The Art of Living Together:
How Owners Can Improve Their Chances for a Successful Project

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A construction project is like a marriage—albeit, a short-lived one. To make that construction marriage successful (while it lasts), project participants must know who your construction partners are, each must be reasonable with the others, and each must treat the others with respect. This construction marriage requires a strong collaborative relationship between project participants acting as a team, whose collective goal is to assist one another in creating a high-quality work product. Project success hinges on the quality of the project relationships. While a marriage does not result in merely moving on to the next job like a construction project, they both involve figuring out how to stay together.

Project owners can improve their chances for a successful project at all project stages if they understand this concept. Project owners must learn “the Art of Living Together.” This paper will outline ten project topics—from project inception to closeout—with collective tips from different construction industry professionals’ perspectives to aid owners in creating and sustaining successful construction marriages.

I. **Selecting the Best Project Delivery Method for Success and Crafting a Unified Focus for Success**

**Tip #1: Know your strengths and weaknesses and know when to ask for help.**

A successful owner should choose a project delivery method that best fits its abilities, knowledge of construction contracting, financing, and the type and size of the project. An owner must know its limits, as well. Attorneys should advise owners to do a “self-evaluation” at the outset of the project to determine its strengths and weaknesses for constructing a particular project. Owners should assess who it employs, what is its employees’ construction-related experience and expertise, and in what areas is the owner lacking in construction understanding or expertise. Knowing an owner’s strengths and weaknesses can help attorneys advise the owner as to what is the best project delivery method.
For example, if the owner lacks construction experience or understanding, it should retain competent counsel, consultants, and owner’s representatives to help it select the best project delivery method.\(^{11}\) Owner’s representatives and consultants are invaluable because they have the necessary experience in managing and overseeing large, complex projects and can supplement and owner’s staff to advise owners as to the project’s various needs and progress.\(^{12}\)

If an owner is a novice in the construction world, lawyers should counsel away from project delivery methods that require heavy owner involvement, like a cost-plus method, and counsel the owner toward a simpler method, like a lump-sum contract.\(^{13}\) “[P]retty much any construction project can be done in any [number] of ways . . . , so what makes the difference is not just the nature of the project, but really the capability of the owner itself.”\(^{14}\)

**Tip #2: Understand the industry forms and kinds of delivery methods.**

Attorneys must understand that delivery methods are often dictated by industry or non-industry forms.\(^{15}\) Standard industry forms are often written by attorneys representing others in the construction industry and not from the owner’s perspective.\(^{16}\)

From an owner’s perspective, the size of the project will also dictate the kind of delivery method recommended to the owner.\(^{17}\) For large projects, it is recommended that owner use owner-drafted, non-industry forms, using a guaranteed-maximum-price contract structure where the contractor is at risk.\(^{18}\) For smaller-scale projects, where the plans and specifications are pristine and complete, lump-sum contracts often meet owners’ needs, and owners can rely on the standard industry forms, with some modifications.\(^{19}\) An owners’ least favorite delivery method is the cost-plus fee arrangement.\(^{20}\) However, sometimes, the cost-plus fee arrangement is a necessary evil when the plans and specifications are not as complete.\(^{21}\) If an owner must use the cost-plus fee arrangement, the standard industry forms on a small-scale project suffice.\(^{22}\)
The design-assist method can be particularly troublesome for all parties, especially when roles and obligations lack clarity and precise definition. Lack of definition in roles and obligations necessarily creates strife in the project relationships and creates differing expectations. The owner, as well as his design-assist contractor, should endeavor to clearly define their roles, expectations, and contractual definitions and obligations to help ensure success in a design-assist method.

II. Selecting the Right Designer and Contractor

Tip #3: In choosing a designer, don’t skimp on good design or contract administration.

Before choosing a designer, an owner must understand and appreciate that the design is the foundation of the project. “Having a bad design is like constructing a building on an inadequate foundation. The building might be well-constructed and beautiful, but [it] will fail due to the inadequate foundation.” Further, a bad design or designer will undoubtedly increase time and costs for the project. Therefore, the owner should not cut costs on the designer’s services. The designer’s services, while crucial, are the least expensive part of the project, and any cost savings would be minimal.

Additionally, owners should also be cautious not to only focus on the design aspect of the designer’s role. Owners should put proper emphasis on the designers’ ability to perform construction administration, including how much assistance the designer will provide in the construction administration phase. There is little doubt that there will be design and construction errors, changes, and problems. Choosing a designer that will effectively and efficiently work with the owner and contractor when issues arise is key to a successful project.

Tip #4: A designer’s name recognition isn’t everything.
Often, an owner will be enamored by a particular designer, purely by name recognition alone, and the project will be married to that pre-chosen designer.\textsuperscript{35} If an attorney is advising an owner at the outset, it should encourage its owner to look past that name recognition and to consider the designer’s track record.\textsuperscript{36} However, if the owner is sold on name recognition alone, it then becomes critical for the lawyer to assist owners in choosing a qualified contractor through the request-for-proposal process.\textsuperscript{37}

**Tip #5: The lowest bid is not always the best bet.**

In selecting the contractor, “the owner’s goal should be to find the best contractor for the particular job with a competitive price, but not necessarily the lowest price.”\textsuperscript{38} An extremely low bid could cause the contractor to cut corners, sticking the owner with a bad product.\textsuperscript{39} The owner should consider other factors outside of budget, including the contractor’s core value, ethics, and cooperative spirit.\textsuperscript{40} Further, the owner should understand that the contractor intends to make a profit while also providing a quality project.\textsuperscript{41}

**Tip #6: Quality relationships are crucial to project success.**

When selecting both the designer and the contractor, one of the most important criteria is their ability to work together as a team and collaborate on problems when they arise.\textsuperscript{42} When a designer or contractor plays the blame game or gets defensive in the face of criticism or issues, the owner loses (as well as all project participants).\textsuperscript{43} The owner will want “to choose a designer and a contractor who understand the same language” by “match[ing] up a designer and a contractor that believe in the same things, understand project delivery, understand how the project must be done, [and] what the timing is.”\textsuperscript{44}

Not only does the owner want the designer and contractor to work well together, but the owner will want to work well the designer and contractor, too.\textsuperscript{45} Owners need to consider if key
project personnel from its own staff, the designer’s staff, and the contractor’s staff have personalities that will work well together.⁴⁶ No amount of contract drafting can fix a bad relationship.⁴⁷

Attorneys for all project participant would serve their clients well to encourage them meet together early on, even before contract negotiations.⁴⁸ “[I]t’s important to see how the group works” over dinner and drinks in a causal, non-construction setting.⁴⁹ After the project participants have met, they can more fully evaluate whether there will be a good working relationship to sustain a successful project. “[A] lot of times, it’s better to walk away when you don’t have the right people than to take a job and see the job deteriorate because of personalities and people not talking to each other.”⁵⁰

Contractors, designers, and owners must be able to communicate together, which often stems from creating relationships early on in projects. “[T]he success of a project lies on communication, communication, and then more communication.”⁵¹ “That one dinner or two dinners, or lunch . . . might be the most important thing [any project participant] do[es] for that job because, if you start with the right communication, you end up with a great project.”⁵² If relationships are created outside of the construction job, project participants will be more likely to solve the problems when disputes arise because they are working with someone they like, understand, and can communicate with.⁵³ If project participants have not established those relationships, they “bunker down on the contract” and “forget that on the other side [are] people with needs and desires” that will help you tomorrow if you help them today.⁵⁴

The dialogue must remain open throughout the project, as well. Owners or contractors might consider, every now and then, to treat onsite project personnel, if they can afford it. “One of the most wonderful things on earth . . . is food trucks, and I’ve been bringing food trucks to the
job site every now and then . . . [It’s] saying to everybody, ‘Come and eat, it’s free, and talk.’”

It creates and encourages communication on the job site, and the benefits outweigh the costs. It

Another great tip for keeping dialogue open between project participants is regular
meetings. Owners, or contractors, might consider hosting meetings once every 3 months to
discuss any outstanding issues, RFIs, claims, changes, controversies, questions, or any contract
problems over the past 3 months. If the owner or contractor is diligent, its goal can be to resolve
all issues practically possible that week of the meeting. Issues that legitimately cannot be
resolved immediately will be postponed until project closeout. After the quarterly meeting, “the
job sort of start[s] anew.” This encourages all project participants to communicate and resolve
disputes in the moment and not put them off until the end, when things will undoubtedly be more
difficult and more costly.

Tip #7: Track records must be considered.

Ideally, an owner would select a designer and contractor that have had past success on
projects. “[P]rior track record” and successful projects in the past are important in helping the
owner select who to staff its project.

Tip #8: Make sure you’ve got the A Team.

Another key criteria in an owner choosing its designer and contractor is ensuring it gets the
“A team” from both of them. “The A team from a lesser known company will be far better than
the C team from a more highly rated company.” The C team “is going to be slower and the quality
is not going to be there, which affects schedule and affects price.”

In today’s market, business is great for contractors and designers and work is abundant,
but that also means their ranks are stretched thin, often filled with people that are new and
inexperienced. Lawyers must counsel owners to truly know who specifically, within the
designer’s or contractor’s firms, will be showing up to perform the work because it may be different from who showed up to sell the owner their business.\textsuperscript{69}

It is crucial that project personnel are consistent and work for the duration of the project.\textsuperscript{70} “[T]he owner should have the benefit of key design personnel and key construction personnel assigned to provide services/work for the duration of the project and not risk their removal, except under circumstances where the personnel assigned leaves the employ of the architect or the contractor, or becomes incapacitated and can no longer serve.”\textsuperscript{71}

Owners might insist on certain contract provisions that require the designer or contractor to maintain certain individuals and require them to be dedicated to one project so that they are not pulled off the job.\textsuperscript{72} Consistent project personnel creates a consistent work product and ensures institutional knowledge is not lost with turnover, which can cause delays and errors. If project personnel must be replaced, the replacement personnel should be subject to the owner’s approval, but the owner must be reasonable and not withhold approval for arbitrary reasons.\textsuperscript{73}

III. Developing and Updating a Reasonable Project Budget, Including Handling Issues with Contingency

Tip #9: Unreasonable expectations make for an unreasonable budget.

“As with most things in life, you get what you pay for in construction. . . . An owner needs to be ready to spend a reasonable amount for the product it wants.”\textsuperscript{74} An owner cannot simultaneously expect a low budget, fast schedule, high quality, and complex design and construction features.\textsuperscript{75} Unreasonable budget and schedule expectations are a recipe for disaster and will result in delays, poor quality, and cost overruns.\textsuperscript{76} Stated differently, owners have “got to face reality and the reality is that . . . the scope will need to be married and matched up with th[e] budget.”\textsuperscript{77}
Owners must also ensure the budget is realistic because lenders will make the owner stick to it. Contractors should understand that a low budget does not necessarily equate to money in the form of change orders. Money will run out if the budget is unrealistically too low, leaving no room for changes or problems and setting the project up for a slew of claims.

In addition, the owner must know that a budget is primarily driven by construction costs. Construction costs, though, cannot be determined without a reasonably complete design. An owner must accept this stepped-phase of the process and not rush the process by proceeding with an incomplete or poor design.

**Tip #10: You’re going to need an owner’s rep.**

Another key to the owner’s success is engaging independent consultants that analyze and review constructability and the schedule, perform value engineering, and understand the market. Attorneys representing owners should always advise them to either have in-house expertise or hire outside consultants, so that there is a person who acts as the owner’s representative who can interface with the designers and the contractor. While these sometimes involve added upfront costs, they will ultimately save money in the end because there is an upfront understanding of the schedule, constructability, and value engineering. “It will pay off for [an owner] to hire a good owner’s rep who understands the market and who understands who the right subs are. . . . [Owner’s reps] understand what’s going on, they understand how to help the contractor help the job and make the project successful.” The owner has to be willing to spend these upfront costs to staff its project appropriately.

**Tip #11: Location, location, location.**

An owner’s budget has to factor in the locale, which includes that locale’s culture, market, and availability of materials and workers, among other things. For example, an American owner
cannot expect American productivity rates when trying to build in another country whose culture has shorter working days, longer breaks, and government-mandated month-long vacations. When an owner does not understand the market or culture of its chosen locale, and budgets for 80% productivity rates, but receives only 40%, “the budget goes out the window.”

The owner must also understand from where it is sourcing its materials and factor in lead times into not only the schedule but also the budget. If an owner chooses to source its steel from China, the owner must factor into its budget certain contingencies under those conditions, such as the time and cost to ship the steel from a foreign country and contingencies, such as the boat breaking down or experiencing adverse weather during transport.

**Tip #12: You can’t have a contingency plan for the contingency.**

When it comes to the contingency (generally only with the guaranteed-maximum-price context), from the owners’ point of view, the owner should have approval rights over the type of things the contingency is used, but not necessarily the process of how it is used. Some contractors feel that the contingency is just a “pot of money” contractors can use to pay their subcontractors for whatever happens on the job, whether anticipated or not and irrespective of fault. Owners, on the other hand, believe that contingency “should be used for genuine mistakes in bidding the work and things where neither the contractor, or its subcontractors, are at fault in having to incur them.” Contingency is not something that should be used for run-of-the-mill corrective work. When the contingency covers corrective work, the owner feels like it is paying for the same thing twice.

That said, owners must be reasonable with contingency. Contractor-caused problems always arise, and owners understandably want to exclude those problems – such as defective work and acceleration due to delays – from the contingency provisions. If the owner does not include money in the contingency to compensate for these costs, the contractor will need to include these
costs as contingency in its or its subcontractor’s costs to cover these more-than-likely occurrences.99 In the end, the owner could be paying for the costs it sought to avoid.

Thus, the contingency clause should be carefully drafted to clearly define what is and is not included in the contingency, within reason.100 Some recommend that the contingency clauses “should cover all costs except those attributable to the negligent acts or omissions of the contractor which could not have been anticipated by [the] contractor at the time of the contract negotiations.”101 Others have developed other creative compromises for contingency issues: the contractor and the owner each are assigned one-half of the contingency with the contractor using the first half for any costs it incurs beyond what it contracted for and the owner using its half for things it pre-approves.102 Owners’ attorneys can also recommend that the contingency clause outline what the contingency cannot be used for.103

IV. Making Payments, Retainage, and Protecting the Project

Tip #13: Prompt payments are the “life blood of the project.”104

In the past, timely payment used to be a central issue for construction projects with owners regularly withholding funds as long as possible.105 Today, making timely payments is rarely an issue, so long as owners are financially viable.106 It seems to be a given that “owner[s] should always pay all project members in a timely manner.”107 This is because “[p]ayments . . . are the lifeblood of the project.”108 If an owner stops payments, the owner is “restricting the blood flow for [its] project, and its going to have an impact on the performance of the project.”109

Tip #14: If you withhold payments, do it reasonably and equitably.

“Owners should make the payment due for work satisfactorily performed, and not withhold payment on what has been satisfactorily performed if there is some portion of the requisition that’s work that is being rejected.”110 When refusing to pay for unsatisfactory work, owners should take
care to exercise that right reasonably. Prompt payment for good work done and reasonable withholding to protect the project “will promote a reasonable and harmonious workforce and a team.”

A real strain on a project is an owner’s unreasonable, over-withholding of funds. “[E]xcessive withholdings . . . hit the parties least able to handle the nonpayment” – the subcontractors. If the owner withholds from the general contractor, the general contractor will pass along the burden to its subcontractors. “If the subcontractors are not receiving sufficient funds to cover their costs, even small problems may impact the project.” The trickledown effect will have real impacts. If word gets out to subcontractors and trades that the owner is slow to pay or not paying, the owner’s “project is going to get put at the bottom of the list” and subcontractors are “going to send their limited and stretched workforce to those projects where it knows it will get paid.” While it is understandable that owners “need to withhold amounts that are reasonably necessary to protect [it and the project],” owners should “be frugal in how they use that hammer.”

**Tip #15: Payment cycles must be realistic.**

Unrealistic payment cycles have the same affect as withholding payments. Projects and subcontractors are set up for monthly, recurring payment cycles; they do not have the ability to wait. Instituting long payment cycles (45 to 60 days for a pay period) creates a strain on the project and does the project a disservice. If an owner negotiates a 60-day pay period with its contractor, the contractor will pass that risk to its subcontractors, leaving the subcontractors left to carry the burden for 90 or 120 days. The strain on subcontractors, who have the least capability to carry it because they often lack financial resources to do so, can put unnecessary stress on the project. Further, competent subcontractors who see extended payment cycles will add
in a percentage for financing or extra contingency to cover the waiting period—owners will have to pay for its extended period in the end. If an owner wants to ensure subcontractors and trades remain involved in the project, it is “going to have to be more accommodating” on payment cycles.

**Tip #16: Consider stepped retainage.**

Retainage needs to be used carefully and equitably. Owners’ retainage should not be maintained at the same percentage throughout the project; it should be stepped. At some point before the end of the job, owners should consider reducing retainage to a percentage below 5 percent. This “gives [the owner] a little bit of a hammer to make sure the contractor finishes well and finishes on time,” but it does not unreasonably withhold funds due and owing.

**V. Creating a Schedule, Liquidated Damages, Delays, and Other Time-Related Issues**

**Tip #17: The schedule cannot be unrealistic or too aggressive.**

From the contractor’s perspective, the trend for owners has been to set aggressive, unrealistic schedules. This approach is folly. Competent contractors and subcontractors will incorporate the risk of delays into their bids, increasing the cost of the project. Or, savvy contractors will not submit bids for projects with unrealistic schedules. Or, the owner will be over-burdened with delay claims and requests for extensions of time.

In developing the schedule, the owner has to consider its locale, the supply of subcontractors, and subcontractor and trade productivity to set a realistic and reasonable schedule. The owner should “give [it]self enough time to finish, but not just finish, to finish properly with the right quality to develop a great project.”

Rather than attempt to save money by having an overly-aggressive, unrealistic schedule, the owner should consider engaging an independent schedule consultant to perform a schedule.
analysis in order to establish a realistic completion date and milestones. This will also help the owner create a realistic budget and set the right tone. Projects that start off on the wrong foot, for whatever reasons, rarely finish on time. That is why it is key to have the proper foundation for the project to ensure timely completion, including having a complete design prior to construction, preforming value engineering, and addressing as many owner predecessor activities as possible, such as permits and utilities.

**Tip #18: Do not be fooled into setting steep liquidated damages.**

Owner’s often disfavor liquidated damages. Liquidated damages do just that: they liquidate damages to a predetermined amount. “Owners would like to be unhampered by what then can recover in case there’s a problem [on the project].” That said, if any owner chooses to forego liquidated damages in favor of actual damages, it may have an uphill battle of proving those actual damages, like its lost profits.

If an owner chooses to incorporate liquidated damages, the owner needs to consider the nature of the project and what its actual damages might be if the project is not finished on time. For example, if the owner is building a hotel, and it cannot charge rates to guests because the project is delayed, the owner needs to calculate its daily expected income. Or, if the project is delayed, the owner might have an increased financing rate or mortgage. If the owner is building a stadium, the owner cannot make profit on playing games, selling tickets, and selling concessions. Determining what the owner projects to lose in the event of a delay will help it set a baseline for liquidated damages.

While owners need to determine what their daily damages could be if the project is late, owners cannot expect liquidated damages to fully compensate them. Owners also cannot artificially create too steep of liquidated damages. Take for instance the stadium project
example. An owner might expect to lose millions of dollars in profits daily if the project is late.\textsuperscript{148} If they owner tries to set its liquidated damages rate at $1 million per day to get fully compensated, contractors will not agree to it.\textsuperscript{149} This has the same problem as setting unrealistic, overly-aggressive schedules: contractors will bake the risk into their bids, or they simply will not submit bids.\textsuperscript{150} High liquidated damages also tend to increase the likelihood of claims and litigation, which is something all parties want to avoid.\textsuperscript{151} “[I]t becomes somewhat of a dance trying to get the owner comfortable with that concept of ‘No, you’re not going to get fully paid if [your contractor is] late.’ But if [the owner] tries to . . . essentially put on the contractor the full impact of [the owner’s] total losses, you’re just not going to be able to . . . find a competent contractor willing to do that.”\textsuperscript{152}

If the owner chooses to assess liquidated damages, liquidated damages have to be set at a reasonable per diem rate. “[A]lthough liquidated damages are there in order to pay back some of the cost of the project being late, at the end of the day, the contractor should expect, regardless of what happens, to make a reasonable profit.”\textsuperscript{153} Owners can also consider setting a reasonable cumulative cap on the total exposure for liquidated damages.\textsuperscript{154}

Finally, “[o]ne of the biggest tricks of liquidated damages . . . is the definition of substantial completion.”\textsuperscript{155} Owners should consider defining substantial completion to mean that the project is sufficiently complete so that it can be used for its intended purpose. For example, if the owner is building a stadium, the contractor will have achieved substantial complete if the sport can be played and you can sell concessions to fans.\textsuperscript{156}

**Tip #19: You must put pressure on your contractors for timely submittals and on your designers for timely responses to submittals and RFIs.**

Untimely submittals are regularly a source of delay. The owner should “aggressively monitor and push the contractor to provide required submittals timely and, likewise, monitor and push the designer to timely review and approve the submittals.”\textsuperscript{157} It seems obvious that submittals
should be submitted and reviewed prior to construction can proceed and before products have been installed. However, that is often not the case, which can lead to “disastrous impacts.” The owner must quickly react to remedy submittal delays.

Not only must an owner require prompt submittals, but it must ensure that submittals are timely approved. The same is true for responses to RFIs. RFIs are generally generated when contractors need an immediate response to an issue that arose in the field. The contractor needs a response right away, and it is unreasonable to expect a contractor (or the project) to wait two weeks for a response. Untimely responses ultimately generate claims from the contractor.

Responses to RFIs also need to be comprehensive. “Not only do[es an owner or designer] have to respond, but [it] need[s] to respond in a way that doesn’t create another RFI.” RFIs that merely tell the contractor to consult the specifications do nothing to advance the progress of the project because the specifications were unclear in the first instance. Therefore, owners must encourage complete, descriptive, and comprehensive responses to create more delays or problems.

An owner can assist in timely responses to submittals and RFIs by employing its designer from the outset to perform construction administration services. Contracting with a designer for only the design, and not also construction administration services, does the owner and the project a disservice. “Because if [the owner] is not buying the full package of CA [construction administration] services, then [the owner is] going to have a problem on this project.”

**Tip #20: Incentives clauses are not really that incentivizing.**

Incentive clauses, in which the owner shares savings of early completion with the contractor, can seem like a logical clause to include. These clauses, however, “have the tendency to elevate the fight between the owner and contractor over time extensions because of the value of
a day of time.” Before an owner incorporates an incentives clause, it should really consider what the value of early completion is to it.

**Tip #21: Are no-damages-for-delay clauses reasonable or unreasonable?**

Plainly stated: no-damages-for delay clauses are often included in contract, but to make them reasonable, such clauses should be accompanied by reasonable Force Majeure clauses, as the two to hand-in-hand and are related. “The contractor’s damages for delay are real costs,” and “[t]rying to pass these costs to the contractor for owner[-]caused delay[s] . . . is generally a mistake by the owner.” Even if a contractor accepts the risk of a no-damages-for-delay clause, a competent contractor will build the risk into its contingency or its price. Further, an owner will likely be unable to avoid litigation or claims when costly delays occur. In today’s market, some contractors and subcontractors will not bid on jobs that exclude damages for delays.

There should be reasonable damages associated with a delay. Owners should agree to time extensions and to compensate contractors’ actual direct costs for legitimate, contract-specified delays. Owners can protect the extent of a compensable delay by limiting the contractor to only direct, out-of-pocket costs and not permitting recovery for markup, profit, or overhead. Owners can also protect themselves by creating time periods for when delays are compensable. For example, the contract might provide that if an excusable delay occurs for 30 days or less, the delay is not compensable. However, any excusable delay over 30 days should be compensated. Owners should “draft a contract that helps the project success” by making sure it meets everyone’s reasonable expectations “instead of a contract that makes everybody look behind their back.”

In addition, the contractual definition of a legitimate, recoverable, compensable delay is key for the owner. For example, if the contract merely excuses delays caused by strikes or labor
disputes, a contractor can artificially create a local labor dispute and claim an excusable, compensable delay. On the other hand, if the owner qualifies when a strike is an excusable, compensable delay by making it subject to an industry-wide economic dispute or strike, the owner is protected but the contractor is covered when a real, unforeseen delay outside its control occurs.

In addition, it behooves owners to be specific in using the language “beyond the contractor’s control” in delay clauses. What is and is not within the contractor’s control is not always clear. Attorneys for owners should recommend that they expand this language to state that the delay is compensable only when it is “beyond the control of anyone who directly or indirectly contracts with the general contractor for performance of a portion of the work that is subcontracted to them.”

Finally, owners should be wary of language in delay clauses, specifically Force Majeure clauses, that create exceptions only for the contractor’s negligent acts or omissions. Whether or not a contractor is negligent should not factor into the analysis—the analysis should only hinge on whether the delay was or was not within the contractor’s direct or indirect control.

VI. Administering Claims and Change Orders and Resolving Disputes

Tip #22: Timely resolving claims and change orders keeps morale up and costs low.

It is in every project participant’s best interest to have a “speedy resolution of outstanding change orders and claims in order to keep the job moving.” Issues need to be resolved collaboratively and quickly. “Letting changes and claims linger results in resentment, often drives up the cost of the project, destroys the teaming relationship, and injures the subcontractors who are the least able to absorb the delay in payment due to the failure to pay for changes.”
Some owners are tempted to only resolve disputes at the end, believing that a contractor’s claims can be bargained or negotiated away. When contractors see owners delaying claims resolution until the end, or an owner has a reputation of negotiating away claims because it has more bargaining power, contractors will take note on the present project and future projects. It will engender adversarial, litigious feelings and make it less likely contractors will want to work with owners in the future.

**Tip #23: Short notice provisions encourage discord and constant letter-writing campaigns.**

One of the biggest issues in claims administration is the notice procedure. “A good project is set up to be administered in the field.” If an owner requires “draconian” notice requirements, e.g. 48-hour notice requirements or risk forfeiture, “you’re not creating a support system that encourages cooperation among the people, the players out there on the project.” Instead, an owner creates an adversarial process from the outset. It also requires the contractor and its subcontractors to have a fulltime staff person dedicated solely to sending notices, because such a stringent notice requirement will require a contractor to send notices every day. While owners justifiably should require some notice period so that they can be involved and make informed decisions about changes as they occur, the notice period must be reasonable. “Contractors should be given the time to build a claim and to provide the right paperwork.” Reasonable time periods will “encourage[e] the contractor to work with its subs to work around the issue, whether it be a change or a delay, in such a way that there is no impact or if there is, it’s been minimized.”

**Tip #24: Employ interim decision-making processes.**

Ideally, an owner would retain an independent consultant to act as a third-party contract administrator who administers changes and resolves changes and delays. If a third-party
consultant is not an option, the owner needs to engage the designer to provide assistance in resolving disputes, changes, and delays.

Owners can consider requiring that claims be resolved on the field at the superintendent level, escalating to project managers and then project executives if left unresolved. “You need to have a layering program by which only they very difficult claims get either sent in to the ‘Come to Jesus’ meetings or get sent in to a dispute resolutions group that can resolve it pretty fast.”

Dispute Review Boards and other independent experts who make project decisions can be considered invaluable and should be incorporated into all projects at all aspects, even when there are no issues to address. Regular meetings during construction with experts or individuals who have the right to issue recommendations that are admissible in legal proceedings has a deterrent effect on claims. Onsite personnel sometimes see these meetings as a waste of time that do not progress the project. However, the hours spent resolving and preventing claims outweighs the hours supposedly lost. Interim, expedited dispute resolution processes are also significant tools to avoid claims and problems growing exponentially worse and benefit the project team.

**Tip #25: Seek advice of counsel when picking arbitration versus litigation.**

Should disputes escalate beyond real-time or interim resolution processes, owners should consider having mediation be a contractual obligation. But it does not serve any party to have a tiered dispute resolution process be drawn out such that it precludes timely resolution of a dispute.

There are divergent views as to whether arbitration or litigation is preferred for owners. At the very least, owners should consider their public appeal, the location of a potential trial, and the complexity of the issues. If an owner’s case went to a jury, the owner has to consider whether a jury will find the owner sympathetic, such as whether they employ many people in the community.
or whether they are building hospitals or schools. Or, if the owner is building a toxic waste plant in a rural, unsophisticated community, the owner has to consider how that will play in the public. Further, if the claims are complex, an owner might prefer to have the issues tried to knowledgeable arbitrators instead of a single judge or novice jurors.

Some believe that arbitration best serves all project participants. Arbitration’s main benefit is “having arbitrators who know and understand construction and construction law [who] make the decision.” Another benefit to arbitration is that it can be tailored to meet the needs of a particular dispute and the particular parties involved in cost-effective way. An owner’s fear that arbitrator’s will “split the baby” and not enforce contract provisions is not always warranted. From an arbitrator’s perspective, parties often take extreme positions, causing arbitrators to make more reasoned decisions in the middle. Arbitrators do not shirk contract provisions, but they do enforce them—albeit, sometimes not as strictly as some judges. If owners have this fear, they should include a clause that in their contracts that the specific clause at issue has been negotiated and agreed by the parties and that it is to be strictly enforced by the arbitration panel.

From an owner’s perspective, litigation is preferred. Instituting litigation is “cumbersome,” and “people have to think twice before they go and actually embark upon litigation.” Litigation also requires the parties to take their claims seriously because “there are no loopholes and judges are not sitting there to bring their own justice” as arbitrators might. Litigation also tends to incentivize earlier resolutions to avoid the effects and costs of litigation.

VII. Transferring Risk, Limiting Liability, Indemnifying, and Waiving Consequential Damages

Tip #26: Passing on all risk to contractors has hidden costs elsewhere.

Generally, from a contractor’s perspective, when an owner thinks it is passing along a risk—and, therefore, the associated cost with that risk—it really is ignoring reality. The owner
will still likely have to pay for and cover that risk in some form. Some risks can be insured, so the owners pay through an insurance program. Uninsurable risks are built into the price of the contract or its subcontractor’s in some way. Thus, the risk and its cost are still born by the owner. Further, when the risk shifted is too great, competent contractors will refuse to sign the contract. If a contractor does agree to absorb certain risks, those risks will be passed down to subcontractors, who are the least able bear the risks, leading to major project impacts. “The owner should carefully consider the impact of the risk shifting and not just try to transfer everything to the contractor.”

**Tip #27: Indemnity for third-party claims is the only real way to go.**

Owners can reasonably expect to require designers and contractors to indemnify it from third-party claims (for personal injury or property damage) resulting from the designer’s or contractor’s acts or omissions. An owner should not, however, attempt to receive an indemnity for others’ actions or for first-party claims. The indemnification should also not extend to “the work itself.” Damages to the project resulting from “the work itself” is the reason project participants procure insurance, and it need not be the subject of indemnity provisions.

Owners might also try to negotiate unlawful or overly broad indemnities. In many jurisdictions, owners (and contractors) cannot require other to indemnify them against their own negligence. Also, crafty owners will require contractors to enter into broad indemnities that require indemnification for all sins, notwithstanding any express provision or limitation of liability to the contrary. In these circumstances, every breach of contract is turned into a separate indemnification claim with the argument that they can “proceed without all the restrictions and limitations and qualification that the contract put on the contract claims.” While owners like
these broad indemnities on their projects, some contractors, in a hot market, will walk away from contracts that contain them.\textsuperscript{241}

**Tip #28: If you do agree to waive consequential damages, you better define them.**

Consequential damages can be devasting and hard for contractors and their subcontractors to absorb.\textsuperscript{242} Therefore, contractors believe that owners should always agree to waive consequential damages.\textsuperscript{243} Contractors have come to believe that mutual waivers are the norm or, at the very least, they expect owners to agree to cap their consequential damages.\textsuperscript{244} Contractors and sophisticated subcontractors will often walk away from projects that do not have mutual waivers of consequential damages.\textsuperscript{245}

The meaning of “consequential damages,” when left undefined, can lead to costly disputes.\textsuperscript{246} Thus, owners should endeavor to identify typical costs that the parties agree are consequential damages and subject to the waiver.\textsuperscript{247} Parties “need to be very careful [about] how [they] craft[s] the waiver of consequential damages,” because “if [they] do not have the right words [in a particular jurisdiction], [they] might not have the right waiver.”\textsuperscript{248}

Owners could not disagree more. Despite what standard industry forms say, consequential damages waivers are not industry norm, according to owners.\textsuperscript{249} Even though waivers might be mutual, the owner is always giving up more.\textsuperscript{250} Owners should not be required to waive their consequential damages with their contractors, and they should be negotiable with their designers.\textsuperscript{251} If owners do waive consequential damages, they should endeavor to limit their breadth and scope by using precise contractual language the delineate what is and what is not waived.\textsuperscript{252} Imprecise contractual definitions are only made worse by differing interpretations of what is and is not consequential in various jurisdictions.\textsuperscript{253}

**Tip #29: Avoid limitation of liability clauses in your contracts.**
Owners do not expect to see limitation of liability clauses unless it is in a small consultant’s contract, where liability is limited to the amount of the consultant’s compensation. These kinds of limitations are reasonable given the kind and scope of work that is performed and because they tend to be smaller entities that could not support a larger risk.

On the other hand, owners should generally negotiate against limitation of liability clauses with larger firms. Larger firms can absorb more risk and have greater insurance coverage. If limitations are insisted upon, owners should require larger limits.

That said, the size of the company is not the only factor for an owner to consider. If the scope of work is small, having a reasonable limitation of liability clause, even with a larger firm, might not be so crucial for owners.

**VIII. Insuring and Bonding the Project**

Counsel for owners should evaluate each owner’s sophistication and their insurance and bonding experience and knowledge, as well as the complexity of the project, to determine how best to advise them on their insurance and bonding needs. Too often, “consideration of insurance and bonding [i]s an afterthought.” Better practice is to encourage owners to make insurance and bonding decisions at the outset during the design stage.

**Tip #30: Beware of subguard.**

Owners should be wary of subguard. Subguard has coverage exclusions that can leave the owner unprotected when a troublesome subcontractor is excluded from coverage. Further, the owner is often left paying subguard premiums for subcontractors that will not cause issues. In addition, owners and lenders cannot be named as additional insureds on subguard policies, and they cannot bring a claim under the policy. In some owners’ advocates’ opinions, subguard is really just a “profit center” for contractors that only protect contractors.
Tip #31: Bond your project but consider using your own bond forms.

Bond premiums are relatively inexpensive, and owners should require them. Bonding not only provides the owner security for a non-performing contractor, but it allows the bonding company to apply pressure to contractors acting unreasonably or who are on the brink of default. In addition, bonding companies do the work for the owner by “prequalifying” contractors.

While requiring bonds for contractors may be a simple decision, getting the bonding company involved and to act is not always as simple. The owner should consider the kind of bond form and when the bonding company’s obligations are triggered. Some bond forms do not require any action from the bonding company until the contractor defaults or is formally terminated. By the time the contractor is formally defaulted or terminated and the bonding company has performed its investigation, the problems have been exacerbated and are still unresolved. If an owner can, it should consider requiring its own bond form that does not require defaulting or terminating a contractor prior to the bonding company getting involved. Getting the bonding company involved early on prevents project disruption from a replacement contractor (who will have to look at the drawings, mobilize, learn the job, and talk with project participants), and it helps mitigate costs. “The second you terminate or default a contractor, you have already created a problem on the job that you did not need”; a problem that could have been mitigated or resolved by the bonding company stepping in. If an owner uses a bond form that forces it to terminate prior the bonding company stepping in, “you bought yourself a fight.”

Tip #32: You’re not an insurance expert, so don’t be afraid to get help.

“Jobs in this day and age either succeed or can fail because of the right or wrong insurance.” Owners are generally not in the business of buying insurance, so they “need to acquaint [themselves] with the right insurance experts to do a job.”
Procuring insurance cannot be taken lightly; it is “extraordinarily necessary for a number of reasons.” For example, builder’s risk policies are crucial for a project, but it is also crucial that the policy has the right language and provisions to ensure that the type of issues that could arise on the owner’s project are, in fact covered.

IX. Closing Out and Commissioning the Project

Tip #33: Plan ahead to closeout.

Owners need to be sure that their contractors “[s]tart closing out the jobs the day [they] begin working on the job.” There should be a plan in place on how the contractor will turn over the project to the owner. The turnover plan could vary from project to project, but the owner should discuss with their contractors what their objectives are. For instance, if the owner is building a hotel, it might like the hotel to be turned over in phases to allow the owner early access to train personnel or to host functions before the hotel is fully operational. Early conversations about goals and expectations will ensure the project is closed out accordingly.

Owners do not always anticipate how long project closeout and commissioning will actually take. “Owners need to be aggressive in this phase and make sure they have sufficient funds and tools to energize the contractor to complete its last work.”

Tip #34: The meaning of “complete” is key.

Contract closeout provisions should be clear on what needs to be done to achieve completion. From an owners’ perspective, owners should not deem a project “complete” “until all punch list items on a list that the parties have agreed to needs to be completed are complete.” Owners also need all temporary and final certificates of occupancy in hand, and the certificates must permit the use for what the project was built. Owners must understand, though, that contractors have no control over how and when governing bodies issue these certificates, so their
must be a reasonable carveout that completion can exist notwithstanding a lack of certificate due to no fault of the contractor.\(^{288}\) Finally, fully completing commissioning is key to final completion and project closeout. Owners need to be sure that they do not release the contractor and give final approval until commissioning is fully complete.\(^{289}\)

**Tip #35: “P[roject closeout and commissioning is more than just monitoring the punch list.”**\(^{290}\)

As technology has advanced, an owner should not expect to be able to simply “flip a switch” and have everything be immediately operable and functional.\(^{291}\) Systems within facilities are increasingly complex and interconnected. The owner should expect that the contractor to have a commissioning plan to test all the systems individually and together so that the owner gets what it pays for and in a manner that allows it to successfully function on a long-term basis.\(^{292}\)

**X. Warranting the Project and Handling Defects**

**Tip #36: Continue the spirit of communication and cooperation when defects arise.**

Most savvy owners include the standard one-year workmanship warranty, product warranties, and exclusions of latent defects from final acceptance.\(^{293}\) But when actual defects or other issues are discovered after final acceptance, the owner should give prompt notice of the defect\(^{294}\) but continue to act collaboratively and not combatively or rashly.\(^{295}\) The owner should engage and collaborate with the original designer, contractor, and subcontractors to find a solution and encourage these parties to contact their insurance carriers.\(^{296}\) While it is good to be collaborative, there is no need for the owner to let a problem linger if the parties cannot reach an agreement on how to resolve the issue.\(^{297}\)

Owners should also consider retaining competent consultants to evaluate the issue and find the most cost-effective solution, so that when the time comes to make its claim, it will be easier to resolve.\(^{298}\)
Another thing owners might consider negotiating for is yearly or biyearly walkthroughs with their contractor or designer during the statute of repose period. Doing this helps all parties determine if there are any issues before the repose period runs and helps to uncover issues and damage early on to avoid major claims or catastrophes.

**Tip #37: You are still protected by the statute of limitation and statute of repose, even if you agree to a one-year warranty.**

From an owner’s point of view, contractors should not expect their one-year workmanship warranty to limit an owner’s remedies under the law. Owners are still protected by the jurisdiction’s statutes of limitation for breach-of-contract actions. Reasonable parties and their attorneys should understand that “the fair thing to do is to have contractual obligations being enforceable during the statute of limitations under contract law.”

**Tip #38: Educate yourself about your warranties.**

Owners need to educate themselves. “[T]he owner needs to have a warranty book that lays out exactly all the different systems, what warranties apply to each of those systems, what they need to do to maintain the warranties[,] and they need to make sure that they’ve got all of that reviewed and documented some place so it can be found. . . . it starts with the owner knowing what those are because if you don’t know why they are, then how do you know how to enforce them?”

**XI. Conclusion**

Successful owners treat each of their projects like a marriage. Like a marriage, a construction project needs good communication, quality project relationships, and reasonableness across the board, even when disputes arise. High quality projects come from strong working relationships between participants who are geared toward the same goal.

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1 Comments from Jose M. Pienknagura. Mr. Pienknagura is Chief Counsel, Executive Vice President, and Risk Manager for AECOM Hunt and is based out of Scottsdale, Arizona. Mr.
Pienknagura handles all legal, insurance, and bonding for AECOM Hunt. His experience includes oversight and management of all facets of construction projects throughout the United States, including hospitals, professional sports stadiums and arenas, and airports, among other projects.  

2 Id. (“And a construction project is just like a marriage. It depends [on], every single day when you go to sleep, how you wake up and how you start the next day, and it depends what resources you avail yourselves to make it work, and it depends [on] what budget and what schedule you’re in with your partner.”). 

3 Comments from Adrian Bastianelli, III. Mr. Bastianelli is a Partner at Peckar & Abramson, P.C. in Washington, D.C. His practice primarily includes representing general contractors, but his career has involved representing every sector of the construction industry at some point. He presently also serves as an alternative dispute resolution neutral for construction disputes, giving him a keen perspective of all construction industry sectors. Comments from Mr. Pienknagura. 

4 Id.; comments from Mr. Pienknagura (“Projects that are successful are the ones where the owner, the contractor, the architect all work with a single purpose, for the success of the project.”); comments from George J. Meyer. Mr. Meyer is a shareholder at Carlton Fields in Tampa, Florida. He has an extensive construction and real estate practice, representing owners, developers, designers, and contractors. Mr. Meyer has represented clients in the construction industry on large, complex projects, including numerous professional sports stadiums and arenas around the country. 

5 Comments from Mr. Pienknagura. 

6 “The Art of Living Together” was derived from the 2018 marriage counseling book “The Rough Patch: The Art of Living Together” by Daphne de Marneffe, PhD, wherein Dr. de Marneffe counsels couples on navigating difficult periods in their marriages. 

7 Comments from Mr. Bastianelli. 

8 Comments from Mr. Meyer. 

9 Id. 

10 Id.; comments from Mr. Pienknagura (“Before you select project delivery, it is important to ascertain first [the] experience of the owner, the type of project, experience of the contractors on hand in order to at that point in time to select [the project delivery method.”). 

11 Comments from Mr. Bastianelli; comments from Mr. Meyer. 

12 Comments from Mr. Meyer. 

13 Id. 

14 Id. 

15 Comments from Susanna S. Fodor. Ms. Fodor is a Partner at Scarola Zubatov Schaffzin PLLC in New York City. Ms. Fodor primarily represents owners and developers in the construction industry with a unique and distinguished practice in both real estate and construction law. She has a long-standing practice as an arbitrator for the AAA’s Large Complex Case Panel, giving her insight and understanding into all facets of the construction industry. 

16 Id. 

17 Id. 

18 Id. 

19 Id. 

20 Id. 

21 Id. 

22 Id. 

23 Comments from Mr. Bastianelli. 

24 Id.
Id. (citing Joel D. Heusinger, Ambiguity Breeds Conflict: The Importance of Defining “Design-Assist” in the Construction Industry, 11:1 JACCL 4 (2018)).

Comments from Ms. Fodor.
Comments from Mr. Meyer.
Comments from Ms. Fodor.
Comments from Mr. Bastianelli.

Mr. Pienknagura calls it the “Come to Jesus” meeting, which he hosts on projects everyone 3 months.

Comments from Ms. Fodor; comments from Mr. Meyer.
Comments from Mr. Bastianelli; comments from Mr. Meyer.
Comments from Mr. Bastianelli.
Comments from Mr. Pienknagura.
Comments from Mr. Meyer.
69 *Id.*; comments from Mr. Pienknagura.
70 Comments from Ms. Fodor.
71 *Id.*
72 Comments from Mr. Meyer.
73 Comments from Ms. Fodor.
74 Comments from Mr. Bastianelli.
75 *Id.*
76 *Id.*; comments from Mr. Meyer; comments from Mr. Pienknagura.
77 Comments from Mr. Meyer.
78 Comments from Mr. Pienknagura.
79 *Id.*
80 Comments from Mr. Meyer.
81 Comments from Mr. Bastianelli.
82 *Id.*
83 *Id.*
84 *Id.*; comments from Mr. Pienknagura.
85 Comments from Ms. Fodor.
86 Comments from Mr. Bastianelli.
87 Comments from Mr. Pienknagura.
88 Comments from Ms. Fodor.
89 Comments from Mr. Pienknagura.
90 *Id.*
91 *Id.*
92 *Id.*
93 Comments from Ms. Fodor.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 Comments from Mr. Bastianelli.
99 *Id.*
100 *Id.*
101 *Id.*
102 Comments from Ms. Fodor.
103 *Id.*
104 Comments from Mr. Meyer.
105 Comments from Mr. Bastianelli.
106 *Id.*
107 Comments from Ms. Fodor.
108 Comments from Mr. Meyer.
109 *Id.*
110 Comments from Ms. Fodor.
111 *Id.*
112 *Id.*
113 Comments from Mr. Bastianelli.
114 *Id.*
Comments from Mr. Meyer.
Comments from Mr. Pienknagura.
Comments from Mr. Meyer; comments from Mr. Pienknagura
Comments from Mr. Meyer.
Comments from Mr. Pienknagura.
Id.
Comments from Mr. Meyer.
Comments from Mr. Pienknagura.
Id.
Comments from Mr. Bastianelli; comments from Mr. Meyer.
Comments from Mr. Bastianelli.
Id.; comments from Mr. Meyer.
Comments from Mr. Pienknagura.
Id.
Comments from Mr. Bastianelli.
Id.
Comments from Ms. Fodor.
Id.
Comments from Mr. Meyer.
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Comments from Mr. Bastianelli.
Comments from Mr. Meyer.
Id.
Comments from Mr. Bastianelli; comments from Mr. Meyer.
Comments from Mr. Bastianelli.
Id.
Comments from Mr. Pienknagura.
Comments from Mr. Meyer.
Comments from Mr. Pienknagura.
Id.
Comments from Mr. Bastianelli.
Id.
Id.
Id.
Comments from Mr. Meyer.

*Id.*

*Id.*

*Id.*; comments from Mr. Pienknagura.

Comments from Mr. Meyer.

Comments from Mr. Pienknagura.

*Id.*

*Id.*

Comments from Mr. Meyer.

*Id.*

Comments from Mr. Meyer.

Comments from Mr. Pienknagura.

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Comments from Mr. Pienknagura.

Comments from Mr. Meyer.

Comments from Mr. Pienknagura.

Comments from Mr. Meyer.

Comments from Mr. Pienknagura.

Id.; comments from Mr. Meyer ("[M]y strong recommendation to owners is always address [claims] as they come up. Don’t, don’t, don’t let them sit and fester . . . ").

Comments from Mr. Bastianelli; comments from Mr. Pienknagura ("Claim administration. Pretty simple, be fair, be equitable, sit down and talk, understand the claim, and resolve it within a reasonable time.").

Comments from Mr. Bastianelli; comments from Mr. Meyer; comments from Mr. Pienknagura.

Comments from Mr. Meyer.

*Id.*

*Id.*

*Id.*

Comments from Ms. Fodor.

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

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Comments from Mr. Bastianelli; comments from Mr. Meyer; comments from Mr. Pienknagura.

Comments from Mr. Meyer.

*Id.*

*Id.*

*Id.*; comments from Mr. Pienknagura.

Comments from Mr. Meyer; comments from Mr. Pienknagura.
Comments from Mr. Meyer.

Id.

Id.

Comments from Mr. Pienknagura.

Comments from Mr. Meyer.

Comments from Mr. Bastianelli.

Comments from Mr. Pienknagura.

Id.

Comments from Mr. Bastianelli.

Id.

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Comments from Mr. Meyer.

Id.

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Comments from Mr. Bastianelli.

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Id.

Id.

Id.

Comments from Ms. Fodor.

Id.

Id.

Id.

Id.

Id.

Id.

Comments from Mr. Bastianelli.

Id.

Id.

Id.

Id.; comments from Mr. Pienknagura (“Owner’s lawyers tend to believe that every bit of risk should be borne by the contractor,” but such a stance is “extraordinarily unfair.”).

Comments from Mr. Bastianelli; comments from Ms. Fodor; comments from Mr. Meyer.

Comments from Ms. Fodor.

Id.

Id.

Id.

Id.; comments from Mr. Pienknagura (“I do not do a contract, period, unless I get overruled by the board, that does not have a full waiver of consequential damages.”).
Comments from Mr. Meyer.

Id.

Comments from Mr. Bastianelli; comments from Mr. Pienknagura.

Comments from Mr. Bastianelli.

Comments from Mr. Pienknagura.

Comments from Ms. Fodor.

Comments from Mr. Meyer. Mr. Meyer diverges from Ms. Fodor, as he believes it is industry norm to have mutual waivers of consequential damages.

Comments from Ms. Fodor.

Id.

Id.

Comments from Mr. Meyer.

Id.

Id.

Id.

Id.

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Id.

Id.

Id.

Comments from Ms. Fodor.

Id.

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Comments from Mr. Bastianelli.

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Comments from Mr. Pienknagura.

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Comments from Mr. Bastianelli.

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Comments from Ms. Fodor.

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Comments from Mr. Pienknagura.
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Comments from Ms. Fodor.
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Comments from Mr. Meyer.