A PRACTICAL GUIDE TO DRAFTING CONSTRUCTION CONTRACTS: ESSENTIAL TIPS AND KEY CLAUSES

Presented by:

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David Meredith

MEMBER

David Meredith's practice is focused on complex construction disputes, representing owners, contractors, subcontractors, and material and equipment suppliers, in numerous federal and state court lawsuits, arbitrations and mediations throughout the United States. He regularly handles matters involving delay, acceleration, loss of productivity, differing site conditions, defective work, default, termination, mechanics liens, and payment and performance bond claims. David's practice experience spans numerous industry sectors, including transportation infrastructure, water treatment facilities, chemical and industrial manufacturing facilities, and oil and gas.

REPRESENTATIVE MATTERS

- Counsel for design-build contractor in disputes arising from $3.1 billion tunnel in Seattle designed to replace the downtown Alaskan Way Viaduct after it was damaged in a 2001 earthquake. The "Bertha" tunnel-boring machine ("TBM") used to mine the tunnel sustained physical damage far beneath the surface, and a recovery shaft was drilled so that it could be repaired. Represented design-build contractor in liability action with the Washington State Department of Transportation regarding differing site condition based on presence of steel pipe encountered by TBM in tunnel alignment and in separate insurance coverage action against insurers that issued builder's all-risk policy.
- Counsel for owner of $60 million bleach manufacturing facility in actions across multiple jurisdictions arising from breach of fixed-price engineering, procurement and construction ("EPC") contract. Successfully defended all subcontractor and contractor claims, obtained multi-million dollar settlement from EPC contractor's professional liability carrier, and obtained multi-million dollar consent judgment against procurement contractor based on claims of fraud.
- Counsel for historic tax credit lender in AAA arbitration involving the renovation and preservation of a certified historic building for residential use. Obtained favorable settlement from the designer's professional liability carrier.
- Counsel for subcontractor in breach of contract action in U.S. District Court for the Western District of Pennsylvania against general contractor for failure to pay amounts owed for renovation of three hotels located throughout Pennsylvania. Obtained six-figure settlement for full amount sought against general contractor.

PRACTICE AREAS:

Construction

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Western District of Pennsylvania

U.S. District Court for the Middle District of Pennsylvania

EDUCATION:

J.D., Western Michigan University, Thomas M. Cooley Law School, cum laude, 2009

B.A., Michigan State University, with honors, 2003

- Counsel for oil and gas company in disputes arising from construction of cathodic protection well in Lycoming County, Pennsylvania. Successfully defended all contractor and subcontractor claims asserted without payment of any amount.
- Counsel for retailer in breach of contract action against general contractor in Court of Common Pleas of Butler County arising from failure to complete renovation of retail store despite payment in full. Obtained default judgment against general contractor for entire amount sought plus attorneys' fees based on repeated discovery violations. Collected judgment in full pending general contractor's appeal of default judgment to the Superior Court of Pennsylvania. Successfully negotiated favorable settlement to resolve all disputes while appeal was pending.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association

NEWS AND INSIGHTS

PUBLICATIONS

- "Made in America: Domestic preferences," Eckert Seamans' Construction Law Update, Spring 2023.
- "Case Study: Understanding Limited Judicial Oversight of Discovery Disputes in Arbitration," Construction Executive Magazine, July 2022.
- "Case Study: Understanding Limited Judicial Oversight of Discovery Disputes in Arbitration," Eckert Seamans' Construction Law Update, Summer 2022.
- "Government contractors beware: Submission of dubious claims subject to dismissal and imposition of statutory penalties," Eckert Seamans' Construction Law Update, Summer 2022.
- "Limited judicial oversight of discovery disputes in arbitration," Eckert Seamans' Construction Law Update, Fall 2021.

Gerard Hornby

ASSOCIATE

Gerard Hornby focuses his practice on construction law, representing general contractors, subcontractors, and owners in all stages of public and private construction projects. He has significant construction law experience with bid protests, the prosecution and defense of delay and impact claims, and differing site condition claims. Gerard also counsels clients on the drafting and negotiating of contract terms and conditions, lien rights and payment and collection issues.

During law school, Gerard served as a judicial intern for The Honorable Justice David Wecht on the Supreme court of Pennsylvania, as well as a judicial extern tor The Honorable Judge Joy Flowers Conti on the U.S. District Court for the Western District of Pennsylvania.

At Duquesne University School of Law, Gerard served as the Executive Student Articles Editor of Volume 58 of the Duquesne Law Review, took part in multiple regional trial advocacy competitions, and worked as a Research Assistant to Professor Rhonda Gay Hartman.

PROFESSIONAL AFFILIATIONS

- Pennsylvania Bar Association
- Allegheny County Bar Association

AWARDS AND RECOGNITION

- CALI Award for Excellence in Torts, Constitutional Law, and Pleadings and Discovery Simulation, Duquesne University School of Law
- 2020 ALI-CLE Scholarship and Leadership Award, Duquesne University School of Law
- 2020 Dr. John and Liz Murray Award for Excellence in Student Scholarship, Duquesne University School of Law
- 2020 Shalom Moot Court Award, Duquesne University School of Law

NEWS AND INSIGHTS

PUBLICATIONS

- "Contractors, pay close attention to bid bond requirements on public projects," Eckert Seamans' Construction Law Update, Spring 2023.

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PRACTICE AREAS:

Construction

Litigation

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Western District of Pennsylvania

U.S. Court of Appeals for the Third Circuit

EDUCATION:

J.D., Duquesne University School of Law, summa cum laude, 2020

B.A., Duquesne University, magna cum laude, 2017

- "Compliance with notice provisions in a construction delay claim must be feasible," Eckert Seamans' Construction Law Update, Fall 2022.
- "Challenging an agency's evaluation of a bidder's past performance – An uphill battle," Eckert Seamans' Construction Law Update, Summer 2022.

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Risk Control

- Contract drafting and agreement is a push-and-pull process.
- Everyone wants to pass down risk, limit risk, or blame someone else.
- There is no perfect contract – but there can be a well-negotiated one that addresses onerous terms.

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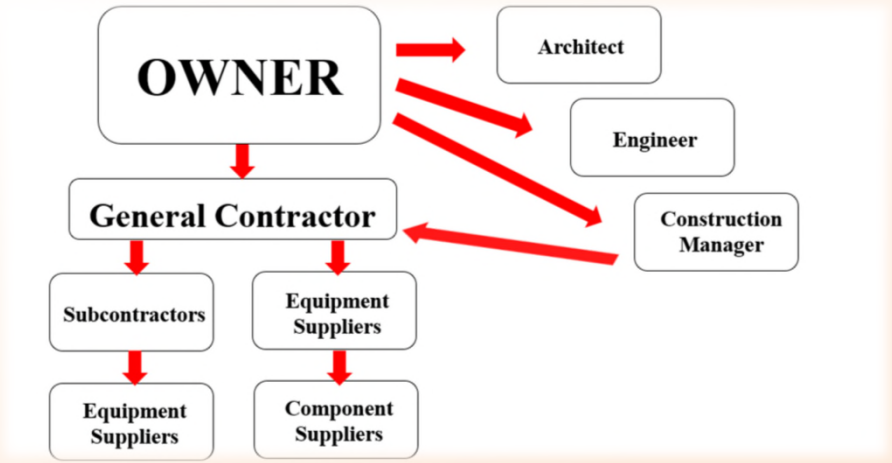
Contractual Relationships



Contractual Relationships

- The **great** contract = you get everything you want.
- The **bad** contract = the other side gets everything it wants.
- The **negotiated** contract.

Governing Principles of Risk Control

- Assume only reasonable risk.
- Assume risk that you can control.
- Ensure the deal not eroded by taking on unreasonable risk.
- An essential way to control risk is by limiting liability exposure and your contractual obligations.

Common Clauses in Construction Contracts

- The following six clauses should always be negotiated as required to control risk:
  - Pay If Paid/Pay When Paid
  - Indemnity Provisions
  - Liquidated Damages Clauses
  - No Damages For Delay Clauses
  - Flow Down Clauses
  - Material Escalation Clauses

First Key Clause: Pay If Paid and Pay When Paid Clauses.

- Shift the risk of non-payment to subcontractors or suppliers even though they may not have control over the circumstances which lead to non-payment.
- Helpful for owners and general contractors while limiting the rights of subcontractors and suppliers.
- Many states are enacting prompt payment statutes and some of them render *pay if paid* and *pay when paid* clauses to be void as against public policy.

First Key Clause: Pay If Paid and Pay When Paid Clauses.

- Pay if paid:

  "Payment to Contractor by Owner is a condition precedent to Contractor's obligation to make payment to Subcontractor and Subcontractor expressly assumes its proportionate risk of the Owner's delay or default in paying Contractor for Subcontractor's Work. Owner's failure to pay Contractor for Work performed by Subcontractor shall bar any claim by Subcontractor for payment thereof under this Subcontract, Contractor's payment bond or the Miller Act. Such payment shall only be due to Subcontractor in the event Contractor receives payment thereof. In the event Contractor receives Payment from Owner, but fails to pay Subcontractor within the time set forth herein, Subcontractor shall be entitled to interest to the extent provided for and at the rate applicable under the Prime Contract."

- Pay if paid is absolute in many states and will result in a subcontractor or supplier not being paid--even if the general contractor's failure to be paid has nothing to do with anything that the subcontractor or supplier did or failed to do.
- For example, bankruptcy of owner or incomplete or defective work by general contractor.
- A pay if paid clause may also preclude or impede bond and lien claims.

First Key Clause: Pay If Paid and Pay When Paid Clauses.

- Pay when paid: "Payment to Subcontractor shall only be due thirty (30) days following Contractor's receipt of payment for Subcontractor's work to Contractor by Owner."
- Pay when paid is somewhat less onerous as many states hold that it is not absolute but requires payment within a reasonable time.
- Reasonable time then becomes an issue to be determined on a case-by-case basis.

First Key Clause: Pay If Paid and Pay When Paid Clauses.

- Subcontractors and suppliers should do their best to avoid pay if paid and pay when paid clauses.
- At a minimum, subcontractors and suppliers should attempt to negotiate language that allows the contractor to withhold payment only if the owner's withholding of payment from the contractor is related to the performance of the subcontractor or supplier.
- Prevention Doctrine: Common law imposes on a contractor an implied duty not to frustrate a precondition to payment by the owner. If payment is being held by the owner due to performance disputes with the contractor, not related to the subcontractor, then the contractor may not refuse to pay the subcontractor based on a pay if paid clause.

Second Key Clause: Indemnity

- Provide that one party (the indemnifying party) will compensate the other party (the indemnified party) for any losses or damages that may arise from a particular event or circumstance.
- Many times, these clauses will provide that a contractor or subcontractor will indemnify the owner and design professionals **from everything and anything that could go wrong on the project**, from personal injury to property damage to environmental issues to economic damages.
- In addition, the clauses will go so far as to require the contractors or subcontractors to indemnify these parties even when their own negligence causes the loss!

Second Key Clause: Indemnity

- "Subcontractor assumes all risks arising from the Work, including responsibility and liability for the actions of its servants, agents, employees and subcontractors and agrees to indemnify, defend and hold Contractor and the Owner harmless to the fullest extent permitted by law from any and all liability, damage, injury or illness of any kind or nature whatsoever (including death resulting therefrom) to all persons, including without limitation, agents, servants and employees of Subcontractor, Contractor and the Owner, and all property (including loss of use thereof) caused by, resulting from arising out of or occurring in connection with the Subcontractor's Work, and all damages, direct or indirect, of whatsoever nature resulting from the performance of the Work or resulting to the Work from whatever cause and whether or not caused by or contributed to by the active, passive, affirmative, or concurrent negligence or breach of any statutory duty, whether delegable or otherwise, on the part of any party indemnified hereunder."

Second Key Clause: Indemnity

- Anti-Indemnity Statutes (see handout): Check the law of the state where the project is located; many states have anti-indemnity statutes that outlaw onerous indemnity terms.
- As a general contractor, subcontractor, or supplier, you should only agree to indemnify parties when you caused or participated in the cause of the loss.
- Only indemnify to the percentile extent your conduct was the proximate cause of the loss.
- Limit your indemnification obligations to property damage and/or personal injury.
- If the parties are unable to settle on an agreeable indemnity provision, consider potential impact to your insurability – your insurance policy may not provide coverage for indemnification of a third party's negligence. Consider buying a rider to your insurance policy to protect the company.
- As an owner, do not agree to language providing that an indemnifying party is only liable in the event of "sole" negligence (e.g. "_____ agrees, to the fullest extent permitted by law, to indemnify Owner from and against any and all damages arising out of the sole negligence of _____.")

Third Key Clause: Liquidated Damages

- Liquidated damages provisions specify a predetermined amount of money that must be paid as damages if one party fails to meet certain contractual requirements.
- These clauses can provide for damages for late completion at the end of the job, or on milestones, or even for the failure of the completed project to meet specified performance criteria.
- Many times, these clauses are written to allow the prime contractor or owner to also recover other consequential type damages, not included as part of its liquidated damages calculation.
- Typically expressed as a certain amount of dollars per day.
- The ultimate purpose of a liquidated damages provision is to allow the parties to agree, at the outset of their relationship, on a fair and reasonable estimate of damages that might otherwise be difficult or impossible to calculate.
- A well-drafted clause eliminates the optional nature of the clause, specifies the rationale for liquidating damages, identifies the types of losses to be liquidated (and not to be liquidated), and clarifies the events that will (and will not) trigger the clause. This can significantly reduce the types of litigation that commonly attend liquidated damages clauses.

Third Key Clause: Liquidated Damages

- As an owner seeking to include a liquidated damages provision:
  - Have the engineer or architect generate a memorandum indicating how the liquidated damages were calculated.
  - Penalty provisions are not enforceable – must be designed as best estimate of actual damages in event of a breach.
  - Include language in liquidating provision indicating that damages will be difficult to ascertain and that the liquidated damages are a fair and reasonable estimate of likely damages.
- As a contractor, subcontractor or supplier negotiating a liquidated damages provision:
  - Provide that liquidated damages are the **exclusive damages** that the contractor, subcontractor, supplier, or owner may recover in the event of a delay or performance issue.
  - Another option is to negotiate a cap on all damages based on a percentage of the contract value, such as: "Notwithstanding anything to the contrary herein, subcontractor's liability for any type of damages, liquidated or otherwise, is hereby capped at 5% of the original subcontract value."

Third Key Clause: Liquidated Damages

"If Contractor breaches its obligation to perform in accordance with the schedule provided for in this contract, Contractor shall pay Owner $x.xx per day for each day of delay as liquidated damages.

The parties agree that quantifying losses arising from Contractor's delay is inherently difficult insofar as delay may impact the Owner, and further stipulate that the agreed upon sum is not a penalty, but rather a reasonable measure of damages, based upon the parties' experience in the widget industry and given the nature of the losses that may result from delay.

This provision shall [shall not] apply in the event of concurrent delay or delay caused by a third-party. The parties further agree that this liquidated damages provision shall not apply in the event Seller's delay causes Buyer to lose a sale on an existing contract."

Fourth Key Clause: No Damages For Delay

- These clauses essentially provide that, if there is a delay not caused by you, you get **more time**, but **not more money:**

  "The Contractor's sole remedy for an excusable delay in the Work shall be an extension of time. The Contractor waives and agrees to make no claims for damages for delay in the performance of this Contract caused by an act or omission of the Owner or its representatives, and agrees that any such claim shall be fully compensated by an extension of time to complete performance of the work as provided herein."

  "Contractor agrees that it shall make no claims against Owner for damages, charges, interest, additional costs or fees incurred by reason of delays or suspension of work caused by the Owner, other parties under the Owner's control, or any other cause in the performance of its work under this Agreement. Contractor's sole and exclusive remedy for delays, stoppage, or suspension of the work is an extension of time equal to the duration of the delay, stoppage, or suspension to allow the Contractor to complete its work under this Agreement."

- If a contract also includes a liquidated damages provision, a contractor may be assessed liquidated damages for contractor-caused delay but not be able to recover its time-related costs resulting from owner-caused delays.

Fourth Key Term: No Damages For Delay

- As a contractor or subcontractor negotiating a no damages for delay provision should:
  - Seek to limit application of the provision to specifically contemplated events of delay:

  "The Contractor shall schedule its operations in such a manner as to minimize interference with the operations of the utility companies or local governments in effecting the installation of new facilities, as shown on the plans, or the relocation or their existing facilities. The Contractor shall consider in its bid all permanent and temporary utility appurtenances in their present or relocated positions and any installation of new facilities required for the project. The Owner will not make any additional compensation to the Contractor for delays, inconvenience or damage sustained by the Contractor due to (i) interference with Project construction caused by the location, condition or operation of utility (including railroad) appurtenances or (ii) the installation, removal, or relocation of such appurtenances; and the Contractor may not make a claim for any such compensation."

  - Negotiate to provide for some objective means to calculate damages based on a reasonable per diem or percentage which ties into the original bid estimated costs for field and home office overhead.

Fourth Key Term: No Damages For Delay

- Negotiate to limit your right to recover to direct, provable costs, such as project supervision, jobsite equipment and other project specific costs rather than no damages at all:

"The Contractor's sole remedy for an excusable delay shall be an extension of time as provided herein, direct field personnel expenses, general conditions, Subcontractors' actual field costs, and direct overhead and profit as allowed by the Contract Documents. The Contractor waives all other damages for delay, including home office overhead and allocated portions of indirect or general overhead expenses, incurred by it or anyone claiming through it."

Fourth Key Term: No Damages For Delay

- As an owner negotiating a no damage for delay provision should:
  - Consider avoiding overly broad clauses, as they could lead to inflated initial pricing, excess contingency, claims for additional costs outside of delay, or a contractor default.
  - Confirm that the no damage for delay provision does not conflict with the change order provisions.
  - Be aware that some courts have held that a contractual no damages for delay clause does not waive increased costs resulting from loss of productivity/disruption caused by owner changes because the clause deals with delay damages, not lost labor productivity damages.
  - Require the contractor to include a flow-down provision in its subcontracts to allow for enforcement against subcontractors and suppliers.
  - Be aware of common exceptions, including: (1) delays resulting from the benefiting party's bad faith, active interference, fraud or misrepresentation; (2) delays that were of a kind or type not contemplated by the parties; (3) delays that were so unreasonable that they constituted an intentional abandonment of the contract by the benefiting party; or (4) delays resulting from a fundamental breach of contract by the benefiting party.

Fifth Key Clause: Incorporation by Reference/Flow Down Clauses

- *Clauses in a subcontract which incorporate the general contract by reference, and which bind the subcontractor to the general contractor to the same extent the general contractor is bound to the owner, are referred to as "flow down" clauses.*

  "The subcontractor shall assume toward the Contractor all obligations toward the Contractor which the Contractor assumes towards the Owner."

- Subcontractor's often take pains to negotiate changes to the subcontract, but then ignore the fact that all of those contractual "gains" may well be trumped by the fact that the terms of the prime contract – equally as onerous and one sided – still govern because of this quiet, silent rogue.

Fifth Key Clause: Incorporation by Reference/Flow Down Clauses

- As a contractor or subcontractor, at a minimum, make sure you have everything you are agreeing to by reference. Do you have all of the documents incorporated by reference? What do the documents say? How do they affect the risk?

- If possible, negotiate that the terms of your contract take precedence over whatever is being referenced OR negotiate a reciprocal flow down provision where the general contractor assumes to the subcontractor the obligations which the owner owes to the general contractor.

  "The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions . . . of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities that the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies, and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies, and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract."

- From the perspective of the owner, collaborate and ensure that all required documents are easily accessible to downstream entities.

Sixth Key Clause: Material Escalation Clauses

- Not really a key clause – but more so a key risk to consider.
- Traditionally, material price increases generally have been viewed as an assumed risk of the general contractor or subcontractor/supplier.
- In recent years, because of Covid-19 and the knock-on effects on supply chains, this has changed.
- From April 2020 to April 2021, the U.S. Bureau of Labor Statistics' producer price index (an index measuring average price changes over time) revealed a substantial increase to a number of different construction materials. For example, from April 2020 to April 2021, there were increases to the producer price index for lumber (by 90%), iron and steel (by 58%), and plastic construction products by (14%). See Bureau of Labor Statistics, U.S. Dep't of Labor, PPI Detailed Report (Apr. 2021).
- Material escalation clauses allow a contractor to shift the risk of price increases or delays in the ability to obtain materials to the owner.

Sixth Key Clause: Material Escalation Clauses

- There are several key factors to consider when negotiating a material escalation clause:
  - The provisions generally require specific identification of the materials to which the clause will apply, or in other words, the parties must identify the materials which are anticipated to have price fluctuations during the course of construction.
  - After identification, parties will agree to the "baseline price" for the materials.
  - Material escalation clauses can be "cost-based" or "index-based."
  - Index-based clauses are linked to published material cost indexes such as the U.S. Bureau of Labor Statistics' monthly publication providing national price information on all sorts of products, including construction materials (e.g., lumber). Tying the baseline price to a published cost index will provide the parties with an objectively verifiable method of determining the extent of any material price fluctuation.
  - The parties might also consider a cost-based clause that simply compares the actual cost to the bid price.
  - From there, the provisions can sometimes include a minimum fluctuation triggering threshold which will allow for an adjustment only if there is a change over a minimum amount (e.g., there must be an increase over 3% of the market price for there to be a contract adjustment).
  - There also may be limits as to the maximum adjustment amount, such as a 10% increase limit.
  - Price escalation provisions will generally require adherence to specified notice procedures in order to qualify for an adjustment.
  - Finally, contractors may include language intended to limit their liability for delays in the delivery of materials.

Sixth Key Clause: Material Escalation Clauses

"If, during the performance of the contract, the price of the material significantly increases, through no fault of the contractor, the price shall be equitably adjusted by an amount reasonably necessary to cover any such significant price increases. As used herein, a significant price increase shall mean any increase in price exceeding ____% experienced by contractor from the date of the contract signing. Such price increases shall be documented through quotes, invoices, or receipts. Where the delivery of material is delayed, through no fault of the contractor, as a result of the shortage or unavailability of _____, contractor shall not be liable for any additional costs or damages associated with such delay(s)."

Conclusion

- The bottom line is that typical risk avoidance techniques and unfavorable contract terms are here to stay.
- However, if recognized and dealt with during the negotiation of the contract, these terms—and any potential risk exposure—can and should be managed.
- Questions?

A Practical Guide to Drafting Construction Contracts: 50 State Survey of Anti-Indemnity Statutes

David Meredith, and Gerard Hornby

August 24, 2023

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Alabama				No statute.
Alaska	✓			Alaska Stat. § 45.45.900. Exception for hazardous substances.
Arizona	✓ (private work)	✓ (public work)	✓ (public work)	Ariz. Rev. Stat. §§ 32-1159, 34-226, 41-2586. Exception for all three for entry onto adjacent land. §§ 34-226 and 41-2586, limit indemnity on public work projects to only those damages caused by the negligence, recklessness, or intentional wrongful conduct of the contractor, subcontractor or design professional, and any express duty to defend is prohibited.
Arkansas	✓			Ark. Code §§ 4-56-104 and 22-9-214.
California	✓	✓		Civ. Code §§ 2782 and 2782.05 (effective with Contracts entered after Jan. 1, 2013). § 2782.5 provides an exception for "the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract."
Colorado	✓	✓		Colo. Rev. Stat. §§ 13-50.5-102; 13-21-111.5. Statutes do not apply to breaches of trust and similar fiduciary duties.
Connecticut		✓		Conn. Gen. Stat. § 52-572k.

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Delaware		✓	See comments.	Del. Code, Title 6, § 2704. *See Chrysler v. Merrell & Garaguso*, 796 A.2d 648 (Del. 2002) (a.i. *requirement* "may, under certain circumstances, be unenforceable," but *endorsement* is enforceable).
District of Columbia				No statutes. *See N.P.P. Contractors, Inc. v. John Canning & Co.*, 715 A.2d 139, 142 (D.C. 1998) (indemnification contract allowed).
Florida		✓ (public work)		Fla. Stat. § 725.06 requires only a monetary limitation and reproduction in bid documents and specs.
Georgia	✓		✓	Ga. Code § 13-8-2. Exception for obligations under workers' compensation agreements and similar coverage or insurance related to workers' compensation.
Hawaii	✓			Hawaii Rev. Stat. § 431:10-222. Inapplicable to workers' compensation claims.
Idaho	✓			Idaho Rev. Stat. § 29-114.
Illinois		✓		Ill. Compiled Stat., 740 I.L.C.S. § 35/0.01, *et seq.* Inapplicable to construction bonds and insurance contracts or agreements.
Indiana	✓			Ind. Code § 26-2-5. Exceptions for "dangerous instrumentalities" and "highway contracts."

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Iowa		✓		Iowa Code § 537A.5. Inapplicable to "any obligation of strict liability otherwise imposed by law."
Kansas		✓	✓	Kansas Stat. § 16-121. Statute voids promises on public and private projects to indemnify or provide liability coverage to another person as an additional insured for that person's own negligence, acts or omissions. There are six exceptions. Kansas Stat. §§ 16-1803 (private) and 16-1903 (public) nullify contract clauses that waive subrogation rights for losses covered by liability or workers' compensation insurance with certain exceptions.
Kentucky		✓		Kentucky Rev. Stat. § 371.180. Applies to contracts entered into after June 20, 2005.
Louisiana		✓ (public work)		La. Rev. Stat. § 38:2216.G. Only protects prime contractors on public work. Compare the Louisiana Oilfield Indemnity Act, La. Rev. Stat. Ann. § 9:2780, applied in *Babineaux v. Reading & Bates Drilling*, 806 F.2d 1282 (5th Cir. 1987) (both "hold harmless" and "additional insured" void).
Maine				No statute.

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Maryland	✓			Md. Code. Ann., Cts. & Jud. Proc. § 5-401. Inapplicable to insurance contract and workers' compensation issues.
Massachusetts	✓			Mass. Gen. Laws, ch. 149, § 29C. Voids any provision which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, sub-subs or agents.
Michigan	✓			Mich. Comp. Laws § 691.991.
Minnesota		✓		Minn. Stat. § 337.02. Indemnification agreements in construction contracts are unenforceable. Two exceptions: (i) Underlying injury or damage is due to negligent act (including breach of specific contractual duty). (ii) Owner, responsible party, or governmental entity agrees to indemnify contractor directly or another contractor for strict liability environmental laws.
Mississippi		✓		Miss. Code § 31-5-41. Inapplicable to construction bonds and insurance agreements.

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Missouri		✓		Mo. Rev. Stat. § 434.100. Nine exceptions, including contracts between state or government agencies.
Montana		✓	✓	Mont. Rev. Code § 28-2-2111. Two exceptions: (i) For negligent, reckless, or intentional conduct of a third party or indemnifying party. (ii) Indemnity of a surety.
Nebraska		✓		Neb. Rev. Stat. § 25-21,187.
Nevada	✓			Neb. Rev. Stat. § 40.693. Effective 2/24/15. Indemnification clauses in residential construction contracts requiring subcontractor to indemnify the general contractor for the contractor's negligence (whether active, passive, or intentional) are void and unenforceable as against public policy. The statute specifically states that its anti-indemnity provision does not apply to indemnity and defense agreements that require a subcontractor to indemnify and defend the general contractor or the developer for claims based on the subcontractor's scope of work.
New Hampshire		✓		N.H. Rev. Stat. §§ 338-A:1 (design professionals) and 338-A:2 (construction contracts generally).

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
New Jersey	✓			N.J. Stat. § 2A:40A-1. Inapplicable to workers' compensation issues.
New Mexico		✓	✓	N.M. Stat. § 56-7-1. Prohibits requirements to "insure or defend," but authorizes OCP, PMPL.
New York		✓		N.Y. Gen. Oblig. Laws § 5-322.1. Contractor cannot require subcontractor to indemnify the contractor for contractor's negligence but contractor may require sub to indemnify contractor from negligence of sub and other trades.
North Carolina		✓		N.C. Gen. Stat. § 22B-1.
North Dakota				No statute. *But see* N.D.Cent.Code 9-08-02.1 prevents owner shifting design risk.
Ohio		✓	See comments.	Ohio Rev. Code § 2305.31. *Compare Buckeye Union Ins. v. Zavarella Bros.*, 699 N.E.2d 127 (Ohio 8th App. 1997) (a.i. barred) *and Stickovich v. Cleveland*, 757 N.E.2d 50, 61 (Ohio 8th App. 2001) (a.i. permitted).
Oklahoma		✓	✓	Okla. Stat. § 15-221.

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Oregon		✓	✓	Or. Rev. Stat. § 30.140. Prohibits subcontractor's "surety or insurer" from indemnifying another's negligence. *Walsh Construction Co. v. Mutual of Enumclaw*, 104 P.3d 1146 (Or. 2005).
Pennsylvania				Pa. Stat., Title 68, § 491, prohibits indemnity of design professionals.
Rhode Island		✓		R.I. Gen. Laws § 6-34-1. Inapplicable to construction bonds.
South Carolina	✓			S.C. Code § 32-2-10.
South Dakota	✓			S.D. Codified Laws § 56-3-18.
Tennessee	✓			Tenn. Code § 62-6-123.
Texas		✓ (See Comments)	✓ (See Comments)	Tex. Insurance Code Ch. § 151. Exception for employee claim § 151.103; see § 151.105 for exclusions; Civ. P&R Code § 130.002 only prohibits indemnity of design professionals.
Utah		✓		Utah Code § 13-8-1. Exception permits indemnity of owner; fault of the owner is apportioned among the parties pro rata.
Vermont				No statute.

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State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Virginia	✓			Va. Code § 11-4.1.
Washington		✓		Wash. Rev. Code § 4.24.115.
West Virginia	✓			W.Va. Code § 55-8-14. Inapplicable to construction bonds.
Wisconsin		✓		Wis. Stat. § 895.447. Inapplicable to insurance contract or workers' compensation plan.
Wyoming				No statute. *But see* Wyo. Stat. § 30-1-131 voids covenants or promises pertaining to "any well for oil, gas or water, or mine for any mineral" which purport to indemnify the indemnitee from loss or liability caused by his or her own negligence.