KILPATRICK TOWNSEND

10 KEY TAKEAWAYS

Considerations for Construction and Design Contracts

Whether your company is about to upsize, downsize, relocate, or reconfigure its space, there is a good chance there is a construction project in your company's future. During the Association of Corporate Counsel Houston Chapter August Meeting, Kilpatrick Townsend Partner Brian Gaudet and Kimco Realty's Jenny Hyun discussed the risks associated with construction contracts and how to manage those challenges.

Key takeaways from the discussion from Mr. Gaudet, include:

1 Many states have specific laws affecting design and construction contracts such as: limitations on indemnity, retainage, choice of law, prompt pay acts. Be sure to search these out to incorporate into your construction and design contracts.

Be sure that the Owner has appropriate rights to use the design if there is a dispute with the architect. This would include owning the design or obtaining a license to use it. If there are specific architectural elements that are unique to the Owner's identity, consider requiring the architect to agree that they will not use those elements in designs they do for other clients. **2**

3 An appropriately crafted "termination for convenience clause" will provide the Owner with a useful tool in dealing with a situation where a termination for cause may be questionable but it is clear that irreconcilable conflicts will continue to negatively affect the project. This is especially helpful if the owner includes limitations on the compensation owed for lost profits on unperformed work.

Even though many force majeure clauses may include pandemics or epidemics as potential events warranting relief you will find that the rest of the clause does not apply very well in the case of a pandemic or epidemic. Many force majeure clauses only permit relief for "unforeseeable" events. Once a pandemic starts, the pandemic may no longer be unforeseeable, but the impacts on the project may be. Revisit these clauses and tune them based on current experiences. **4**

5 Regardless of whether the Owner engages some of the consultants or the architect hires some or all of them, one party needs to be responsible for coordinating the design and services of all of the consultants. Consider the architect for that role and include that obligation in the contract.

Liquidated damages need to be a reasonable approximation of the expected actual damages and not a penalty. Some states determine reasonableness only at the time of contracting, and some states permit you to "look back" to see if the liquidated damages **6**

damages and not a penalty. Some states determine reasonableness only at the time of contracting, and some states permit you to "look back" to see if the liquidated damages were reasonable. If not, they may be invalidated.

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Make sure that appropriate insurance is in place, usually commercial general liability, commercial auto, worker's compensation and builders risk. Carefully examine the exclusions to make sure they are all appropriate for the project. For the architect a professional liability (E&O) policy should be required. Always request pricing for at least a one year and two year extended reporting period ("tail") and make a determination as to whether those should be required of the architect and/or other design professionals.

Require contractors to prepare and provide a critical path schedule in both paper format and their native schedule files. Require any requests for time extensions to be accompanied with a critical path analysis to be sure that only proper time extensions are given.

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Price escalations are routine visitors to the construction materials markets. When considering a price escalation clause, consider whether a price fluctuation clause is more appropriate (i.e. one that provides the contractor more money when prices go up, but one that gives the Owner back money if prices go down). Price escalation clauses are typically tied to changes to an index or increases in actual invoices. Well-crafted price escalation clauses are complicated. Do not just borrow one from some other contract without being prepared to modify it to fit your particular situation.

Engaging counsel to help prepare and/or negotiate a reasonable construction contract (even if you are using an industry form) is not particularly expensive or time consuming. It is substantially cheaper than paying too much for the project as a result of unfair risk allocation or paying a lawyer to litigate a dispute.

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