

Critical Construction Contract Clauses

Owner, Contractor, and Subcontractor Perspectives

By Bruce W. Merwin, Joanne Linley, and Tracy L. Steedman

Bruce W. Merwin is a partner at Thompson & Knight LLP, Houston, Texas. Joanne Linley is a partner at Peckar & Abramson, P.C., Miami, Florida. Tracy L. Steedman is a partner at Niles Barton & Wilmer, LLP, Baltimore, Maryland.

It is well known in the industry that owners and developers are attempting to shift more risk downstream when negotiating construction contracts. Tony Illia, *Owners Shift More Financial Risk as Recovery Remains Sluggish*, Engineering News-Rec., Oct. 29, 2013, available at http://enr.construction.com/business_management/finance/2013/1029-owners-shift-more-financial-risk-as-recovery-remains-sluggish.asp. The overarching goal in contract negotiations is to create a contract that clearly expresses the parties' intentions based on reasonable and realistic expectations and incorporates incentives for cooperation and performance. This article will offer strategic insights and practical tips on negotiating a fair contract and allocating risk.

Each Party's Perspective

As with most contract negotiations, the parties to a construction contract have varying interests that they seek to satisfy with favorable contract language. This article considers the position that each party is likely to take on a variety of common contract issues.

Owners, for example, want their projects built to be fully functional and completed on time and under budget. The owner's suggested provisions in this article reflect an aggressive owner attitude designed to maximize the contractor's accountability, risk assumption, and indemnity responsibility while permitting the owner to achieve maximum leverage over the contractor by controlling the work description, site conditions, change orders, and payment and warranty procedures. The owners further seek the right to terminate the construction contract for convenience.