

# UNFAVORABLE

# CONTRACT CLAUSES

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The construction estimator faces many challenges in the preparation of an estimate, whether for a competitively bid or a negotiated project. While some of these challenges are well recognized, (for example, the work must be quantified and priced) others, perhaps equally as important, may not be adequately recognized or analyzed. This is particularly true when our environment is changing in areas we are accustomed, by force of habit, to skim over in estimate preparation.

One of these areas is General Conditions. Believing ourselves familiar with General and Supplementary Conditions, we no longer read them, but rather do a cursory review, looking for "exceptions" to our normal expectations. This practice is becoming more and more risky.

The owner, the owner's program manager, or the owner's design team normally drafts General Conditions. Recently there have been significant changes in specifications designed to shift risk traditionally borne by the owner or designer to the construction team. These changes make it much more difficult for the constructor to recover its costs, overhead, and profit when unfavorable events occur during construction. They may be loosely gathered under the heading "Unfavorable Contract Clauses."

Faced with a set of specifications or a contract containing such clauses, the constructor may 1) attempt to get the clauses changed, 2) refuse to submit a price, 3) include contingency to cover the risk added by such clauses, or 4) ignore the clauses and hope for the best.

None of the options is appetizing save the first, getting clauses changed. This is often the most difficult to effect. But failure to recognize such clauses is to opt for the last choice, to "hope for the best," a tenuous hope at best. At worst, such clauses can literally kill a constructor.

This paper will examine examples of such unfavorable clauses, the author believing that recognition is prerequisite to resolution.

Clauses examined will include those of the following types:

Indemnity clauses, which require the constructor to indemnify and hold harmless the owner, designer, program manager, and sometimes other from their own negligence or all negligence except their "sole negligence."

No damage for delay clauses which bar the constructor from compensation for delays in the progress of the work, regardless of the cause or length of the delay.

Extension of time clauses, which confer upon the owner control of all schedule float.

Interference clauses which require the contractor on multiple contractor sites to coordinate its work directly with those other contractors and absolving the owner of any liability for damages for delays caused by other contractors.

Intent clauses, which require the constructor to provide all parts of the project necessary for its completed operation whether or not shown or specified.

Deductibles clauses, which shift the burden of satisfying deductibles on owner, provided insurance from the owner to the constructor.

Changes and delay clauses which provide unreasonably short notice requirements concerning cost and/or delays and which include a waiver of claims for cost or time unless the notice requirements are met.

Soils report clauses, which either do not include the soils report in bidding documents or include soils information with disclaimers denying responsibility for the accuracy of the report.

Each of these types of clauses will be treated in order.

## INDEMNITY CLAUSES

### Clause A

Let us begin with the closest thing to an industry standard and use it as a benchmark: AIA DOCUMENT A201-1987, General Conditions of the Contract for Construction, Paragraph 3.18 "Indemnification." Paragraph 3.18.1:

"To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including loss of use resulting there from, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Sub-contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."

Paragraph 3.18.3: "The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Order, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage." (Underlining added.)

In plain English, the Constructor will protect the owner and design team from claims, including attorneys' fees and the loss of use which the owner may experience because of the claim, even if the owner or designer is partly, and perhaps wholly responsible for the loss. In other words, the constructor will pay all, and defend the other construction team members in so doing, even if the constructor is not fully to blame, or even if the constructor is not very much to blame, or maybe even if the constructor isn't to blame at all. Paragraph 3.18.3 gives slight relief from the constructor's obligation in the case of the Architect to the extent that the liability arises from the architect's preparation of contract documents or from the architect's directions or lack thereof, only if the directions or lack thereof are the primary cause of the liability.

### **Clause B**

Other specifications quantify how much negligence must be shown by other team members in order for the constructor to be relieved of its duty to pay the full amount of the claim. In one case the constructor is liable, but "this indemnity shall not apply and Owner shall reimburse Contractor for reasonable defense costs in the event that it is established by a court of competent jurisdiction that said injury was not in fact the result of Contractor's negligent acts, errors or omissions, gross negligence, willful or wanton acts or breach of contract and that said injury resulted from twenty-five percent (25%) or more of Owner's contributory negligence." If the Owner is 25% or more to blame, the owner will pay 25% or more of the costs. The architect is not mentioned in these Supplementary Conditions, but they supplement AIA 201-87, so it can be reasoned that the provisions given therein limit the design team's liability.

Others are not so generous.

### **Clause C**

"Contractor hereby agrees to indemnify and hold harmless Owner and Engineer,... from any and all claims, suits, or judgments, based upon damage to property or injury or death to persons arising out of, or connected with, the work covered by the contract, regardless of how it may be caused."

And, in another instance,

### **Clause D**

"The Design/Builder shall release, indemnify, and save harmless the City ... provided, however, that the Design/Builder need not indemnify and save harmless the City... from damages resulting from the sole negligence of the City's officers...." (Underlining added.)

In the first case, the constructor agrees to provide protection and pay all claims, even if the other members of the construction team are totally responsible for the damage or injury. In the second, the owner must be protected unless it is 100% responsible.

In none of the examples given is there an example of clear language in which the owner and designer take full responsibility for their share of the liability, no matter how little. In one case, the constructor is asked to indemnify the owner and design team against all their own negligence.

In some states indemnifying one against his own negligence is against the law, but this is not true in all, and must be researched for each.

Certainly these and similar indemnification clauses seek to place upon the constructor the risk of liability caused by the actions of the other construction team members, the owner and the designer, actions over which the constructor has little or no control. In the most extreme cases, this liability can be total since the indemnification is total, and the extent to which this added liability can greatly increase the risk of a project is precisely the extent to which it must be carefully researched and evaluated in the preparation of the estimate.

### **NO DAMAGE FOR DELAY CLAUSES**

Few types of contractual language raise the ire of construction professionals so completely as do modern delay clauses, easily the most heinous one being the "no damage for delay" variety. First, consider a somewhat neutral example of the delay clause, and then compare it to those that follow.

#### **Clause A**

"If the contractor is delayed at any time in the progress of the work by any act or neglect of the owner or the architect, or by any employee of either, or by any separate contractor employed by the owner, or by changes ordered in the work, or by labor disputes, fire, unusual delay in transportation, adverse weather conditions not reasonably anticipatable, unavoidable casualties, or any causes beyond the contractor's control, or by delay authorized by the owner pending arbitration, or by any other cause which the architect determines may justify the delay, then the contract time shall be extended by change order for such reasonable time as the architect may determine...."

(The preceding paragraph) does not exclude the recovery of damages for delay by either party under other provisions of the contract documents."

#### **Clause B**

"Unless otherwise specifically provided for by the contract, the contractor shall not be entitled to damages of any type resulting from hindrances or damages from any cause under this contract except when the work is stopped or suspended by a written order signed by the Contracting Officer or by intentional interference by the Authority."

### Clause C

"Neither the Owner, the Owner's Representative nor the Engineer shall be obligated or liable to the Contractor for, and the Contractor hereby expressly waives any claims against them, or any of them, on account of any damages, costs or expenses of any nature whatsoever which the Contractor, its Subcontractors or Sub-subcontractors or any other person may incur as a result of any delays, interferences, suspensions, rescheduling, changes in sequences, congestion, disruptions or the like arising from or out of any act or omission of the Owner, the Owner's Representative or the Engineer, it being understood and agreed that the Contractor's sole and exclusive remedy in such events shall be an extension of the Contract Time, but only in accordance with the provisions of the Contract Documents ... all at no additional cost to or compensation from the Owner."

### Clause D

"If the Contractor is delayed by the Owner or Architect or any Agent or employee of either, the Contractor's sole and exclusive remedy for the delay shall be the right to a time extension for completion of the Contract and not damages. This paragraph does not preclude the Owner's recovery of damages for Contractor-caused delay including the Owner's cost for the Architect's additional services which are incurred by the Contractor's unauthorized delays; or under any other provisions of the Contract Documents."

The underlining is, in all cases, added.

The construction business is not an exact science. When constructors bid projects, judgment is required, whether related to productivity, material pricing, equipment rates, or the project schedule. The estimator must plan the project mentally, establishing, by experience and past history, a reasonable time in which to construct the project. The Estimator cannot plan for the unforeseen circumstance, which may cause a delay in the progress of the project, nor can the estimator, competitive pressures being as they are, put a cost contingency into the estimate to offset such "possible" occurrences. Many projects are not delayed, and if this particular one is delayed, questions such as how much and by whom are at best no more than shots in the dark at bid time.

Constructors have traditionally treated delays, then, as unknowns, which cannot be rationally analyzed in the competitive arena. The conventional wisdom has been, let him who causes the delay pay for it. If it is the constructor, he should pay; if another contractual entity, that entity should pay.

Clause A is a reflection of this traditional approach. It recognizes that delays do in fact happen, and that if they are beyond the Constructor's control (a traditional list of examples is given) and their occurrence damages the Constructor, the Constructor is entitled to compensation. Similarly, if the Owner or Designer is damaged by an action taken by the Contractor, they are entitled to compensation. This is the traditional doctrine of fairness.

Clause B recognizes the Constructor's right to damages, but the circumstances under which he may collect are substantially narrowed to include only those situations approved by the designer or those caused by intentional malfeasance on the part of the Owner or designer. In other words, the delay is not valid simply because it is beyond the Constructor's control; it must be caused by the owner or designer.

Clause C is an example of a widely used "no damage for delay clause." It says that the only remedy a Constructor has for a project delay is an extension of the contract schedule, no matter what the cause of the delay.

Clause D takes Clause C one step farther. In it, the Constructor is not entitled to damages for any reason, but the Owner and Designer are entitled, if the delay is caused by the Constructor.

In these clauses, from the Constructor's viewpoint, we have gone from the rational to the ridiculous, from the Owner and Designer shouldering their responsibility to requiring the Constructor to take all responsibility, even that of the Owner and Designer.

The estimator must ferret out this type of contract clause and in the cases given by Clauses B, C, and D, bring the language to the attention of company management. If a dispute arises under such contractual language, it is not at all certain that the courts would not interpret them in exactly the way they read, to the (possibly) enormous cost to the Constructor. If the Constructor feels that the language makes the project too risky, the Constructor should refuse to bid the project and should inform the Owner of the reason for the decision. If the Constructor decides to accept the risk, the Constructor should do everything possible to insure that his competitors are aware of the language, by informing sub-bidders and by raising the concerns at the pre-bid conferences, in written correspondence to the Owner and the Designer, etc. The Constructor should lobby the Owner, and encourage other members of the Constructor community to do likewise, to attempt to get such language changed, as being unfair and quite possibly adding unnecessary cost to the project.

## **OWNERSHIP OF FLOAT CLAUSES**

Consider this scenario. The project specifications give the contract duration of the project being estimated at 30 months. Having studied the documents, prepared the estimate, talked with subs and suppliers, and confirmed with company management that qualified company staff is available to build the project, the estimator believes the project can be constructed in 24 months, and calculates field overhead (general conditions) based on this 24 month schedule.

After being awarded the project, the estimator's firm begins construction and is soon delayed for one month by an action of the owner. We will assume here that there is no "no damage for delay" clause in the contract. Is the estimator's firm entitled to collect this one month's additional over-

head from the owner?

Our initial response might well be "yes," since the firm did not estimate the project to last what is now 25 months and the delay was caused by the owner (or any event outside the control of the Constructor). Our initial response might well be incorrect. It depends upon the project language with respect to the ownership of float.

Float (also called "slack") time is defined as the amount of time between the early start and the late start dates or the early finish and late finish dates of a CPM schedule. In the case above, the constructor's early finish date is 24 months and the late finish date is as given in the contract, 30 months.

Look at the following clauses:

**Clause A**

"Float or slack time is owned and controlled by the City; provided, however, that the City may, in its sole and absolute discretion, equitably allocate all or portions of said float or slack for use of the contractor if such allocation is not likely to adversely affect the completion date of the project,..."

**Clause B**

"Float or slack is owned and controlled by the Design/Builder. The Design/Builder may, in its sole and absolute discretion, equitably allocate all or portions of said float for use of the Design/Builder if such allocation is not likely to adversely affect the Substantial Completion date of the Project, or adversely affect the schedules of the City or City's separate subcontractors or suppliers."

**Clause C**

"Float or slack time is not for the exclusive use or benefit of either the Owner or the Contractor. However, if float time associated with any chain of activities is expended but not exceeded by any actions attributable to the Owner, the Contractor will not be entitled to an extension in the contract time."

**Clause D**

"Float or slack time is not time for the exclusive use of or benefit of either the Government or the Contractor. Extensions of time for performance required under the Contract Clauses entitled "CHANGES," "DIFFERING SITE CONDITIONS," "DEFAULT," or "SUSPENSIONS OF WORK" will be granted only to the extent that the equitable time adjustments for the activity or activities affected exceed the total float or slack along the channels involved at the time Notice-To-Proceed was issued for the change."

Clauses A and B place the ownership of float with the Owner and the Design/Builder, respectively. In essence, these parties are disclaiming liability for the period between early finish and late finish. In our hypothetical case, we would have to exceed the contractual schedule, 30 months, for reimbursement of general conditions to take place, no matter who caused the delay, unless the Owner or Design/Builder allowed us to do otherwise.

Clause C is one of those "what does it really mean?" clauses. It begins by asserting that float is not for the exclusive use of either party, which seems objective enough, then proceeds to give all the float to the owner in spite of the first sentence, in those instances where the owner is the cause of the delay. The phrase "chain of activities" appears here for the first time. A chain of activities may be a subset of the overall schedule. As such, if the Owner-caused delay exceeds the float for that chain, the Constructor may be entitled to a change including a schedule extension.

Clause D is the clause found in most Federal Specifications, and can be interpreted along the lines of Clause C, but is broadened to cover acts of delay from any source save the constructor, which provision is not found in Clause C.

If the Constructor bids a schedule shorter than that provided in the specifications, the constructor should attempt to have the owner accept the constructor's schedule as the contractual schedule. In this way the constructor is more likely to be able to recover general conditions costs resulting from a delay not the fault of the constructor. The constructor's schedule may not show any float at all, or it may show a substantially less amount than the schedule given by the specifications. Showing no float may be a double-edged sword in that liquidated damages may be assessed if the contractor fails to complete the project on time through its own lack of diligence.

If having the contractor's schedule accepted as the contractual schedule is not or cannot be done, however, the contractor must recognize the added risk the project entails because added costs may not be recoverable.

## **COORDINATION CLAUSES**

Let us suppose your firm is bidding a project, which is likely to have multiple prime contractors performing on the project at the same time. All of these prime contractors contract directly with the owner; none has a contractual relationship with any other of the prime contractors.

As with any multiple contractor project, there will be disagreements among the prime contractors as to delays and damages caused by one of the other primes, and the contractor injured by such delays or adverse effects caused by another will doubtless want to be justly compensated for them.

Who should be responsible for contractor coordination and adjudicating disagreements, which

may arise?

Consider the following examples:

#### **Clause A**

"The owner reserves the right to perform work related to the project with his own forces, and to award separate contracts in connection with other portions of the project or other work on the site under these or similar conditions of the contract documents. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, he shall make such claim as provided elsewhere in the contract documents...."

The owner will provide for the coordination of the work of his own forces and of each separate contractor with the work of the Contractor, who shall cooperate therewith...."

#### **Clause B**

"The Owner reserves the right to perform work related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project, [or] other work on the site under these or similar conditions of the Contract.... If the Contractor claims that delay, damage or additional cost is involved because of such action by the Owner, the Contractor shall immediately, or in no case longer than twenty (20) days, make such a claim in a complete manner, as provided elsewhere in the Contract Documents...."

The Construction Manager, on behalf of the Owner, will supervise the coordination of the work between the Contractor and the separate contractors)...."

Any costs caused by defective or untimely work shall be borne by the party responsible therefor...."

Should the Contractor be caused damage by any other contractor on the Project, by reason of such other contractor's failure to perform properly his contract with the Owner, no action will lie against the Owner or Construction Manager, and neither the Owner nor Construction Manager shall have liabilities therefor, but the contractor may assert his claim for damages against such other contractor as the third party beneficiary under the contract between such other contractor and the Owner or the Construction Manager. If, after reasonable attempts at resolution, the contractors involved in such a third party damages claim are unable to resolve such dispute, the Construction Manager will intervene to assist the parties in the settlement of such claims. The Construction Manager may make monetary determinations as necessary in order to resolve the issue. Such determinations shall be final. Such determinations shall in no way prejudice the Owner's position as stated in the preceding paragraph or elsewhere in the Contract Documents...."

### **Clause C**

"By entering into the contract. Contractor acknowledges that there may be other contractors on the site whose work will be coordinated with that of his own. Contractor expressly warrants and guarantees that he will cooperate with other contractors and will do nothing to delay, hinder or interfere with the Work of other separate contractors, the Owner, the Construction Program Manager or Architect. Contractor also expressly agrees that, in the event his work is hindered, delayed, interfered with or otherwise affected by a separate contractor, his sole remedy will be a direct action against the separate contractor as described in Article Three. Contractor will have no remedy, and hereby expressly waives any remedy, against the Owner and/or the Construction Program Manager or Architect on account of delay, hindrance, interference or other event caused by a separate contractor."

### **Clause D**

"The Contractor shall afford other contractors and the Owner reasonable opportunity for the introduction and storage of their materials and equipment and the execution of their work and shall properly connect and coordinate the work with such other work.

If the execution or result of any part of the work depends upon any work of the Owner or of any separate contractor, the Contractor shall, prior to proceeding with the Work, inspect and promptly report to the Owner in writing any apparent discrepancies or defects in such work of the Owner or of any separate contractor that render it unsuitable for the proper execution or result of any part of the Work.

Failure of the Contractor to so inspect and report shall constitute an acceptance of the Owner's or separate contractor's work as fit and proper to receive the work, except as to defects which may develop in the Owner's separate contractor's work after the completion of the work and which the Contractor could not have discovered by its inspection prior to completion of the work.

Should the Contractor cause damage to the work or property of the Owner or of any separate contractor on the Project, or to other work on the Job Site, or delay or interfere with the Owner or said separate contractor's work, the Contractor shall be liable for the same; and, in the case of another contractor the Contractor shall attempt to settle said claim with such other contractor prior to such other contractor's institution of litigation or other proceedings against the contractor. [If] so requested by the parties to the dispute, the Owner may, but shall not be obligated to, arbitrate the dispute, in which event the decision of the Owner shall be final and binding on the parties to the dispute.

If such separate contractor sues the Owner, the Owner Representative and/or the Engineer on account of any damage, delay or interference caused or alleged to have been so caused by the Contractor, the Owner shall notify the Contractor who shall defend the foregoing in such proceedings at the Contractor's expense. If any judgment or award is entered against the Owner, the

Owner Representative and/or the Engineer, the Contractor shall satisfy the same and shall reimburse the Owner, the Owner Representative and/or the Engineer for all damages, expenses, attorneys' fees and other costs incurred by them, or any of them, as a result thereof.

Should a separate contractor cause damage to the work or to the property of the Contractor or cause delay or interference with the Contractor's performance of the work, the Contractor shall present to said separate contractor any claims it may have as a result of such damage, delay or interference (with an information copy to the Owner) and shall attempt to settle its claim against said separate contractor prior to the institution of litigation or other proceedings against said separate contractor. If so requested by the parties to the dispute, the Owner may, but shall not be obligated to arbitrate the dispute, in which event the decision of the Owner shall be final and binding on the parties to the dispute.

In no event shall the Contractor seek to recover from the Owner, the Owner's Representative or the Engineer, and the Contractor hereby represents that it will not seek to recover from them, or any of them, any costs, expenses (including, but not limited to, attorneys' fees) or losses of profit incurred by the Contractor as a result of any damage to the Work or property of the Contractor or any delay or interference caused or allegedly caused by any separate contractor."

Clause A is the only clause in which the owner both takes direct responsibility to coordinate the work of separate contractors and allows the constructor to present a claim for any effect the constructor feels as a result of the actions of other contractors. The claim provisions mentioned are the same provisions used to file any type of claim, so that the net effect of this clause is to treat a multiple contractor coordination issue exactly as any other changed condition the contractor faces.

All the other clauses are not so generous to the constructor. All state that the constructor agrees to forgo a claim against the owner, construction manager, and/or designer, and to seek the only permitted type of remedy, one directly against the other contractor. Clause B asserts the right of the owner or construction manager to step in and force a solution in the case the two disagreeing contractors cannot settle matters, and the Construction Manager's decisions "shall be final." Clause C makes no such statement. Briefly and directly to the point, it simply says that the contractors are on their own to settle any dispute. The owner has no liability and will take no part in dispute resolution.

In many ways, Clause D is the most stringent. First is the acceptance language, which says that a constructor's beginning work on the work of another contractor is acceptance of that work and no claims can later be lodged unless they could not have been found by "inspection." This raises the interesting question as to what constitutes "reasonable" inspection. What is reasonable to the owner may be cost prohibitive to the contractor. Second, the clause discusses the contractor's responsibility to protect the owner in the event another contractor sues the owner for this constructor's actions. This constructor will defend the owner, pay the owner's legal costs, and in the event the court finds the owner responsible, pay the owner's fines and judgments. Again, the court may find the contractor did nothing wrong and the owner everything, but the contractor will still pay the

judgment levied upon the owner. And finally, of course, the contractor gives up his right of action against the owner or the owner's team if the contractor has a dispute with another contractor.

Many owners and designers argues that they should have no coordination responsibility for multiple contractors on the same project, that the contractors should coordinate themselves and settle their own disputes, leaving the owner and designer out of the process. An excellent argument can be made for the reverse position, that it is the owner's responsibility to coordinate the work and that the owner should and does have some responsibility for disputes which arise.

As a practical matter, however, the contract in which the owner and the owner's team absolve themselves of this responsibility is a much more risk project for the constructor than that in which the owner accepts responsibility. This added risk must be evaluated when preparing and presenting an estimate for a construction project.

## **INTENT CLAUSES**

Consider the following clauses:

### **Clause A**

"Omissions and misdescriptions. Omission from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted work (no matter how extensive) or misdescribed details of the work, but they shall be performed as if fully and correctly set forth and described in the drawings and specifications."

### **Clause B**

"Should discrepancies and/or conflicts be discovered within one hundred twenty (120) days after receipt of the Notice to Proceed, the Contractor must report same to the Construction Manager immediately in writing and no work connected with the discrepancies and/or conflicts shall be started until such notification has occurred and direction from Construction Manager has been received; or if started. Work in the affected area shall be stopped immediately until the Construction Manager and Architect and/or Interior Designer agree upon the clarification thereof.

Should discrepancies and/or conflicts be discovered after one hundred twenty (120) days has elapsed since the receipt of the Notice to Proceed, the Contractor must report same to the Construction Manager immediately, and then proceed to rectify the discrepancy. However, due to the Contractor's failure to properly research and review the Contract Documents, the Contractor will

be completely responsible for all additional direct and indirect costs associated with the resolution of the discrepancy and/or conflicts, if any should occur."

### **Clause C**

"Contractor acknowledges and agrees that the Contract Documents are adequate and sufficient to provide for the completion of the Work, and include[s] all work, whether or not shown or described, which reasonably may be inferred to be required or useful for the completion of the Work in accordance with all applicable laws, codes and professional standards of the construction industry."

### **Clause D**

"The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner pursuant to Subparagraph 2.2.2 and shall at once report to the Architect all errors, inconsistencies, or omissions and to concealed or unknown conditions as defined in Paragraph 4.3.6. The Contractor warrants that the Contract Documents are adequate, free from any errors or inconsistencies, and that there are no omissions. The Contractor shall not be entitled to an increase in the Contract Sum or Contract Time on account of any error, inconsistency, or omission in the Contract Documents that the Contractor did not report to the Architect in writing prior to the effective date of the Contract. If the Contractor performs any construction activity involving an error, inconsistency, or omission in the Contract Documents that the Contractor did not report to the Architect, the Contractor shall be responsible for the performance and the correction thereof."

### **Clause E**

"The intent of the Contract Documents is to include all items necessary for the proper execution and completion of this Work. The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. Should any work or materials be required which is not denoted in the Drawings and Specifications either directly or indirectly, but which is, nevertheless, necessary for the proper carrying out of the intent thereof, it is understood and agreed that the same is implied and required and that the Contractor shall perform such work and furnish such materials as fully as if they were completely delineated and prescribed."

### **Clause F**

"Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as fully and correctly set forth and described in the drawings and specifications."

All of these clauses have one thing in common. They place upon the shoulders of the Constructor the responsibility for the completeness of the design. In the short (usually four to six weeks) time the Constructor has to prepare his bid (in comparison to a year or two which the owner and designer take to prepare the documents,) the Constructor must not only quantify and price, talk to subs, etc., etc., he must also make sure he includes what the owner and designer intended, not just what they have shown. This includes in some cases compliance to codes, interference problems, and items simply forgotten. All of this the Constructor must fathom during bid preparation, or be lost.

Have you ever had the experience of finding discrepancies, inconsistencies, questions, etc., submitting them to the designer prior to the bid, only to have them remain unanswered on bid day?

What is "manifestly" necessary for the project to function as "intended"? Who decides? Who pays? Who is responsible if the project is not designed to code? Who pays to bring it up to code? Who gives up the right to extra cost to remedy a design problem if there is one?

Without careful study of such "intent" clauses, the Constructor may well find himself on the wrong end of these questions.

## **DEDUCTIBLE CLAUSES**

A discussion of deductible clauses can be brief, because it revolves around an estimator's review of the specifications to determine the kinds of insurance required, the amount of coverage required, and who is responsible for paying the premiums for the insurance. If the constructor is to pay, the premiums for this coverage must be included in the estimate as being as a real a cost of work as is concrete or masonry.

In the event that the owner provides some of the insurance required, the estimator must determine whether the coverage and amounts are acceptable to the constructor. If they are unacceptable, additional coverage must be obtained and it's cost, of course, included in the estimate. Even if the amount and coverage is acceptable, the provisions for deductibles in the owner's policy must be recognized.

For example, examine the following provision addressing builder's risk insurance:

"The builder's risk policy will contain a deductible in an amount to be determined by the Owner. The Contractor and its Subcontractors shall be responsible for its losses to the extent of the first \$10,000 - 50,000 for each loss."

The question to be answered is whether the constructor's policy will satisfy any portion of this deductible if a claim exists. If not, the constructor who feels that such a deductible (assuming the

\$50,000 case) is not acceptable must include the required costs to buy coverage for the deductible portion. This can be expensive and must be researched with care.

## **CHANGE AND DELAY CLAUSES**

Consider the following examples of specification language addressing changes:

### **Clause A**

"Any changes in the Work made by the Architect or the Owner shall not adversely impact the Contractor's construction schedule. The Contractor shall perform such changes in the Work without an adjustment in Contract Time."

### **Clause B**

"The Contractor shall within 20 days after submitting a Contractor Change Notice, provide the Resident Engineer a complete and itemized proposal which includes a detailed explanation of why the Contractor believes a Change Order should be issued. If the Contractor does not submit its itemized proposal for a Change Order within the time limits described above, it waives any claim for an adjustment in the contract amount or Contract Time arising out of the act or event described in the Contractor Change Notice unless the Resident Engineer has approved in writing a longer time to submit the proposal."

### **Clause C**

"The Owner, without invalidating the contract documents, may order changes in the work within the general scope of the contract documents consisting of additions, deletions or other revisions, the contract sum and the contract time being adjusted accordingly. All such changes in the work shall be authorized by change order, and shall be performed under the applicable conditions of the contract documents.

The cost or credit to the owner resulting from a change in the work shall be determined in one or more of the following ways:

By mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

By unit prices stated in the contract documents or subsequently agreed upon;

By cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

By the method provided [below].

If none of the methods set forth in [the paragraphs above] is agreed upon, the contractor, provided he receives a written order signed by the owner, shall promptly proceed with the work involved. The cost of such work shall then be determined by the architect on the basis of the reasonable expenditures and savings of those performing the work attributable to the change...."

#### **Clause D**

"If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a "proposal for adjustment" (hereafter referred to as proposal) based on defective specifications, no proposal for any change under paragraph [above] shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order ... or (2) the furnishing of a written notice ... by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government...." [underlining added]

The important questions to ask in reviewing contract language relating to changes are:

Who initiates the change and within what time period after the event occurs?

In clauses B and D, the Constructor has 20 days to submit documentation relating to a claim. The documentation required to substantiate a claim must be researched thoroughly, since some specifications require notice only, while others require that the claim be presented in its entirety.

What right does the Constructor forfeit if it does not meet these time constraints?

The constructor, in the case of Clause B, forfeits all rights to compensation or schedule adjustment if it fails to meet the time limits set out.

Who determines the value of the change? Notice that in clause C, the Architect is the final arbiter of cost.

These clauses give some idea of the wide disparity of methods specified to determine the timeliness and cost of a change. Some clauses severely restrict the rights of the Constructor where changed conditions are encountered, thus increasing the risk of the project. This added risk must be carefully evaluated during estimate preparation.

### **DIFFERING SITE CONDITIONS CLAUSES**

When a constructor is the successful bidder on a project and begins excavation for the project, who has responsibility if conditions encountered are different from what is expected? The owner has doubtless commissioned, and the designer has doubtless used, a soils investigation. Soils investigations are sampling studies, and it is well recognized that conditions may vary between samples. Who pays for those varying conditions? Increasingly, the owner and designer seek to shift the liability for differing site conditions to the construction team, even though the construction team has no rational way of quantifying the risk. Consider the following clauses;

#### **Clause A**

The geotechnical investigation is an exact copy of the originals made by photo process reproduction. This information was obtained by the Owner for design purposes and is made available to the Contractor so he may have the same information the designers used. This information is not intended as a substitute for the Contractor's personal investigations, interpretations, or judgment. The Contractor may make his own soils investigation, but must first obtain approval from the Architect. Failure of the Contractor to conduct his own investigation or to analyze the available data shall not relieve the Contractor of any responsibility in excavating difficult materials.

The Contractor should be cognizant that materials between borings can vary from that shown on logs. Final and complete identification of all materials between borings can be verified only by site excavation. The Contractor shall assume full responsibility for excavating all materials encountered during construction regardless of density or ground water condition."

#### **Clause B**

"The Contractor represents that it is familiar with the Project site and has received all information it needs concerning the conditions of the Project site. The Contractor represents that it has inspected the location of the Work and has satisfied itself as to the condition thereof, including, without limitation, all structural, surface and subsurface conditions. The contractor shall undertake such further investigations and studies as may be necessary or useful to determine surface and subsurface conditions. The Contractor shall have no claims for surface or subsurface conditions

encountered."

### **Clause C**

"Because the sub-surface conditions indicated by the borings are a sampling in relation to the entire construction area, ... the Owner, the Architect or the firm reporting the sub-surface conditions based on the borings, do not warrant the conditions below the depths of the borings or that the strata logged from the borings are necessarily typical of the entire site....

No consideration for extra payment will be given for conditions occurring which could have been anticipated from the soil information. If conditions occur resulting in extra work which could not have been anticipated or reasonably inferred from the soil information, the Conditions of the Contract for changes in the Work shall apply."

### **Clause D**

"The [geotechnical] report was prepared primarily for use by the Architect's consultant in designing the foundations for the Project and is not a part of the Contract Documents. The report is available for Bidders' information, but is not a warranty of subsurface conditions.

The report, by its nature, cannot reveal all conditions that exist on the site. Should subsurface conditions be found to vary substantially from the report, modifications in the design and construction of foundations will be made, with resulting adjustments to the Contract Sum in accordance with the Contract Documents."

The underlining has been added.

The first two clauses are certainly more risky to the constructor than are the last two. Clearly, the constructor who signs a contract with language similar to clauses A and B is accepting risk not only for what may be reasonably be inferred by the soils report, but also for any conditions encountered. From the standpoint of risk analysis, then, clauses A and B are properly called by the estimator to the attention of company management, along with any of the other clauses discussed earlier, as a legitimate risk not usually assumed by the constructor.

The foregoing discussion has been designed to acquaint the estimator with some contract provisions, which have been missed or given scant attention in the past. The constructor can no longer afford this inattention. Such provisions must be recognized before being weighed for risk. The owners of projects in which such clauses are blatantly unfair should be confronted in an effort to get the unfair provisions removed. This may not be possible immediately, but construction associations, individual firms, and individuals can help educate the construction industry about the

perils of such language, and assist in developing collective efforts to have them removed from construction documents. Such action is not only helpful; it is becoming vital. Inaction is tantamount to potential disaster for the entire industry. It is also tantamount to inviting other, perhaps even more unfair and harsher clauses in the future.