RISK ALLOCATION IN THE AIA GENERAL CONDITIONS

Examination of the A201 in Light of Texas Law

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Risk Allocation in the AIA A201 General Conditions
An examination of the A201 in light of Texas law
By William H. Locke, Jr.

CHAPTER 1. INTRODUCTION.

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is allocated in a contract are by the use of representations and warranties

This article examines the following risk allocation provisions in the AIA A201: Chapter 2 - ¶ 3.31 Site Safety Responsibility; Chapter 3 - ¶Claims for Concealed or Unknown Conditions, Chapter 4 - ¶¶ 3.2.1 - 3.2.3 Contractor's Review of Design Documents, Chapter 5 - ¶ 4.3.10 Waivers of Consequential Damages, and Chapters 6 and 7 covering Extraordinary Risks and Risk Shifting Provisions ¶3.18 Indemnity and ¶11.4 Insurance. Chapter 6 includes an extensive explanation of the AIA bodily injury and property damage risk allocation system, the forms developed by Insurance Services Office, Inc. ("**ISO**") for use by its members to address these risks, including commercial general liability ("**CGL**") insurance, workers compensation insurance, and business auto insurance, additional insured endorsements, and builders risk insurance. Chapter 7 explains the special aspects of Texas law that make certain aspects of the AIA risk allocation by indemnity and waiver provisions unenforceable in Texas.

CHAPTER 2. SITE SAFETY.

The following provisions are from the current edition of the AIA General Conditions (1997 Edition) for use with the AIA A101-1997 Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM and the AIA A111-1997 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the COST OF THE WORK PLUS A FEE with a negotiate Guaranteed Maximum Price. On the left hand side are the AIA contract risk allocation provisions. On the right hand side is the Commentary explaining the risk allocation.

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SITE SAFETY	COMMENTARY
3.3.1 SITE SAFETY. **3.3.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. *The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.* If the Contract Documents give specific instructions concerning means ... the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means....If the Contractor determines that such means ... may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means ... without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage. [Emphasis added.]	**3.3.1** places control over all construction "means, methods, techniques, sequences and procedures" on the contractor and, accordingly, sole responsibility for job site safety. In addition to making sure all Work is performed safely, the contractor is allocated the responsibility for coordinating all portions of the Work in such a way as to allow the Work to be safely performed. However, the 1997 revised A201 to permit the owner or architect to give instructions to the contractor on how the Work is to be performed. The 1997 revision to the AIA A201, while expressly shifting to the owner liability for contractually-required instructions, it (1) Places an affirmative obligation on the contractor to (1) evaluate the owner/architect directives for safety concerns; (2) notify the owner and architect of any unsafe means, methods, and techniques so mandated; and (3) develop safe methods, means, and techniques, or suggest changes to the specified instructions to make them safe. (2) Allocates to the contractor liability for the safe performance of the mandated work, if the contractor proceeds according to the contractual instructions without proper objection.

If the contractor is instructed to proceed with the required means, methods, techniques, sequences, or procedures "without acceptance of changes proposed by the contractor, the contractor must do so, but the liability for any resulting loss or damage becomes the sole responsibility of the owner.

Contractor Objections.

This provision in the A201 shifts some of the owner's and architect's liability for third-party claims to the contractor. This provision may subject the contractor's employees to increase risk of injury. Delays may arise as the contractor is forced to wait for clarifying instructions. Contractors may as a result argue for the return of the provision to the pre-1997 state, where liability is allocated to a party to the extent that the party is responsible for the construction methods, means, and techniques.

CHAPTER 3. DIFFERING SITE CONDITIONS.

"**Differing site conditions**" are any on-site subsurface or concealed physical condition that is substantially different from what the contractor reasonably expected and that increases the time and/or money, required to complete the Work.

AIA A201 - General Conditions of the Contract for Construction

DIFFERING SITE CONDITIONS	COMMENTARY
4.3.4 CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.	The A201 provides that the party detecting a differing site condition must promptly notify the other party of this finding before the conditions are disturbed, and no later than 21 days after first observing the condition. The architect is responsible for investigating the situation and determining whether the contractor is entitled to an equitable adjustment of time or money. Such conditions are referred to as "**Type I conditions**" (site conditions are "materially different" from what is indicated in the contract) and "**Type II conditions**" (site conditions are materially different from conditions ordinarily recognized as inherent to the Work called for by the contract). The 21-day period is to allow the owner the opportunity to investigate the situation before the changed condition is disturbed and before additional work is performed. If contractor intends to make a claim for price or time adjustment due to differing site conditions, it is required to give a claims notice *before proceeding to execute the work*, except in the case of an emergency affecting the safety of persons or property. If either the owner or contractor is dissatisfied with the architect's determination of the differing site conditions claim, the A201 provides that the dissatisfied party is required to file its opposition within 21 days of the architect's findings. In the absence of an **4.3.4** type provision, Texas common law would permit a contractor to adjust the price or time only if it could prove owner misrepresentation, deceit, or breach of warranty with respect to site conditions. A **4.3.4** type provision allows the contractor to price the project based on normal conditions without an allowance (a "risk premium") for differing site conditions.
4.3.5 CLAIMS FOR ADDITIONAL COST. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for claims relating to an emergency endangering life or property arising under Paragraph 10.6.	

CHAPTER 4. DESIGN RESPONSIBILITIES.

AIA A201 - General Conditions of the Contract for Construction

DESIGN RESPONSIBILITIES	COMMENTARY
3.2.1 CONTRACTOR'S REVIEW OF DESIGN DOCUMENTS. **3.2.1** Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. *These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents;* however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.	**3.12.10's Circumstances Where Design Responsibility Allocated to Contractor** **3.12.10** provides for design responsibility, and consequent potential design liability, arising out of professional services that are (1) specifically required by the Contract Documents or (2) necessary to carry out the contractor's responsibility for construction means, methods, and techniques. Whereas **3.12.10** of the A201 stipulate that the architect must specify all design and performance criteria, and that the contractor is not responsible for the adequacy of performance or design criteria that are required by the contract documents, **3.2.1-3.2.3** provide that the contractor is required to study and compare the various design components of the contract documents and other owner-furnished information, take field measurements of existing conditions, and to generally plan its work.
3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that *the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional* unless otherwise provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with the applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.	**Reporting Requirements** The A201 places on the contractor the duty to report errors, omissions, or inconsistencies in the architect's design and to notify the architect of any noncompliances with laws, building codes or other regulations. A contractor who knowingly fails to inform the architect of the nonconformity may be forced to pay to correct the errors, inconsistencies, or omissions.
3.2.3 (...) *The Contractor shall not be liable* to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents *unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.* **3.12.10** The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such	**Contractor Objection** Contractors may object to the inclusion of this provision on grounds that it relieves the architect of its responsibility to review submittals independently of review by the contractor. In any event, the potential risk of design liability arising under **3.2** allocated to a contractor should be considered by owner and contractor in the project's insurance specifications.

services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will renew, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

CHAPTER 5. WAIVER OF CONSEQUENTIAL DAMAGES.

"**Damages**" broadly defined encompasses all injury or loss suffered by a person as a result of an act or omission of another person. In construction claims, damages fall into two categories: "**direct damages**" and "**consequential damages**." "**Direct damages**" are typically immediate and arise naturally from the breach of the contract. Direct damages are the most common form of damages incurred by an injured party, either owner, architect, contractor, or subcontractor. Direct damages are incurred when specific project costs increase as a result of a certain event. For example, a project delay may produce direct damages in the form of increased material, rental, and labor costs. Unless waived or prohibited by contract, contracting parties are usually able to recover direct damages. "**Consequential damages**" are more remote than direct damages and may not naturally flow, or be reasonably foreseeable as a result of breach. They have an indirect link to a damage-producing event. Examples of consequential damages are lost profits and harm to a business's reputation. Because consequential damages do not directly flow from the event giving rise to the claim, they are harder to prove and recover. There may not be a bright line between what are direct damages and what are consequential damages.

This provision was not included in earlier editions of the A201. This provision of the 1997 AIA A201 is a mutual waiver by Owner and Contractor of a claim for consequential damages, including consequential damages arising out of or relating to the termination of the contract. This waiver includes the contractor's lost profits and extended home office overhead and the owner's loss of use claim.

This provision states certain types of consequential damages as being "**included**." Without clarification by adding "**but not limited to**" some commentators have argued that the listed consequential damages may be the exclusive damages waived.

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WAIVER OF CONSEQUENTIAL DAMAGES	COMMENTARY
4.3.10 CLAIMS FOR CONSEQUENTIAL DAMAGES. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes: **.1** damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and **.2** damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in the Subparagraph 4.3.10 shall be deemed to preclude	**Deletion of the Waiver from the Contractor's Perspective.** Striking this provision, removes from the contractor the AIA form's protection against liability for consequential damages suffered by the owner if the contractor's work proves faulty. This waiver likely covers practically all liabilities suffered by the owner except the cost to repair or replace defective work. For example without this wavier, the contractor is still exposed to a loss of use claim by the owner arising out a contractor's defective work. Such claim can easily exceed the cost of repair. Retention of the waiver reduces the contractor's uncertainty as to the magnitude of an owner's claim. **Contractor's Revision.** Contractor may seek to delete from the waiver "home office overhead, including salaries of home office employees." In support of this modification, if the contract contains a liquidated damage provision as to claims by the owner against the contractor for failure to complete on time, such liquidated damages include an element of consequential damages incurred by the owner, namely loss of use. A contractor could achieve much the same result by negotiating a per diem

an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

rate to recover its home office expenses as part of its recoverable and compensable delay damages.

Ambiguity in the Provision.

This provision excludes "liquidated **direct** damages." While "liquidated damages" are a common industry term. There is no definition of "liquidated direct damages." Does this somehow mean that "liquidated **consequential** damages" are not waived?

CHAPTER 6. EXTRAORDINARY RISK SHIFTS.

1. Contractual Extraordinary Risk Allocation Provisions.

1.1 Indemnity.

Chapter 7 discusses the concept of Indemnity and the special requirements imposed by Texas to make indemnities covering an Indemnified Person's liability for its own negligence, whether the liabilities are caused in whole by the Indemnified Person's fault due to its negligent acts or omissions or in part by the Indemnified Person's negligent acts or omissions, or if the Indemnified Person's liability arises without fault due to its strict liability.

Indemnity agreements are comprised of the following elements:

(1) the person giving the indemnity (the "**Indemnifying Person**"), the person or persons protected by the indemnity (called herein "**Indemnified Persons**"),

(2) the matters triggering the indemnity (such as a relationship or an event; for example, the Work or Operations of the Indemnifying Person, or the acts or omissions of the Indemnifying Person, the occurrence of an injury or an environmental contamination, or the providing of products and services, or a location such as the Job Site, called herein "**Indemnified Matters**"), and

(3) the liabilities covered by the indemnity (for example, a claim, loss, liability, damage, attorney's fees, court costs, expert witness fees, called herein "**Liabilities**" and to the extent indemnified called "**Indemnified Liabilities**" and to the extent not indemnified "**Excluded Liabilities**").

There are three types of indemnity agreements.

Broad Form Indemnity: Under what is known as "broad form indemnity" the Indemnifying Person agrees to be responsible for any and all Liability arising out of an Indemnified Matter, including Liability that is the result of the sole negligence of the Indemnified Person. Most states, not Texas, prohibit, or severely limit the use of broad form indemnity provision in construction contracts.

Intermediate-Form Indemnity: Under an "intermediate-form indemnity" the Indemnifying Person agrees to be responsible for Liability arising out of Indemnified Matters that is caused by the Indemnifying Person's sole fault or negligence, as well as Liability for which the Indemnifying Person and the Indemnified Person are jointly at fault. Under this form of indemnity the Indemnifying Person is not responsible for liability incurred as a result of the sole fault or negligence of the Indemnified Person.

Comparative (or Limited) Form Indemnity: Under a "comparative-form indemnity" the Indemnifying Person agrees to be responsible for Liability to the extent that the Liability is caused by the Indemnifying Person, but not to the extent that the Liability is caused by the Indemnified Person.

AIA A201 - General Conditions of the Contract for Construction

INDEMNIFICATION

3.18 INDEMNIFICATION.

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph **11.3**, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against **claims**, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of **the Work**, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, **but** only to the extent **caused** in whole or in part by **negligent acts or omissions of the Contractor**, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless** of whether or not such claim, damage, loss or expense is **caused in part** by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph **3.18**.

3.18.2 In claims against any person or entity indemnified under this Paragraph **3.18** by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Paragraph **3.18.1** shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

3.18.3 The obligations of the Contractor under this Paragraph **3.18** shall **not** extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instruction by the Architect, the Architect's

COMMENTARY

[1] AIA's Attempted Broad Form Shift of Risk from Owner to Contractor for Owner's Contributory Negligence is Unenforceable in Texas as Drafted.

The AIA risk management system reflected in the AIA A201 seeks to shift the risk of liabilities [**3.18.1**] "arising out of the Contractor's performance of the Work, if such liabilities are caused in whole or in part by the negligent acts or omissions of the Contractor or by its Subcontractor [or] anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless** of whether or not such claim, damage, loss or expense is **caused** in **part** by a party indemnified hereunder."

Scope of Indemnity

3.18.1 is unclear as to whether the owner's negligence is an Indemnified Liability. Contractor's indemnity is worded both as being limited by "**only** to the extent caused by the negligent acts or omissions of the Contractor" but is also clarified by "**regardless** of whether or not such claim ... is caused in part by a party indemnified hereunder." The issue is whether the contractor's indemnity covers all Liability arising out of resulting from Contractor's performance of the Work, even if the Liability is in part caused by the negligence of the Owner or Architect.

This indemnity language does not meet either the express negligence test or the fair notice test. As a result it does **not** indemnify the "Owner, Architect, Architect's consultants, and agents and employees of any of them" (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The "regardless of whether ... caused in part by a party indemnified hereunder" does not expressly refer to the negligence, in whole or in part of the Indemnified Persons. *Ethyl Corp. V. Daniel Construction Co.,* 725 S.W.2d 705 (Tex. 1987); *Fisk Electric Co. v. Daniel Construction Co.,* 888 S.W.2d 813 (Tex. 1994).Thus the exclusion from the Contractor's indemnity to the extent the claims are covered by Project Management Protective Liability insurance purchased by the Contractor for the Owner's protection, is irrelevant as the Contractor's indemnity never comes into play.

consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage. . . .

The failure of the indemnity to be enforceable as an indemnification of the Indemnified Person's negligence also results in the indemnity not being enforceable as to the Indemnifying Person's own concurrent negligence. *Ethyl Corp. V. Daniel Construction Co.,* 725 S.W.2d 705 (Tex. 1987); *Monsanto Co. v. Owens-Corning Fiberglass Corp.,* 764 S.W.2d 293 (Tex. App.–Houston [1st Dist.] 1988, no writ).

As such, the indemnity does not overcome the Workers' Comp bar. *Varela v. American Petrofina Co., of Texas,* 658 S.W.2d 561 (Tex. 1983).

[2] AIA's Language Does Not Cover Cost of Defense.

The AIA language does not expressly recite that the Indemnifying Person is to defend the Indemnified Persons and as a result the cost of defense is not covered even though attorney's fees are recited as an Indemnified Liability. Additionally, due to the failure to meet the express negligence test the cost of defense are not covered even if the Indemnified Person is negligent. *Fisk Electric Co. v. Daniel Construction Co.,* 888 S.W.2d 813 (Tex. 1994); *Glendale Construction Services, Inc. V. Accurate Air Systems, Inc.* 902 S.W.2d 536 (Tex. App.–Houston [1st Dist.] 1995, writ denied).

[3] Unnamed Persons are Not Implied to be Indemnified Persons.

Care should be taken in listing all persons who are to be indemnified. For example, the failure to list partners, shareholders, officers, principals and consultants of an Indemnified Person results in their not being indemnified. *Melvin Green, Inc. V. Questor Drilling Corp.,* 946 S.W.2d 907 (Tex. App.–Amarillo 1997, no writ).

[4] AIA Form Does not Expressly List Punitive Damages or Fines as an Indemnified Liability.

[5] AIA Form Does Not Expressly Cover Legal Costs Beyond Attorney's Fees Incurred to Enforce Indemnity.

The failure of the AIA form to cover the Indemnified Persons' legal costs (copying, filing fees, courier fees) in enforcing the indemnity may result in such costs not being an Indemnified Liability. *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.–Dallas 1999, no writ).

[6] AIA Form Fails to Address Settlement Rights.

The AIA form fails to address settlement. This may result in the loss of indemnity upon settlement of the liability. *MAN GHH Logistics GMBH v. Emscor, Inc.,* 858 S.W.2d 41 (Tex. App.–Houston]14th Dist.] 1993, no writ); *Liberty Steel Co. V. Guardian Title Co. Of Houston, Inc.* 713 S.W.3d 358 (Tex. App.–Dallas 1986, no writ). This may result in the loss of an Indemnified Person's attorney's fees upon settlement. *Humana Hospital Corp. V. American Medical Systems, Inc.*, 785 S.W.2d 144 (Tex. 1990).

[7] The AIA Form Fails to Include as an Indemnified Matter Strict Liability of an Indemnified Person.

The failure expressly to indemnify the Indemnified Person for liability imposed on it due to strict liability in tort, statutory environmental liability, or strict products liability results in these types of liabilities not being indemnified. *Houston Lighting & Power Co. V. Atchison, Topeka & Santa Fe Railway Co.,* 890 S.W.2d 455 (Tex. 1994); *Fina, Inc. V. ARCO*, 200 F.3d 266 (5th Cir. 2000); *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App.–Houston [1st Dist.] 1974), *aff'd*, 530 S.W.2d 794 (Tex. 1975); *Dorchester Gas corp. v. American Petrofina, Inc.* 710 S.W.2d 541 (Tex. 1986); *Arthur's Garage v. Racal-Chubb,* 997 S.W.2d 803 (Tex. App.–Dallas 1999, no writ).

[8] The AIA Form Does Not Contain a Mutual Indemnity by Owner of Contractor for Owner's Comparative Share of Negligence.

The AIA form does not contain a mutual indemnity by Owner of Contractor. The AIA risk management system seeks to pass to the Contractor through the Contractor's indemnity liability for injuries caused by the joint negligence of Contractor and the Indemnified Persons (*i.e.,* the Owner, Architect, Architect's consultants, and agents and employees of any of them). Also, the failure of the AIA form to have a mutual indemnity by the Owner of the Contractor results in the Worker's Comp. Bar preventing recovery by Contractor against Owner for Owner's share of negligence for injuries to Owner's employees. *Varela v. American Petrofina Co. Of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983).

HAZARDOUS MATERIALS

10.3 HAZARDOUS MATERIALS.

10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop work in the affected area and report the condition to the Owner and Architect in writing.

10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, **arising out of** or resulting from performance of the **Work** in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph **10.3.1** and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

....

10.5 If, **without negligence** on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

....

COMMENTARY

"**Hazardous substances**" are broadly defined in **10.3.1** as a material or substance encountered on the site that presents the "risk of bodily injury or death." If a contractor identifies a hazardous substance on site "for which reasonable precautions" would be inadequate to prevent foreseeable injury, the contractor is required to suspend operations in the affected area and report the condition to the owner and architect in writing. Work can resume in that area only after the hazardous substance is rendered harmless. If a material delay results, the contractor is entitled to a time and price adjustment.

Indemnity

A201 ostensibly requires the owner to indemnify contractor, architect and subcontractors for claims or damages arising out of or related to the presence of hazardous substances on site, including costs of removal, containment, and injury, except for such liabilities that arise for hazardous substances brought to the site by the contractor.

AIA's Attempted Broad Form Shift of Risk from Contractor to Owner of Contractor's Contributory Negligence Due to Hazardous Materials at Owner's Premises is Unenforceable in Texas as Drafted.

A similar malady exists as to the indemnity contained in **10.3.3**, which is an indemnity by the Owner of the Contractor as to claims against the "Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them ... provided that such damage, ... is not due to the sole negligence of a party seeking indemnity." This indemnity language does **not** meet either the express negligence test or the fair notice test.

As a result it does not indemnify the "Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them" (the Indemnified Persons) for the Indemnified Liabilities for which this provision was intended. The phrase "provided that such damage, ... is not due to the sole negligence of a party seeking indemnity" does not expressly indemnify the Indemnified Persons for hazardous materials liability arising out of either the concurrent negligence of the Indemnified Persons or their non-negligent strict liability.

The reiteration in Paragraph **10.5** of the **10.3.3** indemnity by the Owner is also subject to the same maladies; it is neither conspicuous and does not expressly state that the Contractor is being indemnified for its strict liability.

Contractor Objections

10.5 places the following limits on the owner's indemnity: (1) it excludes liabilities occurring if the contractor is negligent thereby excluding from the indemnity cases where the owner and contractor are "**concurrently negligent**" and (2) it excludes liabilities from owner's indemnity where they are not "**solely**" the result of Contractor's performance of the Work (leading to disputes as to what is meant by "solely.").

1.2 Insurance.

LIABILITY INSURANCE	COMMENTARY
11.1 CONTRACTOR'S LIABILITY INSURANCE	**No Requirement Imposed on Contractor to Purchase CGL Insurance to Protect Owner or to List Owner as AI on Contractor's CGL.**
11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the **Contractor** from claims set forth below which may arise out of or result from the Contractors **operations** under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:	The liability insurance coverage being provided by Contractor pursuant to Paragraph **11.1** protects the Contractor against liability for liabilities "which may arise out of or result from the Contractor's operations...."
.1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable tot he Work to be performed;	**Since AIA's 3.18.1 is Unenforceable in Texas to Indemnify Owner for its Negligence, AIA's 11.1.1.8 is Requirement for Contractor to Provide Contractual Liability Insurance Protection is Irrelevant and Ineffective.**
.2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;	This provision does not directly protect the Owner, except to the extent of the protection afforded by Clause **11.1.1.8** which protects the Contractor for "claims involving contractual liability insurance applicable to the Contractor' obligations under Paragraph **3.18**." Clause **11.1.1.8** is not direct insurance in favor of the Indemnified Persons. It is indirect protection to the extent that the **3.18** indemnity is effective. Since **3.18** is not enforceable in Texas, an issue exists as to whether the "assumed liability on an insured contract" coverage under the Contractor's CGL policy will provide the Indemnified Persons any protection.
.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractors's employees;	
.4 claims for damages insured by personal injury liability coverage;	
.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;	
.6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;	
.7 claims for bodily injury or property damage arising out of completed operations; and	**AIA Form Does Not Impose Requirement on Owner to Maintain Liability Insurance or Require Owner to Have its Other Contractors Maintain Insurance.**
.8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph **3.18**.	**Need Copy of AI Endorsement**
11.1.2 The insurance required by Subparagraph **11.1.1** shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.	This provision should be modified to provide that a copy of the AI endorsements are to be furnished to the AI prior to commencement of Work.

11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph **11.1** shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire initial at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph **9.10.2**. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

11.2 OWNERS'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's **usual** liability insurance.

11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

11.3.1 Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's **vicarious liability** for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall **not** be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses **11.1.1.2** through **11.1.1.5**.

11.3.2 To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

AIA Insurance Provisions Place upon Owner the Obligation to Carry Liability Insurance to Protect Owner Against Injuries Arising out of Contractor's Work or Operations Caused by Owner's Contributory Negligence.

Paragraph **11.3** provides the Owner with an option at the Owner's expense to require the Contractor to purchase Project Management Liability insurance for the "Owner's, Contractor's and Architect's **vicarious liability** for construction operations under the Contract."

AIA Provisions Prohibit Owner from Requiring Contractor to Name Owner as an AI on Contractor's CGL Policy.

Subparagraph **11.3.1** provides that "Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner." Subparagraph **11.3.3** provides that the "Owner shall **not require** the Contractor to include the Owner, Architect or other persons or entities as **additional insureds**."

Thus, the AIA system contemplates that the most common form of risk shifting device will **not** be employed to protect the Indemnified Persons for the very risk that were attempted to be shifted to the Contractor under the indemnity in Paragraph **3.18**, the risk of liability for concurrently negligently caused liabilities.

A common method of protecting the Owner from the risk of liability arising out of its concurrent negligence is to require the Contractor to have its insurance company list the Owner and the other Indemnified Persons as additional insureds under an ISO Additional Insured Endorsement, such as an ISO CG 20 10 Additional Insured - Owners, Lessees or Contractors – Scheduled Person or Organization (See **Chapter 6 Form 2.2**) or an ISO CG 20 26 Additional Insured - Designated Person or Organization (See **Chapter 6 Form 2.4**).

11.3.3 The Owner shall **not** require the Contractor to include the Owner, Architect or other persons or entitles as additional insureds on the Contractor's Liability Insurance coverage under Paragraph **11.1**.

11.4 PROPERTY INSURANCE

11.4.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph **9.10** or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph **11.4** to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project.

.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

.2 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

11.4.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverage required by this Paragraph **11.4**. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or

Completed Operations Risk Coverage

Additional insured status as to liabilities arising after final completion of a contractor's work may be endorsed on to the contractor's CGL policy by ISO CG 20 37. Additional Insured - Owners, Lessees or Contractors – Completed Operations (See **Chapter 6 Form 2.5**). See the Commentary following each of these forms.