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# Understanding and Navigating Contracts in Your Business

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Women Builders Council, Inc.,  
NYC Small Business Services,  
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# Using Contracts to Reduce Risk and Maximize Profits

Understanding how proper contracts can help you grow your business and reduce your legal exposure.

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# Code of Hammurabi

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- ❖ If a builder builds a house for a man and does not make its construction firm, and the house which he has built collapses and causes the death of the owner of that house, **that builder shall be put to death.**”
- ❖ The law has come a long way from the Code of Hammurabi.

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# Time is Money

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- ❖ In every construction project, time equals money for most of the parties involved.
- ❖ Well-crafted contracts allow the parties to reduce the risk of delay.
- ❖ Contracts can also allow the parties to provide for recovery when unnecessary delays cause loss.

# Contracts as a Tool for Managing Risk

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- ❖ Construction projects can be particularly risky.
- ❖ The goal of each party to a construction contract should be to reduce *and* allocate responsibility for these risks.
- ❖ The law assigns responsibility in some instances, but it is essential to know when contract language can override the law and when it can't.
- ❖ Warranties must be made only with full knowledge of the risk and liability involved.

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# Risks Allocated to the Owner

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- ❖ Subsurface conditions
- ❖ Accuracy of plans and specifications, including code compliance
- ❖ Presence of asbestos or other toxic or hazardous materials
- ❖ Site access
- ❖ Availability and adequacy of financing to pay construction costs
- ❖ Delays caused by the owner or its agents
- ❖ Building permits and zoning compliance

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# Risks Allocated to the Contractor

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- ❖ Material and labor availability and price
- ❖ Labor strikes by contractor's employees
- ❖ Delay due to minor weather variances
- ❖ Subcontractor performance
- ❖ Site safety
- ❖ Means and method of construction

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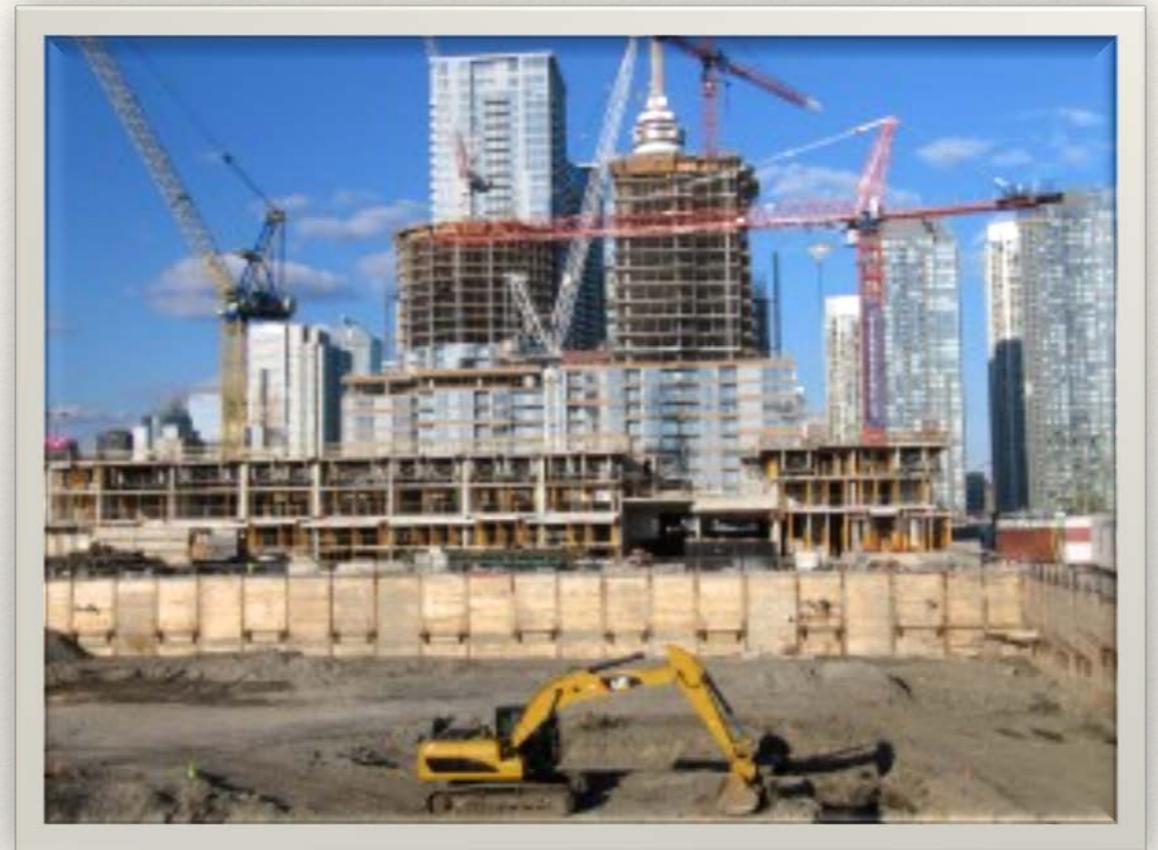
# Risks Best Shared by the Parties

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- ❖ Industry-wide labor strikes
- ❖ Impossibility of performance due to factors not within the parties' control, such as change of laws, total unavailability or extreme price increase of materials, prolonged unseasonable and extreme weather conditions, etc.

# Specific Contractual Provisions

Certain provisions are common in construction agreements and essential for contractors and sub-contractors to understand



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# Owner-Contractor Agreement

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- ❖ Many clauses that seem harmless can cause substantial legal issues down the road.
- ❖ The most troublesome are those concerning
  - ❖ Compliance with all laws and regulations;
  - ❖ Time extensions;
  - ❖ Delay damages;
  - ❖ Changed conditions;
  - ❖ Change orders; and
  - ❖ Site inspections.

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# Compliance with Laws and Regulations

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- ❖ Contractors should consider amending the language to limit the obligation to those laws and regulations that specifically address the scope, manner, or method of the contractor's work.
- ❖ Contractors should limit such provisions to laws and regulations in effect and actively enforced at the time the agreement is executed.
- ❖ Provisions requiring contractors to obtain necessary permits can be tailored to shift responsibility for some specialized permits to the owner.
- ❖ Laws enacted after execution should be excluded because they can create additional unanticipated cost.

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# Time Extension Clauses

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- ❖ Construction contracts generally set forth specific start and completion dates.
- ❖ Extensions are generally only provided for under certain circumstances.
- ❖ Clauses can be amended to enable extensions for environmental concerns outside its control.

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# Delay Damage Clauses

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- ❖ A standard “right to suspend performance” clause does not protect the contractor against the added costs due to delays.
- ❖ Contractors can demand a clause requiring the owner to compensate the contractor for delay costs.
- ❖ Common reasons for delay include work stoppage, work performed out of sequence by necessity, discovery and abatement of hazardous substances.
- ❖ Costs should include demobilization and remobilization costs, lost productivity, and delay damages.

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# Delay Damage Clauses, Continued

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- ❖ Such a modification usually requires other clauses be changed or added:
  - ❖ A clause permitting the owner to suspend the contractor's performance;
  - ❖ A clause permitting the owner to alter the sequence of work;
  - ❖ A “no damage for delay” clause;
  - ❖ A clause permitting the owner to employ independent contractors and requiring coordination by the contractor with those independent contractors.

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# Changed Conditions/Differing Site Conditions Clauses

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- ❖ Although most applicable to underground construction, can apply to conditions in existing buildings.
- ❖ Requires contractor to perform any necessary work related to an undisclosed or unanticipated subsurface condition discovered during construction, for additional compensation on a time and materials basis.
- ❖ Contractor should build in the option to treat the contract as terminated in this case, or shift this risk to the owner.
- ❖ Careful definition of “changed conditions” is also essential to avoid later disputes over whether this provision applies.

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# Change Order Clauses

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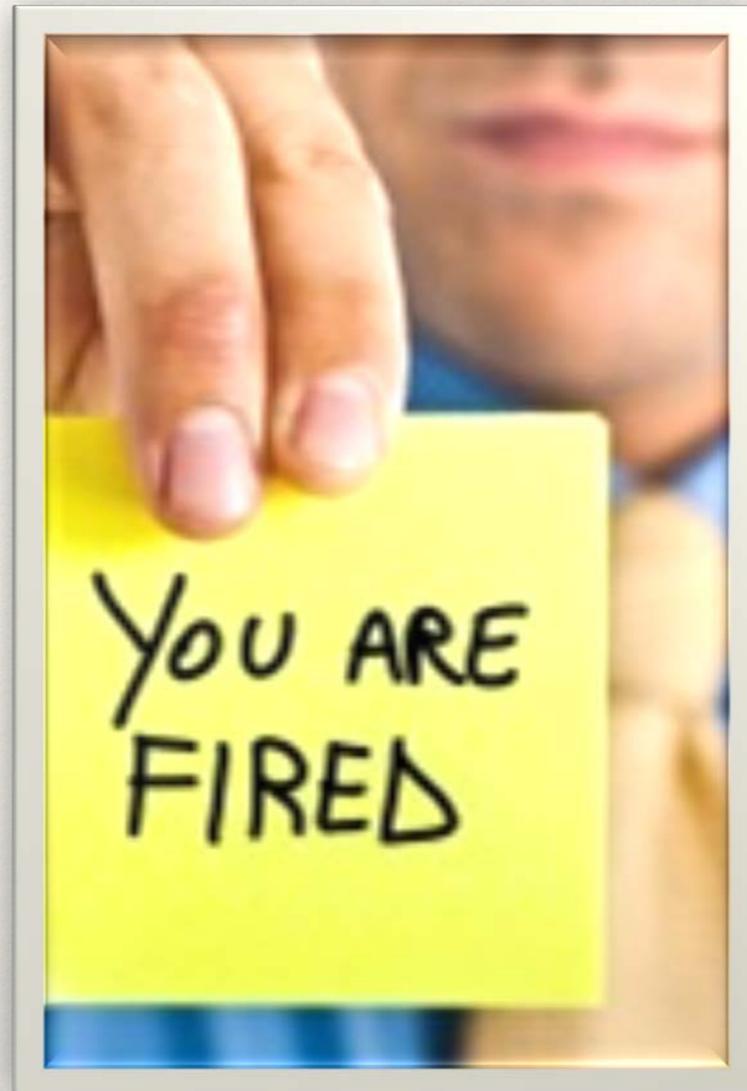
- ❖ A contractor should ensure that its contracts allow it to refuse a change order it is not qualified to perform.
- ❖ The contractor must also retain authority to decide who should perform change order work.
- ❖ These concerns are especially important when dealing with an environmentally troubled construction project.
- ❖ A clear method for processing and pricing change orders must be included.

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# Site Inspection Clauses

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- ❖ Standard site inspection / investigation clauses state that the contractor has visited the site, is familiar with it and the conditions under which work is to be performed.
- ❖ Places the burden of undiscovered or concealed conditions on the contractor.
- ❖ Contractors should avoid language requiring it to inspect subsurface or concealed areas.
- ❖ Can specifically exclude any obligation to investigate, discovery, or accept responsibility for hazardous materials.



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# Termination of a Contract

Being prepared for and aware of the consequences of contract termination is essential.

# Breach of Contract v. Quantum Meruit

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- ❖ If an owner materially breaches a contract, the contractor may choose to either 1) sue on the contract; or 2) abandon/rescind and sue in *quantum meruit*.
- ❖ Material breach varies, but may be failure to pay or interference with performance.
- ❖ Contract damages: contract price, less payments made already expected cost of completing the contract
- ❖ *Quantum meruit*: fair and reasonable value of the work, labor, materials and services, including overhead and profit thereon.

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# Insurance v. Bonds

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- ❖ Insurance companies assume risk; bonding companies guarantee credit.
- ❖ Insurance policies are two-party contracts that generally do not allow for a third-party to bring a direct action against the insurance company.
- ❖ A bond is a three-party contract that *does* allow for direct right of action against the bonding company by specified third parties.
- ❖ Insurance companies assume the risk of loss for a premium based on calculable odds. If a claim is covered, the company pays and rarely seeks to recover from third –parties.
- ❖ Bonding companies extend credit on behalf of their principals, acting more like a bank issuing a letter of credit. Like a bank, it will avoid all possible losses and make substantial efforts to collect its losses.

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# Insurance

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- ❖ Construction contracts often require the contractor to obtain either too much or too little insurance.
- ❖ Few parties involved understand construction insurance well enough, and brokers and agents are rarely better informed.
- ❖ Using a specialized broker and agent experienced in the industry is essential for finding just the right coverage.

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# When an Insurance Claim Arises

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- ❖ You *must* give timely notice to your carrier as soon as anything occurs that could give rise to a claim. Also notify the owner, architect, contractors, subcontractors, and each of their insurance companies.
- ❖ Just because you are insured does not mean you should not attempt to avoid liability – do not admit fault, give oral or written statements or even discuss the occurrence.
- ❖ Cooperate with the insurer in defense of the suit or investigation of the claim.
- ❖ Preserve your right to sue your insurer if it disclaims coverage.

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# Indemnification

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- ❖ Indemnification, generally, shifts responsibility for the liability of one party to the indemnifying party.
- ❖ Indemnification clauses are common in construction contracts.
- ❖ To the extent such a clause purports to require a party to indemnify another party for the other party's own negligence or intentional acts, it will generally be void.
- ❖ Indemnification clauses are distinct from clauses requiring a party to purchase insurance for the benefit of another party.



# Managing and Streamlining Your Contracts

Your business should be prepared in advance to enter into contracts on short notice.

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# Managing Your Contracts

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- ❖ Consider using template agreements and tailoring them to your projects.
- ❖ Consider hiring counsel to guide you through any special considerations.
- ❖ Use of purchase orders.
- ❖ Keep in mind the importance of documentation.



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With an emphasis on litigation and dispute resolution, Erin's practice focuses on labor and employment issues, commercial matters, and personal and property-based torts.

Erin also works with business and institutional clients, advising them on employment and compliance issues, drafting and negotiating commercial and employment contracts, and on other transactional matters.



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