What to Look for When Entering a Construction Contract

August 28, 2025

Pittsburgh, PA

Contractor's Compass

(by **Marc Felezzola** and **Angela Harrod**)

Maybe your construction business is growing, or maybe it has been a long-standing national competitor, but regardless of how established your business is on the national scene, there are certain things that you should always consider when reviewing a subcontract. This is especially true when your business is entering into a subcontract for a project in an unfamiliar jurisdiction. The following are just a few of the contract provisions that any subcontractor should give special consideration when undertaking a new project in an unfamiliar jurisdiction.

- **Anti-Indemnity Legislation**
  Indemnity clauses are a popular and effective means for shifting financial risk. Owners utilize them to shift risk to general contractors; general contractors use them to shift that risk down further to their subcontractors; and so on. These clauses generally require one party to agree to legally defend another in disputes arising from the project, and to pay for any damages that are awarded to the party whom is owed the indemnity. Indemnity clauses can cover all types of risk, but among the most common are non-payment of another party (e.g., the subcontractor must indemnify the prime contractor from claims for payment by the subcontractor's vendors and suppliers), intellectual property ownership or usage, missing project milestones, and injury to persons or property.While indemnification in construction contracts is commonplace, some states limit the circumstances under which indemnity provisions may be enforced. For example, states like West Virginia (W. Va. Code § 55-8-14), Michigan (MCLS § 691.991), and Georgia (O.C.G.A. § 13-8-2) prohibit broad, generalized indemnity provisions. In contrast, Texas prohibits one party requiring another to indemnify it against the other from that party's own negligence. It is important to consult with legal counsel regarding the level of indemnification that is permitted in a given jurisdiction when negotiating a construction contract so that the level of risk for each party is understood and allocated in accordance with applicable law.

- **Limits On Retainage**
  Just as state laws vary on the permissibility of indemnification provisions, retainage may also be regulated by state statute. Some states limit the amount of retainage an owner or contractor may withhold. For instance, retainage is not permitted on public projects in North Carolina that are valued under $100,000, and owners on private projects may not withhold more than 5% retainage through the first 50% of a project (N.C. Gen. Stat. § 143-134.1).Similarly, retainage may not exceed 10% on a public project in Pennsylvania, and when the contract is 50% complete, one-half of the retainage must be paid (62 Pa.C.S. § 3921). Furthermore, the Department of General Services in Pennsylvania specifically may not withhold more than 6% retainage for the first half of the project, and no more than 3% for the second half of the project (62 Pa.C.S. § 3921). However, retainage on private projects is regulated in Pennsylvania so there is no cap or limit. Certain states also permit a contractor or subcontractor to provide substitute security on private projects to avoid retainage altogether.Because of the jurisdictional differences, subcontractors should ensure they check whether there are any restrictions or regulations on retainage when taking on a project in a new state so that retainage is not withheld from them at a rate in excess of what is legally permitted in that jurisdiction.

- **Conditional Payment Clauses (i.e, Pay-If-Paid Provisions)**
  Conditional payment clauses are one of the strongest risk-shifting provisions contractors include in agreements with subcontractors. Under such a clause, which is often referred to as a "pay-if-paid" clause, the contractor and subcontractor agree that the owner's payment to the contractor is an express condition precedent to the contractor's obligation to pay the subcontractor for its work. This means that the subcontractor takes on the risk of owner non-payment and will only get paid if the owner pays the contractor for the subcontractor's work. Thus, if an owner encounters financial troubles and stops paying its contractor, the contractor is not obligated to pay the subcontractor.Once again, the enforceability of these provisions varies by state. Many states have case law that requires that the contract language clearly express the parties' intent to shift the risk of owner nonpayment to the

subcontractor for a conditional payment clause to be enforceable. For example, in Pennsylvania and Georgia, pay-if-paid provisions must state explicitly that the parties intend for payment to the contractor to be a condition precedent to payment for the subcontractor for a court to enforce them. Other states, including California (Cal. Civil Code § 8122), Virginia (Va. Stat. §§ 11-4.6 (private projects), 2.2-4354 (public projects)), and North Carolina (N.C. Gen. Stat. § 143-134.3), have statutes that make conditional payment clauses void and unenforceable as a matter of public policy. Understanding whether and to what extent contingent payment clauses are enforceable could be a very important piece of your risk management and subcontract negotiation strategy when considering whether to cross state lines into a new jurisdiction for a project.

- **No Damages for Delay**
  Owners and contractors use "no damages for delay" provisions to limit or eliminate claims for damages due to delays on a project. These clauses generally state that in the event of a project delay, the sole and exclusive remedy available to the contractor/subcontractor is a no-cost extension of time to account for the delay. While the enforceability of "no damages for delay" provisions also varies by state, a common method for challenging the provisions is contesting whether the delay is within the scope of the "no damages for delay" clause.No damages for delay clauses are generally enforceable for private projects (but, *see* Wash. Rev. Code § 4.24.360), but are unenforceable for public projects in several jurisdictions. Moreover, even in states that have no regulations for no damages for delay clauses, there are generally court-created exceptions to the full enforcement of the provision under certain circumstances. Understanding whether and to what extent a no damages for delay clause will be enforced in a jurisdiction is crucial when negotiating a subcontract, and counsel familiar with the enforceability of these clauses and the exceptions thereto in the jurisdiction may be able to negotiate to limit or even eliminate the impact of no damages for delay clauses.

- **Preliminary Notice Requirements for Lien and Bond Claims**
  When embarking on any new projects, subcontractors must be aware of statutes requiring preliminary notices for lien or bond claims, as failing to comply with such a requirement can result in loss of payment security from the outset of the project.In some jurisdictions, owners and contractors may take preemptive steps to insulate themselves, as permitted by state law, from potential lien or bond claims at the end of the project. Those preemptive steps often entail filing/posting a "Notice of Contract" or "Notice of Commencement," which function as a public declaration that work on a project is commencing. If an owner or contractor takes those steps, it then triggers a requirement that all subcontractors for the project file a corresponding preliminary notice, often in the form of a "Notice of Subcontract" or "Notice of Furnishing" within a specific (and short) amount of time after the subcontractor commences work on the project. Failure to file the preliminary notice within the required statutory time period can result in the subcontractor forfeiting some or all of its payment bond or mechanics' lien rights with respect to the project.Because subcontractors often have a relatively short amount of time to file the required preliminary notice, and because these requirements vary widely by jurisdiction, it is critical that a subcontractor be aware of any preliminary notice requirements it may have prior to starting work on a project in a new state.

  The topics discussed in this article capture only a small subset of those that should be considered when entering a construction contract and/or venturing into a new jurisdiction. Businesses should consult with a legal professional—especially when doing work in an unfamiliar jurisdiction—to ensure that they understand what risks they are assuming and how to properly preserve their legal rights.

About the authors:

Mark J. Felezzola is a shareholder at Babst Calland. He focuses his practice on complex construction-related and environmental matters. Felezzola serves as outside general counsel for owners, developers, design professionals, and construction companies, and frequently represents them in a variety of commercial and construction-related disputes including construction bid protests, construction defect claims, differing site condition claims, delay and inefficiency claims, payment and performance bond claims, mechanics' lien claims, as well as all other types of payment and contract performance disputes. Contact Mark at 412-773-8705 or mfelezzola@babstcalland.com.

Angela M. Harrod is an associate at Babst Calland. Ms. Harrod has a broad range of experience representing corporate clients in matters including breach of contract, unfair trade practices, and complex litigation. Ms. Harrod represents contractors, subcontractors, owners, developers, design professionals, and construction companies in a broad range of matters arising from complex construction and development projects. Contact her at 412-394-5688 or aharrod@babstcalland.com.

Reprinted with permission from the August 2025 issue of Contractor's Compass.

To read the full article, **click here**.