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Seminar Overview

- **Objectives**
- Contract Basics
- Key Terms & Principles
- Special Cases
- In Practice

Seminar Objectives

- Raise awareness of the importance of contracts.
- Learn to recognize contract risks, especially those risks unique to international contracts.
- Learn to help manage contract risks while preserving owner/engineer relationships.
- Review current industry custom & practice.

“This is our standard contract.
We can’t change it.”

Owner

“All your competitors sign this contract. They never take exception to it. You’re just too hard to do business with!”

Owner

“Yes, the contract makes you strictly liable for everything that goes wrong with the project. But don’t worry, we’d never enforce it that way!”

Owner

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“It doesn’t matter what’s in the contract. If the owner wants to sue us, he’ll do it anyway.”

Engineer/constructor

“We’ve been doing business with these guys for years. No one looks at the contract anyway... once we sign it, we’ll just stick it in a drawer!”

Engineer/constructor

Seminar Overview

- Objectives
- **Contract Basics :**
 - **Definitions & Risks**
 - **Good & Bad Contracts**
- Key Terms & Principles
- Special Cases
- In Practice

Contract Defined

- An agreement which is
 - Legally enforceable,
 - And where breach of contract typically results in the award of money damages.



General Contract Risks

- CONTRACTUAL
 - Commercial ambiguity
 - Breach of contract/warranty
 - Indemnity
- OUTSIDE THE CONTRACT
 - Misrepresentation
 - Negligence
 - Statutory liability

Risks Unique to International Contracts

- Political risk.
- Currency and payment risks.
- Tax risk.
- Special statutory risks (Foreign Corrupt Practices Act, Export Administration Act, etc.).
- Foreign laws and legal system risks.

Bad Contracts Typically Result In Unlimited Liability For:

- Any property damage (including the owner's property).
- Commercial damages (including consequential losses).
- Any personal injury (including owners' employees).

“There are conditions under which there’s only one thing worse than losing a job...and that’s getting it.”



Quality Contracts

- Clear and unambiguous.
- Allocate risk : reward reasonably.
- Consistent with industry custom and practice.
- Specifically address unique aspects of international contract risks.

Core International Contract Elements

- Scope of work
- Contract price
(currency; taxes;
security)
- Terms of payment
- Warranties
- Indemnities
- Insurance
- Applicable law
- Dispute resolution

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Key Contract Terms

- **Warranty:** An assurance you give another about the quality of your goods/services.

Beware of liability for the costs (“bricks & mortar/concrete & steel”, etc) resulting from engineering errors or omissions.

Contracting Principles

- Limit warranty obligation to remedial work/services, and disclaim all warranties implied by law (such as merchantability or fitness for purpose).

Key Contract Terms

- **Indemnity:** A commitment to absorb another's financial losses and to "hold him harmless" under certain circumstances.

Engineers should be cautious of accepting liability for the consequences of owner's negligence.

Contracting Principles

- Exclude (or limit) liability for existing owner property “irrespective of fault or negligence”, which must be expressly stated.

Key Contract Terms

- **Insurance:** A contract whereby an insurance company is paid a price (premium) to bear another's (insured's) risks of loss.

Beware of exposing corporate coverage to owner risks as well as risks excluded under the contract.

Key Contract Terms

- **Subrogation:** The right of an insurance company to “step into the insured’s shoes” once it pays on a loss, and to pursue the party which caused the loss.

Key Contract Terms

- **Agreement that “time is of the essence”**: An agreement to absolutely achieve any promised performance or completion dates; completion a millisecond later than promised is a material breach of contract.

Key Contract Terms

- **Consequential Damages:** Indirect financial losses and damages (such as lost profits) which flow from an event creating legal liability (such as breach of contract or negligence).

**These will put you out of
business quickly!**

Contracting Principles

- Exclude consequential losses “irrespective of fault or negligence”, which must be expressly stated.

Contracting Principles

- Comply scrupulously with applicable laws (especially the Foreign Corrupt Practices Act and the anti-boycott provisions of the Export Administration Act).

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- **Special Cases:**
 - **JV**
 - **Subcontractor**
- In Practice

Joint Ventures

- **Remember:** You're jointly and severally liable for all JV liabilities if your partner defaults.

Pick your partner with care!

Joint Ventures

- If you contract as a JV, take particular care in addressing:
 - Management of the JV
 - Risk allocation/indemnities
 - Dispute resolution
 - Tax issues
 - Capitalization, accounting, and profit/loss allocation
 - Insurance/bonds
 - Scope allocation
 - Technology protection

Subcontractor

- **Remember: If you're a sub, you have no contract with the owner.**

You may potentially be liable to the owner for direct and consequential damages arising out of engineering errors or omissions, especially if the latter cause property damage (rather than solely economic loss).

Subcontractor

- Get your protection into the prime contract if possible; or
- Get it into a side letter with the owner.
- An indemnity from the prime contractor is the **LAST RESORT**.

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Reviewing & Negotiating Contracts

- Read it! Analyze it! Understand it!
- Take reasonable exceptions.
- Emphasize fairness (reasonable balancing of risk/reward) and industry custom/practice.
- Be patient & persistent in negotiations.
- Get help when you need it!

Effective Risk Management

- Quality contracts; remember, it's what's **NOT** in the document that will put you out of business.
- Quality (project) management.
- Quality contracting practices.
- Quality clients.
- Quality insurance.

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Questions & Answers

