



Contract Clauses

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The clauses included here are suggestions to help avoid risk in contracts. The laws in all 50 states have NOT been reviewed while developing this document and it is strongly advised to research the requirements in the area the project and or contract is bound to. Below you will find the listing for two different sites describing the laws in each jurisdiction.

www.ASAonline.com

<http://www.keglerbrown.com/biddingandcontracts/50-state-summaries/>

1.) Indemnification

- a.) **Broad Form** - Indemnity Language requiring Precaster (Indemnitor) to Indemnify, Defend and Hold Harmless an Indemnified Party for the Indemnified Parties' (Contractor, Owner, Architect) Negligence even if Indemnified Party is solely negligent.
- b.) **Intermediate Form** - Contractor will try to shift this risk to Subcontractor except to the extent the Contractor is found to be **solely** negligent.

Review of the State Indemnity Statute is imperative in order to understand whether or not the State the project is located allows for Broad Form, Intermediate Form or Comparative Form



Precast/Prestressed Concrete Institute

Indemnity. For instance, the State of North Carolina only allows for Comparative Form Indemnity. The State of Florida allows for Intermediate Form to the extent consideration is provided by Contractor (In consideration of \$10.00 the Subcontractor agrees....) and a value capping the indemnity exposure is provided in the Indemnity Article.

<http://www.keglerbrown.com/biddingandcontracts/50-state-summaries> &
www.asaonline.com.

Broad or Intermediate Form Indemnification - Subcontract Language requiring PCI Member to indemnify, defend and hold harmless an indemnified party for the indemnified parties' negligence. The contractor will try to shift this risk to the subcontractor except to the extent the contractor is found to be **solely** negligent. The preferred language below provides for the indemnification and defense requested but only to the extent caused by PCI Producer Member. **The preferred language allows for comparative or contributory negligence.**

Preferred Language: "With regard to any and all of the indemnity and/or defense requirements specified in this agreement, Subcontractor agrees only as follows: To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless the Owner and General Contractor, their agents and employees from and against claims, damages, losses and expenses, including but not limited to attorney's 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 to the Work itself) including loss of use resulting therefrom, **but only to the extent** caused in whole or in part by negligent acts or omissions of the Subcontractor, a Sub-subcontractor, or anyone directly employed by them for the construction of the Work, or anyone for whose acts they may be liable."

It may be difficult to delete an Indemnity clause so the addition of "but only to the extent" added to indemnity article may suffice or the deletion of "sole" or "solely" from the Indemnity Article is another option in most cases.

Request a copy of the Prime of the Contract to see what the Contractor is providing to the Owner regarding Indemnity obligation. More often than not, you will find the Contractor is providing Comparative Form while perhaps requiring Subcontractor to provide Intermediate Form.

Indemnity Agreements are increasingly difficult to read and understand and may be found on other Subcontract Documents such as Waivers and Change Orders so we have to stay vigilant when reviewing documents.

Another option:

Hold Harmless Restriction. Any indemnification or hold harmless obligation of



Subcontractor extends only to claims relating to bodily injury and property damage (other than to the Subcontractor's work), and then only to that part or proportion of any claim caused by the negligence or intentional act of Subcontractor, its sub-subcontractors, their employees or others for whose acts they may be liable. Subcontractor shall not have a duty to defend. This paragraph does not, however, restrict obligations of Subcontractor, if any, to indemnify Customer against intellectual property infringement claims or against claims for payment for work for which Subcontractor has been paid.

1.) Existing Conditions

- a.) Acceptance of Substrate Conditions/Verifying The Work of Others** - Most subcontracts contain language such as "Subcontractor's commencement of its work shall constitute acceptance of the related substrate conditions and Subcontractor shall be responsible for all costs arising therefrom, etc." And most subcontracts will state explicitly that the subcontractor shall verify the prior work of others before performing any portion of the subcontractor's work, etc. This language defeats the purpose of bidding/fabricating work in accordance with the Contract Documents and places an undue burden on subcontractors whose work depends on the proper preceding work of others. This acceptance/verifying language usually extends to the Contract Documents whereby making the subcontractor responsible for discovering errors and omissions in

Preferred Language: "Subcontractor's commencement of its Work, preceded by a visual inspection only and notification of defects of supporting and/or contiguous work shall not constitute a waiver of Contractor's obligation to construct its work in accordance with tolerances and quality levels specified in the Contract Documents. Neither Subcontractor nor its Sub-subcontractors shall be responsible or liable in any way for errors and omissions in the Work of others, including the Contract Documents."

Possible Addendum: "Subcontractor's commencement of its Work, preceded by a reasonable inspection of supporting and/or contiguous work shall not constitute a waiver of Contractor's obligation to construct its work in accordance with tolerances and quality levels specified in the Contract Documents. Neither Subcontractor nor its Sub-subcontractors shall be responsible or liable in any way for errors and omissions in the Work of others, including the Contract Documents." (A more radical version for the preceding sentence is – "Neither Subcontractor nor its Sub-subcontractors shall be responsible or liable in any way for reviewing, reporting, verifying, analyzing, or evaluating the work of others, including the Contract Documents.) Subcontractor does agree to make a reasonable effort to coordinate its Work with the Work of other trades and report any deficiencies it finds as part of performing its Work."

Another option:

Subcontractor's obligation to examine documents, the project site, and materials and work



furnished by others is limited to notification of Customer of any defects or deficiencies that a person in the trade of Subcontractor would discover by reasonable visual inspection. No testing beyond reasonable visual inspection shall be required. Subcontractor is entitled to rely on the accuracy and completeness of plans, specifications, and reports of site conditions provided to Subcontractor.

2.) Protection/Risk of Loss

Protection/Risk of Loss - Most subcontracts attempt to make the subcontractor responsible for protecting its work in place until final acceptance by the owner. As the subcontractor has no control over the activities of the contractor or other subcontractors, the subcontractor cannot assume the responsibility of protecting its work in place until acceptance, especially since acceptance of the subcontractor's work usually is tied to final acceptance of the entire project which is sometimes months (usually six to twelve months) after the PCI Member completes their work.

Preferred Language: "Subcontractor agrees to exercise reasonable care in protecting the existing construction and improvements from damage during the performance of its Work. Protection of Subcontractor's Work once installed on the structure is excluded. Furthermore, the Risk of Loss of Subcontractor's Work passes to the Owner and/or Contractor once installed on the structure, but only to the extent such loss or damage is not caused by acts or omissions of Subcontractor. Subcontractor is not responsible for the repair of damage to its Work caused by others."

Or:

Subcontractor is not responsible for damage to its work by other parties, and any repair work necessitated by such damage is extra work.

Alternate:

The Subcontractor shall provide reasonable protection for its jobsite material and work, but shall be liable for losses only to the extent caused by the Subcontractor's negligence. It is understood and agreed to that the Owner's all-risk insurance includes coverage for the full value of loss or damage to the Subcontractor's work in place, for its stored materials and for its materials in transit.

3.) Delays

No Compensation For Delays - Most subcontracts contain language that basically states that if the subcontractor is delayed in the performance of its work, the subcontractor's "sole and exclusive" remedy shall be an extension of time; hence, the subcontractor shall not receive any compensation except to the extent caused by and paid by the owner if allowed by the owner contract. While Subcontractor understands that it is not in a position to modify the owner



contract, not receiving compensation for delays caused by the contractor or other subcontractors can be costly.

Preferred Language: "In the event Subcontractor is delayed by or has any other claim for damages and/or an extension of time caused by Contractor or other Subcontractors through no fault of its own, inclement weather, acts of God, labor disputes, unavailability or shortages of material and any governmental actions which can affect Subcontractor's ability to perform according to the terms of this Agreement, Subcontractor will be entitled to compensation and an extension of time with Contractor, and Subcontractor's schedule obligations shall be revised accordingly. Adherence to the schedule and Precast Producer's corresponding ability to fabricate the product within the scheduled manufacturing window requires the timely performance of the General Contractor and Owner's authorized agents.

Possible Addendum: "In the event Subcontractor is delayed by or has any other claim for damages and/or an extension of time caused by Contractor or other Subcontractors through no fault of its own, Subcontractor will be entitled to compensation and an extension of time. Subcontractor shall be compensated for time and expense required to make up time for delays not caused by Subcontractor (including but not limited to delays caused by inclement weather)."

4.) Schedule

Mutual Schedule - The contractor and subcontractor start with a "Bid Schedule." This schedule is usually attractive to the subcontractor and its erection subcontractor or the subcontractor could not bid the project. The subcontractor and its subcontractors try to procure other projects in accordance with its/their open schedule slots, etc. It is not reasonable for the contractor's schedule to be materially modified from the original "Bid Schedule" while maintaining that the subcontractor and its subcontractors "begin Subcontractor's Work as soon as instructed by Contractor" and "furnish additional shifts of labor, work overtime, pay premium costs" as stated in most subcontracts.

Although there may be claim procedures mentioned in the subcontract, the subcontract usually states that "Subcontractor shall, nevertheless, proceed as requested by Contractor" and there may be cases where the subcontractor simply cannot comply, thereby triggering a breach of contract by the subcontractor. In summary, if the contractor's schedule "slides" out of its original slot reserved by the subcontractor and its subcontractor(s), then the subcontractor should have some input as to the "revised schedule."

Preferred Language: "All project schedules for the Work (including schedules for submittals) and any revisions thereto, shall be mutually agreed upon by Contractor and Subcontractor. Subcontractor agrees to use every means available to Subcontractor to comply with Contractor's reasonable schedule revisions for compensation, if any, mutually agreed upon by Contractor and Subcontractor. If Subcontractor cannot comply, Subcontractor shall not be penalized in any way for its noncompliance."

Or:

Project Schedule. Subcontractor shall be entitled to equitable adjustments of the contract price, including but not limited to any increased costs of labor, supervision, equipment or materials, and reasonable overhead and profit, for any modification of the project schedule differing from the bid schedule, and for any other delays, acceleration, out-of- sequence work and schedule changes beyond Subcontractor's reasonable control, including but not limited to those caused by labor unrest, fires, floods, acts of nature or government, wars, embargos, vendor priorities and allocations, transportation delays, suspension of work for non-payment or as ordered by Customer, or other delays caused by Customer or others. Should work be delayed by any of the aforementioned causes for a period exceeding ninety (90) days, Subcontractor shall be entitled to terminate the subcontract. Subcontractor change proposals must be processed in not more than thirty (30) days or as otherwise indicated on the change proposal.

Customer shall make no demand for liquidated damages or actual damages for delays in excess of the amount paid by the Customer for unexcused delays actually caused by Subcontractor. Subcontractor's maximum liability for delay damages shall not exceed 5% of the original subcontract value. Customer expressly waives all claims for special, incidental, or consequential damages it may have against Subcontractor, including without limitation damages for principal office expenses, loss of financing, loss of business and reputation, and loss of use.

5.) Payment

Pay When Paid - This item represents a "Business Risk", not an "Insurable Risk." Usually the contractor has already researched the owner's financial position including security agreements, etc. and will provide copies of pertinent information upon request. If the subcontractor is not comfortable with the owner's ability to pay, the subcontractor may ask for language such as the following:

“Acceptance of the conditional payment terms is conditioned on the understanding that those terms apply solely to monies withheld by Owner due to some deficiency of Subcontractor. If Owner fails to pay Contractor for reasons unrelated to the Work of Subcontractor, Contractor shall have a reasonable time to make payment to Subcontractor following the time when such payment would normally be due. If Contractor is not paid by Owner for any reason, Subcontractor agrees to cooperate and assist Contractor in obtaining such payment. Subcontractor does not assume the risk of non-payment by Owner to Contractor.”

Preferred Language: "Unless otherwise specified and agreed upon by all parties, payment terms are net cash within 30 days from the date of Subcontractor's invoices. Invoices will be rendered every 30 days for work completed. If payment is not made within 30 days after date of invoice, commencing with the 31st day, interest shall be charged on the unpaid balance at the rate of 1-1/2% per month (18% per annum). Nonpayment shall be cause for immediate stoppage of work



by Subcontractor. Subcontractor shall be paid for finished materials produced and stored in our yard. **Subcontractor does not accept the risk of Customer's receipt of payments from any source, and in no event will payments to Subcontractor be based upon or subject to, Customer's receipt of payment for Subcontractor's work."**

Or:

Payment Terms. The ATTACHED Schedule of Values shall be used to determine progress payments. All sums not paid when due shall bear interest at the rate of 1½ % per month from due date until paid or the maximum rate permitted by law, whichever is less. Subcontractor does not accept the risk of Customer's receipt of payments from any source, and in no event will payments to Subcontractor be based upon, or subject to, Customer's receipt of payment for Subcontractor's work. Subcontractor will only issue waivers of lien or bond rights that exclude any waiver of lien or bond rights securing payment of retainage, unbilled changes and claims which have been asserted in writing or which have not yet become known to Subcontractor, and any such waivers shall either apply only through the date of work covered by Subcontractor's last payment application that has been paid in full, or shall be conditional upon receipt of funds to Subcontractor's account. Should Subcontractor's payment be delayed because (a) Customer fails to receive timely payment of amounts certified and approved, or (b) Customer fails to make timely payment after itself receiving payment for Subcontractor's work, or (c) because Customer's payments are not received by Customer for reasons not the fault of or directly related to Subcontractor's work, then Subcontractor may suspend work after giving at least seven (7) days written notice to Customer of the intent to suspend and the date of intended suspension. Should Subcontractor's work be thereafter suspended for at least twenty-one (21) days, Subcontractor may terminate this subcontract upon written notice of termination to Customer. Payments received by Customer for Subcontract Work shall be held in trust and used solely for the benefit of Subcontractor and those for whom it is responsible.

a.) For Stored Materials:

Progress payments equal to 100% of the contract price for precast design services and/or fabricated precast materials, stored in Subcontractor's facility, awaiting delivery, will be invoiced monthly, near the end of each month, due by the 30th of the following month.

Seller will invoice buyer for all castings stockpiled in Seller's yard during the previous month. Retention to be released 30 days after seller's work is complete.

A Bill of Sale, COI for store materials will be provided, pictures provided upon request.

GC, Architects, or Owners are always welcome to visit subcontractor's plant and view production of their panels or view stored product. Some projects require a right of entry documents or a bailment document in case of default or bankruptcy by our firm which allows entry and claim to the paid product.



Typically, payment is for 90% of the value, therefore the subcontractor still has a 10% interest in each panel. Review and signing of lien rights with monthly progress payments must be reviewed and appropriately noted. Releases of lien should be marked up to some extent, and sometimes add a note that “unpaid retainage lien rights are not waived”.

b.) Retainage:

For precast suppliers when retention is required:

Ten percent of the approved progress payments shall be retained by the Owner until billed Work totals 50% of the contract amount, at which time no additional retainage shall be withheld from progress payments. Upon completion of delivery of product, retention shall be released in its entirety to the precast supplier. In the event that a portion of the Work is in question and not approved, a reasonable value to repair or replace that Work will be mutually agreed upon and 150% of that value will be withheld until such Work is approved.

For precast subcontractor including supply and install:

Ten percent of the approved progress payments shall be retained by the Owner until billed Work totals 50% of the contract amount, at which time no additional retainage shall be withheld from progress payments. Upon completion of delivery and erection of product, retention shall be released in its entirety to the precast subcontractor. In the event that a portion of the Work is in question and not approved, a reasonable value to repair or replace that Work will be mutually agreed upon and 150% of that value will be withheld until such Work is approved.

Or:

Retainage. Customer shall not deduct retainage from Subcontractor’s payments except to the extent of retainage held by project owner on Subcontractor’s work. Within seven (7) days after receiving any retainage relating to Subcontractor’s work, Customer will pay the same to Subcontractor or interest shall accrue as provided for late payments. Customer will use best efforts to secure release of retainage as soon as it is possible in accordance with Customer’s written agreement with project owner as existing and disclosed to Subcontractor on the date hereof, or else Subcontractor may look to Customer for payment of all amounts retained by the project owner plus interest.

6.) Liens/Payment Bonds

Lien/Payment Bond Rights - Some subcontracts will try to allow for the subcontractor to waive its Statutory Payment rights without actually being paid for the work or provide the contractor's Surety same defense contractor has regarding non-payment by the owner for any reason as a contractual reason not to pay the subcontractor. Depending on the state, these clauses have been found to be enforceable.

Preferred language: "It is expressly understood and agreed that Subcontractor reserves and in no respect waives its rights to payment under current Federal and/or State law, including any and all statutory remedies set forth therein. Furthermore, nothing in this agreement shall limit or reduce Subcontractor's lien or payment bond rights."

Or:

Lien and Bond Rights Preserved. Notwithstanding any provision to the contrary, Subcontractor may take all steps reasonably necessary to preserve and enforce its lien and bond rights.

Performance Bond Restriction. To the extent that performance and payment bonds are required by the subcontract to be provided by Subcontractor, the bond forms must be the ConsensusDOCS 706 (2007) and ConsensusDOCS 707 (2007) published by ConsensusDOCS.

7.) Insurance

Insurance and Taxes: Precast Supplier agrees to carry Workmen's Compensation and Public Liability Insurance. Owner agrees to provide Builder's Risk, Fire, Extended Coverage and Vandalism Insurance with protection of Precast Supplier and/or its contracted associate's interest in materials supplied, work in process and finished work at the jobsite. Precast Supplier agrees to pay all Sales Tax, Social Security and/or pension and Unemployment Compensation taxes upon the material and labor provided hereunder. Precast Supplier and/or its' subcontractors shall provide their standard insurance coverage, which does not include Broad Form Indemnity, Waivers of Subrogation, or Primary Non-Contributory for Additional Insured status.

Insurance Restriction. Subcontractor is not required to name additional insureds to its general liability insurance policy or to waive subrogation for claims covered by workers' compensation or commercial general liability insurance. Subcontractor shall maintain insurance with coverage and limits only as provided by Subcontractor's existing insurance program as shown by its certificate of insurance available on request.

OCP Optional. If available, then before commencement of work Subcontractor may be required to provide, at Customer's expense, an Owners & Contractors Protective Liability Policy (CG 00 09) naming Customer, project owner and such others as Customer may designate as insureds, with limits of liability equal to the limits of the primary general liability policy required to be maintained by Subcontractor. All such named insureds waive all claims and rights of subrogation they may have against Subcontractor for losses and claims covered by the said Owners & Contractors Protective Liability Policy, which shall provide for such waivers of subrogation by endorsement.

"All-Risk" Insurance. Customer shall provide, if the project owner does not, purchase and maintain all risk insurance upon the full value of the work performed, materials delivered to the jobsite, materials stored at a temporary storage location away from the site, and materials in transit, which shall include the interest of Subcontractor.



8.) Clean up:

This proposal does not include Seller's participation or contribution to any composite clean-up crew. Seller will be responsible for, on a continuous basis, the removal and disposal of all trash, dunnage, packaging, or other material created by its forces and not incorporated into the completed scope of work. **Any claim by Customer for Clean up costs shall only be allowed if Customer has placed Subcontractor on at least three business days notice of areas needed to be cleaned and Subcontractor fails to reasonably clean said area of litter of its own causing. Subcontractor is not responsible for clean up of other trades or the Customer.**