

# **Construction Contract Drafting Strategies**

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**Crafting Enforceable Payment, Performance,  
Termination and Damages Provisions**

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# DAMAGES

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## Drafting Enforceable Damages Provisions in Construction Contracts

# Consequential Damages

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- Direct v. Indirect Damages
- May include calculated consequential damages

# Waiver of Consequential Damages

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- Clause does not limit “direct damages,” but those that flow as a consequence of a breach of contract
- AIA A401 example
  - “The Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Subcontract...”

# Liquidated Damages

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- Damages specified in a contract to be paid in the event of an unexcused delay
- Typical Clause:

“If subcontractor should default in performance of the work or otherwise commit any act which causes delay to the prime contract work, Subcontractor shall be liable for all losses, costs, expenses, liabilities and damages, including consequential damages and liquidated damages, sustained by Contractor, or for which Contractor may be liable to Owner or any other party because of Subcontractor’s default.”
- Make sure you comply with notification requirements of delays and otherwise document any work that falls outside the schedule you are required to adhere to

# Liquidated Damages

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- Liquidated damages clauses may or may not be enforceable
  - Depends on the state
  - Check with legal counsel
- Damages must be reasonable and be a fair assessment of what damages truly would have been
- Liquidated damages cannot be used as penalty

# “No Damage for Delays” Clause

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- Clause that provides that in the event of delay the delayed party will be compensated only with an extension of time, but *no monetary compensation*
- Extent of risk taken in a contract with a "no damage for delay" clause cannot be overemphasized
  - For owners
  - For general contractors
  - For subcontractors
- Construction delays, and the damages that result, are the cause of most claims in the construction industry
- "No damage for delay clause" can be, and frequently is used to thwart any attempts to collect damages as a result of delays

# “No Damage for Delays” Clause

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- Will begrudgingly give time extensions
- Will not want to pay true cost for delay
- If any delay damages at all, will try to limit them to Actual Cost
  - no inefficiency claims,
  - no actual vs. as-built analysis,
  - no home office overhead,
  - limited extended general conditions

# “No Damage for Delays” Clause

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- Clearly enforceable in *most* jurisdictions
- Varies by state
- Example: Colorado and Oregon maintain statutes which prohibit the enforcement of these clauses on public works projects

# “No Damage for Delays” Clause

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- These clauses are often used in proprietary subcontract forms to declare that the General Contractor has no liability to the Subcontractor for delays.
- Example:
  - **If Subcontractor is responsible for any delays in the time and sequence of the schedule, Subcontractor shall pay Contractor for all costs and damages suffered by Contractor as a result of such delays, including any damages against Contractor under the Contract Documents.**

# “No Damage for Delays” Clause

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## Example cntd:

- **In the event that Subcontractor’s performance of the Work is delayed or interfered with, for any reason and for any period of time, by acts or omissions of Owner, Contractor of other subcontractor, Subcontractor may request an extension of time for performance of the Work, but shall not be entitled to any increase in the Subcontract price or to damages or additional compensation as a consequence of such delays or interference, except to the extent that the Contract Documents entitle Contractor to compensation for such delays, and then only to the extent of any amounts that Contractor may, on behalf of Subcontractor, actually receive from Owner for such delays.**

# “No Damage for Delays” Clause

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- Most of the case law from all jurisdictions has shown that the application of these exceptions to a "no damage for delay" clause is extremely limited
- Exceptions to enforceability:
  - (1) fraud, misrepresentation, or bad faith;
  - (2) active interference by the owner with the contractor's performance;
  - (3) unreasonable delay, particularly delay which amounts to abandonment of the project; and
  - (4) delay not intended or contemplated by the parties to be governed by the provision.