NEW CONSTRUCTION SEASON: CONTRACT CHECKUPS FOR CONTRACTORS

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As the 2026 construction season ramps up, now is the perfect time for contractors to review and update their contracts. During the busy season, contracts are often signed quickly, using familiar forms or "boilerplate" language. However, provisions that seem routine can have serious consequences when something goes wrong on a project.

The legal landscape is constantly evolving, and so are the practical risks contractors face—labor shortages, supply-chain volatility, inflation, and increasingly complex project teams. An off-season contract checkup helps ensure your agreements still reflect today's realities and protect your bottom line.

Below are several key contract provisions every contractor should revisit before the next project breaks ground.

Indemnity: Know What Risk You're Really Taking On

Indemnity clauses are fundamentally about **risk allocation**—who pays when something goes wrong. Whether you're reviewing an owner-contractor agreement or a subcontract, indemnity provisions deserve close attention because they can dramatically shift liability.

Not all indemnity clauses are created equal, and **one size does not fit all projects or jurisdictions**. State law often limits who can indemnify whom and for what. Understanding what is legally allowed where the project is located is critical.

Minnesota Law Matters

In Minnesota, construction indemnity is governed by Minn. Stat. § 337.02. As a general rule, the statute prohibits clauses that require one party to indemnify another for the other party's own negligence. In other words, you typically cannot be contractually forced to cover someone else's mistakes.

There are important **exceptions**, however. Indemnity obligations that are supported by proper insurance—such as additional insured coverage and completed operations coverage—may still be enforceable. This is where contractors often get tripped up: the contract may require indemnity that the insurance does not actually cover.

Equally important is making sure indemnity provisions are **consistent across all project contracts**. Misaligned flow-down provisions between prime contracts and subcontracts can create coverage gaps and unexpected exposure.

Indemnity Best Practices for Contractors

When drafting or reviewing indemnity clauses, consider these practical guardrails:

- **Tie indemnity to fault:** Limit obligations to the indemnitor's own negligence, breach, or those for whom it is legally responsible.
- **Separate the duties:** Clearly distinguish between "indemnify," "defend," and "hold harmless," and define when each duty is triggered.
- **Use savings language:** Include language limiting obligations to "the fullest extent permitted by law."
- **Match insurance to risk:** Confirm the indemnity scope aligns with available insurance, including additional insured and completed operations coverage.
- **Spell out procedures:** Address notice, tender, defense control, cooperation, and settlement authority.
- **Avoid overreach:** Do not agree to indemnify for another party's sole negligence or willful misconduct.

Delay and Price Escalation: Allocate Risk Before It Happens

Since COVID, **disputes over delays and price escalations have exploded**. Volatile material pricing, supply disruptions, and labor shortages have made clear drafting more critical than ever.

Well-written delay and price escalation clauses help set expectations, allocate risk up front, and reduce disputes when conditions change mid-project.

Price Escalation Clauses: Key Approaches

Common escalation mechanisms include:

- **Index-based adjustments**, using published benchmarks such as the Consumer Price Index (CPI), Producer Price Index (PPI), or construction-specific indices like the ENR Cost Index. These provide an objective, standardized adjustment method.
- **Cost-based adjustments**, which rely on documented, actual cost increases. These typically require proof of original pricing, increased costs, and may include thresholds before adjustments apply.

Regardless of the method, every escalation clause should clearly define:

1. **Triggering events**
2. **How adjustments are calculated**
3. **Notice and documentation requirements**

Understanding Delay Types (and Why It Matters)

Not all delays are treated the same, and contracts should clearly address each category.

Excusable Delays

Excusable delays are caused by events beyond the contractor's control—such as severe weather, government actions, labor strikes, supply disruptions, or owner interference. These delays typically entitle the contractor to a time extension and, in some cases, compensation.

Contracts should clearly define excusable delay events and avoid vague or overly narrow definitions.

Non-Excusable Delays

Non-excusable delays result from the contractor's own failures, such as poor planning or inadequate staffing. These delays generally do not justify time extensions or compensation and may expose the contractor to liquidated damages.

Compensable Delays

Compensable delays are caused by the owner, architect, engineer, or their consultants—such as late approvals or incomplete design information. These delays should entitle the contractor to both additional time and money.

Contractors should confirm that their contracts:

- Allow compensation for owner-caused delays, and
- Excuse liquidated damages when delays are not the contractor's fault.

Concurrent Delays

Concurrent delays occur when multiple parties contribute to a delay simultaneously. Contracts should avoid language that automatically bars all relief in these situations. Instead, they should establish a fair method for allocating responsibility and costs.

Notice Requirements Can Make or Break a Claim

Delay clauses should clearly define:

- Who must receive notice
- How notice is delivered
- When notice must be given

Avoid overly tight deadlines that can unintentionally waive claims. A two-step approach—initial notice followed by a detailed claim—is often more practical. Contractors should also consider requiring owners to act promptly to avoid compounding delays.

Dispute Resolution: Pick the Right Tool for the Job

Dispute resolution provisions are often treated as boilerplate, but they can significantly impact cost, timing, and leverage if a dispute arises.

Litigation

Litigation offers formal procedures and broad tools, including:

- Ability to join all necessary parties
- Full discovery and subpoena power
- Appellate review
- Motions practice
- Jury trials

Downsides include longer timelines, public filings, limited scheduling control, and judges who may lack construction expertise.

Arbitration

Arbitration can offer faster resolution and subject-matter expertise, with confidential proceedings and finality. However, discovery is limited, appellate review is minimal, and arbitrator and administrative fees can be significant.

If using arbitration, contractors should:

- Specify the administering organization and rules
- Define arbitrator qualifications
- Set panel size
- Address fee allocation and attorney's fees

Mediation

Mediation involves a neutral facilitator—not a decisionmaker—who helps parties resolve disputes voluntarily. Key considerations include:

- Is mediation required before litigation or arbitration?
- How is the mediator selected?
- Are timelines clearly defined?
- Is executive-level participation required?

Mediation can be a powerful early-resolution tool when appropriately structured.

Final Check: Make Sure the Contracts Work Together

No contract clause operates in isolation. **Flow-down provisions** ensure that subcontract obligations align with the prime contract, creating consistency across the project.

Well-drafted flow-down clauses:

- Align schedules, specifications, and safety requirements
- Preserve upstream claims and pass-through rights
- Standardize dispute resolution forums
- Reduce conflicting obligations between contract tiers

At a minimum, flow-down provisions should clearly incorporate the prime contract, identify controlling documents, and resolve conflicts between plans, specifications, and contract terms.

The Bottom Line

What worked in your contracts five—or even one—year ago may not work today. Laws change. Markets shift. Project risks evolve.

Taking the time to review and update your contracts is one of the most effective risk-management steps a contractor can take. A proactive contract checkup now can prevent costly surprises when the next project is underway.

About the Authors

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2/1/2026