Construction Claims Avoidance:
Or How to Make Molehills Out of Mountains

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Traditional Organizational Chart

Owner ——— Designer

General Contractor

Trade Contractor  Trade Contractor  Trade Contractor  Etc.
Multiple Primes Chart

Construction ——— Owner ——— Designer
Manager

Trade Contractor  Trade Contractor  Trade Contractor  Etc.
Construction Manager At Risk

Owner ——— Designer

Construction Manager

- Trade Contractor
- Trade Contractor
- Trade Contractor
- Etc.
Contract Clauses

• Implied Contract Obligations
  – Owner not to delay or obstruct contractor
  – Contractor to perform in good and workmanlike manner
Contract Clauses

• Implied Contract Obligations
  – Owner’s failure to provide adequate plans and specifications
    • The Longeran case vs. the Shintech case
Contract Clauses

• Implied Contract Obligations
  – No implied duty of good faith
  – Disclaimers
Contract Clauses

• Differing Site Conditions
  – Equitable allocation of unknown risk
  – Pros and cons of inclusion
Contract Clauses

• Differing Site Conditions
  – Type I
    • Conditions materially different from contract indications
  – Type II
    • Unusual conditions not ordinarily encountered
Contract Clauses

• Differing Site Conditions
  – Site inspection obligations
  – Disclaimers
Contract Clauses

- Exculpatory Clauses
  - Indemnity
  - No Damages for Delay
  - Disclaimers of Liability
  - Limitations of Liability
Contract Clauses

• Exculpatory Clauses
  – Indemnity
    • Express negligence doctrine
    • Fair notice
Contract Clauses

- **Indemnity**
  - Clause must be conspicuous or provide fair notice
    - Must be apparent to a reasonable person
  - Clause must satisfy express negligence test at time of contract signing
AIA A201 General Conditions Indemnity (1987)

3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them, from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.
Indemnity Clause

In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court upheld the following language as satisfying the express negligence doctrine:

Contractor [PPI] agrees to hold harmless and unconditionally indemnify COMPANY [ARCO] against and for all liability, cost, expenses, claims and damages which [ARCO] may at any time suffer or sustain or become liable for any reason of any accidents, damages or injuries either to the persons or property or both, of [PPI], or of the workmen of either party, or of any other parties, or to the property of [ARCO], in any matter arising from the work performed hereunder, including but not limited to any negligent act or omission of [ARCO], its officers, agents or employees.
• Indemnity
  – Texas Civil Practice & Remedies Code Section 130.002
    • Invalidates attempt to have contractor indemnify A/E for liability for personal injury or property damage arising from A/E negligence in preparing plans and specs or in contract administration
Contract Clauses

• Indemnity
  – If owner requires indemnity for owner’s negligence, buy insurance
  – Indemnity for owner’s negligence also covers gross negligence
Contract Clauses

- Exculpatory Clauses
  - No Damages for Delay
    - General rule
    - No damages for delay clause at work
Contract Clauses

• Exculpatory Clauses
  – No Damages for Delay
    • Exceptions
      – Delays not contemplated
      – Owner’s active interference
      – Bad faith
      – Intentional misconduct
Contract Clauses

• Exculpatory Clauses
  – Disclaimers of Liability
    • No damages for delay
    • Defects in plans and specifications
    • Extra costs
    • Soil conditions
    • Regulatory changes
    • Shifting of risk
Contract Clauses

• Exculpatory Clauses
  – Limitations of Liability
    • Liability limited to fee
    • Liability limited to insurance proceeds
    • Liability limited to set amount
    • Liability on comparative negligence basis
Extras and Changes

• Scope of Work
  – The Devil is in the Details
Extras and Changes

• Constructive Changes
  – Change that only one side recognizes
Extras and Changes

• Pricing
  – Examine Contract Terms
  – Unit Prices from Bid
  – Negotiated Amount
  – Time and Materials
Extras and Changes

• Change Orders, Exceptions and Reservations
  – Exceptions
    • Quantum meruit
    • Waiver
    • Breach of contract
    • Oral Contract
    • Promissory Estoppel
Contract Clauses

• Termination for Convenience
  – Allows owner to terminate contract for owner’s convenience
  – Limits owner’s liability to specified amount
Contract Clauses

- Final Payment as Waiver of All Claims
  - Contractor’s acceptance of final payment may waive all claims against owner
Contract Clauses

- **Attorney’s Fees**
  - Texas law provides for attorney’s fees for recovery of money under contract
    - Expert costs not included
  - Clause may permit recovery of expert and internal management costs
Contract Clauses

• Lien Waivers
  – Pre-waiver of lien rights at signing of contract
    • Enforceable under Texas law
Avoid Ambiguous Contract Clauses

- Read the Contract
  - Find ambiguous terms or words
    - “May”
  - Imprecise terms
  - Indefinite scope
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