.

Duties, taxes and tariffs (P3): In Ontario P3 project forms, Contractors are not provided relief granted for changes in duties and tariffs that may be imposed on the work. This is contrary to the relief provided for Contractors and design-builders in the CCDC template agreements (e.g. CCDC 2 and 14). As demonstrated by increased trade and political volatility in recent years, this is a significant risk that cannot be predicted or priced by Contractors. Similarly, the cost implications of new taxes introduced after a bid submission cannot reasonably be anticipated or priced by Contractors.

These issues may be solved by adding relief provisions, consistent with the CCDC and PBC forms of agreement, for new and changed tariffs, duties, and taxes imposed post-bid.

Insurance and contract security

Liability for insurance deductibles: Contractors should avoid assuming liability for builder's risk insurance deductibles, particularly in circumstances where the Contractor is not at fault for the loss. Contractors often cannot price the risk of having to pay insurance deductibles where the loss is caused by acts of God, including adverse weather, wildfire, flood, earthquakes, etc.

Owner takeover

Prerequisites for owner takeover: It is important to ensure that the prerequisites for Owner takeover of the

project are reasonable, achievable, and within the Contractor's reasonable control. Further, the contract should expressly entitle the Contractor to either an extension of time, or a deferral of the Contractor's obligations if a particular prerequisite cannot be achieved for reasons outside the Contractor's control. This is because failure to achieve this milestone could give rise to contractual penalties and/or extend the Contractor's warranty period depending on the wording of the contract question.

Early occupancy by Owner: If the contract allows for early occupancy by the Owner for portions of the work, it should expressly transfer responsibility for that portion to the Owner as well. This is important in order to protect the Contractor in the event that the Owner (or subsequent contractors) causes damage to the work and seeks recovery against the Contractor.

Indemnification, waiver of claims, and warranty

Limitations of liability: Contracts without appropriate limitations of liability can pose potentially catastrophic risks to Contractors. As a general rule, a Contractor's risk in performing work should not significantly outweigh the potential reward. Appropriate limitations of liability should therefore be tailored to the circumstances of each project. The following are some concepts to consider when negotiating limitations of liability in contracts:

- Whether the project is a revenue-generating facility and, if so, is there a waiver of consequential damages (see below);
- Whether there are indemnity provisions that increase the Contractor's risk profile (see below);
- Whether the project work or location is inherently risky or dangerous;
- Whether the limitation of liability provision takes precedence over others in the agreement; and
- Whether there are any exclusions to the limitation of liability provision and, if so, whether they are reasonable.

Inappropriate indemnities: Indemnities can greatly expand the scope of a Contractor's liability. Contractors should avoid one-sided indemnities and indemnities under which the obligation to indemnify is triggered without a requirement for fault (i.e., negligence or willful misconduct) on the part of the Contractor. Such indemnities are pervasive on commercial and residential construction projects. Contractors should also be mindful of who they agree to indemnify and ensure that the indemnity does not unreasonably expand its obligations to third parties (e.g., the Owner's consultant) or effectively undermine any other limitation of liability in the contract in favour of the Contractor.

Liquidated damages: Owner contracts are increasingly including large daily penalties in the form of "Liquidated Damages" ("LDs") for costs arising from project delays. This includes, in some instances, the yearly salaries of individual personnel required to attend the project longer than anticipated. In some cases, contracts contain language stating that LDs are not the Owner's sole and exclusive remedy for the delay, which creates the possibility of Owners pursuing claims for delay damages over and above the LD amount.

LD clauses are not necessarily problematic. They are intended to strike a balance that benefits both parties–they relieve Owners of the obligation to prove actual delay damages and allow Contractors the ability to quantify

the potential impact of project delays. However, this balance is destroyed when the Owner reserves the right to pursue Contractors for other delay damages in excess of LDs.

To remain balanced, LDs should be the Owner's sole and exclusive remedy for delay. Alternatively, if the Owner insists on removing this protection, the contract should include an overall cap on delay damages to allow the Contractor to quantify potential delay risk. In either event, Contractors must ensure that the daily LD amount is reasonable and consider carrying appropriate contingencies to account for them.

Penalty clauses: Penalties imposed on Contractors for non-conformances, late submissions of plans, replacement of key individuals, and other contract administration matters are becoming increasingly common. While there has historically been some judicial debate about the enforceability of such contractual "penalties," courts are increasingly inclined to give effect to the parties' agreement.

While Owners have argued that these costs can be avoided through "proper" contract administration, this is not always the case, and the frequency and quantum of these penalties are often excessive. The imposition of the multitude of penalty regimes necessitates a significant increase in the overhead and staffing requirements for projects, increases the risk profile without additional value, and reduces productivity due to the onerous incremental administration requirements. Finally, Owners often seek to make acceptance of such penalties a condition to achieving substantial or final completion certification, which significantly increases the overall risk profile for projects to the point of being untenable to Contractors.

Therefore, it is essential for Contractors to review any proposed penalty regimes in their entirety and ensure the overall risk profile is reasonable.

Waivers for consequential loss, lost profit, etc.: Owner risks associated with consequential damages, loss of profit, loss of revenue, and loss of use are potentially massive and difficult, if not impossible, for Contractors to quantify. Without a proper waiver of consequential damages to provide the necessary protection, Contractors may be exposed to potentially catastrophic risk. This is especially true for projects involving the construction of revenue-generating facilities (e.g., casinos). Owners often argue that these risks can be insured. However, this is often not the case nor the proper solution, as exposing insurance programs to unnecessary risk leads to higher risk of claims and premium increases.

The following are some concepts to consider when negotiating consequential damages waivers:

- Whether the project is a revenue generating facility;
- Whether the contract includes liquidated damages (see below) that are the Owner's sole and exclusive remedy for delay;

The waiver should cover:

- Consequential loss;
- Indirect damages;
- Loss of profits;

- Loss of use;
- Loss of revenue;
- Loss of product;
- Loss opportunity; and
- Financing costs.

Warranty periods: Contractors should exercise caution before agreeing to excessively long warranty periods. Warranty periods have increased in recent years from the previous industry standard of one-year from substantial completion to two or three years in some cases. This puts pressure on Contractors to push this requirement onto subtrades, creating additional risk that they are not always equipped to handle. This risk is exacerbated on longer term construction projects as early works subtrades' warranties may not even commence until two to three years after their work is finished. While it may be possible to mitigate some of these impacts by ensuring the contract allows for the progressive release of holdback, this is something for which Contractors should be mindful.

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