



Risk Assessment and Management: Developing Contract Terms

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Legal Affairs Seminar – Austin, TX
February 25, 2013



MAKING IT HAPPEN.

Risk Workshop for Contract Drafting

- Identify Project Goals
- Identify risks
- Prioritize
- Take steps to reduce risks
- Decide how to allocate risk
- Consider effect of limitations of liability

Identifying and Prioritizing Risks

RISK	Likelihood of Occurrence	Severity	Rating
Differing site conditions			
Permits/ Design Approvals			
Utilities			

Steps To Reduce Risk

- What can the owner do, in advance of contracting, to reduce the likelihood of the risk or magnitude of impact?

Issues To Consider in Allocating Risk

- Cost to complete
- Delay in completion
- Inability to complete
- Direct and consequential damages
- Third party injury
- Is contractor liability limited?
 - By contract?
 - By limited assets?
 - By statute?
- Can risk be transferred to third parties?

Risk Allocation Questions

Who can best control the risk?

Who can best manage the risk?

Are contractors willing to assume the risk?

How much will it cost?

- Differing site conditions
- Force majeure
- Hazardous materials
- Paleo/archaeo/bio
- Permits
- Railroads
- Right of way
- Utility relocations

Difficult/Impossible To Shift Certain Risks to Contractors

- Owner-directed changes
- Major environmental permits
- Major force majeure (including injunctions and changes in law)
- Unknown hazardous waste
- Legal constraints (differing site conditions, owner-caused delays, *Spearin* doctrine, utility issues)

Transfer of Risk to Third Parties

- Agreement to perform work
- Agreement to pay for work
- Agreement to assume liability
- Liability as a matter of law
- Performance security and insurance

Risk/Responsibility Matrix

Coordinating with Railroads					
Entering into Master Utility Agreements; Entering into Individual Agreements					
Identifying Utilities; Verifying Location of Utilities					
Coordinating With Utility Owners					
Utilities Requiring Relocation Because of Design Changes					
Performance of Utility Design and Construction Work					
CONSTRUCTION					
Quality Control and Quality Assurance					
Construction Survey					
Control Survey					
Supply of Equipment, Materials and labor					
Owner-Provided Items					
Coordination of Construction					
Coordination with other work					
Coordination with outside work					
Design Changes Affecting Construction Already Underway					
Differing Subsurface Conditions					

Performance Security/Insurance

Type	What is covered
Performance bond Parent co. guaranty Letter of credit	failure to perform
Payment bond	failure to pay subs
Builder's risk ins.	damage to project
CGL	third party liability
Auto/RR/aircraft	property damage, third party liability
Professional liability	faulty design
Worker's comp.	injury to workers
Pollution liability	third party liability

Best Practices and Lessons Learned

- How should contractual risk allocation process connect with RM process?
- How should attorneys/contracting officers be involved in RM process?
- How does RM connect with business case analysis for P3s?
- Examples:
 - Exclusion of lawyers from initial RM process may lead to inaccurate assessment of risk
 - Inefficiencies in contract drafting where risk allocation decisions are deferred

Contact

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