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CONSTRUCTION
Claims Topics

'Sticking It to the Other Guy'— The Art And Science of Transferring Risk

In 1989, the National Association of Attorneys General prepared and circulated a draft of proposed model construction contracts and was lambasted by just about every stakeholder in the construction industry. The draft documents were finally withdrawn, *supposedly*, dying a quick death. The essence and substance of NAAG's model contract documents were nearly *total risk transference* from the owner to the contractor and, in some areas, to the design professional.

Circulation of the NAAG draft model was quite extensive. It reached virtually all states attorneys general and their staff attorneys, and most city, county, town, township, and other political subdivision legal departments and outside legal counseling firms.

Because of this circulation, the more stringent risk transfer clauses of the model contracts are showing up in increasing numbers in more and more public construction contracts. In short, the NAAG model construction contract documents are not dead at all but are living quietly in political subdivisions across the U.S.

Moreover, even some federal agencies have creatively attempted to use them in construction project plans and specifications in an effort to overwrite or negate federal contracting and acquisition regulations. So far, the attempts to federalize the NAAG model documents appear to be ill conceived and poorly advised legally, but the troubles they can cause on a federal construction project are unbelievable.

Here are a few of the risk transfers from owner to contractor or design professional the NAAG documents espoused:

■ **Design Errors and Omissions:** Contractor recovery for them must be made directly from the design professional. The secondary issue is destruction of the design professional's privity of contract defenses. For example, from 1988 until 1991, the Ohio Attorney General's Office advised all state construction user agencies to deny design E&O-based construction claims, which they systematically did in Administrative Article 8 hearings with a passion and, which in most cases, were summarily reversed in court.

■ **Other Prime Contractor Caused Delays:** Contractor recovery for them must be made directly from the other prime contractor on the project who caused the delay. The secondary issue here is destruction of the multiple prime contractors' privity of contract defenses. For example, the Ohio Attorney General's Office inserted and supported this language in many state contracts from at least 1988 to early 1991. In most cases, the language is still being used in some manner.

■ **No Damages for Delays:** The contractor is denied *any* owner-paid monetary damages for delays, disruptions, interferences and/or suspensions of work, regardless of who caused them, and some contracts even attempt to deny time extensions for them. In fact, many state and local public construction contracts are still being bid containing this provision.

Few, if any, of the political subdivisions that inserted the risk transfer clause in their public construction contracts from 1988 to the present have removed it, thus far.

And the list continues. Attorneys and law firms specializing in construction law have been attempting to warn their clients of the *extreme legal consequences* and *high added costs* of NAAG's proposed and recommended model construction contract clauses. Such clauses in public construction contracts are always offered on a take-it or don't-bid-it basis, since any modification of the bid and contract documents by the contractor generally renders the bid "informal," thereby earning it an immediate rejection.

As a final example of what happens when a public owner inserts a large number of risk transferring clauses into its contracts, simply look at the City of Columbus (Ohio) Division of Sewerage and Drainage contracts for the Southerly Waste Water Treatment Plant (Project 88). From 1986 through 1988, many contractors bid contracts for Project 88 and performed them under "unusual" contract documents language that had many similarities to some of NAAG's model contract provisions. Generally, these contractors were not a contented lot once they were faced with the realities of the contract language and a very tough-minded owner's construction management team that gave little ground, if any, concerning the contract language. In late 1988 and early 1989, the agency attempted to let its first post Southerly Waste Water Treatment Plant contract *containing the same risk transfer clauses*. There were two bidders, and both greatly exceeded over the owner's estimate.

Stories like this exist all across the U.S. Contractors need to remember the old P. T. Barnum adage pertaining to fools — and remember it well. Any contractor who is willing to accept virtually all the risk on a construction project in exchange for the same old, traditional bidding and pricing methodologies, fits P. T.'s profile of "there's one born every minute."

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Construction Claims Topics **serve as guidance documents only and are written for the expressed purpose of helping construction industry executives and supervisors learn better ways of identifying the sources and causes of construction claims and preventing disputes.**

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