



CONSIDERATION OF SOME GENERAL CONDITIONS IN BID DOCUMENTS

W.J. Kenny – Miller Thomson LLP
Chris Hustwick – Suncor Energy Services Inc.
Evan Johnston – The Churchill Corporation
Dale Bercov – Syncrude Canada
Jennifer Brusse – Kiewit Energy Company
Steve Richards – PCL Constructors Inc.
Jan Derdiger – Capital Power Corporation



Consequential Damages:

- Contractors:
 - Consequential damages are to be excluded and avoided
 - Industrial assets are huge money generating assets, and a contractor cannot take the risk of an owner's loss of revenue
 - Three common carve-outs to consequential damage exclusion:
 - Breach of confidentiality
 - Breach of intellectual property
 - Willful misconduct
 - To the extent of available insurance maybe a carve out as well
- Owners:
 - Start from the position no exclusion will be given, but concede if requested, subjected to the three carve outs above and gross negligence
 - Available Insurance: If contractor is including insurance in the rates, owner should have access to this insurance
 - Gross Negligence: Is not defined in first instance, difficult to define
 - US Exception: Government entities, depending on industry and area, will not agree to accept exclusion of consequential damages



Warranty provisions including rework, rip and repair, fitness for purpose, latent defects and more:

➤ Contractors:

- Term of Warranty: (What the market will bear, 12 month period after substantial or mechanical completion, plus another 12 months for anything performed during warranty period) 24 month ultimate period
- In a cost reimbursable model owner pays for rework
- Exclusions to Warranty: Not responsible for wear and tear, improper operation, maintenance or repair, failure to comply

➤ Owners:

- Warranty: expect contractor to be responsible for repairing their own work and repair aspects
- EPC or Engineering: warranty period should be tied to date of initial operations (18 months – reasonable warranty period)



Indemnity, including indemnity against liability assumed under contract and for third party liability:

➤ Contractors:

- Will provide indemnity for third party claims
- Concern is extending indemnity to cover losses of owner if incurred under contracts with others

➤ Owners:

- Indemnities: Most difficult legal concept
- If contractor has caused a third party claim, it should be the contractors responsibility (Seeking full indemnity from contractor for any 3rd party claim)
- Contractor to take responsibility for the work of its sub-contractors
- US: Recovery for legal expenses; covered by indemnity
- US: Indemnifying the owner for treating the contractor's employees as third parties (Employee who gets injured can either be covered under Worker's Compensation or sue employer; some jurisdictions can do both)



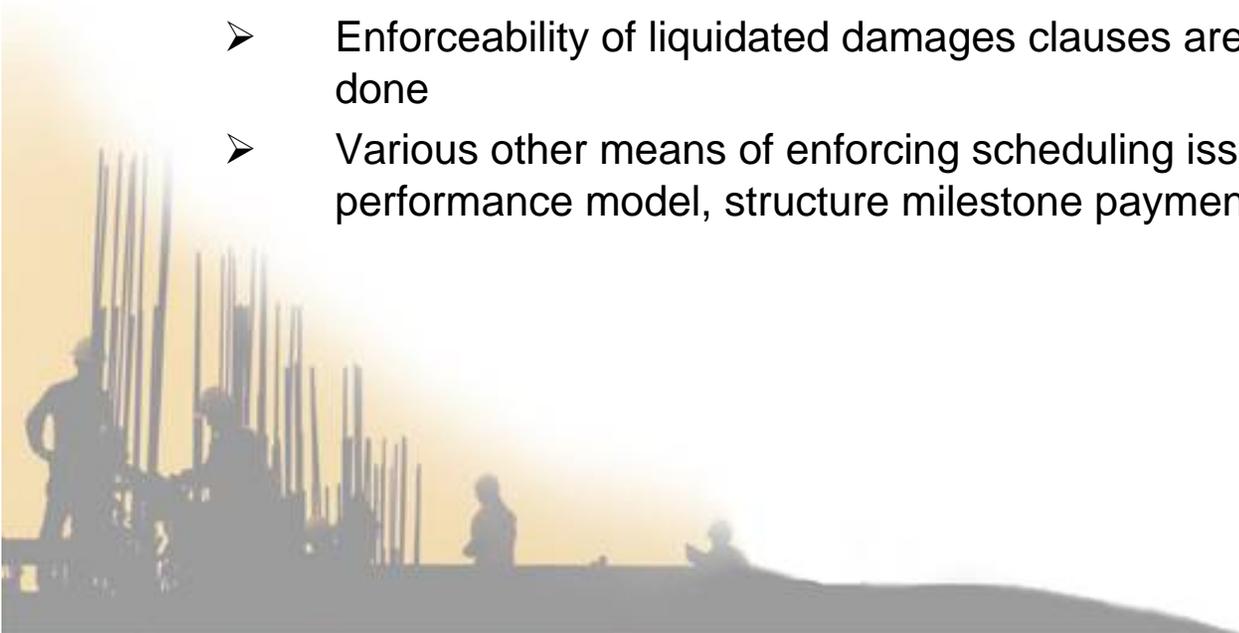
Liquidated Damages:

➤ Contractors:

- Prefer not to include liquidated damages
- Willing to accept in lieu of consequential damages
- Providing a realistic pre-estimate of damages not easy
- A maximum liability is created

➤ Owners:

- Enforceability of liquidated damages clauses are a concern; but can be done
- Various other means of enforcing scheduling issues; fee for performance model, structure milestone payment dates





Dispute Resolution:

➤ Contractors:

- Should you build in mediation? Yes, provided it is structured (has to have a professional mediator and structured process)
- Arbitration or Litigation? In Arbitration; you can choose who will decide your dispute
- Full document production: Yes, but not as extensive as litigation
- Questioning, Discovery? Yes, but more limited
- General quicker; less rules and formality

➤ Owners:

- Mediations: Produce Settlements, does not produce a final and binding answer
- Arbitration is confidential, whereas Litigation involves filing documents in court (becomes available to public)
- Absence of rules in arbitrations is a con; therefore Litigation may be preferred
- US: New organization (JAMS International) moves faster than Arbitration



Change order mechanism including change in conditions:

➤ Contractors:

- Should not agree to forego compensation if no C.O. in writing issued unless owner prejudiced – need to include in contract
- Both parties should understand the change mechanism in the contract
- Do not waive your right to compensation by proceeding with the work without an agreed upon price for change, and schedule alteration
- Set out method of evaluation (clear to both parties regarding payment)

➤ Owners:

- Change management has to be clear and practical
- Cost reimbursable model: contractor will probably have different risks or issues
- Notice is very important: ensure that contractor has obligation to make the changes known to the owner
- Get as much finality when a change is executed as possible; do not leave impact to be determined later



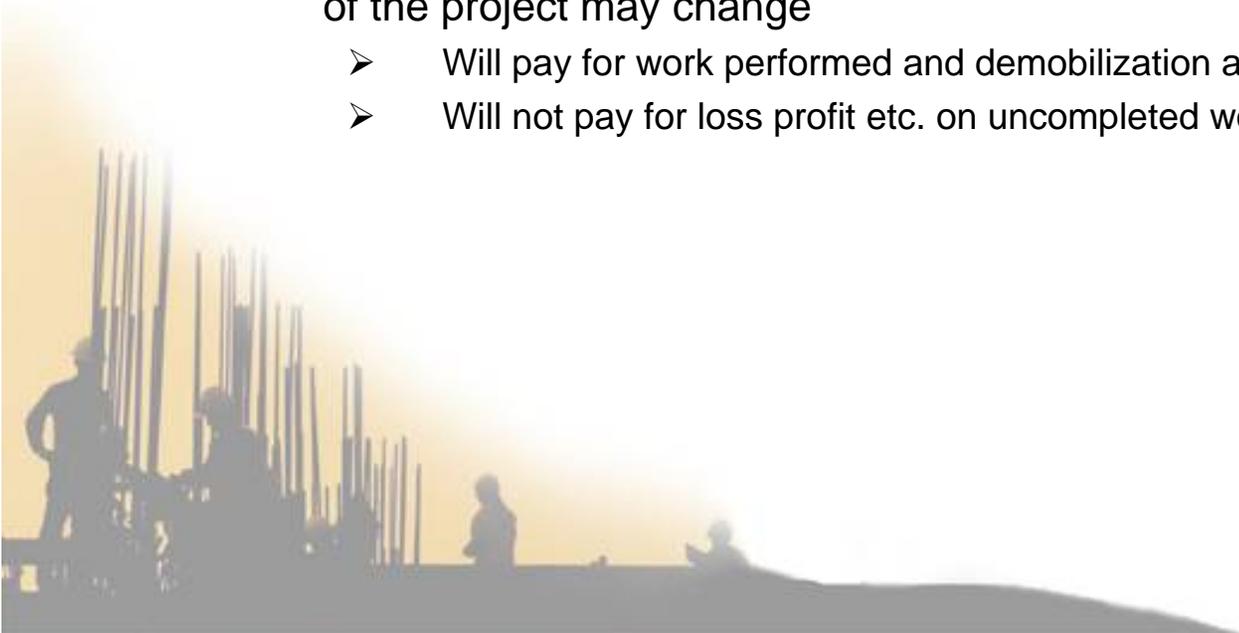
Suspension/termination for convenience:

➤ Contractors:

- Need to be paid for all costs of suspension or termination, including cost of committed orders and long term leases for project fees of rented equipment

➤ Owners:

- Require right to suspend or terminate for convenience as the economics of the project may change
 - Will pay for work performed and demobilization and repatriation
 - Will not pay for loss profit etc. on uncompleted work





Notice Provisions:

➤ Contractors:

- Avoid “immediately”, instead use x days
- Waiver of rights should be tied to prejudice of owner

➤ Owners:

- Ensure the notice provisions are workable
- Notice of change is critical, and all costs should be included on change order





Confidentiality:

➤ Contractors:

- Depending on the vendor, may require proprietary designs to be protected
- Be careful of the obligations you have made to that vendor

➤ Owners:

- Have a provision that says everything the owner gives the contractor is confidential
- Contractors will ask to make this reciprocal (Disagree: Design should be available for owners to send to others if required)
- OEM's want their drawings to be confidential; clarity should be made on this (full life cycle costs on equipment, not just capital costs for equipment)
- Want right to use drawings etc. to have others repair, rebuild and expand



Delay by either party:

➤ Contractors:

- Delays: May be tied to liquidated damages at the end of the contract
- Schedule risk:
 - Ensure you have entitlement for anything beyond your control
 - Ensure contractor owns the float in the schedule

➤ Owners:

- Either party should assume responsibility for repercussions of the delay that they cause
- In the event of a delay: work together practically (if there is another scope of work that can be worked on, make use of time and do so)
- Requests for C.O. in the field, make sure any scheduled time is included



Force Majeure:

➤ Contractors:

- Excuses performance during event of FM

➤ Owners:

- List events that **are** Force Majeure
- Today's Force Majeure clauses are much more general and should be specific





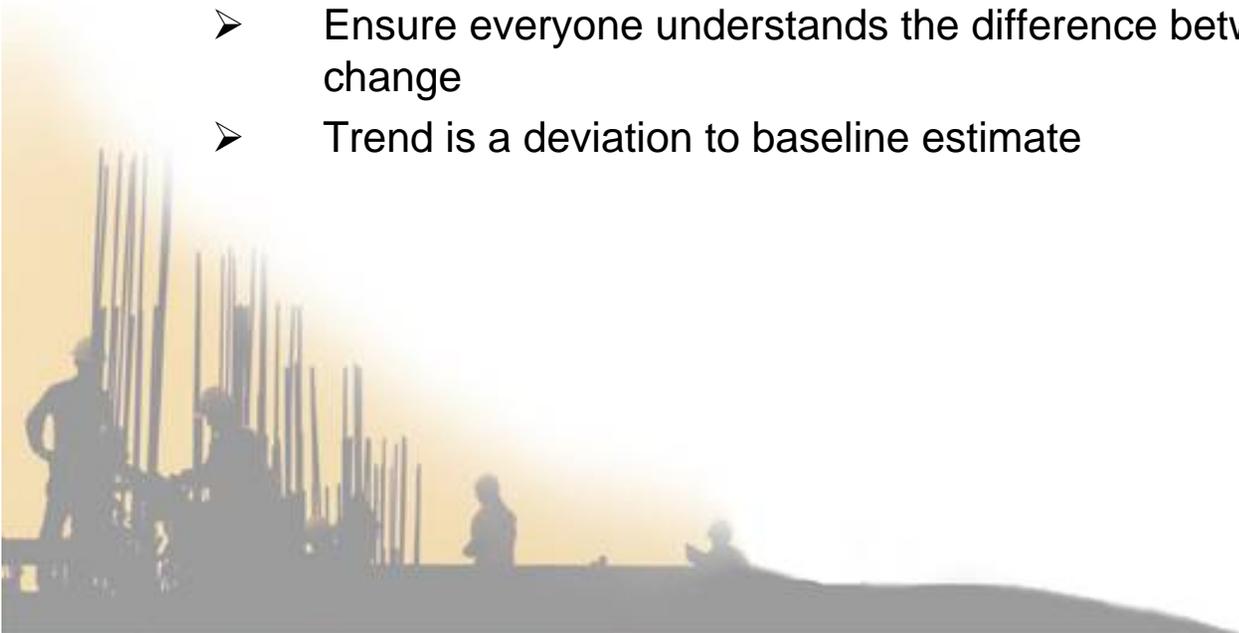
Requirement for change order to increase contract price in the case of a reimbursable arrangement:

➤ Contractors:

- If contract calls for a C.O. above a certain price, ensure owner is obligated to rescue C.O. or contractor has right to stop work when price ceiling reached

➤ Owners:

- Ensure everyone understands the difference between a trend and a change
- Trend is a deviation to baseline estimate





Entitlement to government rebates, including WCB, EI and tax refunds:

➤ Contractors:

- Need clarity on who is entitled to rebate

➤ Owners:

- Depends if contract is true reimbursable contract or simply paid at agreed rates; where true reimbursable all rebates accrue to owner

