

Supplementary Conditions In Construction Contracts

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Construction contracts are sometimes instituted using standard forms, such as CCDC or CCA documents, and sometimes by customized documents. When using standard forms, one of the parties (usually the owner) may seek to revise the standard provisions by having supplementary conditions incorporated into the contract.

The inclusion of supplementary provisions may be unobjectionable when they are intended to adapt a standard form document to unique circumstances of the project or of the relationship between the parties. Also, standard form general contracts are often revised to set out in detail the contractor's responsibilities to have builders liens filed by subtrades removed from the project's property title and to provide for the owner's retention of deficiency holdback. Those changes can be viewed as reasonably adjusting the document to the practical realities of the construction industry.

However, just as commonly, a party proposing supplementary conditions may want to reapportion in its favor the construction risk factors addressed in the contract.

Standard form construction contract documents have been created out of consultation between different stakeholder groups in the construction industry. They generally represent an attempt to allocate construction risk fairly and practically. Therefore, by definition the reallocation of risk by supplementary conditions involves benefit to one of the contracting parties at the expense of the other.

It is essential that close attention be given to supplementary conditions proposed by another potential contracting party. They should be reviewed for typographical errors, clarity in wording, consistency with the other provisions of the contract which will not be amended, consistency with the general conceptual principles of the contract and, most importantly, their net effect on the parties' respective rights and responsibilities.

A useful approach when reviewing proposed supplementary conditions is to consider how each would change what would otherwise be the parties' rights and responsibilities under the unamended standard form contract and those aspects of the common law of contract which the standard form does not preempt. Consideration should then be given as to whether such a change is reasonable, and whether it is in any event acceptable.

The following are some common ways in which supplementary conditions proposed by owners seek to change the relative positions of the parties under standard form general contracts and the common law:

1. Generally, failing to provide for reasonable reciprocity between the parties' respective rights and responsibilities.
2. Making the contractor responsible for unanticipated soils conditions.
3. Imposing on the contractor unreasonably wide responsibilities as to specifics of subcontractor conduct, such as their insurance coverage.
4. Providing for unnecessary or otherwise unreasonable intrusion of the owner into the contractor's relationships with subcontractors, particularly as to potential direct payment from the owner to subcontractors.
5. Providing excessively wide-ranging and arbitrary criteria for the owner's withholding of payment from the contractor.
6. Intentionally or unwittingly including in the contractor's duty to clear property title any builders lien filed by the contractor itself.
7. Providing criteria for contractually defined substantial performance of the contract which exceed the criteria applicable under the *Builders Lien Act*, and thereby potentially extend the holdback release period.
8. Excluding entitlement of the contractor to damages in the nature of lost profits on the balance of the work in the case of termination or for the late completion of the contract, in the absence of fault by the contractor.

Owners seek to impose such provisions for the purpose of obtaining greater protection against increased construction cost and time. However, the transfer of additional risk to contractors may actually result in the inclusion of higher costs for contingencies in their tendered or negotiated contract prices. It also increases the potential for the contractual relationship to be soured from its commencement, which may also result in a more aggressive approach by a contractor to extra and delay claims and otherwise increase the likelihood of disputes.

For these reasons, owners should consider the possibility that more may be lost than gained by attempting to impose on contractors supplementary conditions which radically alter the contractual equilibrium between the parties anticipated by unamended standard form contracts.

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