

Tips, Strategies, and Risk Management: Key Issues for Construction Contracts

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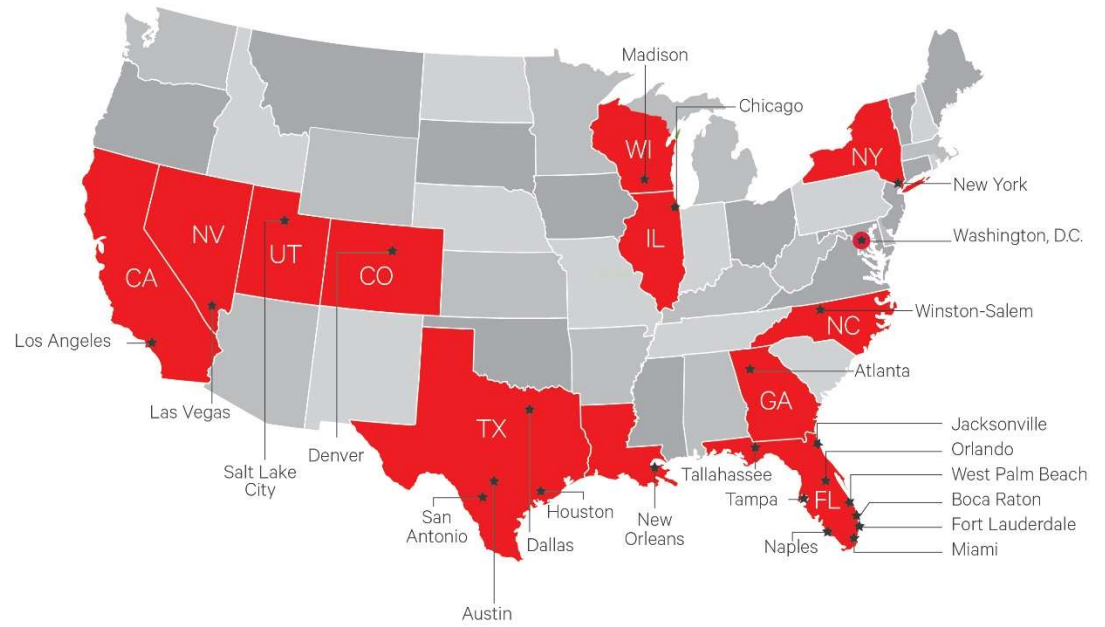
Trey Tate (Florida)

A large red hot air balloon is the central focus, floating over a landscape with green trees and a blue sky. Another smaller red hot air balloon is visible in the background to the right. The scene is captured from a low angle, making the balloons appear to be rising steeply.
akerman

About Akerman

About Us

- 700+ lawyers and business professionals across 24 offices
- Ranked among the top 100 U.S. law firms by *The American Lawyer*
- Recognized by *Financial Times* as among the most forward-thinking law firms in the industry
- Ranked among the top 10 large law firms (600+ lawyers) for diversity by *Law360*



What We Do

- We are known for our results in complex disputes and middle market M&A, and for helping clients achieve their most important business objectives in the insurance, financial services, real estate, and other dynamic sectors.

Our Construction Practice

- Our national Construction Practice is involved in the legal aspects of major construction initiatives and infrastructure projects around the world, providing pragmatic counsel on contracting strategies, contract drafting, formation, and administration issues, as well as construction litigation and various alternative dispute resolution methodologies.
- We represent clients on a variety of design and construction projects, including transportation, energy (renewable and conventional), petrochemical and heavy industry, public infrastructure, housing, government facilities, healthcare, sports, hotels and resorts, multifamily, and mixed-use development projects.

Awards and Recognitions

- Ranked Tier One in the U.S. in Construction Law and Construction Litigation by *U.S. News – Best Lawyers*
- Recognized by *The Legal 500* as a national leader in construction law.
- Our team, which includes board certified and LEED accredited lawyers as well as former engineers and project managers, is “extremely astute at strategy” (*Chambers USA*), providing clients with practical legal and business advice so they can manage risks and successfully complete the most complex projects.

Why the Contract Terms Matter



Read the contract terms

- What form to use - or draft your own?
- The details do matter



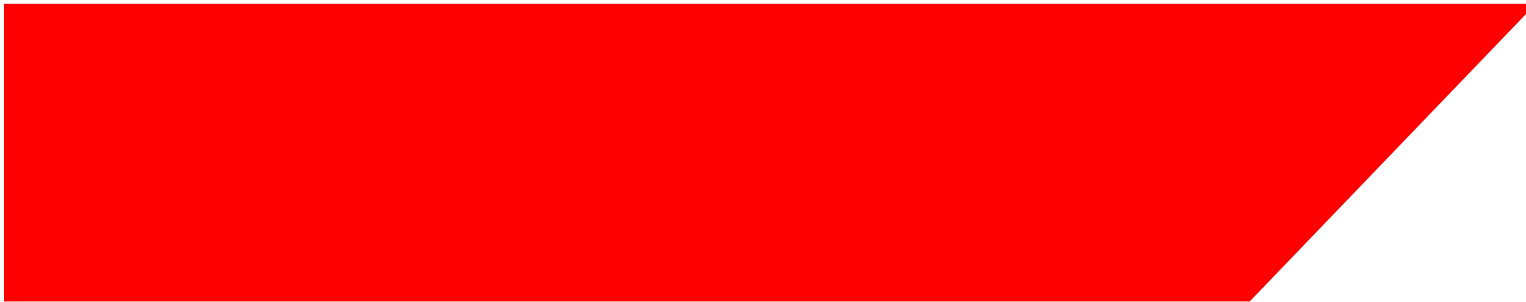
Negotiation is Key

Start as you mean to continue

- COVID 19 pandemic impacts
 - Virtual Negotiation
 - Execution issues



Change Orders and Claims



Scope of Work/Extra Work:

Addressing Foreseeable & Unforeseeable Changes

- Scope needs to be precise
- Exclusions and how to document
- Changes in Scope documentation



Change Order Clauses

- Key Components
 - Notice – How much time?
 - Requirement for a writing
 - Interim agreements/Field Orders
- Construction Change Directives
 - Do you cap the amount of CCDs?
 - Interim payments
- Claims Process
 - What documentation is required?
 - What are the steps?

How do I get paid for my work?

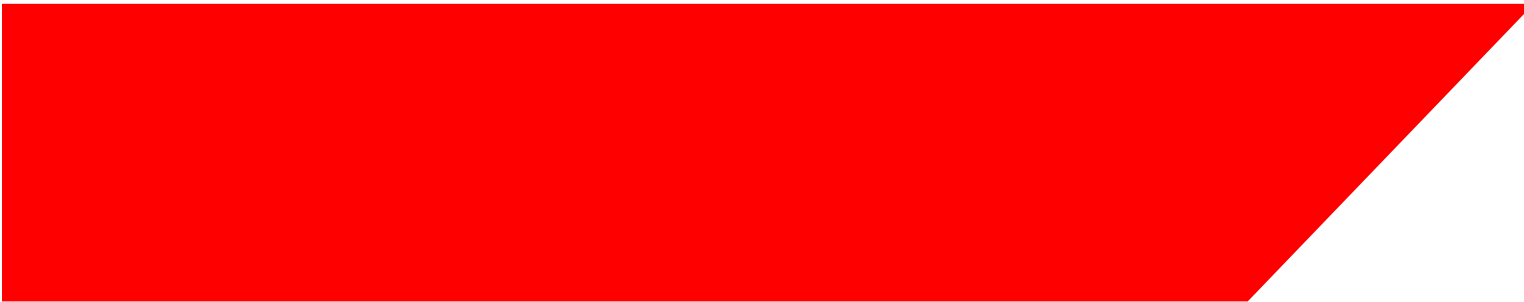


Payment Issues

- How to best protect getting paid timely
- Payment terms in your contract
 - Prompt pay
 - Pay when/if paid clauses
 - Retainage
 - Escalation
- Payment applications



What if....?



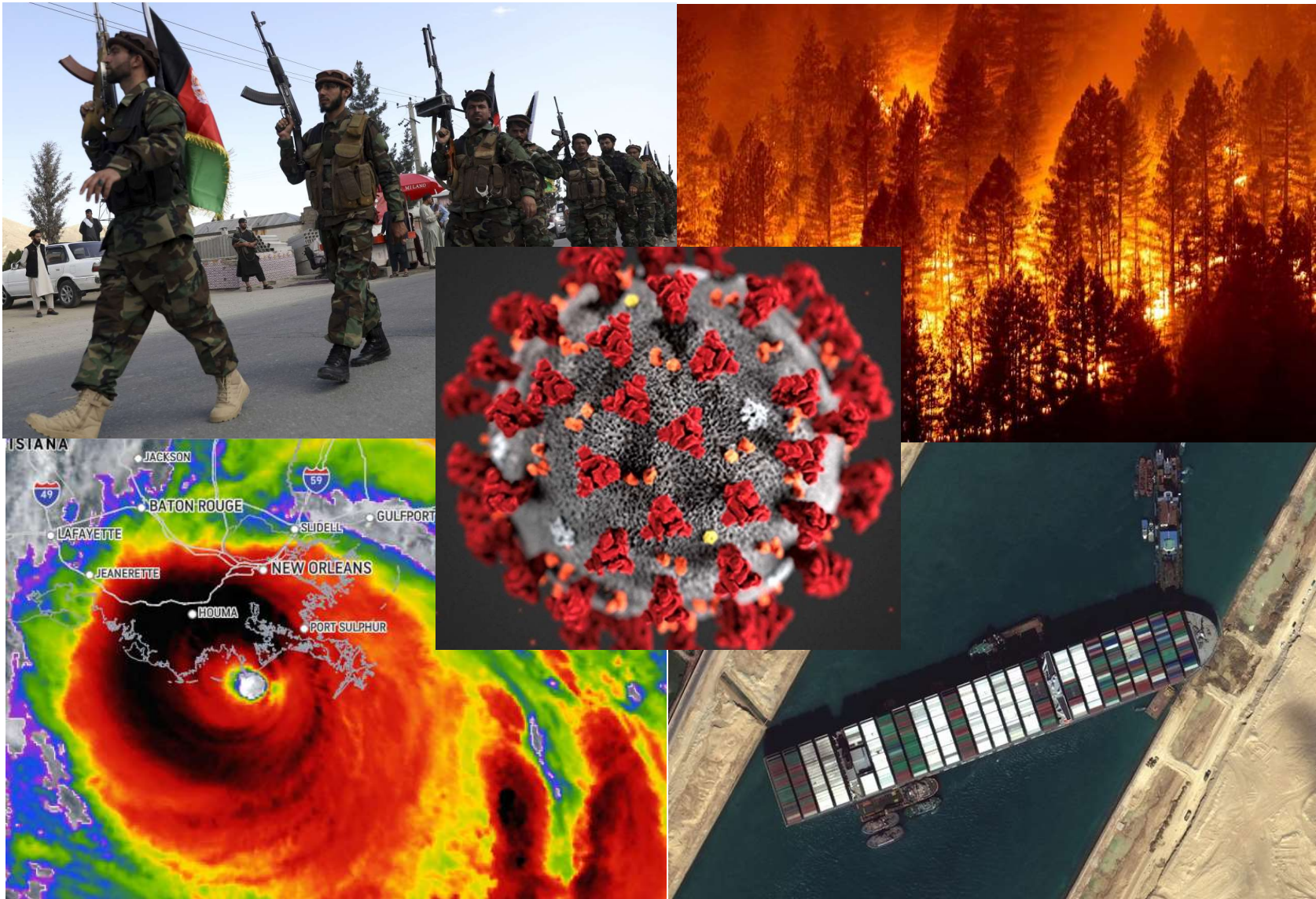
Unforeseen Conditions & Delays

- How much to investigate in advance?
- How do deal with unforeseen conditions?
- Pandemics, employee shortages – what counts?



Considerations for Delay Clauses

- Scheduling requirements
 - Format, Frequency of Updates, Owner review
- Float
 - Who owns the float?
- Delays that are Owner caused, Contractor caused, concurrent, and Force Majeure
- Compensation for delays – grace periods
- Liquidated Damages
- Early completion bonuses
- Documentation and Notice
- COVID – supply chain disruptions, proving COVID caused the delay



Force Majeure

Managing impact from external factors beyond the parties' control.

- “Not reasonably foreseeable”
- Scope of Clause
 - Pandemic
 - Tariffs
 - Stay-at-home orders
- Related Topics:
 - Price escalations
 - Impossibility / Impracticability
 - Frustration of purpose
- Duty to mitigate



Know when (and how) to walk
away...



Termination & Suspension

- Address suspensions of work during contract negotiation
 - Cause and Duration
- Termination provisions and how to deal with them
 - For Convenience
 - For Cause
- Notice requirements
- Rights and obligations post-termination
- Litigation even when you did it right?

The Finger Pointing Game



Insurance issues

not the answer to everything...

- Who is your broker?
- What does insurance really mean?
- How to make it work for you?



Risk Transfer & Indemnity

- What is Indemnity and why is this critical?
- Careful drafting is key! The specifics do matter.
- Know your jurisdiction.



Indemnity language issues

- Difference between INDEMNITY and DEFENSE
- “Arising out of” versus “Caused by”
- Scope of damages (consequential or direct?)
- Except for sole negligence

Limitation of Damages



Waiver/Limitation of Remedies

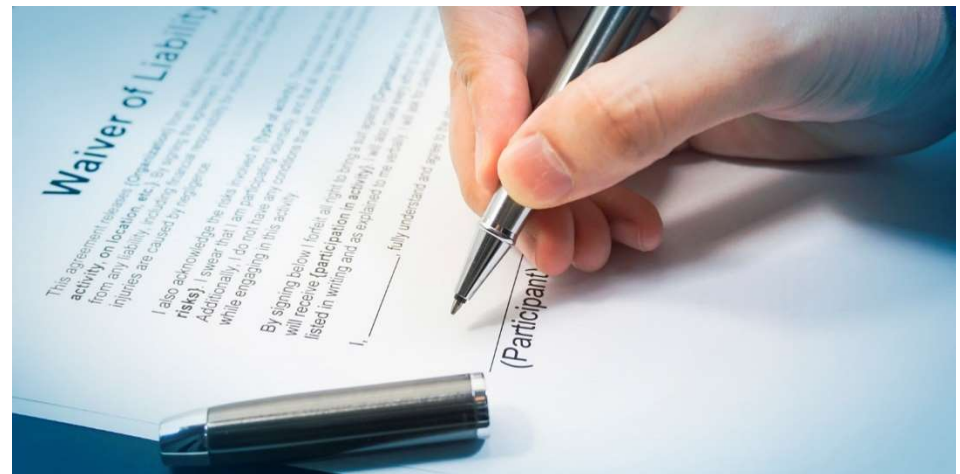
Know your options in the event of a breach.

Common Limitations of Remedies:

- Waiver of consequential damages
- No damages for delay
- Limitation of liability
- Liquidated damages
- Attorney fees

Waiver:

- Notice periods
- Lien waiver and releases



Questions?

Contact Us



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The logo for Akerman LLP, featuring the word "akerman" in a white, lowercase, serif font. A small red horizontal line is positioned under the letter "a".