**THE TIMES THEY ARE A CHANGING!**

**TERMS & CONDITIONS**

**NEGOTIATION TRAINING EXERCISES (HIGHLIGHTED/REDLINED)**

**WWEMA F&CA Council Meeting**

**May 15-17, 2018**

**Indianapolis, IN**

**LIMITATION OF LIABILITY**

Seller’s maximum liability to Buyer shall be limited to an amount equal to the greater of $5,000,000 or one hundred fifty percent (150%) of the Total Purchase Value for the Work.

Notwithstanding the foregoing, nothing in this provision shall be deemed to limit Seller’s liability to less than the amounts of Seller’s insurance. In addition, this limit of liability shall not include, nor shall it limit, Seller’s indemnity obligations or for liability for physical damage to or loss of property; pollution; discharge of hazardous material; breach of contract or warranty; willful misconduct; violation of laws; infringement of intellectual property rights; or failure to pay taxes.

**Notes:**

* $5,000,000 or 150% may or may not be a fair limit depending on the value of the contract, risks, amount of control you have, etc.
* In any event, it should not be the greater of the two numbers (pick one)
* If you are going to tie the limitation to insurance:
	+ Again, it shouldn’t be the greater of the amount of insurance or the amount set forth in the first paragraph – pick one
	+ Only tie the limitation to the insurance limits set forth in the contract – some of you might have access to higher limits
* Excluding indemnity obligations, including those for infringement of intellectual property, might be acceptable, but make sure you have properly limited those obligations
* Excluding the other highlighted items guts the limitation – what else is there? – and makes this an unlimited liability

**WAIVER OF CONSEQUENTIAL DAMAGES**

Neither Contractor nor Seller will be liable to the other party for any consequential damages, including any damages for failure to pay amounts owed for the equipment, even if advised of the possibility of such damages or if such possibility was reasonably foreseeable, other than with respect to any breach of the contract by Seller that causes harm to Contractor, Owner, or another third party.

**Notes:**

* Only “consequential” damages? What about indirect, incidental, special, exemplary, and punitive damages?
* Payment is the Buyer’s main, and possibly only, obligation under the contract – including damages for Buyer’s breach means you are waiving your main contractual rights
* Excluding damages caused by Seller’s breach completely guts the waiver – you generally only get damages if there is a breach
* “Contractor, Owner, or another third party” in this context means you are excluding damages to everyone in the world except you

**INDEMNITY #1**

Seller obligates itself to Buyer, Buyer’s surety, Owner, and any other party required to be indemnified under the Prime Contract, and their officers, directors, employees, agents, representatives, invitees, contractors, and subcontractors, jointly and severally, in the same manner and to the extent Buyer is obligated under the Prime Contract.

Seller shall release, defend, indemnify, save, and hold harmless Buyer, Buyer’s surety, Owner and other indemnified parties, and each of their officers, directors, employees, agents, invitees, partners, affiliates, contractors, and subcontractors, against and from, any loss, damage, costs, suits, claims, liabilities, expenses, (including attorneys’ and expert witness’ fees) for damages to property, including loss of use, injuries to persons, including death, liens or encumbrances, violation of laws, infringement of any intellectual property right, and/or breach of any provision or covenant of this agreement, regardless of fault, unless the fault is the sole negligence of the party to be indemnified.

**Notes:**

* Why indemnify Buyer’s surety?
* You don’t know who is required to be indemnified under the Prime Contract, or who “agents, invitees, etc. are, and even if you do, why should you indemnify them?
* Agreeing to be jointly and severally liable could result in you assuming liability for something someone else has done
* It probably isn’t a good idea to tie yourself to someone else’s contract
* “Release” could mean that you are giving up your rights to cross- or counter-claim
* “Defend” and “save” impose an obligation on you to defend a lawsuit upfront, even if you are not at fault or only minimally at fault
* Including attorneys’ and expert witness’ fees is a backdoor way of paying defense costs
* Loss of use is a classic consequential damage
* Claims based on liens and encumbrances, violation of laws, intellectual property infringement, and breach are all breach of contract actions, not things that should be subject to indemnity – if you indemnify for these, the other side just has to show you the bill and demand payment, and they may or may not have to prove liability or mitigate their damages (you may, however, want to still take on an indemnity obligation for infringement claims on your intellectual property because you don’t want anyone else making concessions with regard to your intellectual property rights)
* “Regardless of fault” means you assume liability even if you’re not at fault or only minimally at fault
* In almost 25 years of practice, I’ve never seen sole negligence in a contested case

**INDEMNITY #2**

**13. INDEMNITIES**

**a. Definitions.** As used in this Contract, the following terms shall have the meanings ascribed to them below unless the context clearly and unambiguously requires that such terms be given a different meaning:

(i) "Claims" shall mean any claims, demands, complaints, losses, fines, penalties, citations, damages, cause of action, suits, judgments, orders, expenses, or costs, including, without limitation, court costs, reasonable attorneys' fees, and expert witnesses' fees.

(ii) "Company Group'' shall mean Company and its parent, affiliates, and subsidiary companies, its and their respective contractors of any tier (other than Contractor and its subcontractors), co-lessees, co-owners, partners, joint venturers, together with its and all of their respective officers, directors, employees, in-house legal counsel, agents, representatives, and invitees, and the respective successors, spouses, relatives, dependents, heirs, and estate of any of the foregoing.

(iii) "Contractor Group" shall mean Contractor and its parent, affiliates, and subsidiary companies, its and their respective subcontractors of any tier, together with its and all of their respective officers, directors, employees, in-house legal counsel, agents, representatives, and invitees, and the respective successors, spouses, relatives, dependents, heirs, and estate of any of the foregoing.

(iv) "Group" shall mean the Company Group, the Contractor Group, or both, as the context requires.

**b. GENERAL INDEMNITIES.**

**(i)** **SUBJECT ONLY TO SECTION 13(B)(iii) BELOW, CONTRACTOR HEREBY AGREES TO RELEASE, INDEMNIFY, PROTECT, DEFEND, AND HOLD HARMLESS COMPANY GROUP FROM AND AGAINST ANY AND ALL CLAIMS RELATED TO OR ARISING FROM WORK PERFORMED PURSUANT TO THIS CONTRACT FOR (I) THE INJURY, ILLNESS, OR DEATH OF ANY MEMBER OF CONTRACTOR GROUP, OR (2) THE LOSS, DAMAGE, DESTRUCTION, AND/OR WRECK AND DEBRIS REMOVAL OF ANY PROPERTY BELONGING TO ANY MEMBER OF CONTRACTOR GROUP, WITHOUT REGARD TO WHETHER ANY SUCH CLAIM IS CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT; ACTIVE OR PASSIVE), STRICT LIABILITY, STATUTORY LIABILITY, CONTRACTUAL LIABILITY, OR OTHER FAULT (EXCLUDING ONLY THE GROSS NEGLIGENCE AND INTENTIONAL MISCONDUCT) OF ANY MEMBER OF THE COMPANY GROUP OR BY ANY DEFECT OR PRE-EXISTING CONDITION (WHETHER KNOWN OR UNKNOWN; PATENT, LATENT, OR OTHERWISE).**

**(ii) COMPANY HEREBY AGREES TO RELEASE, INDEMNIFY, PROTECT, DEFEND, AND HOLD HARMLESS CONTRACTOR GROUP FROM AND AGAINST ANY AND ALL CLAIMS RELATED TO OR ARISING FROM WORK PERFORMED PURSUANT TO THIS CONTRACT FOR (1) THE INJURY, ILLNESS, OR DEATH OF ANY MEMBER OF COMPANY GROUP, OR (2) THE LOSS, DAMAGE, DESTRUCTION, AND/OR WRECK AND DEBRIS REMOVAL OF ANY PROPERTY BELONGING TO ANY MEMBER OF COMPANY GROUP AND WHICH IS SITUATED AT THE SITE AT WHICH THE APPLICABLE WORK IS TO BE PERFORMED HEREUNDER, WITHOUT REGARD TO WHETHER ANY SUCH CLAIM IS CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT; ACTIVE OR PASSIVE), STRICT LIABILITY, STATUTORY LIABILITY, CONTRACTUAL LIABIUTY, OR OTHER FAULT (EXCLUDING ONLY THE GROSS NEGLIGENCE AND INTENTIONAL MISCONDUCT) OF ANY MEMBER OF THE CONTRACTOR GROUP OR BY ANY DEFECT OR PRE-EXISTING CONDITION (WHETHER KNOWN OR UNKNOWN; PATENT, LATENT, OR OTHERWISE).**

c. Notwithstanding anything contained in Section 13d(b) of this Contract to the contrary, in the event that an injury or accident giving rise to a Claim which is subject to the laws of any jurisdiction that prohibits or limits the Parties' ability to provide the indemnity set forth above, then, if such law must be applied, the indemnifying Party's obligations shall exist to the full extent allowed by the law of such jurisdiction; and such indemnifying Party voluntarily agrees to carry the maximum amount of insurance which may be allowed or required by the law of such jurisdiction for the protection of the indemnified Parties against such loss or liability. The Parties agree that their respective indemnity obligations hereunder are independent of any insurance which such Parties may be required to carry hereunder. The liabilities assumed by a Party pursuant to this Section 13 shall not be limited to the amounts of any current property or liability insurance carried by such Party.

d. Any indemnified Party under this Section 13 shall have the right to participate at its own expense, with attorneys of its choice, in the defense of any Claim for which it has rights to indemnity pursuant to this Section without releasing the indemnifying Party from any of its indemnity obligations hereunder; provided, however, that the indemnifying Party shall have the exclusive control of the defense and settlement of any such Claim; provided, further that the indemnifying Party shall not have the right to settle any Claim for any resolution other than the payment of money without the indemnified Party's express, written consent.

**Notes:**

* This is actually a pretty fair knock-for-knock indemnity
* Biggest concern is making sure your insurance carrier will accept this type of indemnity – depending on how often you accept these types of indemnities, what type of work you are doing on-site, how many people/much equipment is involved, etc., they may or may not adjust your premiums
* Make sure the provision mostly mirror each other so that it is a true knock-for-knock – may be okay to limit the other side’s liability to just the jobsite since they may have other sites
* I did highlight some of the cross references here because the referenced sections did not appear in this sample

**WARRANTY**

Seller represents and warrants to Buyer that the goods and services shall be free from all defects, of the best quality, be fit and appropriate for the purpose intended, and strictly conform to the provisions, specifications, performance standards, drawings, samples or other descriptions contained herein or in the Prime Contract, or as otherwise set forth. Seller agrees to make good, at its own expense, any defect or damage in goods and services which may occur or develop for a minimum of one year after Buyer's release from responsibility to Owner. If after the date for commencement of warranties, any work is found to be not in accordance with this Agreement, Seller shall correct work promptly after receipt of written notice. The applicable warranty period shall be extended twelve (12) months from the performance of the corrected work. The cost of labor, materials and expenses associated with work required to restore equipment performance to the requirements of this Agreement will be borne solely by the Seller.

**Notes:**

* Representations and warranties are terms of art and have different obligations, rights, and remedies than simple express warranties – delete references to representations
* “Best” quality could also be a term of art under state law and may require you to provide the “platinum” solution instead of the specified or industry standard quality
* “Fit for the purpose intended” is an implied warranty under the UCC and should only apply to commodities – for custom goods, you only know the purpose specified, not what they intend
* “Strict” conformance means exact – no deviation – might be better to say “materially” conform
* Tying yourself to the Prime Contract or “other” requirements may expand your warranty obligations beyond what you expected
* “Make good” is another term of art that could make you do more than you expected – at the very least, it could make you liable for removal/reinstallation costs
* There should be limits on what defects and damages are covered (i.e., not abuse, etc.), and they should not include damages that could be caused by the actions of others
* Extending the warranty for repairs could lead to evergreen warranties – limit these to extending the warranty only on the part(s) repaired and set a maximum time limit
* Labor and associated expenses could include removal/reinstallation costs
* Depending on the circumstances, costs may need to be allocated among multiple parties – it’s not a good idea to agree to be “solely” liable until all the facts are in

**PAYMENT TERMS**

Requisitions for payment shall be submitted by the 25th day of the month. Buyer shall pay Seller within 60 days of Buyer’s receipt of payment from the Owner, which is an express condition precedent to Buyer’s payment obligations to Seller. 10% retainage shall be withheld upon each progress payment and released upon Final Completion. Buyer may, in addition to any other rights under this Agreement, withhold payment of all or a portion of any Requisition for Payment to the extent, in Buyer’s opinion, necessary to protect Buyer from loss due to any failure of Seller to meet its obligations under this agreement. Buyer may withhold 200% of the estimated value of any punchlist items from the final payment.

**Notes:**

* Having payments submitted by a particular day of the month may or may not be an issue, depending on how the milestones fall – if the milestone falls on the 26th, you may have to wait 90 days or more for payment
* 60 days for payment is a long time, especially if payment applications must be submitted by a particular day
* Waiting for Buyer’s receipt of payment from the Owner as an express condition of payment is a pay-when/if-paid provision – the if-paid may not be legal in some states, but in any event such provisions make it very easy for Buyer’s to withhold/refuse payment
* A 10% retainage may be fine, but if you have milestones after delivery, you actually have a double retainage – also, some Canadian provinces and even some U.S. municipalities have automatic holdbacks of up to 10%, which can lead to triple retainage
* “Final Completion” could mean waiting a year or more for final payment – in addition, whose “final completion” are we talking about?
* Giving a right to withhold may be considered commonplace in our industry, but it also give the Buyer a blank check to withhold payment without any consequence – if you have to agree to this, add a statement that withholding is subject to Seller’s right to claim the withholding is wrongful
* Allowing the Buyer to determine how much they need to protect themselves is also a blank check
* Why do they need 200% of the punchlist value? And, who makes the estimate?

**LIQUIDATED DAMAGES**

The parties’ rights, duties, and obligations with respect to liquidated damages shall be the same as those set forth in the General Contract between the Owner and the Contractor, flowed down to apply equally to this Purchase Order.

The time of Seller’s performance is of the essence. Seller agrees to reimburse Contractor for any and all liquidated and/or actual damages that may be assessed by Owner against Contractor, or that Contractor may otherwise incur that may relate to Seller’s alleged failure to perform the Work required by this Contract within the time fixed or in the manner provided for herein. Seller also agrees to pay Contractor upon demand any increased costs or other damages Contractor may sustain by reason of Seller’s alleged delay or other failure, whether or not liquidated or actual damages are assessed by Owner. The payment of such damages shall not release Seller from its obligations to fully perform this Contract.

**Notes:**

* Again, beware of tying yourself to the Prime Contract
* “Time is of the essence” is a legal term of art that could mean that the Buyer is relieved of all its contractual obligations (including payment) if Seller is even one day late in delivery – best to say something like time is very important or time is critical (not “material” or “essential”) – but in some states (like Texas) you have to say time is of the essence in order to collect liquidated damages
* You can’t have liquidated and actual damages; you need to pick one – however, I have heard of a few cases where the judge felt that the parties were sophisticated enough to know better and did grant both
* Anything that refers to “other damages” is an attempt to get actual damages on top of liquidated damages
* “Alleged” failure should be changed to just “failure” – damages should only be assessed if there is an actual failure to deliver on time, not just because the Buyer “alleges” delay
* “Upon demand” is basically the same thing – you shouldn’t be obligated to pay just because someone asks
* Assessment of liquidated (not actual) damages even if the Owner does not assess them against the Buyer may be a fair request (it imposes strict liability for late delivery) – you may want to consider “no-harm-no-foul” language instead
* Payment of liquidated damages may release Seller from some obligations under state law – certainly the obligation to pay actual damages for late delivery – but it wouldn’t release the Seller from its obligations to ultimately deliver or to warrant the goods – consider re-wording this so it is not quite so general

**INCORPORATION OF PRIME CONTRACT/SPECIFICATIONS**

(a) The term “Prime Contract” as used herein refers to all the general, supplementary and special conditions, drawings, specifications, amendments, modifications and all other documents forming or by reference made a part of the contract between Contractor and Owner.

(b) Seller, by signing this Contract, acknowledges that it has independently assured itself that all of the Prime Contract documents have been available to it, and confirms that it has examined all such documents and agrees that all of the aforesaid Prime Contract documents shall be considered a part of this Contract by reference thereto. Seller agrees to be bound to Contractor and Owner by the terms and provisions thereof so far as they apply to the Work, unless otherwise provided herein.

**Notes:**

* Contractors like to incorporate the Prime Contract in case there are gaps in responsibility (you don’t want to have to fill those gaps) – it may be okay to incorporate some of the technical portions from the specifications to the extent they are consistent with the scope of work in your proposal, but incorporating commercial terms and conditions that might be embedded in the sections could undo all of your good work negotiating fair terms
* It’s unlikely that you will be able to have access to **all** of the Prime Contract – you certainly are not going to see the parts that contain the Buyer’s price
* You don’t want to bind yourself to the Owner because you don’t have a contract with the Owner, and the Owner is almost certainly not bound to you at all

**DISPUTE RESOLUTION**

(a) In the event of any request or claim by Seller seeking additional time or compensation which arises out of or is related to the acts or omissions of the Owner, changes to or defects in the Prime Contract, or any other claim for which the Owner may have responsibility, Seller agrees to be bound to Contractor to the same extent that Contractor is bound to Owner, both by the terms of the Prime Contract and by any and all decisions or determinations made there under by the party, board or court as authorized in the Prime Contract for resolving such claims. Seller agrees to be bound by any final determination as rendered on its claim, whether pursuant to any such Disputes clause or otherwise, and Seller shall in no event be entitled to receive any greater amount from Contractor than Contractor is entitled to and actually does receive from Owner on account of Seller's claims, less any markups or costs incurred by Contractor and to which Contractor is otherwise entitled, and Seller agrees that it will accept such amount, if any, received by Contractor from Owner as full satisfaction and discharge of such claims. Seller agrees that it will not take any other action with respect to any such claims.

(b) Any dispute between Contractor and Seller which cannot be brought under the Section above shall be decided by Contractor whose decision thereon shall be final and binding. Seller shall proceed diligently with the Work, pending final determination pursuant to this or any other Disputes clause or pursuant to any other action taken with respect to a claim or claims.

**Notes:**

* Main point here is that you want a process that is fair and neutral and that doesn’t give any one side an unfair advantage
* Again, you don’t want to bind yourself to the Owner or any process between the Buyer and the Owner because you have no say in that process, and they could make side deals that are harmful to you – even if the Buyer says they will let you prosecute your own claims or prosecute them for you, the Owner might not agree to that (and, in this provision, you are paying the Buyer to do this)
* If you give the Buyer or Owner decision-making authority, what do you think the chances are that they will decide in your favor?
* Your greatest leverage to getting paid is your absolute right to stop work – you can certainly waive that right by agreeing to continue working in the event of a dispute, but it is like waiving your right to remain silent

**FORCE MAJEURE**

Unavoidable delays in the prosecution or completion of the Work shall include delays which, in the opinion of the Buyer, result from causes which are beyond the control and without the fault or negligence of the Seller, which could not have been foreseen by the Seller, and which could not have been avoided by the exercise of care, prudence and diligence on the part of the Seller. The Buyer and the Seller anticipate the possibility of such delays in the preparation for or prosecution of the Work, and provision is herein made to compensate the Seller in time only for such delays. Delays due to acts of God or public enemy, war or other national emergency making performance temporarily impossible or illegal, strikes and labor disputes not brought on by any act or omission of the Seller, fires, floods, epidemics, quarantine restrictions, freight embargoes, weather of unusual severity such as cyclones or tornadoes, or excessive adverse weather which is considered abnormal and unforeseeable for this region at the appropriate time of year, will be considered to be unavoidable delays, provided Seller notifies Buyer of such delay within five (5) days of the event causing the delay.

**Notes:**

* Force majeure should always be an objective standard – again, what are the chances the Buyer will decide in your favor?
* Some events, such as tornadoes in Kansas, can easily be foreseen, but are still force majeure events
* Time as the only remedy makes sense when the parties are at the same site, but equipment suppliers are often in different areas – it could be possible for you to be able to deliver, but the Buyer not be able to receive
* The list of force majeure events should be inclusive, not exclusive – avoid language that implies force majeure events “are x, y, z,” and instead use language that states that force majeure events “include (or “such as”) x, y, z”
* Avoid vague terms like excessive or abnormal weather conditions; they only add confusion and foster litigation – hurricanes in Florida are certainly not abnormal, nor are the associated floods, but they could be excessive (also, places tend to close down in anticipation of certain weather events as a precaution)
* Five days may or may not be enough – consider changing to business days (think of long breaks like Thanksgiving or Christmas)
* The clock shouldn’t start with the event itself because it may take time for your subsupplier to notify you (especially if the tornado wiped out their building) – instead insert language that the clock starts when Seller knew about the event
* Finally, while this provision doesn’t have it, beware of things that might be excluded from the list of force majeure events (such as strikes) – a contractor may have control over strikes at the jobsite, but a supplier cannot control strikes at the workplace of its subsupplier

**LIENS**

Seller shall promptly pay all claims of persons or firms furnishing labor, equipment or materials used in providing the Product. Buyer requires Seller to submit satisfactory evidence of payment and releases of all such claims in accordance with this clause. Seller agrees to waive any and all liens, which might otherwise be asserted in the resolution of disputes arising out of the performance of this Agreement and agrees that no lien shall be filed or maintained against any property where work for the Project is to be performed, or any interest of Owner or Buyer in such property by or in the name of the Seller or any Subsupplier or subcontractor acting or claiming through or under Seller for work performed or materials furnished in connection with this Agreement. Seller further agrees that is will defend, indemnify and hold Buyer, Owner, and the Buyer Parties, their affiliates and authorized assigns harmless against any and all loss, cost, expense (including attorney’s fees and cost of defense), liability, or demand arising from any such claim. If a notice of lien or similar notice alleging non-payment is filed or served upon Buyer or its client by a laborer, materialman or subcontractor of Seller, Seller shall remove such lien within two (2) days from notice from Buyer, and Buyer may retain payment to Seller sufficient to completely indemnify Buyer and its client against such potential lien. If such payment amount is not sufficient to fully indemnify Buyer and its client, Seller shall compensate Buyer and its client for the insufficient amount.

Seller further agrees to incorporate the substance of this provision into all of its Agreement with Subsuppliers or subcontractor. Prior to invoicing final payment, Seller and its Subsupplier or subcontractors shall sign a release of Liens in a form prepared by Buyer and furnished to Seller. Seller shall execute such forms and additional documents as required by Buyer or Owner to the extent deemed necessary to affect such waiver.

**Notes:**

* Again, avoid terms such as “satisfactory” because when there is a problem no one is satisfied, and the Buyer doesn’t care about your satisfaction
* Contractors and even some Owners might be very sensitive to liens, but they may not be as powerful as you think – still, you don’t want to go around waiving all of your rights in advance
* You don’t want to indemnify for liens – first, you shouldn’t have to indemnify if you file a lien for non-payment, and, second, if you indemnify for liens filed by your subsuppliers you may give up your leverage if there is a dispute about the quality of their work (the Buyer will pay them off and then backcharge you under the indemnity)
* Two days may not be enough to remove the lien; again, use business days – also, there are ways to cheaply and easily bond of lien claims so the Buyer and Owner are protected, and you can still maintain your dispute with the subsupplier
* Don’t obligate yourself to protecting the Buyer or paying whatever charges they decide to pay
* If you have master agreements with vendors, you may not be able to include lien waivers in your agreements with them, and even if you could, they might not be desperate (or foolish) enough to agree – don’t obligate yourself to something you can’t control
* Beware of agreeing to forms that could be developed later by the Buyer; they could contain language that goes beyond a simple lien waiver – best practice is to agree to language upfront and include waiver forms as exhibits to the contract

**INSURANCE, BONDING, & LETTERS OF CREDIT**

Seller shall maintain insurance in a form and manner, and in such amounts, that Buyer specifies. If Buyer determines that Seller’s insurance is inadequate to protect Buyer, or if Buyer determines that additional insurance is required, Seller shall immediately procure such insurance to Buyer’s satisfaction. If Seller fails to maintain insurance satisfactory to Buyer, Buyer may purchase such insurance and charge Seller/withhold from payment the associated costs. Seller shall include Buyer as an additional insured on all of its insurance policies and shall waive its right to subrogation.

Within ten (10) Days after the Notice to Proceed and as a condition for payments under this Agreement, Seller shall furnish to Buyer performance and payment bonds, each in an amount at least equal to the Contract Price, as security for the faithful performance and payment of all of Seller’s obligations under the Contract Documents. In addition, within ten (10) days after the equipment is installed, Seller shall furnish to Buyer a warranty bond in an amount at least equal to ten percent (10%) of the Contract Price, as security for the faithful performance and payment of Seller’s warranty obligations under the Contract Documents. These bonds shall remain in effect until one (1) year after the date when final payment is made or the date the equipment is placed into operation, whichever is later. Seller shall also furnish such other bonds as are required by the Contract Documents. All bonds shall be in the form prescribed by the Contract Documents and shall be executed by such sureties rated A+ or better. If the surety on any bond furnished by Seller is declared bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of the Project is located or it ceases to meet the requirements of this paragraph, Seller shall promptly notify Buyer and shall, within 20 days after the event giving rise to such notification, provide another bond and surety, both of which shall comply with the requirements of this paragraph.

Within ten (10) Days after the Notice to Proceed and as a condition for payments under this Agreement, Seller shall provide a Performance Letter of Credit to Buyer to secure its obligations under this Agreement. The Performance Letter of Credit shall be in the form of an irrevocable standby Letter of Credit as set forth in the Agreement, in favor of Buyer and from a bank acceptable to Buyer. The value of the Performance Letter of Credit will be in an amount at least equal to ten percent (10%) of the total Agreement Price valid from the date of issuance of Performance Letter of Credit until Final Completion. In the event that Seller has failed to perform some or all of its obligations under the Agreement, Buyer shall have the right to make a draw against the Performance Letter of Credit per the conditions of the same.

**Notes:**

* Biggest point here is to make sure whatever provision you agree to matches what your carrier/surety will do – most suppliers have programs already in place (not project-specific) that are not easy to change
* Make sure the timing of the obligations under the insurance/bond/letter of credit does not exceed the timing of your obligations under the contract
* For Sellers, bonds are definitely better than letters of credit

**INCORPORATION CLAUSE**

Buyer assumes no responsibility for any understanding or representation made by any of its officers or agents prior to the execution of this Contract, unless such understanding or representation by Buyer is expressly stated in this Contract. Buyer is entitled to rely on all proposals and representations made by Seller in bidding on this Contract. Unless specifically referenced herein and attached hereto, no acknowledgements of the Contract or terms of any nature submitted by Seller prior to the execution of this Contract shall be of any effect.

**Notes:**

* A good, fair incorporation clause simply says that the signed contract represents the complete deal between the parties, and there are no side deals or understandings – avoid anything that allows either side to rely on any prior statements or proposals

**TERMINATION**

Seller’s performance under this Agreement may be terminated by Buyer for convenience in whole or in part whenever Buyer shall elect. Upon receipt of any such notice, Seller shall, unless the notice requires otherwise, immediately discontinue Work on the date and to the extent specified in the notice, place no further orders for materials other than as may be necessarily required for completion of any portion of the Work that is not terminated, promptly obtain cancellation on terms satisfactory to Buyer of all purchase orders and subcontracts to subsuppliers or assign those purchase orders and subcontracts (including those with intellectual property rights) to Buyer as directed by Buyer, and assist Buyer upon request in the maintenance, protection, and disposition of property acquired by Buyer under this Agreement. Upon termination of this Agreement, payment of all amounts due Seller under this Agreement or any other may be withheld pending completion of the Work, including performance of rework, and may be used to offset liabilities of Seller under this Agreement. Buyer will only pay Seller for work satisfactorily completed prior to the date of termination.

**Notes:**

* Again, avoid language that allows the Buyer to decide when they are satisfied or gives them too much discretion
* The provision above mixes termination for default and termination for convenience, and it doesn’t allow for payment for work in progress – if there is a termination for convenience, the Seller should not have to incur any additional costs
* Beware of termination provisions that require assignment of subcontracts – most of us are “middlemen,” and you don’t want to do the work and then get cut out of the deal