



Shifting Liability:
*Seven Important Provisions
in Construction Contracts*

Daniel Gabris
GABRIS LAW, LLC



SEVEN IMPORTANT CONTRACTUAL PROVISIONS

1. Liquidated Damages
2. Consequential Damages
3. Termination for Convenience
4. Change Orders
5. Unforeseeable/Subsurface Conditions
6. Hold Harmless/Indemnification
7. Claims/Dispute Resolution



Liquidated Damages

- GC hired to construct 4 highway bridges for state of MO
- \$1.25 mil contract
- 120 days to complete Project with \$200 per day liquidated damages
- Subcontractor hired to fertilize, seed & mulch 12 acres for ~\$14,000

Taos Const. Co., Inc. v. Penzel Const. Co., Inc., 750 S.W.2d 522 (1988).



Liquidated Damages

- Subcontractor had 46 delay days
- Totaling \$9,200 in delay damages
- Subcontractor claims liquidated damages are a penalty provision because they were 66% of subcontract amount

Taos Const. Co., Inc. v. Penzel Const. Co., Inc., 750 S.W.2d 522 (1988).



LIQUIDATED DAMAGES

- Enforceable unless considered a penalty:
 1. Amount of Liquidated Damages = reasonable forecast of harm caused by breach; **and**
 2. The harm caused by the breach is one that is difficult to accurately estimate.



CONSEQUENTIAL DAMAGES

- 100 Acre Cattle Farm where Owner was looking to install 7 acre lake
- Requested contractor to install a septic field to existing septic system
- “Purpose of septic field was to avoid raw sewage draining into the lake”

Cason v. King, 327 S.W.3d 543 (2010).



CONSEQUENTIAL DAMAGES

- Few weeks after installation was complete, septic leaked into lake
- Odor was so bad owner and guests could not remain outside
- Owner did not keep “very many” fish he caught in the lake
- Court awarded the owner \$3,500 in costs of repair and \$5,000 for loss of use of the lake



CONSEQUENTIAL DAMAGES

- Contractor reconstructed septic system
- Court awarded the owner \$3,500 in costs of repair and \$5,000 for loss of use of the lake

Cason v. King, 327 S.W.3d 543 (2010).



Consequential Damages

What are Consequential Damages?

- Damages arising from a breach that are indirect damages
- Must be reasonably foreseeable or within the contemplation of parties at time of contracting
- Sometimes referred to as special damages



EXAMPLES OF CONSEQUENTIAL DAMAGES

- Loss of Opportunities and Profits
- Loss of Bonding or Increased Bonding Costs
- Damages to Reputation
- Property Damage
- Personal injury



AIA Provision Regarding Consequential Damages – Article 15

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.



TERMINATION FOR CONVENIENCE

- State of Missouri hired Sam's Janitorial Service
- 9 Contracts to clean state of Missouri buildings
- Illegal workers found on projects and arrested for falsifying documentation (social security cards)



TERMINATION FOR CONVENIENCE

Contract stated:

“The Division of Purchasing and Materials Management reserves the right to terminate the contract at any time, for the convenience of the State of Missouri, without penalty or recourse, by giving written notice to the contractor at least thirty (30) calendar days prior to the effective date of such termination.”

Asamoah-Boadu v. State, 328 S.W.3d 790 (Mo. App. 2011)



TERMINATION FOR CONVENIENCE

- Trial Court found Sam's Janitorial Service did not breach the contract and awarded judgment in the amount of **\$151,782.67**
- Appellate Court allowed State of MO to utilize Termination for Convenience Clause and limited the damages to the 30 days after notice of termination
- Sam's Janitorial Service ended up with a judgment in the amount of **\$14,742.08**

Asamoah-Boadu v. State, 328 S.W.3d 790 (Mo. App. 2011).



CHANGE ORDERS & WAIVER

- Construction of 60 unit hotel in St. James, MO for \$1.5million
- 142 days to complete project
- 3 Change Orders were submitted (steel reinforcing rods in parking lot, slotted drain, etc.)
- No Change Orders were ever signed – testimony that they were orally agreed to between owner and contractor

Wisch & Vaughan Const. Co. v. Melrose Properties Corp., 21 S.W.3d 36 (2000).



CHANGE ORDERS & WAIVER

- Contract required change orders to be signed and in writing
- Contractor did not complete the work within the 142 days allotted
- Owner fired Contractor and completed project
- Contractor sued Owner for extra work performed under change orders
- Jury awarded \$170,283.00 to Contractor for work



CHANGE ORDERS & WAIVER

Can Contractor collect for the work under the change orders even though they were not signed and in writing?



CHANGE ORDERS & WAIVER

When a contract requires written change order, the contractor may not recover for extra work **unless Contractor:**

1. obtains a written change order, or
2. waiver by the owner.



UNKNOWN/SUBSURFACE CONDITIONS

- Contractor to build beach area and bath house for Jackson County, MO
- Contractor hired subcontractor to install pipes, lines, and underground mains
- Contractor's engineers made boring logs for design purposes, but the boring logs were excluded from the contract documents



UNKNOWN/SUBSURFACE CONDITIONS

- Boring subcontractor incurred ~\$9,500 in what it claimed to be extra work due to subsurface conditions

Specifications stated:

“The bidder shall make his own interpretations of this available information and shall be expected to obtain additional data at its own expense, if required to satisfy himself as to the conditions to be encountered.”



UNKNOWN/SUBSURFACE CONDITIONS

When Can a Contractor Recover
More than the Fixed Price Contract
Amount?



UNKNOWN/SUBSURFACE CONDITIONS

- **Extra Work (extra compensation recoverable)**

"work not contemplated by the parties at the time of contract and entirely independent of what is required in performance of the contract."

- **Additional Work (no extra compensation)**

work "necessarily required in the performance of the contract, but the necessity of which arises from unanticipated conditions"



Starlight Theatre



Starlight Theatre



HOLD HARMLESS & INDEMNIFICATION

- Nusbaum (Plaintiff) was leaving the Starlight Theatre after a show and tripped on a protruding manhole cover causing severe injuries
- Plaintiff sued City of Kansas City, JE Dunn, and a slew of other parties
- Starlight Theatre (owner) settled with Plaintiff for \$45,000; JE Dunn settled for \$5,000



HOLD HARMLESS & INDEMNIFICATION

- JE Dunn knocked down a light pole near the site where Mrs. Nusbaum fell
- JE Dunn promised to replace the light pole
- JE Dunn never replaced the light pole, and
- JE Dunn damaged the manhole/sidewalk area where Mrs. Nusbaum was injured.



HOLD HARMLESS & INDEMNIFICATION

- Starlight sued JE Dunn on basis of contractual indemnification for \$~70,000
- JE Dunn sued its subcontractor, PC Contractors, for contractual indemnification for ~\$95,000
- The Court granted judgment in favor of Starlight against JE Dunn and in favor of JE Dunn against the PC Contractors in the amount of ~\$95,000



HOLD HARMLESS & INDEMNIFICATION

- PC Contractors appealed the judgment
- The Court of Appeals stated:

“A contract of indemnity will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms.”



Claims and Dispute Resolution

- Choice of Law – what state's law governs?
- Choice of Forum – where would litigation be?
- ADR – Litigation in Court or Arbitration?
- Attorney's Fees – Unilateral v. Fee-Shifting
- Interest



Recap

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Questions?



GABRIS LAW, LLC

2333 Grissom Dr., Suite 107

St. Louis, MO 63141

314-624-1005

DG@GabrisLaw.com

www.StLConstructionLawyer.com