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## Three Onerous Contract Provisions to Avoid

BY JUDAH LIFSCHITZ AND DANIEL A. KAPNER

If a contractor assumes contractual risks that are unreasonable or disproportionate to the benefits to be gained, the chance increases that the project will be unsuccessful or end up in dispute. Such a result could be disastrous.

Contractors must carefully read and study contracts before signing them. While this may seem obvious, it is surprising how often project participants sign agreements containing clauses that a party did not read, did not understand or did not take seriously.

Following are three contract provisions that place an onerous or unreasonable risk on the contractor.

### Indemnification

In the following provision, the contractor has agreed to indemnify the owner for a broad array of claims and damages for which the contractor may not be directly responsible. Unlike a fair indemnification provision, this clause unreasonably requires the contractor to indemnify the owner for any loss arising out of the performance of the work, even if the loss is caused by the owner's partial negligence.

"The contractor shall defend, indemnify and hold harmless the owner from and against liability for all claims, damages, losses and expenses, including but not limited to incidental and consequential damages, and attorneys', expert witnesses' and consultants' fees that arise out of or result from the performance of the work, operations at the

jobsite, or any act or omission by the contractor. This includes the performance, operations, acts or omissions of the contractor's subcontractors, sub-subcontractors, suppliers, and their respective agents and employees and anyone for whose acts said parties may be liable. This indemnity obligation and the duty to defend applies, regardless of whether such claim, damage, loss or expense is also caused or is alleged to have been caused in part by the negligence or act or omission of the owner provided

also responsible for consequential damages and attorneys' fees.

This provision also unreasonably requires the contractor to indemnify the owner for claims caused by the owner's partial negligence. For example, if an incident occurred in which the owner was found to be largely at fault and the contractor was found only to be partially at fault, the contractor would still be obligated under this clause to indemnify the owner for loss caused by the incident. Many states prohibit enforcement of this type of provision.

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it is also caused or alleged to have been caused at least in part by the contractor, et al.”

An indemnification provision typically obligates a contractor to indemnify the owner for property damage or personal injury caused by the contractor's negligence—a risk that should be covered by the contractor's insurance. However, the provision above obligates the contractor, more expansively, to indemnify the owner for all claims and damages arising out of the performance of the work. Importantly, the contractor is

### Acceptance of Work

The following provision grants the owner the right to accept or reject the contractor's work at the owner's sole discretion.

"The contractor shall perform all work and all other obligations necessary for the completion of the work to the satisfaction of the owner in its sole discretion and in strict accordance and full compliance with the terms of this agreement.”

This clause does not provide that the contractor must perform the work to the “reasonable” satisfaction



of the owner, or that the owner's acceptance of the contractor's work is subject to a defined objective standard. Thus, the contractor runs the risk that the owner will reject work that another more reasonable owner would find acceptable.

#### **Differing Site Conditions**

The following provision places significant risk on the contractor for differing site conditions.

"This contract contains no differing site conditions clause and no claim may be made and no additional compensation, or time extension, will be granted as a consequence of any differing site or subsurface conditions

encountered by the contractor. The contractor is responsible for undertaking and completing all excavation work specified in the contract at the contract sum and within the contract time regardless of subsurface conditions encountered, whether those conditions be naturally occurring, man-made or artificial, and includes all unexpected, unanticipated or unforeseen geotechnical conditions, water table conditions, materials dumped or artificially placed on the site or buried, man-made obstacles or debris such as rubble, underground tanks, abandoned or unknown utilities

or pipes or similar artificial or man-made conditions."

Under this provision, in addition to shouldering the cost of dealing with a subsurface condition, the contractor will have no basis for an increase in contract time and will be obligated to meet contract completion requirements regardless of time lost due to the differing site condition. [CE](#)

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*Judah Lifschitz is principal and co-president of Shapiro, Lifschitz & Schram, P.C. in Washington, D.C., and Daniel A. Kapner is a member of the firm. For more information, email [lifschitz@slslaw.com](mailto:lifschitz@slslaw.com) or [kapner@slslaw.com](mailto:kapner@slslaw.com).*