

How to avoid construction litigation with carefully constructed contracts

Oklahoma's heavy civil and oil and gas construction will likely increase in the near term due to increased activity in the oil and gas fields and President Trump's proposed \$1.5 trillion [investment in infrastructure](#). Often seen as a heavily litigious industry, construction projects don't have to end in litigation if contracts are carefully drafted and parties enforce the provisions during the course of the project. Here are some points to consider when drafting and/or reviewing.

Know your deadlines. Most construction contracts impose liquidated damages in the event of a delay. While substantial/final completion is likely non-negotiable, (sub)contractors should raise, and try to draft around, any potential milestone concerns during negotiations to prevent the assessment of liquidated damages or exercise of the contract default provisions. Additionally, all parties need to be aware of the timeline for making claims or submitting change orders. Both are often waived under the contract if the proponent of the claim/change doesn't submit the appropriate notice to the appropriate person in the requisite period of time.

Know the payment scheme. Payments are also often a cause for litigation in construction. All parties should be aware of lien and, if applicable, bond claim rights, as they vary based on who the contracting entity is and where the project is located. Additionally, "pay if paid" and "pay when paid" clauses should not be confused. "Pay if paid" clauses shift the risk for nonpayment to lower tiers if payment is not received from higher tiers. "Pay when paid" generally only acts to give the (sub)contractor time to pay after it receives

payment. Case law suggests that “pay if paid” clauses would need to be explicit to be enforceable in Oklahoma, though no cases directly examine the clause.

Know your contracting partners. Conduct [due diligence](#) to ensure that those you are contracting with – at each tier – have the skills and financial stability to complete the project. Consider including (or modifying) clauses that allow suspension and/or termination of the contract, if the representations and warranties you relied on when deciding to enter into the contract were untrue or grossly overstated.

Know your contract. Finally, don’t simply sign the construction contract and put it in a drawer. All parties should know the provisions and educate their employees about provisions relevant to their scope of work.

[Gavel to Gavel](#) appears in The Journal Record. This column was [originally published in The Journal Record](#) on February 15, 2018.