

Top Ten Considerations for Municipal Construction Contracts

A CLE Presentation for Texas City Attorneys Association

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Top Ten Considerations for Municipal Construction Contracts

Top Ten Considerations

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| 01 Authority of Decision Makers | 06 Contractual Notice Requirements |
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| 04 Standard of Care | 09 Statutory Bonds |
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Top Ten Considerations for Municipal Construction Contracts

01

Authority of Decision Makers



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Photo credit: <https://www.usp-research.com/insights/news/building-construction-decision-making-whos-in-control/>

01 | Authority of Decision Makers — Legal Framework

Who can the City authorize to make decisions?

- "Authorized officials"
- Contracts beyond an official's authority may be void, not merely voidable

Key Threshold Questions

- Who has contracting authority?
- Governing body or properly delegated that authority?
- Dollar thresholds requiring city council action?

Ratification

- Can the city ratify an unauthorized contract?
 - Cannot ratify a contract that violates state law



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01 | Authority of Decision Makers — Practical Guidance

Before Executing a Contract

- Proper procurement process
- Identify City's approval process for amendments
- Review authority for Design Professionals or "Owner's Representative"
- Who decides disputes – "Initial Decision Maker"

During Contract Administration

- COs = same approval process as the original contract
UNLESS delegated authority (\$50K or less)
- Be wary of verbal authorizations
- Document all approvals in writing



02

Limits of Liability

Tex. Gov't Code Chapter 271



02 | Chapter 271 — Waiver of Governmental Immunity

The Baseline Rule

- Governmental immunity bars suits absent a statutory waiver
- Tex. Gov't Code §271.152 - statutory waiver for public works contracts

Scope of Waiver — What Ch. 271 Allows

- Suits for breach of a written contract for goods or services (§271.152)
- Limited damages (§271.153(a))
- Attorney's fees & Interest (§271.153(c), (d))

Scope of Waiver — What Ch. 271 Does NOT Allow

- No exemplary or punitive damages (§271.153(b)(1))
- No damages for unperformed future obligations (§271.153(b)(2))
- Consequential damages (except — see Topic 3)



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02 | Chapter 271 — Limitations and Strategic Considerations

Key Procedural Requirements

- Written contract is mandatory
- Contract must be “subject to the subchapter”
- Contractual notice provisions may be conditions precedent

The 'Balance of Payments' Cap

- Damages limited to amounts due and owed under the contract for performed work
- Lost profits and expectancy damages are unrecoverable
- This cap interacts critically with consequential damages waivers

Drafting Strategy

- Include clear payment milestones
- Define change order process explicitly
- Avoid damages beyond those statutorily allowed



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03

Waiver of Consequential Damages



03 | Consequential Damages — Definitions and Scope

What Are Consequential Damages?

- Flow from a breach but are not the direct, immediate result of it
 - E.g., lost profits, lost productivity, home office overhead, extended general conditions, escalation costs
- Distinguishable from direct damages:
 - E.g., cost to complete, cost to repair, unpaid contract amounts

Why They Matter in Municipal Construction

- Consequential damages can dwarf direct damages on complex public projects
- Common Contractor claims: extended general conditions, loss of bonding capacity, business disruption
- Common Owner claims: extended oversight costs, re-procurement costs, rental costs, storage fees, lost tax revenue from delay

03 | Consequential Damages — Ch. 271 application

Texas Law Baseline – under Ch. 271

- Consequential damages are NOT recoverable damages for breach of contract
- Except ... the increased cost to perform work as a direct result of owner-caused delays or acceleration
- AIA standard forms include mutual consequential damages waivers

03 | Consequential Damages — Waiver Enforceability and Drafting

Types of Waivers

- Mutual waiver (both parties waive)
- One-sided waiver (contractor only)
- Partial waiver with carve-outs — e.g., delay damages, LDs, indemnity obligations

Drafting Recommendations

- Define explicitly what 'consequential damages' includes in the waiver
- Carve out LDs, indemnity obligations, and insurance proceeds from the waiver
- Include provision for owner-caused delay or acceleration as an alternative remedy

04

Standard of Care

Design Professionals & Contractors



04 | Standard of Care — Design Professionals

The Professional Standard

- Standard is codified – TCPRC 130.0021
- Not a perfection standard — errors and omissions are not automatically negligence
- Certificate of Merit

The Spearin Doctrine in Texas

- An owner impliedly warrants adequacy of plans and specs
- If contractor builds plans & project fails, owner—not contractor—bears responsibility for design
- BUT Design-build delivery → Design-builder assumes design risk & liability
- Texas codified the Spearin Doctrine – Tex. Bus. Comm. Code Ch. 59

Contractual Modifications of the Professional Standard

- Beware of limitation of liability clauses

04 | Standard of Care — Contractors

Implied Warranty of Workmanlike Performance

- Contractor will perform in a good and workmanlike manner
- add “in strict accordance with the Contract Documents”

Express Warranties and Performance Guarantees

- May expressly warrant work against defects for a stated period
- Distinguish warranty obligations from defect correction

04 | Standard of Care — Limitations

Statute of Repose and Limitations

- Tex. Civ. Prac. & Rem. Code §16.008-.009 — 8-year statute of repose for government projects
 - Runs from substantial completion
 - Exception for civil projects §16.008(a-1)(3)
- Tex. Civ. Prac. & Rem. Code §16.061 – No limitations for breach of contract claim

05

Statutory Indemnity

Design Professionals — Tex. Ins. Code §130.001



05 | Statutory Indemnity — The Anti-Indemnity Statute

Tex. Civ. Prac. & Rem. Code §§130.001–.004 – Design only

- Cannot require A/E to indemnify from the indemnatee's own negligence
- Applies to architectural, engineering, surveying, or landscape architectural services
- Cannot be waived by contract
- Prohibited provisions are void and unenforceable
- Does not apply to worker's comp

Tex. Ins. Code §151.101

- Voids indemnity provisions: “indemnify, hold harmless, or defend for claims arising from the indemnitee's own negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract”
- Applies to construction contracts
- Exception for employee claims (i.e., workers compensation claims)

05 | Statutory Indemnity — The Anti-Indemnity Statute

What Is Prohibited

- Broad indemnity: including claims caused by Owner's negligence
- For A/E, defense obligations that do not carve out the indemnitee's own fault
- Insurance endorsements that effectively require the insurer to cover Owner's negligence

What Remains Permissible

- Proportionate fault indemnity
- Proportionate Attorneys' Fees
- Broad form Workers' Compensation indemnification



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05 | Statutory Indemnity — Other Considerations

Limitation of Liability (LOL) Provisions

- LOL provisions capping A/E liability are generally enforceable in Texas
- Common form: limit A/E total liability to amount of available insurance proceeds
- Watch out "total amount paid" language

Professional Liability Insurance Implications

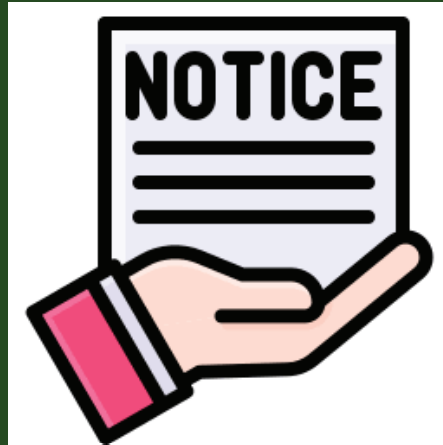
- CGL coverage does NOT cover professional errors or omissions — PL policy is required
- Additional insured status on PL policies is generally unavailable
- Require A/E's PL policy to be maintained after the expiration of the contract (2 or 4 years after)
- Require extended reporting period (tail) endorsement if the policy is cancelled or non-renewed



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06

Contractual Notice Requirements



06 | Notice Requirements — Conditions Precedent to Claims

Why Notice Provisions Matter

- Notice provisions serve dual purposes:
 1. alert the owner to act and mitigate and
 2. preserve an evidentiary record
- Courts may treat notice as a condition precedent
- Failure to give timely notice may waive the claim entirely

Common Notice Provisions in Public Construction Contracts

- Differing site conditions: 7–21 days from discovery (See AIA; EJCDC)
- Claim or dispute: 21 days from the event giving rise to the claim
- Change order/equitable adjustment: 14–21 days after the event giving rise to the change
- Tex. Gov't Code §311.034 —Statutory pre-suit notice before suing municipality
- Tex. Gov't Code §2272.003 – Statutory pre-suit report of defects before suing contractor

06 | Notice Requirements — Drafting and Compliance Strategy

Drafting Recommendations for Owners

- Clear, unambiguous notice periods — specify form (written), addressee, and delivery method
- State expressly that failure to give timely notice waives the claim
- Require notice to a specific title with a copy to legal counsel

Compliance Best Practices

- Make sure City is complying with notice requirements
- When in doubt — give notice; a protective notice does not harm your negotiating position
- Preserve all written communications
- Include the surety when necessary

07

Change Order Limitations

Tex. Gov't Code Chapter 252

 **AIA**® Document G701® – 2017

Change Order

PROJECT: (name and address)

CONTRACT INFORMATION:

Contract For:
Date:

CHANGE ORDER INFORMATION:

Change Order Number:
Date:

OWNER: (name and address)

ARCHITECT: (name and address)

CONTRACTOR: (name and address)

THE CONTRACT IS CHANGED AS FOLLOWS:

(Insert a detailed description of the change and, if applicable, attach or reference specific exhibits. Also include agreed upon adjustments attributable to executed Construction Change Directives.)

07 | Chapter 252 — Competitive Bidding Requirements

Chapter 252 Framework

- Tex. Loc. Gov't Code §252.001 requires competitive bidding for municipal purchases over \$100,000
- Gov't. Code Ch. 2269 & §252 apply to contracts for construction services, and goods
- Purpose: prevent favoritism, ensure value for taxpayers, and maintain public confidence

Change Orders and the Competitive Bidding Problem

- Substantial changes in materially changing or adding scope may require re-procurement
- Tex. Loc. Gov't Code §252.048(d) – cannot increase more than 25% of original contract price or decrease more than 25% without the contractor's consent
- A change order adding significant new scope may be an unauthorized modification void under Ch. 252

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Change Orders and the Competitive Bidding Problem

- Substantial changes in scope may constitute a new contract requiring competitive bidding
- Loc. Gov't Code §252.048(d) – cannot increase more than 25% of original contract price or decrease more than 25% without the contractor's consent
- A change order adding significant new scope may be an unauthorized modification void under Ch. 252

07 | Chapter 252 — Managing Change Orders in Practice

Permitted Change Order Mechanisms

- Owner contingency or allowances — reduces risk of later re-bidding (exceeding 25%)
- Bid alternates priced in the original solicitation — can be added/deducted without a new bid

Proper Authorization of Change Orders

- City council approval required above \$50,000 (\$100,000 if pop. over 240,000) (§252.048(c), (c-1))
- All changes in writing and authorized before work proceeds — oral directives create significant risk

Documentation Best Practices

- Include detailed scope description and pricing in every CO
- Track cumulative CO total against original contract amount
- Document the time impact in each CO and incorporate it into the project schedule



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08

Insurance Coverages & Limits



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Photo Credit: <https://www.insurancebusinessmag.com/us/guides/what-does-business-insurance-cover-a-guide-for-small-businesses-499227.aspx>

08 | Insurance — Core Required Coverages

Commercial General Liability (CGL)

- Covers bodily injury and property damage from operations and completed operations
- Minimum for public projects: \$1M per occurrence / \$2M aggregate — scale upward with project size
- Completed operations coverage - extend through statute of repose (recommend 8 years)
- Rule of thumb: CGL limits should approximate 10–20% of contract value for larger projects

Workers' Compensation & Employers' Liability

- Mandatory in Texas — Tex. Labor Code Ch. 406 – statutory limits
- Confirm coverage via TWCC certificate; employers' liability minimum \$1M per occurrence

Commercial Auto Liability

- Require 'any auto' endorsement covering owned, hired, and non-owned vehicles
- Minimum \$1M CSL for all vehicles used in project operations



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08 | Insurance — Core Required Coverages

Professional Liability (E&O) — for Design Professionals & Contractors with Design Scopes

- Required for all A/E or contractor with design scope — covers design errors and omissions
- Claims-made policy: require extended reporting period (tail) after completion (2-4 years)
- Minimum limits: \$1M/\$2M depending on project complexity and A/E scope

Builder's Risk Policy

- insure 100% of completed project value including soft costs and owner-furnished equipment

Excess Liability/Umbrella Policy

- include \$5M to \$10M excess policy depending on project complexity

Note A/E limit of liability should not be less than available insurance limits



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08 | Insurance — Limits, Additional Insured, and Common Pitfalls

Additional Insured Requirements

- Owner and A/E should be named additional insureds on contractor's CGL
- Primary and non-contributory language — contractor's policy pays first before owner's policy
- Waiver of subrogation — prevent insurer from suing the additional insured after paying a claim

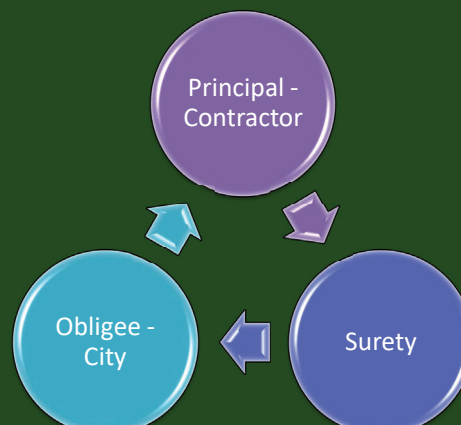
Common Pitfalls to Avoid

- Certificates of insurance are not policies — do not rely on the COI alone
- Request and review actual policy endorsements — confirm they are attached, not just promised
- Require 30-day notice of cancellation endorsed into the policy
- Gap risk: contractor demobilizes or goes out of business, coverage lapses — require continuous coverage provisions

09

Statutory Bonds

Tex. Gov't Code Chapter 2253



09 | Statutory Bonds — Framework and Requirements

Chapter 2253 — Public Work Bonds Act

- Applies to all public work contracts valued at more than \$100,000 (performance), \$50,000 (payment)
- each equal to 100% of the contract amount
- Bonds must be executed by a surety authorized to do business in Texas and rated by an acceptable rating organization

Performance Bond

- Secures the contractor's obligation to complete the work in accordance with the plans, specifications, and contract documents
- Triggers: contractor default, abandonment, or material failure to perform
- Surety's options: finance the contractor, complete directly, tender a replacement contractor, or pay the penal sum
- Owner must formally declare default, give notice & an opportunity to cure before terminating

09 | Statutory Bonds — Framework and Requirements

Payment Bond

- Secures payment to subcontractors, material suppliers, and laborers on the public project
- No mechanic's lien rights against public property — the payment bond is the exclusive remedy
- Claimants must strictly comply with notice requirements and filing deadlines under §2253.041

Bond Forms & Contract Provisions

- City should specifically tailor bonds forms pursuant to Gov't Code Ch. 2253
- Revise contract to remove requirement for notice to surety of all contract changes
- Check limitations period in bond form (statutorily 1 year from termination, abandonment or final completion)

09 | Statutory Bonds — Claims, Notice, and Enforcement

Performance Bond Claims

- Owner must formally declare contractor in default and give a cure opportunity
- Notice to the surety of default is critical
- Common surety defenses: owner-caused breach (payment failure, differing conditions); limitations

Avoiding Bond Disputes

- Verify bond form complies with Ch. 2253 before project commences — reject deficient bonds immediately
- Require bonds from Treasury-listed, A-rated sureties only
- Maintain current list of subcontractors and suppliers — contact info for potential claimants

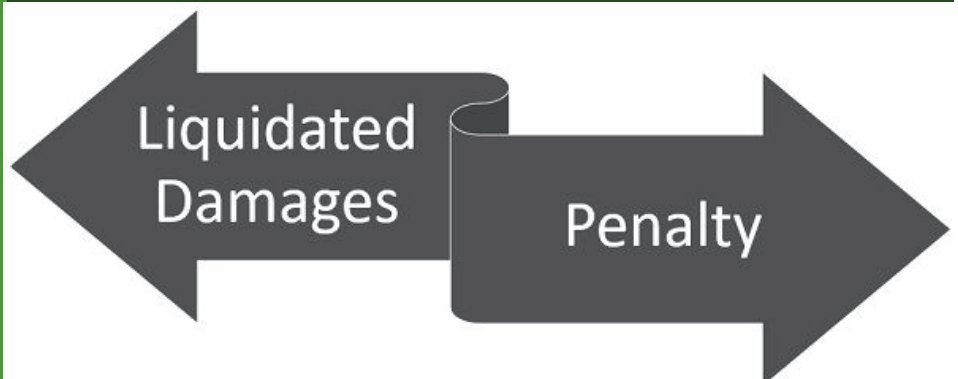


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10

Liquidated Damages

Including Key Texas Caselaw



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Photo credit: <https://keydifferences.com/difference-between-liquidated-damages-and-penalty.html>

10 | Liquidated Damages — Legal Framework

What Are Liquidated Damages?

- A pre-determined sum payable per day of delay in achieving a defined completion milestone
- Serve as an alternative to proving actual delay damages — critical where damages are inherently speculative

Texas Enforceability Standard

- Step 1: At time of contracting, actual damages must be difficult or impossible to estimate
- Step 2: The stipulated LD amount must be a reasonable forecast of just compensation — not a penalty
- *Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991) – landmark case
- *Atrium Medical Center, LP v. Houston Red LLC*, 595 S.W.3d 188 (Tex. 2020) - applied “second-look” approach
- Step 3: If LD provisions is facially reasonable, determine whether, at the time of the breach, an “unbridgeable discrepancy” exists between the actual and liquidated damages

10 | Liquidated Damages — Legal Framework

The Penalty Distinction

- If LD amount is 'grossly disproportionate' to actual damages, void as an unenforceable penalty

Common Contractor Defenses

- LD amount is a penalty
- Owner prevention or hindrance — if owner-caused delay contributed, LD clause may not apply
- Concurrent delay — if both parties contributed, courts struggle with apportionment
- Waiver by owner — continued acceptance of late work without assessing LDs can constitute waiver

10 | Liquidated Damages — Drafting and Practical Guidance

Setting the LD Rate — Documentation Is Critical

- Identify anticipated delay costs: owner overhead, extended inspection/administration, financing costs, lost revenue from delayed opening
- Perform and document the calculation methodology to determine daily rate — retain analysis in the permanent contract file

Key Drafting Provisions

- Never refer to LDs as a 'penalty' in the contract
- LD rate must be a set amount
- Define completion milestones triggering LDs with precise specificity
- Address excusable delay: weather, force majeure, owner-caused delays — provide for time extensions without cost



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Questions

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