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## **Strategies for Negotiating with EPC Contractors: Exclusive Remedies and Liquidated Damages**

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Alan's experience includes serving as in-house counsel for a Fortune 250 provider of EPC services, commercial leasing (office, retail and industrial) including tenant representation throughout North America, representation of one of the nation's largest title insurers, and litigation in state and federal district and appellate courts in Texas and Louisiana.

Alan is a frequent contributor to the Commercial Lease Law Insider and the Commercial Tenant's Lease Insider and he serves on the Board of Advisors for both publications. He is licensed to practice law in Texas and Louisiana. He obtained his JD from the Louisiana State University Law Center in 2001 and his undergraduate degree from the University of Texas at Austin in 1998.

## **Strategies for Negotiating with EPC Contractors: Exclusive Remedies and Liquidated Damages**

The EPC (engineering, procurement and construction) contracting model frequently is used for renewable energy projects because it establishes a single point of responsibility for issues bearing on time, cost and quality. An EPC contract normally includes detailed performance specifications and guarantees, along with a guaranteed completion date. In the event of project delays and/or performance failures, the developer need look no farther than the contractor and the specific guarantees included in the EPC contract. Most EPC contracts provide for delay liquidated damages to compensate the developer for losses sustained due to late completion of the project, and for performance liquidated damages to compensate the developer for losses sustained due to failure of the project to achieve specified performance guarantees.

EPC contracts that provide for payment of liquidated damages normally specify that the developer's exclusive remedy in the event of delay or failure of performance is the right to recover liquidated damages. Most EPC contractors also attempt to include exclusive remedy provisions in their contracts that limit the developer's right to recover for any failure of the contractor to the remedies specified in the contract. At first blush, it seems reasonable if you are specifying the developer's remedies in the contract, to limit the developer's remedies to those specified in the contract. For the reasons discussed below, exclusive remedies language should be avoided or modified to ensure the developer has recourse in the event of a failure by the contractor.

An exclusive remedies provision specifies the remedies available to the developer in the event of contractor default. Remedies not specified are unavailable. EPC contractors like to specify the remedies available for contractor default because it provides them with certainty about their exposure under the contract. An exclusive remedies provision like the example provided below might be buried in the "Miscellaneous" provisions found at the end of the contract.

### **Sample exclusive remedies provision:**

The remedies stated in the agreement are Developer's sole and exclusive remedies for any failure by Contractor to comply with obligations to Developer, and Developer hereby irrevocably waives any right to assert a claim against Contractor based on a legal theory that a remedy provided herein fails of its essential purpose.

The liquidated damages section of an EPC contract also might include exclusive remedies language. Contractors offering delay liquidated damages and performance liquidated damages typically seek to include contract language making the recovery of liquidated damages the developer's exclusive remedy for any delay and performance failure.

Exclusive remedies language is problematic for several reasons:

1. An exclusive remedies provision could prevent the developer from recovering any damages not specified in the EPC contract.

If an EPC contract includes an exclusive remedies provision, the developer must include in the contract a specific remedy for every potential contractor failure. When negotiating a multi-million dollar EPC contract it simply is not possible to identify each and every potential breach by the contractor along with the resulting damages. Even if it were possible to identify all potential failures and damages, no contractor would agree to include liquidated damages for every potential failure except in exchange for a substantial price increase.

2. The remedies specified in the contract could be unenforceable.

To be enforceable, a liquidated damages provision cannot be a penalty and the amount of damages must be reasonable and consistent with the actual or anticipated harm caused by the breach. If a developer's exclusive remedies for breach are the recovery of liquidated damages, and the liquidated damages specified in the EPC contract are invalid because they are deemed a penalty, the developer could be precluded from recovery of general damages for breach.

3. Liquidated damages are designed to compensate for a performance shortfall, but not a complete failure.

Performance liquidated damages are designed to compensate a developer for a facility that is operational, but at a reduced output. Performance liquidated damages do not adequately compensate a developer for defective design, equipment or construction, or for a condition that reduces the useful life of the project. Nevertheless, a contract which includes exclusive remedies language but specifies no damages other than performance liquidated damages could leave the developer with no remedy in the event the project satisfies the performance guarantees (evaluated prior to final acceptance), but subsequently fails due to faulty design or construction by the EPC contractor. Or, exclusive remedies language could relieve the EPC contractor of responsibility for a project that fails in its entirety upon payment by the EPC contractor of the liquidated damages specified in the contract.

Recommendations to developers:

General exclusive remedies provisions like the provision provided above should not be included in EPC contracts. Instead, developers should seek to include the following provision:

Remedies Cumulative: All rights and remedies provided in this Agreement are cumulative and not exclusive of any other rights or remedies that may be available to the parties, whether provided by law, equity, statute, in any other agreement between the parties or otherwise. Notwithstanding the foregoing, Developer's exclusive remedies for breach of the Performance Guarantees specified in Attachment A shall be the remedies specified in

Attachment A, and Developer's exclusive remedies for breach of the Schedule Guarantee specified in Attachment B shall be the remedies specified in Attachment B.

If the contract provides for delay and performance liquidated damages, it will be difficult to convince an EPC contractor to include the "Remedies Cumulative" provision without including the last sentence, which takes exception for the performance and schedule guarantees. The above provision is an acceptable compromise; however, if the remedies associated with the performance and schedule guarantees are narrowly defined so they only apply to the specific failures for which they are intended.

EPC contracts that provide for payment of schedule and performance liquidated damages also should include the following provision to account for the possibility that the liquidated damages provisions will be unenforceable:

If any provisions which provide for payment of liquidated damages are found for any reason to be void, invalid or otherwise unenforceable so as to prevent Developer from recovery of liquidated damages, Developer is entitled to recover from Contractor any damages recoverable at law for Contractor's failure described in the liquidated damages provision.

The above provision should entitle the developer to recover general damages at law for a performance or schedule failure if performance or schedule liquidated damages are held to be unenforceable. If the EPC contractor is unwilling to include the above language, it is acceptable to include language limiting the amount of damages recoverable to the amount of liquidated damages that would have been recoverable for the failure if the liquidated damages provision were not held to be unenforceable.

EPC contractors like including liquidated damages provisions in their contracts because liquidated damages provisions limit their exposure for schedule and performance failures. Although liquidated damages may be intended by the developer to apply only to specific failures, and not to preclude recovery for other failures under the EPC contract, EPC contractors will attempt to include contract language to limit the developer's recourse for any failure or breach to the liquidated damages specified in the EPC contract. Careful attention should be paid to any contract language discussing exclusive remedies available to the developer in the event of contractor breach. Contract provisions that specify remedies for specific failures should be narrow in scope to ensure the developer's recourse is not limited to liquidated damages.