Learning a Lesson by Sweating the Small Stuff

When negotiating contracts, it is sometimes difficult to properly assess the risks and rewards of certain terms. The idiom "that one can't see the forest through the trees" comes to mind. At times, though, even determining which forest needs to be seen can be the bigger challenge. We are all informed by our experiences and "battle wounds"—sometimes to our own detriment.

Recently, my client and I considered a contract provision which many attorneys' clients likely believe is an elementary exercise: the number of adverse weather days which should be included in a prime contract. The exercise led us to some surprising conclusions and forced us to consider whether we were overlooking other, seemingly-routine, contractual provisions.

Let's assume that an owner and general contractor are negotiating a prime contract on a private project. Consider the following two options from the perspectives of each of these two stakeholders: the first perspective will be that of an owner who has experience writing "too many change orders" for weather days; the second perspective will be from a contractor who "never gets enough time for weather."

Option One

> The Contract Time is 15 months. The Contractor shall be allowed three (3) weather days per month. Each additional weather day in any month that delays the critical path of the schedule shall result in an extension of the Contract Time. The Contractor shall not receive compensation for additional weather days.

Option Two

> The Contract Time is 16 months. The Contractor shall anticipate seven (7) weather days per month. Each additional weather day in any month that delays the critical path of the schedule shall result in an extension of the Contract Time. The Contractor shall not receive compensation for additional weather days.

What is your initial reaction to the above options if you are a project owner? A general contractor? How would you prefer to mitigate risk and maximize possible earnings on the upcoming project?

Recently, the above-mentioned client and I were presented with a similar scenario. The client, a general contractor, initially preferred Option One.

This was because it would've been easy to extend the schedule for weather delays, given that any month with four or more days of adverse weather would've entitled him to a schedule extension. But after we further analyzed the options, we came to a different conclusion.

For purposes of discussing the hypothetical scenario, we will assume that the general contractor determined:

1. The entirety of the project's work would be on the schedule's critical path.
2. He could complete the work within 15 months if there were three days or less of inclement weather each month.
3. He is likely to encounter five days of inclement weather each month (an extra two days per month as compared to the contractual provision of three days per month).
4. Spread over 15 months, this totaled 30 extra weather days.
5. Thus, he believed the project would take 16 months to complete if he encountered the weather he expected.

From the contractor's perspective, if Option One was utilized, and his assumptions were correct, the Contract Time would be adjusted by two extra days for each of the contract's 15 months, which would add 30 days to the Contract Time. The total adjusted Contract Time would then be 16 months. Thus, if the contractor had built a 15-month schedule and bid based on Option One, the contractor would receive payment for 15 months of general conditions, though it would have taken 16 months to build the project. In other words, the contractor would incur the costs of an extra month of general conditions without receiving compensation for those costs.

If Option Two was selected, the contractor would not receive any time for change orders. However, he would be expected to budget for a full 16-month contract duration. Thus, if the contractor entered the contract having budgeted for 16 months, he would only receive compensation for all his general conditions—not the 15 months as allowed by Option 1.

Let's change points of view and consider the owner's perspective. If the owner does not want to issue change orders for weather-related delays, he may initially favor Option Two. If, in the above scenario, Option Two was selected but it never rained more than five days in a month, weather-related time extensions would be unnecessary and the owner would presumably be satisfied because he would not have issued change orders for weather delays. However, the owner would have paid to mitigate that risk, because the contractor would have accounted for the extra 1-2 months of contract time in its bid and proposal. The contractor would have carried at least 16 months of general conditions costs in its budget. These general conditions would not have been included if the contract included the terms outlined by Option One.

In summary, Option One initially appears to benefit the contractor (because weather days are easier to recover) and Option Two appears to benefit the owner (because the threshold to recover weather days is more onerous). But in practice, the inverse may be true, because, under Option One, the owner would not pay for the 16th month of general conditions, while under Option Two the owner would have paid for that 16th month. In our contract, the client and I negotiated toward the concept presented by Option Two so that they could recover more general conditions costs.

We were surprised by this analysis and glad we took the time to consider both options. Attorneys and contractors should all try to keep this lesson in mind and consider all possible “forests” when negotiating any contractual term. Many terms that may appear to benefit one party on the surface could cause unneeded expense when the other party protects itself from the underlying risk. Consider how a contractor’s bid may increase if it is required to carry an extra-ordinarily low insurance deductible; or if it must accept a broad definition of reasonably foreseeable conditions.

Of course, every contract contains a benefit of the bargain for both parties. All parties who are drafting or negotiating construction contracts should take the time to consider the impacts to both parties when considering these types of risk-shifting provisions.