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RICHARDS & FARMER

# Contractual Risk Management Beyond Insurance

**Ben Thronson**

**Mitchell Hayward**

**Reynolds Mirth Richards & Farmer LLP**



## Overview

- Approaching Contracting Carefully
- Key Terms for Allocating Risk
- Selling/Leasing Municipal-Owned Real Estate: Best Practices
- Construction Projects – Prudent Building
- Indemnities
- Force Majeure
- Liability Caps
- Questions



## Approaching Contracting Carefully

- Contracting as a process
- Five general steps:
  - Identifying Objectives
  - Initial Negotiations
  - Drafting
  - Execution
  - Closing/Performance
- What kinds of review are needed?  
Political/legal/insurance?



## Key Terms for Allocating Risk

- Term
- Termination Clauses
- Consequential Damages
- Insurance
- Indemnity



## Term

- How long is a contract to be performed for?
  - Indefinite?
  - Fixed term?
  - Indefinite but terminates upon a condition being satisfied?
- Depends heavily on context (construction contracts, employment contracts, service agreements, supplier contracts).



## Termination Clauses

- Depends heavily on context (construction contracts, employment contracts, service agreements, supplier contracts).
- Key factors to address:
  - *When* a party can terminate a contract
    - On default of contractor?
    - On default of municipality?
    - At convenience?
    - At expiry of term?
  - *The consequences* of terminating the contract



## Termination Clauses Examples

### Employment

The Company may terminate the Employee's employment in its sole discretion and without cause at any time. The amount of notice the Employee is entitled to will be limited to the minimum amount of notice of termination, pay in lieu of notice or any combination of notice and pay in lieu of notice as outlined in section 56 of the *Employment Standards Code*, which for greater clarity, is appended hereto as **Schedule "C"**. The Employee will not be entitled to any further compensation of any nature beyond the date of termination and upon compliance with this section the Company shall have no further or other liability to the Employee whatsoever. The Employee hereby waives any right that the Employee has, or may have, to receive reasonable notice at common law or damages in lieu of such notice. Notwithstanding the foregoing, under no circumstances shall the Employee receive less than the Employee's minimum entitlements under the *Employment Standards Code* (Alberta) as amended time to time.



## Termination Clauses Example

### Construction

An Owner may terminate a Contractor's right to continue with the Work, if the Contractor is in Default, and the Owner has provided sixty (60) days notice of the Default and such default has not been cured by the Contractor within sixty (60) days. Upon termination, the Owner shall be entitled to:

1. Take possession of the Work and Products at the Project, subject to the rights of third parties, and utilize the Construction Equipment at the Place of the Work; finish the Work by whatever method the Owner may consider expedient, but without undue delay or expense,
2. withhold further payment to the Contractor until a final certificate for payment is issued,
3. charge the Contractor the amount by which the full cost of finishing the Work as certified by the Consultant, including compensation to the Consultant for the Consultant's additional services and a reasonable allowance as determined by the Consultant to cover the cost of corrections to work performed by the Contractor that may be required under GC 12.3 – WARRANTY, exceeds the unpaid balance of the Contract Price; however, if such cost of finishing the Work is less than the unpaid balance of the Contract Price, the Owner shall pay the Contractor the difference.



## Consequential Damages

At law, innocent parties can seek to recover losses as damages, including “direct damages”:

- The cost of remedying a defect,
- The cost of a diminished value of a product,

As well as “less direct” or “consequential” damages such as:

- Loss of business or sales
- Loss of future business opportunities
- Cost of future financing.

## Consequential Damages

**Consequential Damages** - Notwithstanding anything to the contrary in this Agreement, neither party shall be liable to the other party for any loss of profit, loss of production, cost of capital, interest, cost of delay, business interruption, plant shutdown or other indirect, special or ***consequential damages*** whether arising from the fault, breach of contract, tort (including concurrent or sole and exclusive negligence), indemnity, strict liability or otherwise of the other party.



## Liquidated Damages Clauses

- A provision that requires a party, who breaches the contract, to pay a pre-determined amount to another party for breaching a party's failure to perform a task.
- Must:
  - Represent a genuine pre-estimate of loss.
- Cannot:
  - Be a penalty, oppressive or unconscionable.



## Insurance

- Liability Insurance
  - Comprehensive General Liability
  - Professional Error & Omissions
- Property Insurance
  - Builder's Risk
  - Course of Construction



## Insurance

- Additional Insured
- Notice of Cancellation
- Provide Evidence of Insurance
- Use Your Insurance Advisor (AMSC, etc.)



## Indemnities

- Contractual obligation of one party to compensate the loss incurred by another party
- More than just boilerplate – important risk management tools
- Consider what triggers the obligation to indemnify



## Selling/Leasing Municipal-Owned Real Estate: Best Practices

- Sales of Land
  - Determining Purchase Price
  - Warranties and Representations
  - Remedies on breach/failure to close
- Leases of Land
  - Key Provisions – cover the basics!
  - Permitted uses of the land
  - Ending a lease
- Options to purchase and rights of first refusal – tread carefully

Questions?



REYNOLDS MIRTH  
RICHARDS & FARMER

Reynolds Mirth Richards & Farmer LLP  
1800 Stantec Tower, 10220 – 103 Avenue  
Edmonton AB Canada T5J 0K4  
P: 780.425.9510 F: 780.429.3044

Thank you for  
attending

1.800.661.7673 (RMRF)  
[www.rmrf.com](http://www.rmrf.com)

Ben Thronson

780.497.3374

[BThronson@rmrf.com](mailto:BThronson@rmrf.com)

Mitchell Hayward

780.497.3378

[mhayward@rmrf.com](mailto:mhayward@rmrf.com)