



## **Risk Tip 2.**

### **The Danger of Improper Contract Risk Allocation**

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As engineers working in the design and construction industry, you know the value of properly drafted contracts. The contracts should accurately identify the respective roles and responsibilities of each of the project participants. The collection of project tasks, duties, obligations, scopes, and levels of services, when properly choreographed and properly executed, result in a constructed project that all participants can take pride in.

Among the most important commercial consideration is the allocation of risks among the various participants. A generally accepted maxim of good contracting practices is that a particular risk should be allocated to the party in the best position to control that risk. Adhering to this maxim results in a fair allocation of risks that can be evaluated, managed and most importantly – priced. Problems begin when one party attempts to gain a short term advantage through unfair contract provisions that upset equitable risk allocation.

Your firm's exposure to inappropriate risk can be affected by the terms and conditions of the owner-constructor agreement. For example; a no damages for delay clause in an owner-constructor agreement that allows for a time extension only when the project is delayed by the owner will likely cause the constructor to pursue others including the engineer to recover the costs associated with any other types of delays. These might include delays due to weather or other matters over which none of the project participants could possibly control. Likewise, a contractual provision precluding recovery for differing site conditions encountered during a project may cause the constructor to seek its recovery from the engineer as well as its subconsultants on the theories of negligent misrepresentation. Delay or differing site risks that are not due to mistakes by any of the project participants should be properly and fairly born by the owner. If the owner abrogates this traditional responsibility, the risk to the engineer increases. Accordingly, it is important to discuss with the owner during your contract negotiations what the owner intends to have as general conditions in the constructor agreement. If the owner is insistent upon harsh, one sided general conditions then you may need a defensive strategy in your design development and drafting of construction documents to guard against claims for delays and extras.

Indemnification provisions also require careful scrutiny. Owners frequently try to shift all risk of third party claims to engineers through these provisions. Most engineers are more than willing to stand behind their work and indemnify owners for claims that arise out of the engineer's negligence. However a duty to defend and indemnify the owner for any and all claims arising

out of the engineer's activities would mean having to indemnify the owner for the portion of the claim that is caused by or contributed to by the owner's actions. This is a risk over which the engineer has no control and is uninsured.

Similarly, it is important to obtain indemnification from your subconsultant for losses that you or the owner incurs as a result of the subconsultant's negligence. This proper "flow down" of the indemnification risk is an important part of contractual risk allocation.

As an engineer, you are called upon to provide your services in accordance with the so-called "professional standard of care". This standard is not a guarantee of perfection. Be on guard for provisions that would tend to heighten the standard of care, such as the owner's satisfaction being required, or warranting a certain result, return of investment, or performance that is beyond your control. A "time is of the essence" provision in your agreement can unfairly force you to work with incomplete information or faster than good engineering practice would otherwise allow. Such a contract provision needs qualifying wording to comply with the engineering standard of care.

Finally, there are certain risk allocation provisions that, while generally accepted and understood to be the norm in the industry, ought to be affirmatively spelled out in an engineering services agreement. For example, having an unambiguous affirmation that the engineer is not responsible for site safety might allow the engineer to get a summary judgment dismissal from an otherwise long, expensive litigation and trial associated with a catastrophic injury occurring at the project site.

Reviewing and scrutinizing a contract for unfair provisions requires diligence and tenacity. The result, however, of knowing that project risks are fairly allocated can be very comforting when problems do arise on the project.

***This Risk Tip is intended to provide current and accurate information to assist the reader in becoming more familiar with the subject matter. It is informational only and not intended to substitute for technical, legal, or risk management professional advice. The reader is encouraged to consult with an attorney or appropriate professional consultant to explore this information further.***

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