

CONSTRUCTION AND THE LAW IN TEXAS

Trips and Traps for Contractors Negotiating Equipment Rental Agreement

Equipment Rental Agreements can be surprisingly onerous. When renting equipment, it is important to read and negotiate the terms of the rental equipment agreement. Frequently, the agreement is provided by the rental company and is the company's standard form agreement. These agreements tend to be drafted in a manner that strongly favors the lessor. Some of the obligations placed on the lessor, often referred to as the "customer", can be overly burdensome and inequitable. As such, contractors should beware of these common one-sided provisions and negotiate the agreement to eliminate or reduce the risks.

When reading a proposed lease agreement, like any contract, it is important to keep in mind who is in the better position to predict, control, or eliminate certain risks and who is in the better position to assume a responsibility for those risks under the contract. This common sense approach can make negotiating a contract much easier. If you can explain to the rental company why it is unfair or does not make sense for that the Customer to assume a particular risk, the chances that the lessor will agree to more equitable or practical terms and conditions may increase. A few examples of this negotiation are discussed below.

Provisions that Broadly Define Customer/Contractor's Possession

If time of possession is defined in the contract agreement to include a broader period than the Customer has actual control of the

equipment, then the risk associated with possession leans too heavily towards the Customer. Possession should start when the equipment is delivered to the Customer's control. If the rental company is delivering the equipment, but they define contractor's possession to start when it leaves the yard, the contractor could potentially be responsible for damage the rental company itself caused to its own equipment during delivery to a jobsite. This definition or term in an agreement should be modified to place the risk of damage on the party in actual control of the equipment when damage might occur.

Provisions that Place the Burden of Inspection on the Customer

Some rental companies require the customer inspect the equipment and identify any damage, missing parts or deficiencies in the equipment before using it. Anything not identified by the customer that is found by the rental company when the equipment is returned to it will be the responsibility of the customer. Placing the burden of inspection and identification of damage on the customer is not an equitable arrangement. The rental company should perform the inspection and identification of any damage because it is in a better position to identify any missing parts or deficiencies.

While, the inspection to identify pre-existing damage or deficiencies should be performed by the rental company, the customer should also perform its own inspec-

tion. It is prudent for the customer to also perform its own inspection and take photographs of the equipment when it takes possession and again when the equipment is returned so the customer has evidence of the condition of the equipment at both delivery and return. Similarly, provisions that require the customer accept the equipment on as "as is" basis should be stricken.

Provisions that Disclaim Rental Company Warranties and Obligations

As a threshold issue, rental companies should agree to provide the equipment in good working order. Lessees should strike any provision disclaiming this essential obligation. Further, the agreement should impose obligations on the lessor to promptly provide service for any required repair or replacement at the customer's project so that the lessor does not suffer lost time or harm due to inadequate or malfunctioning rental equipment. The agreement should also allow the customer to recover any damages suffered as a result of the lessor's failure to provide the equipment in good working order. Beware of and strike provisions waiving rights to recover these damages.

Addition waiver language that might appear in an agreement concerns damage to a Project caused by improper functioning equipment. This language often includes disclaimers of responsibility for damage to the jobsite or project that occurs during delivery or pick-up of the equipment. A more equitable provision would require any damage caused by the rental company's delivery or pick-up activities to be paid for by the lessor.

Provisions that Broadly Define the Rental Period or Expand It to Include Time of Repairs

Rental agreements often define the rental period to include time the machine is being repaired if it was returned with damage. This provision may be a disincentive to the lessor to repair damage with haste. A more equitable option would be for the customer to acknowledge liability for repair and lost rental opportunity, but only to a reasonable degree. This option can be accomplished by allowing the lessor to recover lost profit during the time of repairs while imposing obligations on the lessor to be diligent in effectuating repairs. Further balancing can limit the lessor's rights to lost profits to only those actually lost a rental of that equipment. If the



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A Balanced Approach to Construction Law.

lessor can demonstrate that (a) someone wanted to rent the damaged equipment but could not because it was down for repairs; (b) an alternate piece of equipment was unavailable, and (c) the lost revenue can be substantiated as a dollar certain, then the customer should agree to pay for charges since the damage would have been its responsibility.

In addition to the above-discussed terms, a lessee of construction equipment should also pay particular attention to collateral or ancillary agreements that a lessor may require before renting equipment. Insurance coverage requirements, credit applications, and personal or parental guarantees can all affect the ultimate liability and potential damages that a contractor or its principals may owe a rental company in the event of a claims. These potential costs require consideration when agreeing to the terms of a contract. 🐾

