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## Checklist 5: General Conditions— Owner’s Considerations

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An owner should consider many issues when drafting the owner/general contractor agreement. The following checklist of questions and issues, although not exhaustive, should be helpful in highlighting some of the important provisions that an owner should consider when drafting such an agreement.

- \_\_\_ 1. **Does the contract specify the terms and responsibilities for project submittals?** Clearly specifying the terms and responsibilities for project submittals can provide increased certainty that the work will be performed correctly and in a timely manner.
- \_\_\_ (a) Is the contractor required to submit each shop drawing, sample, product data, and/or material list based on a specified time and/or schedule so that the owner and architect will have ample time to review, approve, and/or request revisions?
- \_\_\_ (b) Does the contract expressly state that owner review and approval of submittals does not include review and approval of (and does not relieve the contractor from responsibility for) means, methods, techniques, sequences, or procedures of construction, or to safety precautions or programs incidental thereto?
- \_\_\_ (c) Is it clear that the owner review and approval of shop drawings does not relieve the contractor from any of its responsibilities or obligations under the contract and shall not constitute a waiver or create an estoppel as to whether the contractor has complied with the contract?
- \_\_\_ 2. **Does the owner have the right to perform audits?** Most contracts give the owner certain limited rights to perform audits regarding contractor financial information. An owner should consider expanding the right

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to audit to provide a more effective means to monitor performance and control project costs.

- \_\_\_ (a) Does the contract provide that the owner shall have the right to review, obtain, inspect, audit, and copy all written and electronically stored records of the contractor pertaining to the contract and/or work, including nonfinancial project documents?
- \_\_\_ (b) Is there a specified time within which all records requested pursuant to an audit shall be provided to the owner, for example, within 10 days of the request?
- \_\_\_ (c) Is the owner expressly allowed to have access to project staff and employees of the contractor to interview in connection with an audit?
- \_\_\_ (d) Does the right to audit include a “flow-down” right to audit all of the contractor’s subcontractors and suppliers of every tier?
- \_\_\_ (e) Will the owner be reimbursed for the costs of the audit in the event overpricing or overcharges of any nature are uncovered by the owner as a result of the audit?

\_\_\_ 3. **Does the contractor have a “continuing duty to perform the work” (that is, waiver of contractor’s right to terminate)?** Where the time deadlines for completion of the project and interim milestones are of the essence, an owner may want to include a requirement that a contractor continue the work, even during a dispute.

- \_\_\_ (a) Does the contract expressly state that all time deadlines under the contract are of the essence?
- \_\_\_ (b) Is the contractor required to proceed with the work even if the contractor contends that the owner has materially and/or otherwise breached the contract? (Such a provision effectively amounts to a waiver of the contractor’s right to terminate the contract subject to any limitations on the enforceability of such provisions.)
- \_\_\_ (c) If there is an existing dispute, disagreement, or a claim by the contractor pending, is the contractor required to proceed with the work, which shall not be stopped, delayed, postponed, and/or otherwise suspended by the contractor pending the resolution of the same?

\_\_\_ 4. **Does the owner have the right to terminate the contract for convenience?** A right to terminate for the owner’s convenience provides the flexibility to end a contract without cause (that is, without having to establish a default by the contractor or breach that would justify termination).

- \_\_\_ (a) Does the contract specifically allow the owner the right to terminate for convenience?

- (b) If it is determined that a termination by the owner was not properly made for cause (that is, there was no default by the contractor), may the termination be automatically converted to a termination for convenience?
  - (c) Does the termination for convenience clause require a minimum amount of notice to the contractor?
  - (d) Is the contractor entitled to compensation or reimbursement of specified items in the event of a termination for convenience (for example, costs incurred plus profit on work completed, noncancellable commitments to subcontractors, etc.)?
5. **How broad is the owner's right to terminate the contractor for default?** An owner's express right to terminate for cause (that is, where termination is justified due to nonperformance, default, or breach by contractor) is an essential remedy to be included in any owner/contractor agreement.
- (a) Does the owner have the right to terminate the contract for cause in whole or in part?
  - (b) Does the contract include a nonexclusive list of acts that constitute grounds for termination for cause (for example, failure to achieve milestones, failure to have sufficient resources to complete the work, etc.)?
  - (c) Is the owner permitted to terminate the contract or the contractor? On public contracts in some jurisdictions, there may be a difference between terminating the contract and terminating the contractor, for purposes of competitive bidding requirements for the completion work. Terminating the contractor rather than the contract may give the owner an additional argument that it need not competitively bid the completion work.
  - (d) Are disputes regarding termination subject to alternative dispute resolution (ADR) provisions and whether ADR provisions (for example, dispute resolution boards) survive termination?
6. **Does the owner have the right to terminate for cause without notice and/or provide the contractor with an opportunity to cure?** Many contracts permit an owner to terminate only after the contractor has been given notice and an opportunity to cure any default.
- (a) Does the contract allow the owner to immediately terminate for any default without notice and an opportunity for the contractor to cure in appropriate circumstances, which might include bankruptcy, insolvency, and certain criminal misconduct?
7. **Is the owner permitted to take over subcontracts after contractor's default?** Providing the owner the express right to take over

subcontracts upon termination for default helps ensure continuity of performance after termination of the contractor.

- \_\_\_ 8. **Under what circumstances does the owner have the right to suspend work?** This provision gives the owner the discretion and flexibility to suspend the work as deemed necessary by the owner, without cause (that is, any reason, including due to loss of funding, safety issues, investigations, etc.), either for such period of time as may be necessary or convenient for the owner (or for a specified fixed period of time). Usually, such provisions provide that the owner is to pay the contractor certain amounts for overhead and may give the owner the right to terminate the contract in the event that the suspension continues for a certain period of time.
- \_\_\_ 9. **Does the owner have the right to perform the work itself?** If so, under what circumstances? Reserving for the owner the right to perform the contractor's work with its own forces and/or pursuant to separate work contracts provides added flexibility to the owner in ensuring the timely performance and completion of the work.
- \_\_\_ 10. **What are the responsibilities of the contractor for the management and superintendence of the work?** Clearly delineating these responsibilities can help eliminate disputes as well as promote the efficient and timely completion of the work.
- \_\_\_ (a) Does the contract provide that it is the contractor's duty to supervise and direct all aspects of the work?
- \_\_\_ (b) Is the contractor solely responsible for, and required to exercise full control over, construction means, methods, techniques, sequences, procedures, and coordination of all portions of the work with that of all other contractors and subcontractors in a manner that will facilitate the efficient and timely completion of the work?
- \_\_\_ (c) Is the contractor required to ensure competent adequate staff and force of skilled workers on the project site to complete the work in accordance with all requirements of the contract?
- \_\_\_ (d) Does the contract provide that the contractor shall provide a qualified full-time superintendent, acceptable to the owner, and assistants, as necessary, who shall be physically present at the project site while any aspect of the work is being performed? Does the contract provide that key personnel shall be fluent in a specified language?
- \_\_\_ 11. **What are the contractor's scheduling requirements?** Requiring the contractor to submit its schedule and schedule updates in a format acceptable to the owner will allow the owner to better monitor progress of the project.

- \_\_\_ (a) Does the contract require the submission of an initial construction schedule, as well as any updates, by a specific date?
  - \_\_\_ (b) Is the failure to submit schedules and required updates a breach of contract by the contractor?
  - \_\_\_ (c) Does the contract require the contractor to make changes to the schedule as requested by the owner?
  - \_\_\_ (d) Is the contractor required to show the logic or methodology of the critical path scheduling? (Note: This and the preceding section could potentially be considered interference by the owner with the contractor’s means and methods of construction.)
  - \_\_\_ (e) What scheduling software should be used? On larger projects, an owner may want to specify the scheduling software to be used (for example, Primavera, Microsoft P3, etc.) and the format of the schedule and updates.
  - \_\_\_ (f) Must schedule updates include plans or proposals for making up delay?
  - \_\_\_ (g) Does the contract specify that the “float” is owned by the owner?
- \_\_\_ 12. **Is the contractor required to meet specific dates in the schedule identified as “milestones”?** Including a specific milestone schedule can provide increased certainty as to the completion time for individual portions of the work, which can assist an owner in monitoring and ensuring completion of the contract as a whole.
- \_\_\_ (a) Does the contract specify a construction milestone schedule and require the contractor to proceed expeditiously, not only in accordance with the initial construction schedule and as amended from time to time, but also to achieve all milestones as set forth in the milestones schedule?
  - \_\_\_ (b) Is the contractor required to furnish and maintain sufficient forces to ensure completion of all work in accordance with the milestones schedule?
  - \_\_\_ (c) Does the contract provide that any proposed adjustments to the milestone schedule that change and/or amend the milestones schedule, contract amount, and/or contract time must be submitted and approved pursuant to the change order procedures of the contract in order to have effect?
- \_\_\_ 13. **What are the owner’s options with respect to remedying defective work?** The owner should retain the flexibility to require the correction of defective work either by the contractor or the owner itself at the contractor’s expense.

- \_\_\_ (a) If there is any work, material, equipment, or other items that do not conform to the contract requirements or that may be deemed defective by the owner, does the contract provide that such defective items must be removed and replaced by the contractor upon notice from the owner at the contractor's expense? Does the owner have the right to remedy defective work at the contractor's expense in the event the contractor does not do so within a contractually specified period of time (or some other reasonable period of time as may be agreed upon by the parties) and by whatever method the owner deems most expedient?
- \_\_\_ (b) Does the contract provide that the contractor shall be responsible for all delays to the milestones and/or contract time caused by the contractor's removal and replacement of defective work, etc.?
- \_\_\_ 14. **Is the contract clear that payment and/or occupancy by the owner does not constitute acceptance of defective work?** Specifying that the owner's approval of a payment application, or the partial or entire use of occupancy of the work, does not constitute acceptance of work not in accordance with the contract ensures that the owner does not inadvertently acquiesce to defective work.
- \_\_\_ 15. **What are the procedures that must be utilized by the contractor in order to make a claim?** By specifying the procedures for the submission of contractor claims and the required supporting documentation, an owner can better regulate the claims process.
  - \_\_\_ (a) What is the required timing and content of any claims submitted by the contractor? Does the contract require that the contractor provide a statement justifying its claim and provide supporting documentation? Must the contractor provide documents and information supporting its claim for compensation? Must the contractor provide a scheduling analysis supporting any asserted delay claim or time impact?
  - \_\_\_ (b) Does the contract provide that any failure by the contractor to comply with the claims procedures amounts to a waiver, release, and forfeiture of the claim? An owner should understand the extent to which such provisions will be enforced under local law and draft language to increase the likelihood of enforceability.
  - \_\_\_ (c) What are the applicable dispute resolution procedures? Does the contract provide for alternative dispute resolution (e.g., mediation, disputes review boards, binding arbitration, etc.), and does it specify whether any types of claims are not subject to the ADR procedures? Prior to the initiation

of ADR or litigation, are there required negotiations that must occur between the executives (or other identified representatives) for the owner and the contractor?

- \_\_\_ 16. **What are the procedures for documenting contract changes and change order proposals?** Detailed procedures for changes, construction directives, and change order proposals can provide the owner the flexibility to direct changes to the work while controlling costs.
  - \_\_\_ (a) Does the owner have the right to direct additions, deletions, and/or revisions to the work?
  - \_\_\_ (b) Does the contract provide that any changes to the contract can only be approved in writing?
  - \_\_\_ (c) Are there specific procedures for owner additions, deletions, and/or revisions resulting in changes to the contract amount, time, and/or milestones pursuant to requests for clarifications, change order proposals, construction directives, and change orders?
- \_\_\_ 17. **Does the owner have the right to assess costs, expenses, and/or damages (including liquidated damages) against contract funds, contractor, or security provided by the contractor such as a performance bond?** By specifying that the owner has a right to assess not only against the existing contract funds otherwise due and payable to the contractor, but also against the contractor and its performance bond, the owner increases its avenues and options for recovery.
- \_\_\_ 18. **What are the certification requirements?**
  - \_\_\_ (a) Does the contract require certification of progress pay applications (for example, “contractor certifies under penalty of perjury that the work for which payment is sought in this progress pay application complies with the requirements of the contract and that all such work has been performed and amounts billed by contractor are due”)? Doing so may decrease the incidence of false pay applications.
  - \_\_\_ (b) Does the contract require certification of potential claims, change orders, and pricing information (for example, “The undersigned originator [contractor or subcontractor as appropriate] certifies under penalty of perjury that the above statements made in connection with this potential claim are true.”)? Doing so may decrease the likelihood of falsified information submitted by the contractor.
- \_\_\_ 19. **Does the contract provide limitations on liability to the owner?**
  - \_\_\_ (a) **Delay damages.**
    - \_\_\_ (i) Is there a no-damages-for-delay provision? (This type of provision may not be enforceable on public works projects in certain jurisdictions.)

- \_\_\_\_\_ (ii) Alternatively, does the contract specify that the contractor is not entitled to recover damages for delays that are not the fault of the owner?
- \_\_\_\_\_ (b) Is there a mutual waiver of consequential damages? Is the concept of consequential damages defined in the contract or is it being left to interpretation?
- \_\_\_\_\_ 20. **Is the contractor barred from recovering delay damages where there is a concurrent delay?** The owner may want to include a provision that expressly provides that the contractor is not entitled to recover delay damages when the delay at issue is concurrent with other delays that are not caused by the owner.
- \_\_\_\_\_ 21. **Does the contract contain a “no third-party beneficiary” clause?** An owner should consider specifying that the contractor is not a third-party beneficiary of any contracts to which the owner is a party, including those entered into with design professionals, (for example, architects, engineers, etc.), and that the contractor has no direct right of claims regarding the design of the project. Such a clause eliminates the contractor’s right to proceed directly against the owner’s design professionals, and others that the owner may want to protect, as a third-party beneficiary. The owner may wish to add other provisions that make it more likely that a court will bar direct claims by a contractor against the owner’s design professionals under the economic loss doctrine or otherwise.
- \_\_\_\_\_ 22. **Does the contractor have a right to early completion?** Does the contract provide that the contractor has no right to bring an early completion claim or seek delay damages where the project is completed on time?
- \_\_\_\_\_ 23. **What are the contractor’s requirements with respect to pre-construction review of site conditions, plans, and specifications?**
- \_\_\_\_\_ (a) Is the contractor required to perform a thorough pre-construction survey of the project site to ascertain and document all existing actual conditions that may affect the work? Doing so will make it more difficult for a contractor to later claim during construction that it encountered an unknown site condition for which it is entitled to a contract adjustment.
- \_\_\_\_\_ (b) Does the contract require the contractor to thoroughly examine pre-construction all plans and specifications for any perceived errors or ambiguities and to file any needed requests for clarification prior to commencement of any work? This requirement will allow the owner the opportunity to correct any such problems in the plans and specifications prior to commencement of construction.

- \_\_\_\_\_ 24. **What are the contractor's indemnity obligations?** Does the contract require the contractor to defend, indemnify, and hold the owner harmless from and against any and all claims arising out of or resulting from the contractor's performance of the work? The broader the indemnification, the more protection that is afforded to the owner.
- \_\_\_\_\_ 25. **Does the contractor warrant and guarantee to the owner that all work will be performed in compliance with the contract and be free of defects?** To increase the owner's protection, the contract should provide that the contractor's obligations are absolute, that is, they are not released as a result of, among other things, any acceptance of work by the owner, any inspection of the work, or any observation by the architect.

