



# Attributes of a Good Construction Contract

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In April, I participated as a panelist for a program titled *Failure is an Option*, which addressed best practices for developing a construction project. Being the only lawyer on the panel among seasoned construction professionals, I was prepared to tackle the topic from a lawyer's perspective. I was told to expect the following questions: 1) Is there such a thing as a "good" construction contract?; 2) Can a "good" contract increase the likelihood of success?; and 3) What are the attributes of a "good" construction contract?

After nearly 30 years of handling construction claims and disputes, I felt that I was qualified to address these points. Specifically, my answers to the first two questions were "yes." A good analogy that I can offer is that a "good" construction contract is like a well-constructed ship—it will get you safely through rough water. Conversely, a "bad" construction contract is analogous to a poorly constructed ship—in rough water, it is likely to capsize, resulting in disaster.

As I considered the third question, I compiled the following list of attributes of a "good" construction contract:

## It is Best Suited to Deliver the Project in the Way the Parties Intended

Many delivery systems are available to the parties (EPC, EPCM, GMP, Cost Plus, Reimbursable, etc.). Great care must be taken to select the project delivery system that is best designed to meet the parties' and the project's expressed needs.

## It Presents Itself as an Integrated, Well-considered Whole

Taking shortcuts to save time and/or money should be avoided. Crafting a good construction contract takes a commitment by upper management on both sides to spend time and money up-front. You often only get one chance to get what you need in a contract, so it is an investment that will pay big dividends later if problems or disputes arise.

## It is Written in Clear, Concise, Unambiguous Language

The clauses and provisions should be written in language that can be easily understood by someone unfamiliar with the project (such as an arbitrator or judge). Ambiguity in a contract can lead to differing interpretations of critical provisions and, in the case of disputes, may lead to the introduction of parole evidence and "custom and practice in the industry"—probably a result that neither party wanted or intended.

## It is Mechanically Sound

All of the provisions, clauses, definitions and terms should be consistent throughout the document, its exhibits and attachments. The document should read correctly as a whole, leaving no gaps or incomplete references. All exhibits, appendices and attachments should be properly identified, included with the main body of the contract and referenced correctly throughout the body of the contract.

## It Clearly Defines the Scope of the Work

Disputes over the scope of the work are the most common of all construction disputes and are typically the most costly. As such, it is critically important that the description of the scope of work be as fully developed as possible so that opportunities for differing interpretations and costly disputes over contract details are avoided.

## It Anticipates a Wide Variety of Potential Problems

The construction contract will, in all likelihood, be a non-factor in the success of a project unless and until a serious problem arises. When problems occur, the parties read it, maybe for the first time, in order to determine their respective rights and obligations. By that time, it is sometimes too late to change the outcome of the problem or dispute. Accordingly, a good contract should consider and address the many obstacles that may arise throughout the project and clearly define the method by which problems will be resolved.

## It Fairly Allocates Risks to the Party who is Best Positioned to Anticipate and Control the Risks

When one party encourages the other to accept risks that it cannot control, the apprehension that results leads to pricing decisions that are not helpful to delivering the project at the best price. Some examples of risks that are sometimes misallocated include:

- Unforeseen site conditions and environmental liability; best for owner to hold.

- Schedule and time of performance, unforeseen labor conditions, increases in the price of materials, risk of subcontractor non-performance, site control and safety; best for the contractor to hold.

### It is Balanced

A contract that is oppressive and heavily in favor of one party inevitably leads to confrontation, disputes and inflated prices. Unfair contracts also tend to break down what may be a cooperative spirit between the parties, making it less likely that the parties will work to resolve problems constructively. Examples of abused clauses include:

**No damage for delay:** Typically inserted by owners to shift costs of delays to the contractor, but inevitably leading the contractor to claim the delay is the Owner’s fault and claim for acceleration.

**Onerous indemnity provisions:** One party should not ask the other to indemnify it for its own negligence.

**Onerous notice provisions:** Owners sometimes put near impossible requirements on the contractor to give notice of a claim. If these provisions are not followed, the claim is forfeited. While well intentioned, it fosters an adversarial atmosphere, breaking down cooperation.

### It Carefully Considers all Aspects of Insurance

The insurance program must be well considered and comprehensive. It should address party specific insurance coverages and their defined limits, and should provide for waiver of subrogation so as to avoid finger-pointing if insurance claims are needed.

### It has a Clear Dispute Resolution Mechanism

At the stage of contract formation, most people avoid thoughts that the project may result in a “bet the company” dispute, but the drafting stage is the time to contemplate this scenario and determine a comprehensive dispute resolution clause. Considerations must include choice of law, choice of venue, choice of language (for international contracts), whether the dispute will be subject to

litigation or arbitration, and which party gets to choose the forum. Consideration should also be given to permitting joinder of third parties to any dispute between the owner and the contractor. Much time and money can be wasted in just appointing the decision maker(s) if the dispute resolution clause is not well crafted.

### It Must be Understood and Followed at the Project Level

Last, but not least, the ultimate value of a good construction contract lies in how well it is understood and followed by the project teams. Those who drafted and negotiated the contract must thoroughly explain the key contract provisions to front line project managers and other project participants, ensuring they fully understand what it is expected and how they must act to preserve the rights of the company. Anything less will risk making all the good effort and attributes identified above meaningless, potentially leading to the forfeiture of important rights.

### Conclusion

In conclusion, the attributes of a “good” construction contract are those that: 1) make it easily understood; 2) address the myriad of issues and problems that can arise; and 3) properly and fairly balance the risks and rewards between the parties. A construction contract that achieves these goals can be expected to enhance the likelihood of success of the project. ●

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