



EQUITABLE RISK ALLOCATION



A LEGAL PERSPECTIVE



Construction Industry Institute

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Equitable Risk Allocation: A Legal Perspective

Construction Industry Institute
Contracting to Appropriately Allocate Risk Research Team

Implementation Resource 210-3

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Executive Summary

When allocating construction risks, appropriate allocation is often not achieved due to the inferior bargaining position held by lower-tier parties. Beyond this dilemma, the most appropriate and equitable allocation of a particular risk can vary from project to project depending on factors such as the type of risk, work, and contract. As a result, no single, appropriate allocation exists for a given construction risk for all projects. Unfortunately, arriving at a conclusive agreement between contracting parties as to the most appropriate allocation of a given construction risk for a specific project can be a cumbersome, albeit crucial, task.

Due to the problems associated with determining appropriate risk allocation between contracting parties, the Construction Industry Institute (CII) formed the Contracting to Appropriately Allocate Risk Research Team in an effort to encourage risk assessment and allocation in a compromising and educated manner, recognizing the unique circumstances of each specific project. By involving both the owner and the contractor in the risk allocation process, which should begin early in the project life cycle, both parties can avoid the increased costs associated with inappropriate risk allocation. To aid in this process, the research team developed the Two-Party Risk Assessment and Allocation Model, which encourages contracting parties to compromise during the risk allocation process.

This publication is meant to accompany the Two-Party Risk Assessment and Allocation Model by providing useful legal perspective references regarding both contract language and legal research. This book looks at the top 14 risks, identified as the “hot-button” risks, which are listed below in order of the most to the least frequently allocated in an inappropriate manner:

- | | |
|----------------------------------|---------------------------------------|
| 1. No Damages for Delay | 8. Cumulative Impact of Change Orders |
| 2. Consequential Damages | 9. Owner-Mandated Subcontractors |
| 3. Indemnity | 10. Insurance Allocation |
| 4. Ambiguous Acceptance Criteria | 11. Differing Site Conditions |
| 5. New or Unfamiliar Technology | 12. Design Responsibility |
| 6. Force Majeure | 13. Waiver of Claims |
| 7. Schedule Acceleration | 14. Standard of Care |

A contract language table was generated for each of the 14 “hot-button” risks. Various examples and/or concepts of contract language were analyzed and categorized according to perceived biases and compromises to help contracting parties consider the most pertinent risk issues and potentially identify “appropriate” compromising clauses.

The research team also developed legal perspective references that provide educational assistance to contracting parties. Those references are contained in this book. The highlight of the legal research for each risk is a legal issues and considerations flow chart. These charts help minimize much of the confusion and ambiguities surrounding the allocation of each risk, as well as denote which party may actually be carrying the associated risk in the eyes of the court.

Industry participants are encouraged to use this publication in conjunction with the Two-Party Risk Assessment and Allocation Model (Implementation Resource 210-2) or as an independent educational resource regarding risk allocation from a legal perspective.

Chapter 1: Introduction

The Purpose of this Implementation Resource

This publication is a result of CII research into risk allocation. It covers contract language and legal research for the 14 risks that are most often cited as “allocated inappropriately.” Accordingly, these risks can be thought of as possessing the most potential for spawning disputes during contract negotiations. It is intended as a guide for contracting parties so that they can become more aware of the associated risk issues from a legal perspective. It also will give contracting parties a better understanding of which party is really carrying a given risk and how the parties may reach a compromising position. Accordingly, the parties will be in a better position to draft appropriate contract language and compromising terms and conditions. This is not a legal book, nor does it purport to be a comprehensive digest of existing statutory or case law. What is ubiquitous is the common nature of the problems and it is in identifying the nature and implications of the problems that this study seeks to give the industry a basis for coming to common terms.

“Hot-Button” Risks

CII formed the Contracting to Appropriately Allocate Risk Research Team to develop a risk assessment and allocation model that will aid contracting parties in cooperatively identifying, assessing, and ultimately allocating risk on any specific project. The data collected by the research team yielded a list of 14 “hot-button” risks that are frequently allocated in an inappropriate manner. Table 1 displays the top 14 risks most frequently allocated in an inappropriate manner in ascending order from the most frequently to the least frequently as determined by various research inputs.

Table 1. Top 14 Risks Most Frequently Allocated in an Inappropriate Manner

Top 14 Risks	
1. No Damages for Delay	8. Cumulative Impact of Change Orders
2. Consequential Damages	9. Owner-Mandated Subcontractors
3. Indemnity	10. Insurance Allocation
4. Ambiguous Acceptance Criteria	11. Differing Site Conditions
5. New or Unfamiliar Technology	12. Design Responsibility
6. Force Majeure	13. Waiver of Claims
7. Schedule Acceleration	14. Standard of Care

Risk Allocation Tools

The research team noted the general lack of education surrounding the topic of risk allocation. As a result, a primary focus of the research was to develop a model that could be used as a learning tool to educate the industry on the legal issues surrounding risks commonly allocated in an inappropriate manner. Accordingly, the research team developed the two legal perspective references contained

here along with a database of risk allocation principles. These three risk allocation tools are to be used during and after the contracting parties have completed the risk assessment process developed by the team (see CII Research Summary 210-1 and CII Implementation Resource 210-2).

Risk Allocation Principles: A Risk Allocation Tool

The research team developed a list of risk allocation principles that will help negotiating parties decide which party is the appropriate party to assume each particular risk. These principles will get both contracting parties to consider the most important risk allocation concepts and ideas that have the most potential to be overlooked or disregarded. The principles are divided into two separate categories: (1) general risk allocation principles and (2) legal risk allocation principles.

General Risk Allocation Principles

- Many risks cannot be entirely eliminated, but can be controlled.

Example: Contracting parties will never be able to eliminate the possibility that a war will break out and halt the progress of a project in a particular geographical area. However, the possibility can be lessened by carefully selecting the geographical location of the project, while the potential financial impacts can be accounted for by drafting force majeure language that addresses the risk of war.

- Eliminating one risk may cause new risks to materialize.

Example: Suppose an owner wishes to completely avoid any and all liability for differing site conditions. Accordingly, the owner provides no representations of said site conditions, and contractually requires the prospective contractors to investigate the conditions for themselves and bid accordingly. Although the owner will have successfully shifted the risk of differing site conditions to the contractors, the owner will now have to hope that the bidding contractors do not severely overestimate or underestimate their increased contingencies. Both extremes could result in disaster to the project's success.

- Many risks are interdependent so it is important to evaluate risk dependencies to be able to predict the cumulative impact or “domino effect” that may materialize with the realization of one individual risk.

Example: If a project has a difficult time attracting skilled crafts to perform the work, a multitude of risks could materialize: delays, rework, increased project management costs, increased absenteeism rates and many other secondary risks will have an increased likelihood of occurring if unskilled craftsmen make up the majority of a project's work force.

- “Lessons learned” from inappropriate risk allocation should be meticulously documented.

Example: If a new, altered version of a contract clause is utilized for a project, litigation ensues and the resultant proceedings end with a court rendering an unfavorable, completely unforeseen verdict pertaining to the altered clause, the clause alterations and project circumstances that led to the ruling should be exhaustively recorded.

- The optimum allocation of many risks may involve shared responsibility.
Example: Similar to the trend of many courts to provide common law indemnification rights on a comparative fault basis, it is simply more efficient and equitable to share risks rather than to load a weaker, single party with the majority of risks.
- Ignoring a risk will not eliminate its potential costs. If a risk is not contractually allocated, it will be assumed, knowingly or unknowingly, by one or both of the contracting parties.
Example: If a risk is not allocated in a contract, parties often end up in arbitration or litigation to argue over the implied allocation. The U.S. legal system is based on a common law system that will assign the implied allocation according to the precedence established by previous case rulings. Depending on numerous project-specific circumstances, common law rulings may yield a sharing of liability or a complete shift.
- The optimum allocation of any particular risk may change from project to project depending on the unique circumstances of the project.
Example: A very clear example would pertain to limits of liability. Optimum limits of liability will vary from project to project depending on the available insurance policies and the financial capacities of the client and contractors involved.
- Any particular party ought to be able to assume a risk if that party: (1) understands the risk, and (2) an adequate reward exists for the assumption.
 - Adequate reward may come in the form of a risk/reward contractual arrangement or as a high probability for increased profit from the assumption of the risk.
Example: A severely schedule driven project, such as a semiconductor manufacturing plant project, will most likely have very high liquidated damages associated with late completion. Accordingly, a sophisticated contractor will recognize that its client has a large amount of earnings at stake, thus justifying the risk of large sums of liquidated damages being assessed. However, the client should also recognize that it has a lot to gain by on time or early completion, thus a contractual provision establishing a monetary reward for on time or early completion should be established to make it reasonable for the contractor to accept the risk.
- If the damages of a risk allocated to the contractor are foreseeable, the contractor has the responsibility to account for the risk in the bid price.
Example: If a contract holds a contractor liable for an owner's consequential damages, the contractor should account for the possibility of the damages materializing within its bid.
- Consideration should be given to the fact that in some cases it may be fiscally efficient for some owners to reallocate common risks between the parties upfront in exchange for a higher bid price or a contractual reward scheme.
Example: A casino project will typically carry very high liquidated damages for late completion. If a reward scheme is not implicitly established, an owner may still prefer to pay "extra" through an extremely padded contractor contingency rather than lower the liquidated damages sum and lessen the incentive for early or on time completion.

- Both parties should always consider the ability of the risk-bearing party (including insurance companies) to survive the materialization of the risk.

Example: Merely successfully shifting a risk to a party does not eliminate the risk that the assuming party may not be able to remain solvent if the risk should occur. This is precisely the reason why the private insurance sector refuses to insure flood damages and instead yields this role to the government. The widespread damage associated with a flood could easily force a private insurance company out of business.

- Owners should realize that shifting risk will often increase the contractor's price, and should determine whether such risks could be more cost-effectively accounted for with owner retention.

Example: Sophisticated contractors will typically recognize onerous contract terms and if negotiations are unsuccessful or not attempted, bid prices may significantly increase. Examples of such contract terms include no damages for delay clauses, non-waivers of consequential damages, and high liquidated damages provisions.

- The maximum possible loss for each risk should not be overlooked or confused with the maximum probable loss.

Example: The maximum possible loss for a risk is the worst case scenario. The maximum probable loss can be interchangeably defined with the "expected value" of a risk. Specifically, none of the associated project personnel accounted for the maximum possible loss associated with the collapse of the World Trade Center towers. Instead, the towers were designed and constructed according to the maximum probable loss.

- Parties should determine the potential for profit that each risk may or may not possess.

Example: Risk/reward schemes encourage amiable contracting relationships while providing clear incentives and disincentives pertaining to performance. Therefore, whenever possible parties should identify and utilize opportunities where an increase in risk assumption is directly correlated to an increase in potential monetary compensation. When potential for profit is considered for every single risk, the optimum allocation may not always be the most efficient (lowest bearing cost) or equitable (most control over risk) allocation, but may instead create the highest likelihood for project success (on time, on budget completion).

- To facilitate a non-controversial contractual relationship, contracting parties should strive for harmony among all contract clauses.

Example: An owner should not attempt to include a no damages for delay clause in conjunction with a liquidated damages clause. Essentially, this demonstrates to the contractor that it will be responsible for its delays to the project, while the owner will not take responsibility for delays it causes. This breeds a controversial relationship from the outset.

Legal Risk Allocation Principles

- Courts will construe provisions exactly as they are written (unless they are against public policy or statute). – *Stricti Juris*

Example: Unless illegal or ambiguous, courts will look at the plain and ordinary meaning of contract language in order to ascertain the intentions of the parties.

- Courts will only construe a contract provision in a manner that will do substantial justice to the parties. – *Strictisimus Juris*

Example: Courts will not interpret contract language to indicate an intention that clearly differs from extrinsic evidence speaking to an alternated agreed upon interpretation between the parties. In other words, a court will not construe ambiguous terms in their most unfavorable light.

- Specific contract language will be construed over general language.

Example: A broad clause that states that the contractor is responsible for providing all materials and labor for a project will not overrule a specific clause that states that the owner will provide certain enumerated materials for construction.

- General disclaimers are not usually enforceable.

Example: General disclaimers of the accuracy or sufficiency of site conditions provided by the owner will typically not be enforced by a court.

- By signing the contract, you have accepted what is in it. – *Caveat Emptor* – “Let the buyer beware.”

Example: A recent legal case reviewed by the author dealt with a design/build contractor’s complaint that unbeknownst to the design/build contractor, its contract with the owner contained both performance and prescriptive specifications. When the design/build contractor attempted to install the prescriptive work as performance-based work, the owner disputed the work. The court ruled in favor of the owner citing the fact that the contractor had not read the specifications closely enough to realize that they contained performance and prescriptive specifications.

- No contractual arrangement can reallocate intentional wrongdoings or illegal activities.

Example: No state will allow an indemnification clause to provide indemnification for willful acts that will knowingly cause harm to other parties.

- Contractual ambiguities will be construed against the drafting party. – *Contra Proferentem*

Example: If a clause in an owner-contractor contract ambiguously specifies the acceptance criteria for a project, the contractor will be allowed to rely on its own reasonable interpretation and the owner will assume all resultant increased expenses.

- If the contract is silent regarding damages, the offending party will be held responsible for the damages “reasonably foreseeable” as a result of their conduct.

Example: The most well-known example would pertain to consequential damages. If a contract does not address consequential damages, all contracting parties will be held responsible for damages that should have reasonably been foreseen as a result of actions or inactions of the parties. For example, if a vendor delays in delivering a piece of equipment to a manufacturing facility, the vendor will be held responsible for the lost profits that would have been averted if the machine would have been fixed on time. The vendor should have reasonably anticipated that its delay would have resulted in a loss in production and ultimately a loss in profits.

Legal Perspective References: Risk Allocation Tools

The first of the two legal perspective references developed is a set of contract language tables that give samples and concepts of contract language for all 14 of the “hot-button” risks. The contract language tables will assist contracting parties in drafting and negotiating compromising clauses by making them aware of the major contract language concepts and issues as perceived by the widely represented research team consisting of owners (public and private), contractors, subcontractors, attorneys, insurance/risk management representatives, and A/Es. Parties will also be able to reference the contract language tables for each of the 14 risks to receive guidance as to where an existing clause may fall on the continuum of appropriate or optimum allocation.

The second legal perspective reference is legal research on the U.S. judicial system’s attitudes surrounding 10 of the 14 “hot-button” risks. The main purpose of the legal research is to identify the major legal issues and considerations pertaining to each of the 10 risks researched. The secondary purposes of the legal research are to determine (1) how the U.S. judicial system will allocate a particular risk in the case that it is not allocated in the contract documents and (2) the exceptions to enforceability established by the courts when the risk is included in the contract documents. Due to the availability of massive amounts of data, the research team conducted legal research for only 10 of the top 14 “hot-button” risks, exclusively. The highlight of each risk discussion is the flow chart that summarizes the legal concepts that contracting parties should be most aware of.

Common Law Definition

Essentially, common law is case law or rules and standards determined by previous decisions in specific cases. Common law can be defined as the precedence established by court decisions over many centuries based not on statutory law, but on the decisions of judges. In this sense, the research team hopes to invoke Oliver Wendell Holmes as he asserted:

“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.” (Holmes, 1881)

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As stated above, **this study does not purport to constitute legal advice.** Additionally, the complexities of the facts underlying each particular construction dispute are such that even cases interpreting longstanding contract clauses may seem like a matter of first impression to the court. This study is intended to only educate the reader as to the general concepts discussed. It is not intended as a substitute for competent legal advice. Further, the suggested resolution of risk allocation set forth herein cannot be said to be the last word on the subject, but rather should represent a significant first step in approaching a reasonable allocation of risk that ultimately will set standards within the construction industry rather than allow the “law of the jungle” to prevail.

Chapter 2: Contract Language Tables

Introduction

The contract language tables are a critical tool when analyzing or drafting a construction contract clause involving any of the 14 “hot-button” risks. The research team investigated contract language clauses associated with each of the top 14 “hot-button” risks to identify clauses that seemed to contain a bias and clauses that seemed to provide compromising language. Accordingly, the contract language tables give examples and/or concepts of contract language for each of the top 14 risks that may 1) favor the buyer, 2) favor the seller, or 3) compromise. Typically, the buyer language favors the owner in an owner-general contractor contract or the general contractor in a general contractor-subcontractor contract. Conversely, the seller language typically favors the general contractor in an owner-general contractor contract or the subcontractor in a general contractor-subcontractor contract.

Research and Findings

The contract language tables were developed by reviewing existing standardized and privatized contracts and conducting phone interviews with four industry personnel thoroughly experienced with drafting and negotiating contract language for their respective organizations. These industry experts were all employees of CII member companies, with two interviews conducted with major owner organizations and two conducted with major contractor organizations. When applicable, the legal issues and considerations revealed through the extensive legal research were used to provide guidance for clause construction. Lastly, the wide representation of the CII research team was utilized to scrub the tables and ensure that all contracting parties’ interests were adequately expressed.

Application of Findings

The contract language tables can be used as a contract language negotiating point between buyer and seller parties who have identified one of the top 14 risks as a high concern that needs mutual attention to ensure appropriate allocation. The compromise language is suggested only and obviously provides no guarantee of success absent such factors as the good faith and ability to perform of the parties. Internally, an industry participant may find it useful to compare its company’s existing standardized clauses pertaining to each of the 14 “hot-button” risks to the contract language found in the contract language tables developed by the widely represented CII research team to determine where there are commonalities or disagreements.

The Contract Language Tables

The following pages contain the contract language tables developed for each of the top 14 “hot-button” risks. The contract language tables are organized from the most to the least frequently allocated in an inappropriate manner, beginning with the “No Damages for Delay” contract language table. At the top of each table, a list of “issues” has been compiled. These “issues” should be considered when negotiating clauses while referencing the 14 contract language tables.

1. No Damages for Delay		
ISSUES: Time only v. time and money, notice provisions, fixed schedule of compensation, foreseeability, owner cooperation, active owner interference (“inexcusable incompetence”), contractor contingencies, subcontractor contingencies, length of delay before compensation (or) as an exception to the clause, owner-financing considerations (price-certainty), excusable v. non-excusable delays...		
Favors Buyer	Compromises	Favors Seller
Language that provides time relief only to a contractor from owner-induced delays. All other damages indirectly or directly related to the delays are non-recoverable. <i>“No interruption, interference, inefficiency, suspension or delay in the commencement or progress of the Work under this Contract, from any clause whatsoever, including those for which Owner may be responsible in whole or in part, shall relieve Contractor of its duty to perform this Contract in accordance with the terms of the Contract Documents, or give rise to any right to damages of any kind or nature from Owner. Contractor expressly acknowledges and agrees that it shall receive no damages for delay. Contractor’s sole remedy against Owner for delay shall be the right to seek an extension in the Contract Schedule. Granting of any such time extension shall not be a condition precedent to this no damages-for-delay provision. This no-damages-for-delay provision shall apply to claims for early completion, as well as claims based on late completion. It is expressly acknowledged and agreed to by Contractor that a material inducement to Owner to enter into this Contract is this no-damage-for-delay provision.”</i>	- Language that contains limits/ exceptions of recovery for delay damages (\$ and time). Language may also include a requirement governing the level of proof necessary to demonstrate delay (or) it may define how monetary recovery is to be calculated to exclude items such as profit, or certain overhead cost elements. If a time extension is part of the agreed upon remedy for owner-induced delays, the contract should specify a reasonable timeframe in which the extension must be granted. - Language that provides “equitable adjustment” for owner-induced delays. <i>“Contractor shall be entitled to equitable adjustments in Contract Price and Contract Schedule in the event Contractor is delayed or impacted due to acts by Agent, Owner, or third parties under Agent or Owner’s control at the work site or by changes in laws or regulations that are made following the execution of this Contract.”</i>	Language that establishes a fixed schedule of compensation for owner-induced delays. <i>“For each day that the Contractor is delayed by the Owner or Owner’s agents, the Owner will pay the Contractor a fixed sum of \$XX,XXX per day of delay.”</i>

2. Consequential Damages		
ISSUES: Owners have more to lose/owners have more to gain, reasonable foreseeability, reasonable certainty, liquidated damages, home office overhead, limits of liability, specific events v. “catch-all” phrases, insurance...		
Favors Buyer	Compromises	Favors Seller
- If there is no language addressing consequential damages, the contractor is put at a high disadvantage. In some projects (i.e., casino, power, semiconductor) an owner’s consequential damages can reach millions of dollars a day. - Language that specifically states that the owner will be allowed to collect consequential damages (regardless of if the contractor is also allowed to collect its consequential damages).	Language that contains a mutual waiver with the contractor responsible to the owner for performance and delay liquidated damages. These liquidated damages may cover loss of profit and loss of product and should capture reasonably estimated damages. Regarding the magnitude of liquidated damages, consideration should be given to ensuring incentive for performance while making allowance for the contractor to remain solvent if the liquidated damages are assessed. Also, insurance should be sought to provide limited liability protection to the contractor. The language below also does not disallow the contractor to collect extended home office overhead costs. <i>“Except to the extent that liquidated damages provided for in the Contract, Owner and the Contractor waive all claims against each other for consequential damages. By way of illustration, but not limitation, consequential damages includes: (1) Owner’s loss of profit, economic loss, loss of reputation, loss of goodwill, loss of revenue, business interruption, arising out of or related to the Contract Documents, and (2) Contractor’s loss of profit, economic loss, loss of reputation, loss of goodwill, loss of revenue, loss of financing, increased financing costs, business interruption, and/or loss of management or employee productivity or of the increased cost of the services of such management or employee productivity arising out of or related to all of the Contract Documents. Nothing herein shall be construed to limit Contractor’s liability for damages for third party claims that may be asserted against the Contractor or Owner, including bodily injury or damage to tangible property arising out of, results from, or related to the negligence, errors or omissions or services provided by Contractor.”</i>	- Language that waives the owner’s right to consequential damages, but allows the contractor to collect its consequential damages. - AIA mutual waiver language that allows the owner to collect liquidated direct damages only. However, by nature liquidated damages are used to estimate indirect or special damages (consequential damages) not known at the time the contract is executed. Therefore, this ambiguous language may be construed to eliminate liquidation of consequential damages for the owner. <i>“The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes: (1) damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and (2) damages incurred by the Contractor for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work. This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.”</i> <i>(AIA: A201-1997, ¶4.3.10 – With the phrase “for principal office expenses including the compensation of personnel stationed there” deleted)</i>

3. Indemnity		
ISSUES: Worker's compensation, broad-form clauses, intermediate clauses, comparative clauses, active and passive negligence, statutes (Illinois' Scaffold Act), public policies, insurance, Owner-Controlled Insurance Programs, Contractor-Controlled Insurance Programs...		
Favors Buyer	Compromises	Favors Seller
"Broad-form" language that requires indemnification for the owner even if the owner is solely negligent and the contractor has "zero" negligence. In other words, the event could be caused in whole or in part by the owner's negligence, but the owner would still be indemnified. <i>"The Contractor agrees to indemnify and hold harmless the Owner, its officers and agents, against any claim for injury or damage to persons, corporations or property arising out of the performance of the work on the Project, regardless of whether the injury or damage is caused in whole or in part by the act or negligence of the Owner, its officers or agents."</i> "Intermediate" language that requires the contractor to indemnify the owner unless the injuring event is caused by the sole negligence of owner. Therefore, if the owner is 99% at fault, the contractor must still indemnify the owner completely. <i>"To the fullest extent permitted by law, Contractor shall protect, defend, indemnify, and hold harmless Owner, its agents, employees, subsidiaries, consultants (including the AE), representatives, shareholders, directors, officers and each of them (collectively "Owner Indemnitees"), from and against any and all claims, damages, losses, costs, and expenses (including reasonable legal, accounting, consulting, engineering, and investigatory costs and other expenses) that arise out of or relate to any act or omission by Contractor or any Subcontractor or any employee, officer, agent, representative, or consultant of any of them, that results in personal injury (including bodily injury), death, or property damage irrespective of proportional fault, except to the extent that such claims, damages, losses, costs, and expenses are caused by the sole negligence of Owner."</i> "Intermediate" language that provides indemnification for the owner and contractor from the subcontractor. Subcontractor must fully indemnify even if the event is caused in part by the owner and/or contractor. No indemnification is provided if the event is caused by the willful misconduct or sole negligence of the owner or contractor. The same contract provides NO mutual indemnification for the subcontractor.	- The best compromising language would specify "knock-for-knock" for the people piece, possibly with limitations, except in the case of gross negligence or willful misconduct. Also, the contractor's liability for damage to the owner's existing property should be capped except in the case of gross negligence or willful misconduct. Lastly, the contractor's third-party liability should be capped, except in the cases of gross negligence or willful misconduct. - An Owner-Controlled Insurance Program or Contractor-Controlled Insurance Program would both constitute as a compromise accounting for indemnification concerns.	This type of clause would be an intermediate or broad-form clause drafted in the favor of the contractor.

3. Indemnity (continued)		
Favors Buyer	Compromises	Favors Seller
<i>"SUBCONTRACTOR hereby releases and shall indemnify, defend and hold harmless CONTRACTOR, OWNER and their subsidiaries and affiliates and the officers, agents, employees, successors and assigns and authorized representatives of all the foregoing from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interest, attorney's fees, costs, expenses, and losses of whatsoever kind or nature in connection with or incidental to the performance of this subcontract, whether arising before or after completion of the Work hereunder and in any manner directly or indirectly caused, occasioned, or contributed to in whole or in part, or claimed to be caused, occasioned or contributed to in whole or in part, by reason of any act, omission, fault or negligence whether active or passive of SUBCONTRACTOR, its lower-tier suppliers, subcontractors or of anyone acting under its direction or control or on its behalf.</i> <i>The foregoing shall include, but is not limited to, indemnity for:</i> <i>1. Property damage and injury to or death of any person, including employees of CONTRACTOR, OWNER, or SUBCONTRACTOR.</i> <i>2. The breach by SUBCONTRACTOR of any representation, warranty, covenant, or performance obligation of this subcontract.</i> <i>SUBCONTRACTOR'S aforesaid release, indemnity and hold harmless obligations, or portions or applications thereof, shall apply even in the event of the fault or negligence, whether active or passive, or strict liability of the parties released, indemnified or held harmless to the fullest extent permitted by law, but in no event shall they apply to liability caused by the willful misconduct or sole negligence of the party released, indemnified or held harmless.</i> <i>SUBCONTRACTOR specifically waives any immunity provided against this indemnity by an industrial insurance or workers' compensation statute."</i>		

4. Ambiguous Acceptance Criteria		
ISSUES: Guaranteed maximum price (GMP) v. cost-reimbursable, performance v. prescriptive specifications, adequate definitions of mechanical completion, substantial completion, and contract or final completion, patent ambiguities, reasonable interpretations, Contra Proferentem, reliance...		
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- Language may specify that the contractor should perform until the work is “deemed acceptable by owner.” - Language may specify that acceptance will occur when the work is “to the owner’s satisfaction” or “fit for purpose.” These types of acceptance phrases are especially troublesome in lump sum or GMP contracts because the owner may continue to delay acceptance by using the punchlist to its advantage – thus eating away at the contractor’s profit. However, in a cost-reimbursable contract, if the owner is going to require additional efforts to be made before acceptance is rewarded; the contractor will most likely be paid unless there is some other issue present that causes the owner to assert that the contractor performed the work negligently the first time.	- Language that states that the contractor shall construct and deliver the work “in accordance with the contract specifications.” This makes the contract documents the “approving” party. - Generally speaking, when acceptance criteria language is well-defined, every party benefits. The contractor benefits because it feels that it has something at stake, and the owner benefits because it has assurance that it will get what it pays for. - Acceptance criteria that cannot be measured should be avoided. Relative and qualitative terms such as “good” or “acceptable” should not be used. - The terms “mechanical completion,” “substantial completion,” “contract or final completion,” and “final acceptance” should always be defined in an unambiguous, measurable manner. - Language should be inserted that states that an unqualified acceptance of work under the construction contract will prevent an owner from recovering the cost of remedying defective work, but acceptance with the understanding that certain defects or deficiencies will be corrected will not bar recovery. - In process-oriented work, language should specify the “performance” that needs to be achieved (performance specifications) by the completed product. For example, no more than X parts per million of carbon dioxide should be produced as a by-product of some sort of process. If the specific output requirements are not met, the contractor should be contractually required to pay liquidated damages based on the “gap” in efficiency of the process; however, the contract should specify an extended testing period before performance liquidated damages are assessed. This gives the contractor a chance to correct defects at its own cost. When a performance specification is not met in a design-build contract, the contractor should be required to redesign at its own cost until it meets the performance criteria. Note: if the work involves owner-specified new or unfamiliar technology, refer to the “new or unfamiliar technology” contract language table. The risk of performance of owner-specified new or unfamiliar technology should remain with the owner as long as the technology was constructed with appropriate, quality means and methods.	- Language that is looser than “in accordance with the contract specifications.” For example, “when the contractor deems the work acceptable or complete.” - Language that states that after the contractor installs its work its contractual responsibilities are complete. This rarely occurs, because it is bad business, and no owner will accept this type of language. - For process-oriented work, language that omits performance testing requirements. For example, if a mechanical contractor puts in pipes, but is not required to leak test them.