



REYNOLDS MIRTH
RICHARDS & FARMER

Managing Contracts and Shifting Liability

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Overview

1. Contracts 101
 - a. Basic Ingredients of a Contract
 - b. Common Clauses

2. Shifting Liability
 - a. Common Clauses
 - b. Tips and Tricks

3. Questions?

Legally Enforceable Promises: Contracts 101

All Contracts Begin with the Same Basic Ingredients

- Offer
- Acceptance
- Consideration
- Intention
- Capacity
- Legality
- Certainty

Key Terms and Common Clauses of a Contract

- Preamble
- Parties
- Obligations
- Default

Preamble

- Sets the stage for the contract:
 - Intention and objectives of the parties
 - Circumstances and goals
 - May aid in interpreting the contract

Parties

- Clearly and unambiguously identifies the parties involved
 - What kind of entity is each party?
 - What is the role of each party?
 - Contract requires “legal person” (individual, corporation, partnership, public body/statutory entity, etc.)

Obligations

- Clearly defines what duties and responsibilities of the parties
 - Express obligations
 - Implied obligations
- “Each party shall treat as confidential all Confidential Information received from the other party, shall not use such Confidential Information except as expressly permitted under this Agreement, and shall not disclose any Confidential Information to a third party without express written permission from the other party.”

Default

- Outlines when a party is in default & the remedies available to the non-defaulting party
- You may see
 - Time permitted to cure the default
 - How notice of default must be provided
 - Right to terminate an agreement
 - Interest on unpaid funds
- Protects the non-defaulting party

Shifting Liability and Managing Risk

Key Terms for Managing Risk

- Term and Termination Clauses
- Liability Caps/Limitations on Liability
- Consequential Losses
- Performance Security
- Insurance
- Indemnity

Term

- How long is a contract to be performed for?
- Indefinite?
- Fixed term?
- Indefinite but terminates upon a condition being satisfied?
- Depends heavily on context (construction contracts, employment contracts, service agreements, supplier contracts).

Termination Clauses

- Key clause for managing risk
- What the clause will look like depends heavily on context (construction contracts, employment contracts, service agreements, supplier contracts).

Termination Clauses

- Questions to ask:
 - *When* may a party terminate a contract?
 - On default of contractor?
 - On default of municipality?
 - At convenience?
 - At expiry of term?
 - *What consequences* flow from terminating the contract?
 - Contractor's entitlement to payment? How much?

Termination Clauses Examples

Employment

The Company may terminate the Employee's employment in its sole discretion and without cause at any time. The amount of notice the Employee is entitled to will be limited to the minimum amount of notice of termination, pay in lieu of notice or any combination of notice and pay in lieu of notice as outlined in section 56 of the *Employment Standards Code*, which for greater clarity, is appended hereto as **Schedule "C"**. The Employee will not be entitled to any further compensation of any nature beyond the date of termination and upon compliance with this section the Company shall have no further or other liability to the Employee whatsoever. The Employee hereby waives any right that the Employee has, or may have, to receive reasonable notice at common law or damages in lieu of such notice. Notwithstanding the foregoing, under no circumstances shall the Employee receive less than the Employee's minimum entitlements under the *Employment Standards Code* (Alberta) as amended time to time.

Termination Clauses Example

Construction

An Owner may terminate a Contractor's right to continue with the Work, if the Contractor is in Default, and the Owner has provided sixty (60) days notice of the Default and such default has not been cured by the Contractor within sixty (60) days. Upon termination, the Owner shall be entitled to:

1. Take possession of the Work and Products at the Project, subject to the rights of third parties, and utilize the Construction Equipment at the Place of the Work; finish the Work by whatever method the Owner may consider expedient, but without undue delay or expense,
2. withhold further payment to the Contractor until a final certificate for payment is issued,
3. charge the Contractor the amount by which the full cost of finishing the Work as certified by the Consultant, including compensation to the Consultant for the Consultant's additional services and a reasonable allowance as determined by the Consultant to cover the cost of corrections to work performed by the Contractor that may be required under GC 12.3 – WARRANTY, exceeds the unpaid balance of the Contract Price; however, if such cost of finishing the Work is less than the unpaid balance of the Contract Price, the Owner shall pay the Contractor the difference.

Limitation of Liability

- Allocates and minimizes risk between the parties
 - Can limit the amount a party can recover as damages
 - Not every liability can be limited
- Can be expressly stated or written into other clauses

Limitation of Liability

- What can be limited?
 - Amounts owed by one party to another
 - Types of damages due
 - Types of claims which may be brought
- Examples of Limitation of Liability
 - Waiver of Consequential Loss (Type)
 - Overall Cap on Liability (Amount)

Example of Limitation - Consequential Losses

At law, innocent parties can seek to recover losses as damages, including “direct damages”:

- The cost of remedying a defect,
- The cost of a diminished value of a product,

As well as “less direct” or “consequential” damages such as:

- Loss of business or sales
- Loss of future business opportunities
- Cost of future financing.

Waiver of Consequential Loss - Example

Consequential Damages - Notwithstanding anything to the contrary in this Agreement, neither party shall be liable to the other party for any loss of profit, loss of production, cost of capital, interest, cost of delay, business interruption, plant shutdown or other indirect, special or ***consequential damages*** whether arising from the fault, breach of contract, tort (including concurrent or sole and exclusive negligence), indemnity, strict liability or otherwise of the other party.

Limitation of Liability

- Beware and Carefully Consider Limitation of Liability Clauses
 - Clarity
 - Reasonableness
 - Consistency with the contract
 - Enforceability
 - Legal review?

Performance Security

- Creating an incentive for the contractor to perform
- Risk of losing a benefit if there is default/non-performance

Performance Security

- Performance Bond
- Letter of Credit
- Parent Company Guarantee
- Cash Retention/Holdback
- Alternate Security (real or personal property mortgage)

Performance Security

- Questions to ask:
 - *What is the municipality's risk exposure* if the contractor defaults mid-project?
 - Should performance security be listed as a requirement in the tendering documents?

Insurance

- Liability Insurance
 - Comprehensive General Liability
 - Professional Error & Omissions
- Property Insurance
 - Builder's Risk
 - Course of Construction

Insurance

Mitigating Risk

- Naming Municipality as Additional Insured
- Requiring Notice of Cancellation
- Contractor to Provide Evidence of Insurance
- Use Your Insurance Advisor (AMSC, etc.)

Indemnities/Hold Harmless Clauses

- Contractual obligation of one party to compensate the loss incurred by another party
- More than just boilerplate – important risk management tools

Indemnities – Questions to Ask

- *Who* is indemnifying? One way, or mutual?
- *What* triggers the obligation to indemnify?
 - Any loss?
 - Loss caused by the indemnifying party?
 - Wrongful action of the indemnifying party?

Indemnity - Examples

- Total
 - “A indemnifies B for all injury, loss or damage suffered by B.”

Indemnity - Examples

- Causal:
 - “Contractor indemnifies Town for all injury, loss or damage suffered by Town as the result of Contractor’s actions.”

Indemnity - Examples

- Fault-based:
 - “Contractor indemnifies Town for all injury, loss or damage suffered by Town as the result of Contractor’s negligence or breach of contract.”

Indemnity - Examples

- Reciprocal:
 - “Contractor and Town indemnify each other for all injury, loss or damage each suffers as the result of negligence or breach of contract of the other party.”

Indemnity - Examples

- Legal Costs:
 - Silence
 - Legal Costs, or Reasonable Legal Fees, or Attorney's Fees
 - Solicitor Client Costs
 - Solicitor and his own client costs

Ownership of Intellectual Property

- Consultants seeking to retain full ownership of all documents the municipality is paying for
- Restrictions on future use of documents

Common Issues in Contracting

Amendment

- Does the contract have a clause specifying the method for making changes?
- Elements of an amendment
 - Written agreement to amend contract
 - Clear and detailed
 - Signed
 - Fresh consideration

Assignment

- Transferring the rights and obligations of a contract from one party to another.
- Considerations:
 - Does the contract have a clause addressing this?
 - Do I need consent of the other party in the contract?
 - Do I still have liability after the assignment?

Termination

- The ending of the contractual relationship
- Considerations:
 - Is there cause?
 - Is there a notice period?
 - Is compensation required?
 - Are there additional obligations?

Breach

- Has one of the parties failed to fulfil their promise?
- Is there a dispute mechanism?
- Can the breach be dealt with without terminating the agreement?

Tips and Tricks

Approaching Contracting Carefully

- Contracting as a process
- Five general steps:
 - Identifying Objectives
 - Initial Negotiations
 - Drafting
 - Execution
 - Closing/Performance
- What kinds of review are needed?
Political/legal/insurance?

Contract Reviews and Negotiations

- Consistency in Terms
- Clarity in the length, scope and obligations
- Consider the possible ending of a contract

Questions



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Thank you for
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