

# CONTRACT BENCHMARKING & ANALYTICS: DOCUMENT CRUNCH REPORT

It is Document Crunch's mission to empower **everyone** in the construction industry to understand what is in their contracts. Our initial products in furtherance of this mission primarily simplify construction contracts by quickly identifying critical risk provisions and providing teams with guidance around those provisions. However, our mission also includes providing construction industry stakeholders with real data insights to understand trends in construction contracts, including what items the industry considers fair and what terms are prominent.

We believe this information is critical to better decision making within the construction industry. With access to this type of contract intelligence, the construction industry can become more aware and its contracts less risky. This will lead to a more collaborative and profitable industry for all.

In late 2021, Document Crunch partnered with ELECTRI International (NECA), the John R Gentile Foundation (MCAA), and the New Horizons Foundation (SMACNA). The first objective was to begin assessing their members' contracts. First, through numerous discussions with key stakeholders in the participating organizations, we determined the riskiest contract provisions that impact trade contractors. While the list below is not meant to be exhaustive, numerous members weighed in and the top ten issues (with a quick overview of each issue itself) are outlined below.



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### TOP 10 CONTRACT ISSUES FOR TRADE CONTRACTORS

- 1 Pay if Paid:** is your right to payment only triggered if the Owner pays the GC?
- 2 Right to Stop Work:** do you have the express right to stop work if you go unpaid?
- 3 Consequential Damages:** are you assuming risks for the GC or Owner's business damages like their lost profits?
- 4 Liquidated Damages:** how are you going to be financially responsible for delays?
- 5 Liability Caps:** is there any limit on your financial liabilities for things like liquidated damages, or overall?
- 6 Indemnity:** are you liable/responsible to protect the Owner/GC from anything and everything or only issues that you caused?
- 7 Delays:** are there any entitlements or limitations for you to get an extension of time if something outside of your control delays your progress?
- 8 Subsurface Conditions:** who is responsible if there are concealed conditions impacting your work?
- 9 Hazardous Materials:** who is responsible to deal with any pre-existing hazardous conditions on the site?
- 10 Design Responsibility:** are you responsible for the project's design and/or to ensure the contract documents are accurate?

We then reached a consensus around the criteria used to analyze where the provisions at issue were considered **Best Practice** (shown as **green**), **OK - Medium Practice** (shown as **yellow**), or **Deficient Practice** (shown as **red**) across these categories. Again, we recognize that there is some subjectivity in this framework, but it is the product of the consensus reached by key participating stakeholders.

Once these parameters were established, the participating organizations sourced their members' subcontracts to be analyzed by the Document Crunch proprietary platform. In early 2022, these documents were collected and Document Crunch was able to extract these specific terms. Our Industry Solutions team then analyzed the terms according to the below referenced criteria. Document Crunch then provided its findings to the participating organizations.

What follows is an overview of this service. This report includes (1) a description of the provisions at issue; (2) the criteria used to identify these issues; (3) the results following the initial cohort analyzed by Document Crunch. We hope this initial study can serve as a building block for the construction industry to have more insights and information relating to its contracts.

## PAY IF/WHEN PAID

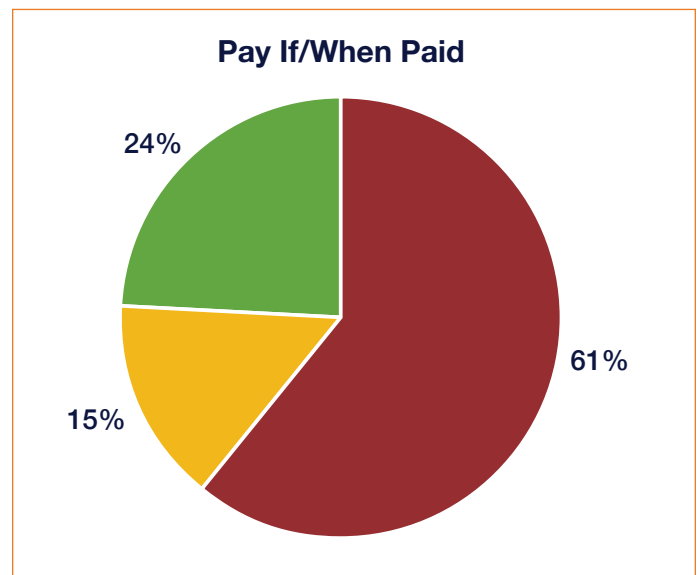
We analyzed provisions in which a party's right to receive payment for services rendered is somehow conditioned upon the payee's receipt of funds from another party. The criteria we used to assess these provisions is as follows:

- Best Practice** (**green**): There is no requirement or condition whereby payment to the Contractor by the Owner must occur before payment to the Subcontractor. In other words, there is no condition adversely affecting payment to the Subcontractor.
- Medium Practice** (**yellow**): There is a condition whereby the Contractor is to be paid by the Owner before being required to pay the Subcontractor. However, this falls short of a strict pay-if-paid clause (i.e., a strict condition

precedent does not exist within this framework, or there exists a clause providing that if the Owner does not pay within a reasonable time, through no fault of the Subcontractor, then the Contractor must pay).

- Deficient Practice** (**red**): A strict pay-if-paid clause exists with the absolute condition precedent to the Subcontractor's right to be paid if and until the Contractor is paid by the Owner.

What follows are the results of the documents analyzed by Document Crunch.



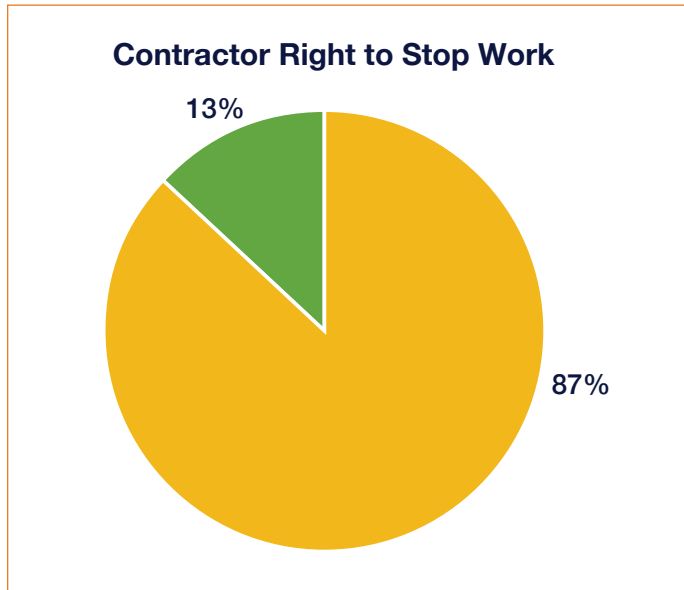
## RIGHT TO STOP WORK

We analyzed provisions to determine under what circumstances a Subcontractor is entitled to stop work due to a failure of timely payment. The criteria we used to assess these provisions is as follows:

- Best Practice:** The Subcontractor is expressly entitled to stop its work due to the Owner/ Contractor's failure to pay in a timely manner.
- Medium Practice:** There is nothing that either prohibits or expressly allows the Subcontractor to stop work in the event of non-payment.

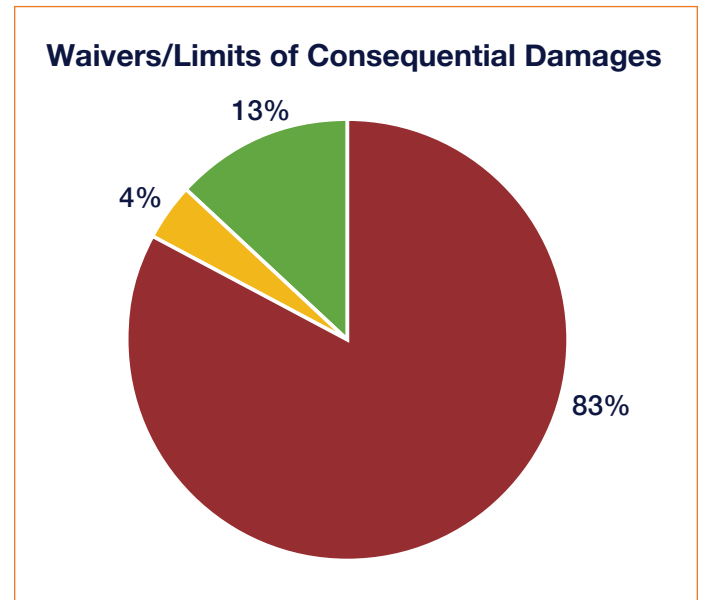
- c. **Deficient Practice:** There exists an ban prohibiting the Subcontractor from stopping work.

What follows are the results of the documents analyzed by Document Crunch.



- c. **Deficient Practice:** There is no waiver of consequential damages in favor of the Subcontractor, or the waiver of consequential damages/indemnity allows for the Subcontractor's exposure for the Owner's consequential losses under the prime contract.

What follows are the results of the documents analyzed by Document Crunch:



## WAIVERS/LIMITS OF CONSEQUENTIAL DAMAGES

We analyzed provisions in which either or both parties are expressly waiving, excluding, or foregoing in any way consequential, indirect, incidental, or special damages. The criteria we used to assess these provisions is as follows:

- a. **Best Practice:** There is a mutual waiver of consequential damages between the Contractor and the Subcontractor, with no carve outs except for liquidated damages.
- b. **Medium Practice:** There is a mutual waiver of consequential damages, but there are carve outs, such as "bad boy acts", to the extent covered by any insurance maintained by the Subcontractor, etc. This will also include scenarios where consequential damages are capped at a certain amount.

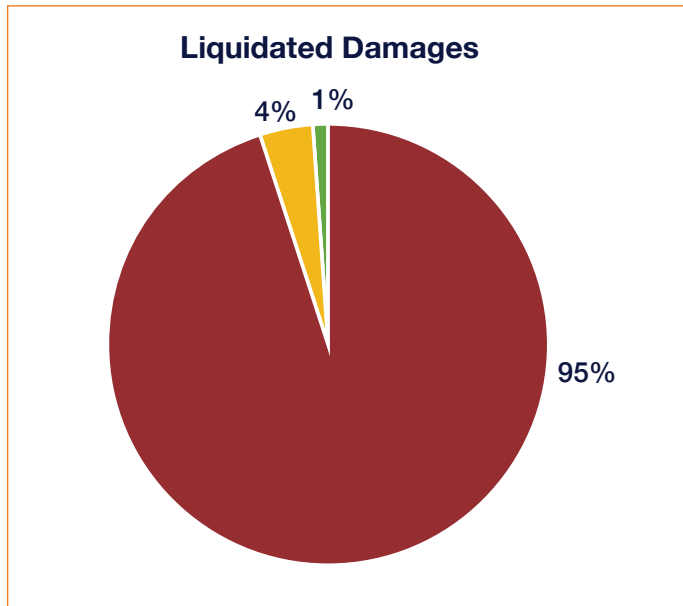
## LIQUIDATED DAMAGES

We analyzed provisions related to the Owner's or General Contractor's rights to liquidated damage as a result of delayed completion and failure to satisfy performance related guarantees, including any overall caps on liability for same. The criteria we used to assess such provisions were as follows:

- a. **Best Practice:** Liquidated damages are specified as the sole and exclusive remedy (in lieu of actual damages) for any project delay and are capped at an amount certain.
- b. **Medium Practice:** Liquidated damages are specified as the sole and exclusive remedy for delay, but there is no identified cap.

- c. **Deficient Practice:** Liquidated damages are not specified as the sole and exclusive remedy for any and all delays, or the liquidated damages are incorporated in the subcontract by reference only and nothing more.

What follows are the results of the documents analyzed by Document Crunch:



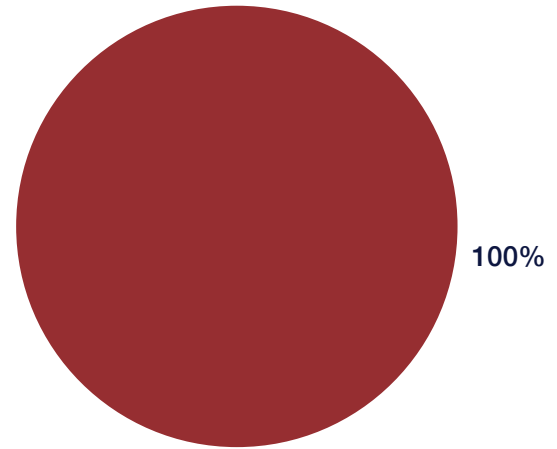
## LIABILITY CAPS

We assessed those provisions that place limits – a “cap” – on the total dollar amount for which a party could potentially be held liable with regard to damages arising out of the contract (not including liquidated damages). The criteria we used to assess such provisions were as follows:

- Best Practice:** An overall limitation of liability exists and is capped at an amount certain.
- Medium Practice:** n/a We view this as a binary standard.
- Deficient Practice:** No limitation of liability exists.

What follows are the results of the documents analyzed by Document Crunch:

### Overall/Aggregate Caps on Liability

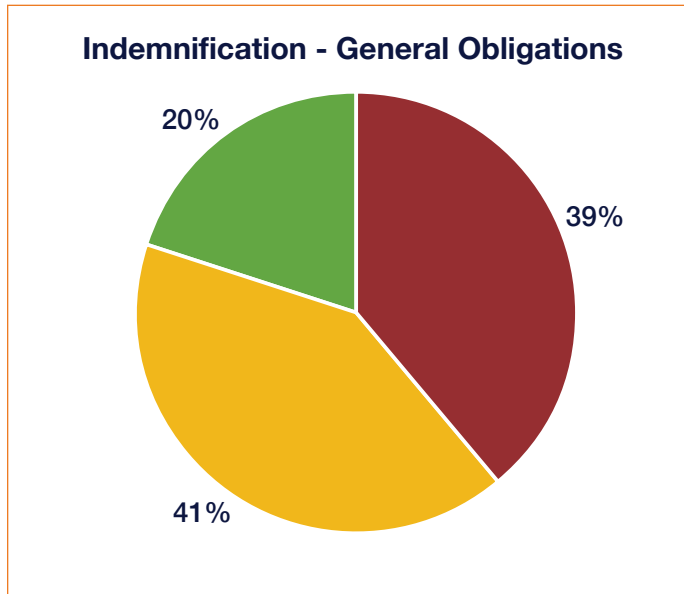


## INDEMNIFICATION – GENERAL OBLIGATIONS

We assessed those provisions relating to general indemnity/defense/hold harmless for claims and damages that arise out of the Subcontractor’s performance under the contract. The criteria we used to assess such provisions were as follows:

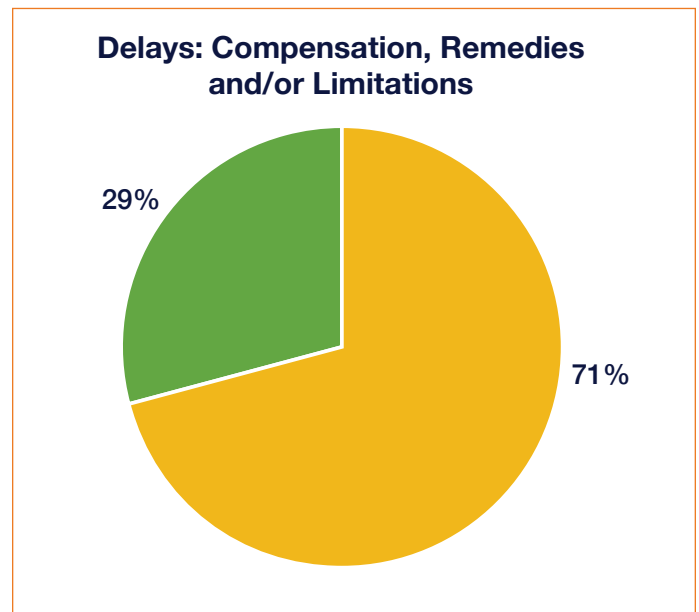
- Best Practice:** The Subcontractor is obligated to provide an indemnity only for property damage and personal injury, and only to the extent caused by the negligent acts and/or fault of the Subcontractor or its employees or subcontractors.
- Medium Practice:** The Subcontractor is obligated to provide a full indemnity as long as that Subcontractor is somewhat at fault (i.e., 10% at fault, owes 100% indemnity), and/or the indemnity is expanded for claims outside personal injury or property damage.
- Deficient Practice:** The Subcontractor is obligated to provide an indemnity even if it (or its sub-subcontractors) is not at fault, or the Subcontractor is required to indemnify the Contractor for the Owner’s consequential losses.

What follows are the results of the documents analyzed by Document Crunch:



- c. **Deficient Practice:** There are no damages for a delay clause that says the Subcontractor is not entitled to compensation for events outside of its control such as Force Majeure, weather, acts of the Contractor, or design deficiencies.

What follows are the results of the documents analyzed by Document Crunch:



## DELAYS: COMPENSATION, REMEDIES, AND/OR LIMITATIONS

We assessed those provisions pertaining to what delay events entitle the Subcontractor to relief by way of an extension of the schedule for performance and/or costs of the delay, and when such remedies may be limited or foreclosed. The criteria we used to assess such provisions were as follows:

- Best Practice:** The Subcontractor has equitable entitlement to schedule and cost relief for all events outside of its control including subsurface conditions, weather, acts of Owner/ Contractor, Force Majeure events, etc. (*Implied in this is that nothing expressly states that time is the only remedy (i.e. "no damage for delay" available to the Contractor).*)
- Medium Practice:** In some instances, the Subcontractor gets both time and money for delays (acts of the Owner, weather, etc.). In other instances, the Subcontractor's remedy is limited to just an extension of time for weather, concurrent delays, etc. The remedy is also limited if the subcontract is silent on the matter.

## SUBSURFACE CONDITIONS

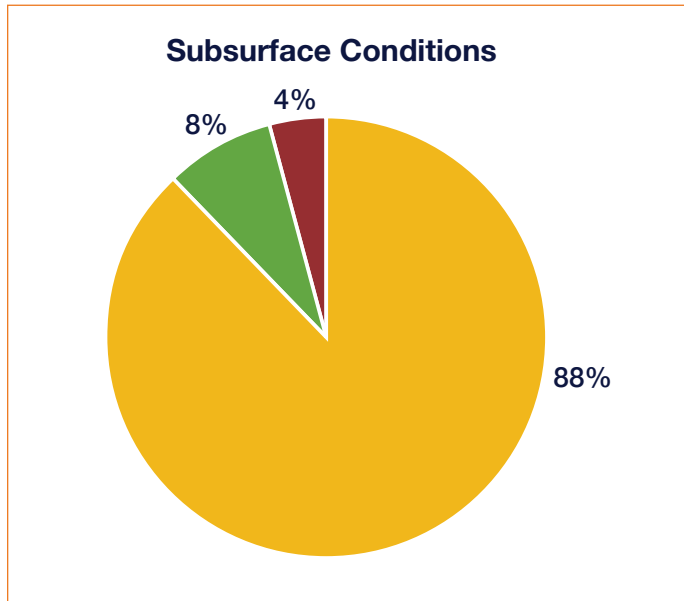
We assessed those provisions pertaining to responsibilities to detect subsurface or unforeseen site conditions and/or what happens if the Subcontractor uncovers a project site condition that is not depicted in the contract documents or expected to be a normally-occurring condition. The criteria we used to assess such provisions were as follows:

- Best Practice:** The Subcontractor is entitled to time and money relief should it encounter conditions that differ from what it reasonably should have known about.
- Medium Practice:** The Subcontractor is limited as to what relief it may achieve if it encounters an unforeseen condition. In another scenario, the Subcontractor is required to conduct its own subsurface testing, thus taking

on some risk even if it is entitled to relief in certain circumstances, or if the subcontract is silent on the matter.

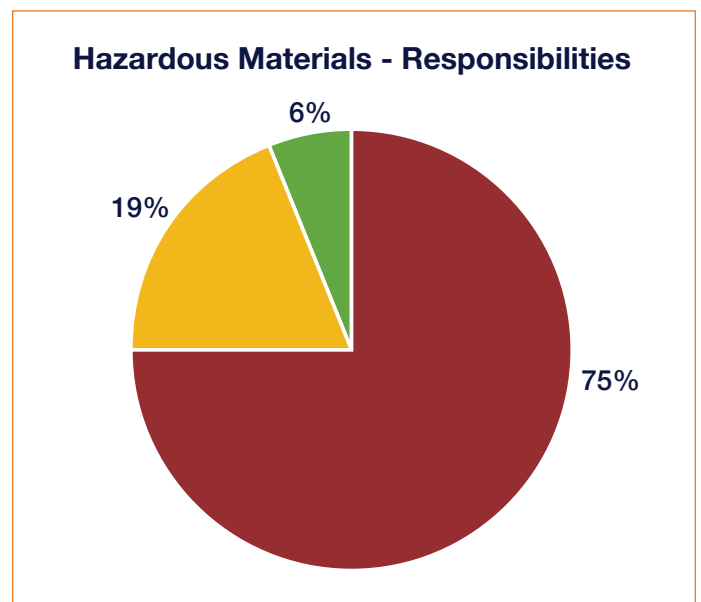
- c. **Deficient Practice:** The Subcontractor bears all site risk and is not entitled to any relief if it encounters unforeseen or latent conditions.

What follows are the results of the documents analyzed by Document Crunch:



- b. **Medium Practice:** There is a disclaimer that the Subcontractor is not responsible for hazardous abatement and/or that the Subcontractor is entitled to equitable adjustments from the Owner/Contractor to the extent the Subcontractor encounters such materials or that the Subcontractor can stop work pending further direction. However, in all instances, no indemnity exists.
- c. **Deficient Practice:** The Subcontractor is responsible for any hazardous materials onsite (the caveat being if the Subcontractor has committed to abatement, but this is still risky), or the contract is silent on hazardous materials.

What follows are the results of the documents analyzed by Document Crunch:



## HAZARDOUS MATERIALS – RESPONSIBILITIES

We assessed those provisions pertaining to what the Subcontractor should do if it encounters hazardous materials, any procedures to be followed, etc. This will include any indemnity/hold harmless framework related to such hazardous materials. The criteria we used to assess such provisions were as follows:

- a. **Best Practice:** The Subcontractor is entitled to a full indemnity from the Owner/Contractor to the extent the Subcontractor encounters pre-existing hazardous materials onsite (except to the extent of its own fault with regard to the materials).



## DESIGN RESPONSIBILITY

We assessed those provisions that address, disclaim, or clarify the Subcontractor's responsibility to undertake design as part of its scope, or to warrant the accuracy of the contract documents, or to state that the Subcontractor will comply with applicable provisions of law. The criteria we used to assess such provisions were as follows:

- a. **Best Practice:** Unless Design Build or a specific scope has been clarified and articulates that the Subcontractor is taking on a heightened responsibility, the contract should clarify that the Subcontractor is acting as a construction professional and not a design professional, and/or the contract should otherwise not provide that the Subcontractor is warranting the accuracy/consistency of the plans and specs.
- b. **Medium Practice:** Nothing implies that the Subcontractor is warranting plans and specifications, but there is no disclaimer language clarifying the standard.
- c. **Deficient Practice:** The Subcontractor has an affirmative obligation to warrant design documents, consistency of plans and specs, etc., and is liable for failure to do so.

What follows are the results of the documents analyzed by Document Crunch:

