



Construction Contracts Top Sticking Points

Presented by
Gary Quinnett

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TOPICS

- A. Payment Clauses
- B. Flow-Through Clauses
- C. No-Damage-For-Delay Clauses
- D. Performance and Timing Clauses
- E. Project-Termination Clauses
- F. Liquidated Damages Clauses

PRACTICE TIP

Project Sheet

- **Project name:**
- **Owner:**
- **Architect:**
- **Contract Value:**
- **Contract Documents:**
- **Commence Date:**
- **Completion Date:**
- **Penalty for Completion Date Miss:**
- **Insurance and bond: [K requirements; Certificates Needed]**
- **Means and Methods Due Date:**
- **Schedule of Values Due Date:**
- **Applications for Payment:**
- **Final Payment:**
- **Change Orders:**
- **Look-Ahead Schedule:**
- **Subcontractors:**
- **Pre-lien and/or bond notice requirements:**
- **Superintendent:**
- **Foreman(s):**

[Disperse to President, COO, AP, AR, Superintendent and Foreman(s); embed key triggers in calendar]

A. PAYMENT CLAUSES

Payment from Owner to Contractor (lump sum)

Retainage: withholding of a percentage of the contract funds earned by a contractor; benefits the owner, protecting against liens, claims and defaults; as much of the project's profit is in the retainage pool, it encourages contractor to complete final

PAYMENT CLAUSES

Four key events:

Schedule of Values Submitted

Application for Payment

Substantial Completion

Final Payment

PAYMENT CLAUSES

Schedule of Values:

- Schedule of Values submitted before work begins
- Allocates the contract sum to the various portions of work
- Scrutinized initially and again when contractor delivers requests for payment
- AIA form typically used

Sample Schedule of Values Clause:

At least 10 days prior to submitting the first application for payment, contractor shall submit a schedule of values allocating the entire Contract Sum to the various portions of the Work, and supported by such data as required by the Architect.

PAYMENT CLAUSES

Application for Progress Payment

After work begins, the contractor submits application for payment to owner or architect

Assuming the application is proper, payment is made withholding retainage

Sometimes must be signed and notarized, with lien waivers

PAYMENT CLAUSES

Sample Application for Progress Payment Clause:

Owner shall make progress payments monthly as the work proceeds. At least 10 days before each progress payment falls due, contractor will submit to architect for review the application for payment filled out and signed and certified by contractor on the approved form covering the work completed as of the date of the application and supported by the schedule of values and other such data as architect may reasonably require. If payment is requested on the basis of materials and equipment not incorporated in the work but delivered and suitably stored at the site or at another location agreed to in writing, the application for payment shall also be accompanied by such supporting data, satisfactory to owner, as will establish owner's title to the material and equipment and protect his or her interest in such material and equipment, including applicable insurance. Architect will, within 5 days after receipt of each application for payment, either indicate in writing his or her approval of payment and present the application to owner, or return the application to contractor indicating in writing his or her reasons for refusing to approve payment. In the latter case, contractor may make the necessary corrections and resubmit the application. Owner will, within 5 days of presentation to him or her of an approved application for payment, pay contractor the amount approved by Architect.

PAYMENT CLAUSES

"Substantial completion" should be defined, since whether this stage is reached will trigger different remedies for breach. Typically, it is defined as "sufficiently complete in accordance with contract documents so that owner can occupy or use the work."

PAYMENT CLAUSES

Sample Substantial Completion Clause:

The date as certified by *Architect* when the construction of the project or a specified part of the project is sufficiently completed, in accordance with the contract documents, so that the project or specified part can be used for the purposes for which it was intended.

PAYMENT CLAUSES

Oklahoma courts refer to "substantial completion" as "substantial performance." Inst. 3.23, *Oklahoma Jury Instructions-Civil*, states:

A party is not required to perform each and every term of a contract completely and exactly in order to recover for its breach.

[Plaintiff]'s performance is substantial if *[he/she/it]* proves all of the following:

- 1 *[Defendant]* received substantially what the contract required;
- 2 Any omissions, deviations or defects can be corrected without difficulty; and
- 3 *[Plaintiff]* acted in good faith in intending to perform *[his/her/its]* part of the contract.

The notes to the instruction state that offsets for minor deficiencies are justified if substantial performance is found, and the remedy in *quantum meruit* if no substantial performance is found.

PAYMENT CLAUSES

Final Payment

includes retainage and frequently sums owed the contractor for change orders

architect typically makes a final inspection, creates a "punch list," and conditions final payments on its satisfactory completion

PAYMENT CLAUSES

Sample Final Payment Clause:

If the Architect is satisfied that the work has been completed and contractor has fulfilled all of his or her obligations under the contract documents, he or she will, within 10 days after receipt of the final application for payment, indicate in writing his or her approval of payment and present the application to owner for payment. Otherwise, Architect will return the application to contractor, indicating in writing his or her reasons for refusing to approve final payment, in which case contractor will make the necessary corrections and resubmit the application. Owner will, within 10 days of presentation to him or her of an approved final application for payment, pay contractor the amount approved by Architect. If after substantial completion of the work final completion of the work is materially delayed through no fault of contractor and Architect so confirms, owner shall, upon certification by Architect, and without terminating the agreement, make payment of the balance due for that portion of the work fully completed and accepted. If the remaining balance for work not fully completed or corrected is less than the retainage stipulated in the agreement, and if bonds have been furnished as required herein, paragraph A, the written consent of the surety to the payment of the balance due for that portion of the work fully completed and accepted shall be submitted by contractor to Architect prior to certification of such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

PAYMENT CLAUSES

Oklahoma's Prompt Pay Statute

Oklahoma's Fair Pay for Construction Act, 61 O.S. §§ 221 et seq, applies to public projects. Relevant definitions include:

"Construction contract" means a written contract or subcontract awarded by an owner or contracting entity for the purpose of making any public improvements or constructing any public building or making repairs to or performing maintenance on the same. 61 O.S. § 222(1)

"Retainage" means the difference between a gross proper invoice amount on a construction contract and the amount paid on said contract. 61 O.S. § 222(6)

The Act doesn't apply to roads, bridges, and highways. See full list of exceptions at 61 O.S. § 227

The Act states that for contracts exceeding \$25,000, the owner must make progress payments within 30 days of a proper application, and limits the rights of owners and subs to reduce a proper invoice. 61 O.S. § 223 It defines when a prime contractor may suspend performance for non-payment 61 O.S. § 225, and limits retainage. 61 O.S. § 226

PAYMENT CLAUSES

Payment from Contractor to Subs

- "Pay-if-paid" are red flags to the subcontractor.
- These clauses shift the risk of non-payment from the general contractor to the sub.

PAYMENT CLAUSES

- See Swanda Bros., Inc. v. Chasco Constructors, Ltd., L.L.P., 2010 WL 476639 (W.D. Okla. 2010) ruling that the following clause was a valid paid-if-paid clause:

Payment to [General Contractor] by Owner is a condition precedent to payment to [General Contractor's] duty to pay [Subcontractor]. [General Contractor] shall withhold retainage from [Subcontractor's] progress payments at a rate equal to the percentage retained by Owner from payments to [General Contractor]. [Subcontractor] shall not be entitled to receive final payment under this Subcontract until all work to be done hereunder has been accepted by Owner and a complete release of any and all claims against [General Contractor] has been delivered by [Subcontractor] to [General Contractor].

PAYMENT CLAUSES

- Oklahoma's Fair Pay for Construction Act also has provisions relevant to payment to subcontractors 61 O.S. § 224
- The prime contractor must pay the subcontractor within ten (10) calendar days after the prime contractor receives its corresponding payment for the work performed. *Id.*
- The subcontractor must pay the sub-subcontractor within seven (7) calendar days after receiving payment. *Id.*

PRACTICE TIP

When representing subs, lessen the potential impact of a pay-if-paid clause by:

- **Not waiving prompt pay statute**
- **Provision that payment to sub is required unless the nonpayment is the sub's fault**
- **Provision that sub retains lien and bond rights**

B. FLOW-THROUGH CLAUSES

- The "Contract Documents" The prime contract, and all documents that are incorporated by reference, e.g. specifications, general conditions, and post-execution modifications
- Requests for proposals, proposals, and bids are usually excluded from Contract Documents
- Subcontracts typically incorporate all Contract Documents

FLOW-THROUGH CLAUSES

Sample Pass-Through Clause:

Whereas Subcontractor has entered into a Subcontract Agreement with Contractor for work to be completed at Project Name, see Subcontract Agreement, dated October 1, 2015, attached as Exhibit A. Subcontractor and Sub-Subcontractor now wish to enter into this Secondary Subcontract Agreement. This Secondary Subcontract Agreement passes down all relevant rights and responsibilities from the Subcontract Agreement into the Secondary Subcontract Agreement. In the event of a conflict between the Subcontract Agreement and the Secondary Subcontract Agreement, the terms and conditions of this Secondary Subcontract Agreement shall prevail.

PRACTICE TIP

When representing the subcontractor:

- **Strike from the list any documents that do not apply to the project**
- **Limit the subcontract documents to documents actually received by subcontractor**
- **Strike most onerous provisions:**
 - Any waiver of rights under M&M liens or bonds
 - Any waiver of damages for delay

NO-DAMAGE-FOR-DELAY CLAUSES

No Damage for Delay Clauses

A no damages for delay clause provides that, in the event the contractor is delayed in the performance of the work by any act of the owner or the owner's agents, then the contractor is entitled to an "extension of time" for the performance of the contract, but not to recover damages for delay from the owner. In other words, the no damages for delay clause provides that a time extension is the contractor's only remedy and the owner is not liable to the contractor for payment of extra compensation or damages by reason of delay.

No Oklahoma cases are reported on this clause. However, the general rule is that the No Damage for Delay clause will be enforced unless the delay was not contemplated by the parties, was unreasonable in duration, resulted from a breach of contract, or resulted from the owner's interference with the contractor's work.

See citations in written materials

PRACTICE TIP

Draft clause that permits an adjustment in the contract sum if the schedule slips [grace period]

D. PERFORMANCE AND TIMING CLAUSES

Performance

Many construction contracts contain some version of a "means and method" clause. Generally, a contractor is solely responsible to implement the owner's design concept through means and methods of its choosing, so long as the owner does not dictate that the contractor employ specific means and methods. Typically, the contractor will inspect the job site, and deliver a "means and methods" plan at the time of bidding. It will cover subjects such as union labor, mobilizations, supervision, sequencing, and materials.

PERFORMANCE AND TIMING CLAUSES

Sample Means and Method Clause:

Contractor will supervise and direct the work efficiently and with his or her best skill and attention. Contractor will be solely responsible for the means, methods, techniques, sequences, and procedures of construction. Contractor will be responsible to see that the finished work complies accurately with the contract documents.

Contractor will keep on the work at all times during its progress a competent resident superintendent, who shall not be replaced without written notice to owner and [architect/engineer] except under extraordinary circumstances. The superintendent will be contractor's representative at the site and shall have authority to act on behalf of contractor. All communications given to the superintendent shall be as binding as if given to contractor.

Beware: the contractor should not assume that the owner's observance of the work will relieve the contractor of responsibility.

PERFORMANCE AND TIMING CLAUSES

Schedule

The schedule for completion of the contract work is an essential component of the contract, and a frequent focus of construction litigation. Frequently, the schedule is incorporated by reference into the contract documents, with commencement date, milestone dates for the essential tasks, and project completion date. The schedule will be updated periodically to reflect changes in the schedule to reflect changes and progress.

PERFORMANCE AND TIMING CLAUSES

Sample Schedule Clause:

Subcontractor acknowledges and commits to the overall Project Schedule as defined by the Subcontract Documents and the terms herein. Subcontractor acknowledges that meeting these durations and milestone dates is a condition of award, and any costs required to meet the schedule durations and milestone dates are included in this proposal and failure to meet these milestone dates may result in withholding of progress payments or supplementing of work forces at its expense. Durations and dates are preliminary in nature and may be adjusted at the Contractor's discretion as required by project schedule.

Subcontractor shall coordinate directly with Contractor site management staff to generate and maintain a two-week look-ahead schedule and sequence at all times.

Time is of the essence in this agreement. Subcontractor shall complete its work within the mutually agreed project schedule and sequence included with this agreement. Subcontractor will provide sufficient manpower, including multiple crews if required, to meet the schedule durations for completion of the work.

PRACTICE TIP

Time not of the essence unless so provided 15 O.S.
§ 174

Reasonable time allowed where not specified 15 O.S.
§ 173

E. PROJECT TERMINATION CLAUSES

A party to a contract has contractual and non-contractual rights to terminate a construction contract.

As for contractual rights, an owner may wish to include a termination for convenience clause, which would limit the owner's liability in the event that the owner for any good faith reason decides to abandon the project.

Such clauses could save owners who are unexpectedly confronted with large cost overruns due to differing site conditions. See, *Restatement (Second) of Contracts*, 261-272.

PROJECT TERMINATION CLAUSES

Sample Termination for Convenience Clause:

Owner shall have the right to terminate this Agreement for any reason, at any time on giving notice in writing to Contractor.

Upon receipt of owner's cancellation, Contractor shall cease operations. Contractor in such event shall receive payment for Work completed, costs caused by the termination, and reasonable overhead and profit for Work not executed.

PROJECT TERMINATION CLAUSES

Sample Termination for Cause Clause:

If CONTRACTOR or any Subcontractor shall materially breach any provision of this Contract, and such breach shall not be corrected within (10) days after written notice from COMPANY to CONTRACTOR (or, if such breach is not correctable within (10) days, then within reasonable time after such notice), or if CONTRACTOR shall become insolvent, enters voluntary or involuntary bankruptcy or receivership or in the event of default, sequestration or seizure of CONTRACTOR'S operations under a mortgage, lien or privilege, then COMPANY will have the right (without prejudice to any other rights or remedies it may have hereunder or by operations of law) to terminate CONTRACTOR'S right to proceed with performance of this Contract, whereupon COMPANY or its nominee may take over and complete the performance of this Contract in which event, the title to and products of CONTRACTOR'S Work, whether complete or partially complete as well as all materials prepared procured or set aside for the Work by CONTRACTOR shall vest in COMPANY. In such event, COMPANY will have the option to require CONTRACTOR to withdraw from the Worksite and CONTRACTOR shall permit COMPANY to use CONTRACTOR'S facilities and associated equipment, materials and supplies. Thereupon CONTRACTOR shall only be entitled to payment for Work performed less any monies previously paid to CONTRACTOR. A waiver of any one default hereunder shall not be considered a waiver to any subsequent default.

PROJECT TERMINATION CLAUSES

“Material Breach” for Termination For Cause Clause may be defined:

Contractor's persistently fails to perform the Work;
Contractor's disregard of Laws or Regulations; or
Contractor abandons the Work

PRACTICE TIP

Strictly adhere to notice and right to cure provisions
Think twice before abandoning the jobsite

F. LIQUIDATED DAMAGES

An owner's damages stemming from a contractor default are the cost of completing or correcting the contractor's work (direct damages) and other loss suffered by the owner as a result of the default, such as loss related to delays caused by the default (consequential damages).

Liquidated damages clauses are appropriate when calculating actual damages is difficult. The damages are "liquidated" in the sense that the contract sets forth a specific sum that will be paid as damages, whatever the actual amount of damages may be. Courts will typically not uphold "liquidated damages" clauses if the damages are disproportionate to the injury, or if the amount of liquidated damages appears to be intended as punitive as opposed to fair compensation for the injury.

LIQUIDATED DAMAGES

Sample Liquidated Damages Clause:

If the work is delayed due to neglect of the Contractor, the Contractor agrees to pay the Owner *[\$dollar amount of daily liquidated damages]* per day as liquidated damages until such time as the work is completed.

LIQUIDATED DAMAGES

Oklahoma law has much to say on the subject. 15 O.S. § 215 provides:

A. A stipulation or condition in a contract except a contract to purchase and sell real property, providing for the payment of an amount which shall be presumed to be the amount of damage sustained by a breach of such contract, shall be held valid, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

Sum provided as liquidated damages, if there is only partial breach, is "penalty," and only actual damages are recoverable. Graves v. Fitzpatrick, Okla., 127 Okla. 124, 260 P. 10 (1927)

Party to contract cannot recover liquidated damages for breach for which he himself is responsible, or to which he has contributed. Smith v. City of Tahlequah, Okla., 117 Okla. 204, 245 P. 994 (1926).

KEY SOURCES

- *Oklahoma Construction Law*, Randi Donaldson Carey, Thomson Reuters
- *Construction Litigation Handbook*, James Acret and Annette Davis Perrochet, West
- *AmJur Trials, AmJur Proof of Facts, Causes of Action*
- *Law of Remedies*, Dobbs, West
- *Bruner & O'Connor on Construction Law*, Thomson Reuters
- *The Construction Contracts Book*, American Bar Association