“Killer” Contract Clauses

Firestop Contractors International Association
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“Killer” Contract Clauses
The Top Ten Killer Clauses for Firestop Construction Contracts

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In an ideal “subcontractor” world...

Contractor– Subcontractor Agreement

“Subcontractor will perform its scope of work in a timely and workmanlike basis, for no more than the maximum price quoted unless the Owner/Contractor changes the scope of work or otherwise hassles the Contractor or Subcontractor. Contractor will be a good guy and let the Subcontractor make a reasonable profit for the work. If all goes well, Contractor and Subcontractor will build lots more projects together down the road.”
Construction “Contracts” look like telephone books and are equally impenetrable

Not only define the responsibilities and rewards for performance,

But also identify and allocate the numerous risks of performance.

Buried in the pages of fine print lurk many “traps for the unwary”.

Often “one sided” in favor of the “other guy” – allocating risks in an unreasonable and unfair manner!
In the “real” world…

Our task today:

“How to”:

- Identify and recognize some of the most burdensome of such unreasonable and unwarranted “risk shifting” language in construction contracts

- Respond and react to such proposed language to avoid assuming unreasonable risk.
Starting Propositions:

1. **Gather all** proposed ‘contract documents”

2. **Read – and understand** - the affects of all proposed contract language

3. All proposals and bids – if permitted – must **take specific exception to undesirable contract language.**

4. **Tie your “$$” to your terms** – or at least do not acquiesce to the other guy’s unreasonable language:
In the “real” world...

Starting Propositions:

4. Options:
   a. Attached “Qualifications, exceptions”:
      (1) Specific exceptions
      (2) “Addendum” (generic or contract specific)
      (3) Propose alternative form of Agreement, general conditions
   b. “Pre bid letter”
Starting Propositions:

5. Finally – be prepared to walk away from a bad deal – too much uncontrollable and unmanageable risk!
1. “No Damage for Delay” Clauses

The Contractor: “You must bear the [VERY REAL, AND OFTEN SUBSTANTIAL] costs of any delays in performance – even if I have caused them!”
THE PROBLEM

Causes of delay can be:

“Excusable” (beyond the control of either party) for which a time extension is allowed; or

“Compensable” (due to the fault of one of the parties, but not the other) for which the resulting costs due to delay may be allowable.

But, even if the other party caused the delay (e.g. by changes, by design problems, interference, etc.), if the contract includes a “NDFD” a time extension may be the only relief available.
Example One (emphasis added):

Neither [Owner], its representatives or agents or the Contractor shall be obligated or liable to the Subcontractor for, and the Subcontractor hereby expressly waives any claims against them, on account of any damages, costs or expenses of any nature whatsoever which the Subcontractor, its sub-subcontractors or any other person may incur as a result of any delays, interferences, suspensions, rescheduling, changes in sequences, congestion, disruptions or the like arising from or out of any act or omission of [Owner], its representatives or agents, or the Contractor it being understood and agreed that the Subcontractor’s sole and exclusive remedy in such event shall be an extension of the Contract Time, but only in accordance with the provisions of the Contract Documents.
Example Two (emphasis added):

If the progress of the Subcontractor’s Work is substantially delayed without the fault or responsibility of the Subcontractor, then the time for the Subcontractor’s Work shall be extended by Change Order to the extent obtained by the Contractor under the Contract Documents and the Schedule of Work shall be revised accordingly. The Contractor shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays unless the Contractor has first recovered the same on behalf of the Subcontractor from said person, it being understood and agreed by the Subcontractor that, apart from recovery from said person, the Subcontractor’s sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontractor’s Work.
ENFORCEABILITY OF “NDFD” CLAUSES?

Some state legislatures and the courts in a few states preclude usage of “NDFD” clauses as AGAINST “PUBLIC POLICY.” Otherwise, “common law” judicial exceptions have evolved allowing avoidance of such “NDFD” language where the delay:

a. Was well beyond the original contemplation of the parties;
b. Was so excessive as to result in effectuating an abandonment of the project;
c. Was the result of the active interference of the other party; or
d. Resulted from bad faith conduct of the other party.
1. “No Damage for Delay” Clauses (Continued)

RESPONSES

A. Avoid NDFD clauses as unreasonable and contrary to otherwise applicable legal principles.

Compare AIA A 201 (2007) document which states affirmatively that an extension of time “does not preclude recovery of damages for delay by either party” (8.3.3)
1. “No Damage for Delay” Clauses (Continued)

RESPONSES
(continued)

B. Expressly qualify or limit application of such clauses so that they do not apply where:

(1) A single delay is more than a specified time [e.g. 30 days]

(2) The cumulative effect of multiple delays is more than a specified time

(3) The delay is due to specified types of causes [e.g. design changes, design errors, owner action or omission]

(4) The total “damages” or direct costs due to delay exceed a specified threshold amount

(5) The amount of direct and indirect project costs are quantified in the contract [e.g. $2000 per day for “compensable delay”]
C. As a “quid pro quo” include a mutual waiver of “consequential damages”, such as that included in the A1A A201 1997 family of AIA documents, to balance out the risk allocation for delays to the project.

See, for example, AIA Document A201 (1997), stating in pertinent part that:

“The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract.” (4.3.10)
2. Omission of “Differing Site Condition” as Changed Condition Clauses

Subcontractor: “I’ll bear the risks I can reasonable identify – BUT the Owner, should bear the risk inherent in its venture that arises out of unforeseen, concealed conditions of the site!”
2. Omission of “Differing Site Condition” as Changed Condition Clauses (Continued)

THE PROBLEM

General “common law” rule, the contractor (and its subcontractor) assumes the full risk of the unknown – including site conditions, weather, “forces majeure”

Unless – the contract provides for relief by inclusion of a “concealed condition” or “differing site condition” clause!

Even where the “risk” involved is beyond the contractor’s (and its subcontractor’s) control and should be a “venture risk” allocated to the owner.
2. Omission of “Differing Site Condition” as Changed Condition Clauses (Continued)

THE PROBLEM (continued)

The “concealed condition” or “differing site condition” clause is usually only found in the “prime contract” – so for subcontractors, it is essential to know if there is such a clause, and if so if its benefits “flow down” to the subcontractor!
Example (emphasis added):

Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are **(1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or** (2) **unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents**, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. If the conditions encountered are materially different, the **Contract Sum and Contract Time shall be equitably adjusted**, but if the Contractor and Subcontractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination.
2. Omission of “Differing Site Condition” as Changed Condition Clauses (Continued)

RESPONSES

A. Make sure that any contract in which there is significant risk of unknown, concealed or “differing” conditions in the site or any existing structures includes such a risk reallocation clause.

B. If not, make sure the price established for the contract is sufficient to cover the risk of the “unknown”.

C. If viewed from subcontract perspective make sure there is a “conduit” clause and a “flow through” of rights and remedies.
3. Unreasonable Site Inspection Requirements

Contractor: “Even though I have had months of time and unlimited access to the site, I want you, Mr. Contractor, to look over the site even closer – and in the few days left before the bid.”
3. Unreasonable Site Inspection Requirements (Continued)

THE PROBLEM

Contracts often include very strong language regarding the subcontractor’s (and its sub-subcontractors)

- duty to inspect and become familiar with the site and all local conditions and to affirmatively discover all conditions that may be encountered – regardless of observability, and

- warrant the price includes all such contingencies

This is often coupled with disclaimers of accuracy or reliability of site condition information furnished by the owner (Site Inspection Reports, etc.).
3. Unreasonable Site Inspection Requirements (Continued)

Example One (emphasis added):

The Contract Documents show conditions as they are believed to exist, but it is not intended or to be inferred that the conditions as shown thereon constitute a representation or warranty by or on behalf of [Owner or Contractor] that such conditions actually exist. The Subcontractor shall inspect the jobsite and conduct any tests or surveys it deems necessary or desirable prior to the commencement of the Work and shall accept full responsibility for any and all costs, expenses, claims, liabilities and/or losses sustained by it as a result of any variances between the conditions as shown on the Contract Documents and the actual conditions (whether concealed or not and whether foreseeable or not) encountered during the progress of the Work or otherwise. The Contract Sum shall in no event be increased by reason of any such variance or concealed or unforeseeable conditions.
3. Unreasonable Site Inspection Requirements (Continued)

Example Two (emphasis added):

The Subcontractor acknowledges that it has taken steps necessary to ascertain the nature and location of the Work and that it has investigated and satisfied itself as to the general and local conditions which can affect the Work and its costs. **The Subcontractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered or difficulties of access insofar as this information is ascertainable from an inspection of the site, and available documents, including all information from exploratory work done by the [Owner or Contractor] and its design consultants as well as from the Drawings and Specifications made a part of this Contract.** The Subcontractor has the right to make any additional tests necessary to assure himself that the site conditions are satisfactory for the work contemplated. (continued)
3. Unreasonable Site Inspection Requirements (Continued)

RESPONSES

A. AVOID contract language that seeks to impose unreasonable pre-bid site inspection or investigation obligations on the subcontractor or requires the subcontractor to assume the risk of conditions not reasonably discoverable in the course of a routine pre-bid site inspection.

B. Make explicit that any such disclaimer language is “subject to the rights and remedies afforded the Contractor under differing conditions” or “changed conditions” type clauses elsewhere contained in the contract.
C. Otherwise, if you are assuming the risk for such physical conditions, make sure that you perform a sufficient investigation to know what they are and include some risk factor amount in your pricing.
4. Duty to Coordinate Among Subcontractors

Contractor: “He may be my subcontractor – BUT it is your risk and your responsibility to control him!”
4. Duty to Coordinate Among Subcontractors (Continued)

THE PROBLEM

A general contractor is considered under common law to have the implied duty to coordinate its multiple subcontractors

- Firestop contractor finds themselves at the junction of many trades:
  - Mechanical
  - Electrical
  - Glass & Glazing
  - Concrete
  - Plumbing
  - HVAC
Therefore, be wary of subcontract language which seeks to contradict this “common law” duty.

Watch out for clauses in which the general contractor seeks to avoid its duty to coordinate among its subcontractors by:

(1) Shifting the responsibility and risk contractually to the subcontractors to “coordinate” among themselves,

(2) Disclaiming responsibility for problems due to the fault of one of its subcontractors and/or

(3) Deflects liability providing remedy for the malperformance by another subcontractor solely and directly against such subcontractor.
Example (emphasis added):

The Contractor reserves the right to engage separate subcontractors to perform aspects of the Project other than the Work under this Agreement. In such case, subcontractor shall be responsible to coordinate, sequence and schedule its work together and in cooperation with such other subcontractors. In the event of any difficulties caused by any such other separate contractor, this subcontractor shall look solely for relief to such other subcontractors and shall not make a claim against Contractor.
5. Duty to Coordinate Among Subcontractors (Continued)

RESPONSES

A. AVOID contract language that purports to require the subcontractor to be responsible for the actions of other subcontractors with whom it does not have a contract.

B. AVOID contract language that seeks to shift to you the duty to oversee, coordinate, sequence or schedule the work of other subcontractors with whom you have no contractual authority.
5. “Design Intent” Clauses

Architect (through Owner): “Do it as I intended, not necessarily as I showed it!”

Subcontractor: “Well, I guess I should get out my crystal ball again!”
5. “Design Intent” Clauses (Continued)

THE PROBLEM

Use of language in provisions describing the scope of the work which can be interpreted to shift to the contractor (or subcontractors) certain unintended design responsibilities and liabilities.

For example, you should be concerned about language requiring the contractor (or subcontractor) to perform in a manner to meet the "design intent" or to "produce the intended results" of the contract documents.
5. “Design Intent” Clauses (Continued)

THE PROBLEM
(continued)

You can only price and should only contract to perform what is reasonably indicated or inferable from the contract documents – not what the designer may have otherwise “intended”
Example Two (emphasis added):

The term Work means all services specified, indicated, shown, intended, implied, or contemplated by the Contract Documents and the furnishing by the Contractor of all materials, equipment, labor, methods, processes, construction and manufacturing materials and equipment, tools, plants, supplies, power, water, transportation and other things necessary to provide a complete construction of such work in accordance with the Contract Documents. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work. Work not specifically covered in the Contract Documents shall be required, if it is consistent therewith, and reasonably implied therefrom as being necessary to produce the intended results.
5. “Design Intent” Clauses (Continued)

**RESPONSES**

A. Hey, that’s the architect’s job! How can the contractor know what the designer intended? Even the AIA recognizes this in its family of documents. Compare AIA Document A201(2007), 3.1.2. providing only that the Contractor perform work only “in accordance with the Contract Documents.”

B. AVOID contract language that seems to require a “crystal ball” on the contractor’s part to divine the unspecified intention of the designer! You should only be obligated to build what is shown or reasonably inferable in the contract documents.
6. Conflicting “Detailed” and “Performance” Specifications and Criteria

Owner (through Architect): “I’ll tell you how to build it, but you make it function and work properly!”
6. Conflicting “Detailed” and “Performance” Specifications and Criteria (Continued)

THE PROBLEM

“Mixed” specifications which blend “detailed” specification with performance criteria.

E.g., where the contractor is (1) required to install the designed fireproof wall system in the specified manner, as shown in the design documents, and yet also (2) assure that the system, once installed per the owner’s design, will have meet certain UL, FM or ASTM standards or have certain F, T & L ratings with which the design may or may not comply or attain.
6. Conflicting “Detailed” and “Performance” Specifications and Criteria (Continued)

THE PROBLEM
(continued)

The contractor (and subcontractor) should not bear the risk that the owner’s design, even if properly installed, will not function properly since the contractor has no control over whether the design is proper.

You should be concerned when you see “performance” criteria set forth in describing any aspect of the contractor's (or subcontractors) obligations when the contractor is not responsible for the design.
6. Conflicting “Detailed” and “Performance” Specifications and Criteria (Continued)

Example One (emphasis added):

Contractor shall furnish all Work in accordance with the plans, specifications and other Contract Documents, such that the completed Work shall ensure a functional and complete facility meeting the owner’s intended purpose.

Example Two (emphasis added):

The Subcontractor shall install all work strictly as shown and require by the subcontract documents and as necessary to provide and complete and fully functional electrical system.
Example Three FCIA Spec 104 A(103) (emphasis added):

1. Firestop all penetrations passing through fire resistance rated wall and floor assemblies and other locations *as indicated on the drawings.*

2. **Provide and install complete penetration firestopping systems** that have been tested and approved by third party testing agency.

3. **F - Rated Through-Penetration Firestop Systems:** *Provide through-penetration firestop systems* with F ratings indicated, as determined per ASTM E 814, but *not less than one hour or the fire-resistance rating of the construction being penetrated.*
6. Conflicting “Detailed” and “Performance” Specifications and Criteria (Continued)

RESPONSES

A. Where there are detailed design specifications, AVOID overlapping or conflicting "performance" specifications based on functional criteria in defining the same work.

B. If a component is designed by the owner’s designer, then the contractor should only assure that it will be constructed according to design, not that it will function properly as intended or hoped for by the owner- or that it will be “fully operating” upon completion.

C. AVOID contract language that guarantees or assures performance results of a component but also tells you how to specifically construct it.
D. If any aspects of the project are to be designed by the Contractor to meet required performance objectives, consider using language similar to AIA A201 (2007), Paragraph 3.12.10:

“The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work . . . If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy...”
Design Coordination is another related clause to be aware of i.e.

“carefully study and compare the Contract Documents and immediately report in writing to [Owner] any error, inconsistency, discrepancy, ambiguity, omission, insufficiency of detail or variance with physical conditions on the jobsite, including any problem which may preclude proper performance of a complete system with the required characteristics of that system”
7. Indemnity: Broad, Broader, Broadest!

Owner/Contractor: “I don’t care if the accident was all my fault, you have to fully indemnify me! – whether you can insure against this type of claim or loss or not!”
7. Indemnity: Broad, Broader, Broadest! (Continued)

THE PROBLEM

“Indemnity” provisions which:

(1) Require indemnity of the other party even if that party is solely or principally responsible

(2) Impose indemnification obligations broader than those covered under the commercial general liability policy “contractual liability” type coverage available to most contractors—that is for claims for personal injury or property damage arising out of the negligent act or omission of the contractor.
7. Indemnity: Broad, Broader, Broadest! (Continued)


To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees or 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) but only to the extent caused by the 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.
Example One (emphasis added):

Subcontractor shall indemnify and hold harmless, the Contractor, Owner, its designee and their directors, officers, employees, agents, attorneys and volunteers (“Indemnified Parties”) from any and all claims, set-offs, losses, damages, liabilities, fines and expenses, including without limitation, the concurrent negligence of one or more Indemnified Parties and Contractors, the contributory negligence of Subcontractor and any third party, and any attorneys’ fees, expenses or other costs associated with or incurred, based on or in any manner arising out of or related to the performance or nonperformance of this Agreement by Subcontractor or the exercise of rights granted to Subcontractor hereunder, including, but not limited to, injury to persons or property, actual damages, consequential damages, punitive damages, losses, set-offs, warranty claims, product liability claims or other damages arising out of an action for strict liability in tort; provided however that nothing contained in this provision shall be interpreted to indemnify or hold harmless the Indemnified Parties.....
7. Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES

A. Be aware that many states have "anti-broad form indemnity" statutes which may render void and unenforceable such contract clauses which would require indemnification of the very party whose sole negligence caused the injury or damage for which the indemnification is sought.
B. But, in many states, if the “broad form” indemnity language (which would otherwise be unenforceable under this statute) is matched to a duty to “insure” such obligation, then the “broad form” language is fully enforceable, even if you cannot actually procure insurance for the full scope of such obligation.
C. Such provisions generally should be reasonably limited to circumstances for which conventional insurance coverage is available. Indemnity obligations are often coupled with a corresponding insurance requirement, and you should not agree to indemnity duties broader than the insurance coverages available.
7. Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

D. AVOID contract language that purports to require you to indemnify or hold parties harmless where:

1. The claim arises out of the indemnified party’s sole negligence [seek to limit such duty to a “comparative” or proportionate basis by qualifying the duty to only “the extent caused by” you or others for whom you are responsible]
7. Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

D. (continued) AVOID contract language that purports to require you to indemnify or hold parties harmless where:

2. Such duty goes beyond the typical CGL insurance coverages for death or personal injury or property damages [e.g. including economic or consequential damages that may flow irrespective of their insurability]
D. (continued) AVOID contract language that purports to require you to indemnify or hold parties harmless where:

3. Such duty is triggered by actions other than “negligence” since that could extend such indemnity and hold harmless obligations to “breach” or failure of performance of contract requirements - which again would fall far beyond conventional insurance coverages.
7. Indemnity: Broad, Broader, Broadest! (Continued)

RESPONSES
(continued)

D. (continued) AVOID contract language that purports to require you to indemnify or hold parties harmless where:

4. Such duty arises even from circumstances beyond your control - such as those generally “arising” out of or simply “related to” the performance under the contract – and not due to your fault.
E. AVOID contract language that purports to require you to “defend”, in addition to “indemnify and hold harmless”.
E. Make sure to give your insurance agent or counselor a copy of any proposed indemnity language - especially if it is specified to be insured - and obtain a firm written commitment that the insurance contemplated for the project does in fact cover the obligation [or specifies what is not covered, so that you can fully assess the uninsurable risk].
8. “Strict” Compliance or “Best” Work as a Standard of Performance

Owner: “I want it done on time, on budget and, by the way, “perfect” as well!”
THE PROBLEM

Contract language that uses extreme terminology in describing the contractor’s standard of performance such as “best,” “highest and best” and “first” class levels of performance.

Among such extreme terminology is a requirement of “strict” compliance with contract documents.
8. “Strict” Compliance or “Best” Work as a Standard of Performance (Continued)

THE PROBLEM (continued)

This could be interpreted to negate the general rule which would measure the contractor’s performance against the norm or the prevailing standard of care of contractors performing this type of work. You could be held to an artificially higher - even impossible - standard

This could override the general legal principal that would provide that substantial compliance is sufficient to generally satisfy the contractor’s obligation without risk of default.
Example One (emphasis added):

Subcontractor warrants to Contractor and Owner that all labor furnished to perform the Work under the Contract Documents will be competent to perform the tasks undertaken, that the product of such labor will yield only first-class results, that materials and equipment furnished will be of good quality and new unless otherwise permitted by the Contract Documents, and that the Work will be of good quality, free from faults and defects, **and in strict conformance with the Contract Documents. Any Work not strictly conforming to these requirements may be considered defective.**
8. “Strict” Compliance or “Best” Work as a Standard of Performance (Continued)

Example Two (emphasis added):

Standard of Care. Contractor shall perform the Services at a level, and be judged by a standard of care, that is consistent with the standards and quality prevailing among first-rate, nationally recognized general contracting firms of superior knowledge, skill and experience engaged in projects of similar size and complexity. Construction Manager shall carry out and complete the Services in an efficient, economical and timely manner, as expeditiously as is consistent with the level of skill and care required hereby and the interests of Owner, and in strict accordance with the Contract Documents. Contractor acknowledges that strict compliance is a more exacting standard than substantial compliance and agrees that its fee takes into consideration the more exacting standard. Owner will not accept Work which fails to comply with such standards, unless the departure from such standards is specifically identified to, and thereafter authorized in writing by, Owner’s Representative.
8. “Strict” Compliance or “Best” Work as a Standard of Performance (Continued)

RESPONSES

A. AVOID contract language that purports to set a “standard” of performance that is higher or more exacting than the ordinary standard of care by which a contractor’s (or subcontractor’s) performance is generally measured.
9. “Change Order” Pitfalls

Owner: “Do it my way, right now – and we will talk about your extra costs tomorrow [and tomorrow, and tomorrow]!”
9. “Change Order” Pitfalls (Continued)

THE PROBLEM(S)

(1) **Directed Change Without Commitment to Compensate.** Contractual change order procedures that permit changes, obligating the contractor (or subcontractor) to additional cost without prior agreement - or even commitment by Owner (or general contractor).

Provisions often empower the owner and/or its architect to direct the contractor in writing to proceed with changes without any correlative responsibility by the owner to pay the contractor or to agree to pay the contractor for the consequences of the change.
9. “Change Order” Pitfalls (Continued)

THE PROBLEM(S)

(continued)

(1) Directed Change Without Commitment to Compensate. (Continued)

Preference would be a structure similar to the AIA approach which permits substantive changes only where the parties agree (by bilateral change order) or at least where the owner and architect must first concede that there is a change (by CCD) before unilaterally directing a change.
Example One (emphasis added):

Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Application for Payment accompanied by a Change Order indicating the parties’ agreement with part or all of such cost. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 4.
9. “Change Order” Pitfalls (Continued)

THE PROBLEM(S)

(2) Limitation of recoverable “costs.” Contractual change order procedures that impose limitations on “costs” that may be recovered.

In some cases, a contractor (or subcontractor) may actually lose money on a change order because of contractual limitations on “indirect,” “General and Administrative or “G & A” or “Overhead” costs even if there is full reimbursement of direct costs.
9. “Change Order” Pitfalls (Continued)

THE PROBLEM(S)

(continued)

(2) Limitation of recoverable “costs.” (Continued)

This is especially true if all other “overhead” and G & A cost is limited to a percentage of direct cost as overhead and profit. If that percentage is too low to reasonably accommodate normal changes, then the contractor (or subcontractor) loses ground with each change order.
Example Two (emphasis added):

Overhead and Profit

The overhead allowance below includes both field and office costs. The maximum allowable overhead and profit for Price Adjustments shall be limited as follows:

(a) To prime Contractor and/or the subcontractor for that portion of the changed Work performed with their respective forces

**Overhead:** 6% of Direct Costs

**Profit:** 4% of Direct Costs

(b) To prime Contractor on Work performed by its subcontractors or materials supplied by its vendors

4% of subcontractor/vendor price
9. “Change Order” Pitfalls (Continued)

THE PROBLEM(S)

(3) **Written Change Order Requirements.** Contractual change order procedures that assert that the owner has the right to direct changes, but that the contractor (or subcontractor) has entitlement to cost and time adjustment only if there exists a bilateral - signed by both parties - written change order.
Example Three (emphasis added):

Owner, without invalidating the Agreement and without obligation to notify any surety of the Contractor, may order changes in the Work. *All changes to any Contract Documents which require an adjustment in the Contract Sum or Time of Performance must be pursuant to a Change Order signed by the Owner and the Contractor. No payment shall be allowed for any adjustments due to changes in the work without such a Change Order.* If Contractor seeks a Change Order, it shall submit its proposed C.O. to Owner’s Representative.
9. “Change Order” Pitfalls (Continued)

RESPONSES

A. AVOID contract language that:

1. Imposes obligations on the contractor (or subcontractor) to perform changes in the work without reasonable contemporaneous compensation for such changes;

2. Permits “unilateral” order requiring the contractor (or subcontractor) to perform changed or extra work without a prompt and equitable method of establishing adjustments in compensation;

3. Limits the “mark-ups” for overhead and profit on changes or extra work unreasonably;
9. “Change Order” Pitfalls (Continued)

RESPONSES
(continued)

A. AVOID contract language that (continued):

4. Does not clearly permit and specify the method for the contractor to preserve any claims for additional time and compensation in the event of any dispute; and

5. Expressly bars adjustment of extra and additional work if not done pursuant to a written, advance change order signed off by both parties - or if so make sure you do not do the work unless you have a change order in hand or other protection of your rights to payment.
10. Contractual Waiver and Release Forms – “Death by Waiver”

**Contractor:** “If you simply sign this “standard” waiver form, I will release payment to you – and you do not need to read the fine print there regarding release of your other claims and rights!”

**Owner:** “If you want this job, my lender requires you to waive all your lien rights upfront.”
10. Contractual Waiver and Release Forms – “Death by Waiver” (Continued)

THE PROBLEM

Contract administration forms (attached to contracts), including lien waiver and release forms, payment application forms may alter or expand upon the obligations and risks undertaken by the contractor and the contract documents themselves.

E.g. these include lien waiver and release forms purporting to effect waiver of lien rights, bond rights, and sometimes even contract rights that are broader than the amounts requested and paid – releasing such claims as to:

- retainage

- pending unresolved change orders and claims
Example One:

The undersigned “does hereby ... further remise, release and forever discharge [Owner and Contractor] ... of and from any and all manner of claims, demands and causes of action whatsoever against [them] which the undersigned... may have for, upon or by reason of any matter, cause or thing whatsoever arising under or out of the contract, as of release date.
10. Contractual Waiver and Release Forms – “Death by Waiver” (Continued)

Example Two:

The undersigned Contractor for and in consideration of the Sixty-nine thousand thirteen dollars and 11/100, $69,013.11 and other good and valuable consideration, the receipt for which is hereby acknowledged, does hereby waive, release and relinquish any and all claims, demands and rights of lien for work, labor and/or materials furnished through the 30th day of August, 2012 on the above described project.

The undersigned further deposes and says that all labor, materials, supplies, equipment, etc., furnished by the undersigned, have been fully paid for and discharged through the above date.
Example Three:

**Progress payment form provision stating:**

“I hereby certify that the work performed and the materials supplied to date, [of the payment application] as shown on the above, represent the actual value of accomplishment through the date hereof under the terms of the contract (and all authorized changes thereto) between the undersigned and [contractor], relating to the above referenced project.”
Example Four:

**Final payment application form included an “affidavit” stating that:**

“2. The Subcontractor hereby certifies that all work required under the above contract has been performed in accordance with the terms thereof, **that all materialmen, subcontractors, mechanics, and laborers have been paid and satisfied in full, and that there are no outstanding claims of any character (including disputed claims or any claims to which the subcontractor has or will assert any defense) arising out of the performance of the contract which have not been paid and satisfied in full except as listed hereinbelow.**”
Example Five (emphasis added):

Interim Payment application form specified that it was for work performed for a certain period of time and stated that,

“In consideration of the payment received, and upon receipt of the amount of this request, the undersigned does hereby waive, release, and relinquish all claim or rights of lien which the undersign [sic] may now have upon the premises above described except for claims for right of lien for contract and/or change order work performed to extent [sic] that payment is being retained or will subsequently become due.”
Example Six (emphasis added):

Monthly pay applications provided that on receipt of payment, the Contractor

“[D]oes hereby ... further remise, release and forever discharge [the Construction Manager] and [Owner] ... of and from any and all manner of claims, demands, and causes of action whatsoever against [them] which contractor ... may have for, upon or by reason of any matter, cause or thing whatsoever arising under or out of the contract, as of release date, except the following (none, unless noted):”
A. AVOID contract language [including language in related contract documents such as payment applications, lien waiver forms, change orders, etc.] that purports to waive or release:

(1) Any rights (lien, bond, or claim) not expressly "conditioned upon receipt" of corresponding payment.

(2) Any rights [lien, bond, contract, or otherwise] regarding future work or performance;

(3) Any rights beyond those relating to any particular change order or payment application;

(continued)
RESPONSES

(4) Rights keyed to the date of execution of the waiver rather than the substance of the transaction [e.g. waiving all rights for work performed through the date of the waiver form, even though the payment to be received relates to an earlier period]; and

(5) Rights not intended to be released by the parties in connection with a particular transaction [such as progress payment applications should not effect waiver of rights regarding retainage and unresolved changes and claims].
10. Contractual Waiver and Release Forms – “Death by Waiver” (Continued)

RESPONSES (continued)

B. To the extent that the “Contract Documents” include certain specified forms for payment applications and related waivers, the time to review and seek modification of objectionable waiver language is before you sign the contract!

C. When confronted with an objectionably broad form of waiver or release, insert appropriate language on its face before execution which expressly preserves rights not to be included.

D. Remind out-of-state owners and contractors that waivers can only be required in accordance with applicable law. . . or not
10. Contractual Waiver and Release Forms – “Death by Waiver” (Continued)

RESPONSES (continued)

E. When all else fails, use the Footnote Solution
   “*Except as provided on Attachment ‘A’ hereto”
RESPONSES (continued)

E. The “Footnote Solution” (continued)

(1) Place asterisk (“*”) in text for the form after insertion of date – then note at foot of “Waiver” form:

“*Except as provided on Attachment ‘A’ hereto”
STATE OF GEORGIA  
COUNTY OF __________

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN EMPLOYED BY _______________________ (NAME OF CONTRACTOR) TO FURNISH _______________________ (DESCRIBE MATERIALS AND/OR LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS _______________________ (TITLE OF THE PROJECT OR BUILDING) WHICH IS LOCATED IN THE CITY OF ________________________, COUNTY OF ________________________, AND IS OWNED BY _______________________ (NAME OF OWNER) AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

_______________________________________________________________________
_______________________________________________________________________
_______________________________________________________________________

(DESCRIBE THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE BY USING EITHER A METES AND BOUNDS DESCRIPTION, THE LAND LOT DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE PROJECT.)

UPON THE RECEIPT OF THE SUM OF $__________, THE MECHANIC AND/OR MATERIALMAN WAIVES AND RELEASES ANY AND ALL LIENS OR CLAIMS OF LIENS IT HAS UPON THE FOREGOING DESCRIBED PROPERTY OR ANY RIGHTS AGAINST ANY LABOR AND/OR MATERIAL BOND THROUGH THE DATE OF _______________________ (DATE) AND EXCEPTING THOSE RIGHTS AND LIENS THAT THE MECHANIC AND/OR MATERIALMAN MIGHT HAVE IN ANY RETAINED AMOUNTS, ON ACCOUNT OF LABOR OR MATERIALS, OR BOTH, FURNISHED BY THE UNDERSIGNED TO OR ON ACCOUNT OF SAID CONTRACTOR FOR SAID BUILDING OR PREMISES.

[ ]

GIVEN UNDER HAND AND SEAL THIS ________ DAY OF ______________, 20___.

[ ]

__________________________ (SEAL)

[Print Name]
[Waiving Party’s Name]

(WITNESS)

[WAIVING PARTY’S ADDRESS]

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT STATED ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH PAYMENT, 60 DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE EITHER AN AFFIDAVIT OF NONPAYMENT OR A CLAIM OF LIEN PRIOR TO THE EXPIRATION OF SUCH 60 DAY PERIOD. THE FAILURE TO INCLUDE THIS NOTICE LANGUAGE ON THE FACE OF THE FORM SHALL RENDER THE FORM UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER O.C.G.A. SECTION 44-14-366.

* Except as expressly reserved on Attachment “A”
E. The Footnote Solution (Continued):

(2) And on “Attachment A” (a page added by claimant to the waiver form) expressly reserve the contract, lien and bond rights for any such unresolved PCOs, CORs, RCOs claims, extras and payment issues for which work has been performed.
10. Contractual Waiver and Release Forms – “Death by Waiver” (Continued)

RESPONSES
(continued)

E. The Footnote Solution (Continued)

Attachment “A” should state that:

“Notwithstanding provisions set forth in the appended waiver form to the contrary, the undersigned expressly reserves all rights to payment under the Contract and all related rights and claims of lien and/or bond claims relative to:

[Option A] All pending and unresolved change order requests and claims properly asserted under the Contract.”

[OR]
E. The Footnote Solution (Continued)

Attachment “A” [Option B - Example]

“All pending and unresolved change order requests and claims properly asserted under the contract, including, without limitation, the following:

(1) RCO #42
(2) RCO #62
(3) Etc. [list specifically]
(4) Claim for equitable adjustment submitted on September 12, 2003
(5) All rights to adjustment of contract time or amount arising out of the written notice given on September 11, 1998, regarding subsurface conditions
(6) Etc. [list specifically]”

Owner: By the way, you won’t mind adding me, my cousin, and my uncle as “additional insureds” under your insurance policy, will you?

THE PROBLEM

Beware of adding to your insurance risks, burdens, costs – directly and indirectly -- by naming the other party to the contract as an “additional insured” under your CGL policy. Such party then becomes an insured under your policy, where the occurrence arises in relation to your work scope, and can consume your policy limits, increase your premiums, impair your ratings -- even if that party was the negligent one.
Example One (emphasis added):

The *Owner [the Architect, and Contractor and often other named parties] shall be covered as an Additional Insured under any and all insurance required by this contract*. Confirmation of this shall appear on all certificates of insurance and on any and all applicable policies.

RESPONSES

A. The best approach for this type of provision is to avoid it or, alternatively, substitute OCP policy coverage which substantially parallels the coverage sought - only not as a part of your own policy coverage.

B. Also, it should be noted that in 1997, the AIA dispensed with any requirement that the contractor include “additional insureds.” See Para. 11.3.3, AIA Document A201 (1997), stating:

11.3.3. *The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor’s Liability Insurance coverage.*

*But – In 2007 reversion to “Additional insured”*

RESPONSES

C. Limit the scope of the “AI” coverage required

e.g. 11.1.4, AIA Document A201 (2007), stating:

The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect’s Consultants as additional insureds for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s completed operations.

RESPONSES

C. Limit the scope of the “AI” coverage required
e.g. 10.5, ConsensusDOCS 200 (2007), stating:

10.5 ADDITIONAL LIABILITY COVERAGE

10.5.1 The Owner _____ shall/____ shall not (indicate one) require Contractor to purchase and maintain liability coverage, primary to Owner’s coverage under Subparagraph 10.4.2.

10.5.2 If required by Subparagraph 10.5.1, the additional liability coverage required of the Subcontractor shall be

(Designate required coverage(s)):

1. Additional Insured. Owner shall be named as an additional insured on Contractor’s Commercial General Liability insurance specified for operations and completed operations, but only with respect to liability for bodily injury, property damage or personal and advertising injury to the extent caused by the negligent acts or omissions of Contractor, or those acting on Contractor’s behalf, in the performance of Contractor’s Work for Owner at the Worksite.

2. OCP. Contractor shall provide an Owners’ and Contractors’ Protective Liability Insurance ("OCP") policy with limits equal to the limits on Commercial General Liability Insurance specified, or limits as otherwise required by Owner.