What Does The Contract Say About That?

Presenter: Stephen Sanford
Senior Vice President, Managing General Counsel
Fluor Corporation

November 13, 2015

FLUOR®

Baseline Approach

Baseline Documents include:

1. The Risk Assessment
2. The Contract

Risk Assessment Process

- Led by Sales
- Participation by Sales, Operations and Technology
- Finance, Insurance, Tax, Legal and IP

What Projects Require a Risk Assessment

- An EPC Project
- A FEED Project
- A Teaming Agreement
- A New Software

The Risk Management Framework

Establish Goals and Objectives

↓ ↑

Monitor and Report

↓

Identify and Prioritize Risks

↓

Identify Risk Mitigation and Select

↓

Develop Action Plans

The Law

- Neighbor Principle
- Pure Economic Loss
- Cattle Market Case

The Contract

- Neighbor Principle
- Benefit of the Bargain

FLUOR®

Liabilities in a Contract

Direct Damages (Neighbor Principle)

1. Personnel
   - Of Owner
   - Of Contractor
2. Property
   - Of Owner
   - Of Contractor
3. Third Parties
   - Personal Injury
   - Property Damage

Indirect Damages – Consequential Damages

Golden Rule or The Customer is the King

- Indemnify the Client for all harm arising to anyone whether by negligence, breach of contract or otherwise, even if the Client caused it
- Knock for Knock
- Anti-Indemnity Statutes
- What about indirect damages

Gross Negligence / Punitive Damages

- A Uniquely American Invention
- Being Exported
- Juries
- Ability to Limit

Industrial Megaprojects

Seven Key Mistakes

- Contractors cannot carry the Risk

- Create a contract framework that:

1. Protects the parties
2. Uses the Insurance
3. Allows a focus on success of the Project

FLUOR®

Insurance

Typical Types of Insurance Coverages

- Builder’s Risk
- General Liability
- Auto Liability
- Professional Liability

Insurance (Continued)

Tie Insurance Terms Together with all Other Contract Terms

- Avoid minimum language
- Avoid named insured

Quality of the Work Risk

Owner Standard of Care – Work will be new, free from defects, fit for the purpose, meet all the specifications and designs, meet the highest standards in the industry, and meet the performance tests at all times during the Warranty Period.

Owner Warranty Period – If at any time during the two-year period after the project starts up, a defect or other, non-conformity arises.

Owner Remedies – Contractor will immediately, upon receipt of notice of such defect or non-conformity, promptly furnish at no cost to Owner, engineering, labor, equipment, goods and materials to repair, replace or correct such defect or deformity and cause the Work to conform with the warranties, including removal, packing, transportation, and reinstallation and to correct any other work damaged as a result of the defect. If the Contractor does not respond to the request to correct the Work, or the Owner believes that the repair must be done on an urgent basis, then Owner, in addition to other remedies it may have, may either retain another contractor to perform the correction or request a reduction or reimbursement of the Contract Price.

Owner Exclusivity – Warranties are in addition to and not a limitation on all other remedies available at law or in equity, and extend to Owner and its successors and assigns.

How Do You Limit This Risk ?

1. Agree on a standard of care

2. When does the warranty begin and end

3. What is the remedy for not meeting the standard during the period

4. Exclusivity

FLUOR®

Schedule Risk

- Time is of the Essence

- Bank Financeable Position

Force Majeure

- Definition is important
- Failure to perform
- Schedule adjustment
- Price adjustment

Choice of Law

- USA Anti–Indemnity Statutes
- International
- Ecuador example
- China example

Questions or Comments?

FLUOR®