

**MECHANICAL SERVICE CONTRACTORS OF AMERICA
13TH ANNUAL EDUCATIONAL CONFERENCE
SEPTEMBER 17-18, 1998**

**KILLER CLAUSES IN SERVICE AGREEMENTS
AND CLAUSES TO DIE FOR**

**Henry J. Donner, Esquire
Jacoby Donner, P.C.
1515 Market Street, Suite 2000
Philadelphia, PA 19102
(215) 563-2400**

Today's service contractor must be as expert at managing its contractual risk as it is at managing a safety program. Many large and small contractors, once considered to be outstanding, are out of business today. Some of these contractors may have even been good financial managers. However, what many of these contractors did not do well was contracting and contractual risk management.

A Working Definition of a Contract

A contract is a binding agreement between two or more parties where consideration, usually a monthly payment is given in exchange for certain performance guarantees involving a well-defined scope of work. In theory, the contract represents a "meeting of the minds" of the contracting parties, with respect to each party's responsibilities, obligations, and assumed risks. (This is not a legal definition.) Traditionally, contractual risk has been allocated to the party that has control over the risk. For example, in a service contract, the contractor has control over safety conditions and, therefore, appropriately accepts responsibility for worker safety risks. Everyone understands this risk and agrees to the allocation of the risk to the contractor.

In recent years, however, this equitable approach to risk allocation has, in large part, been ignored. True, the contractor is still responsible for worker safety, but often the service contractor is also contractually responsible for many risks over which it has little or no control. Today, it is not unusual for a contract to unfairly allocate risk to the service contractor.

There are several ways a contractor can minimize its exposure to inequitable allocations of risk. Once the proposed contract has been reviewed, and the “killer” risk allocation clauses have been identified, the contractor can attempt to negotiate these clauses out of the contract. By agreeing to the contract as it stands, a contractor may waive its rights to compensation for costs associated with risks that would normally, and appropriately, be allocated to the other party. As long as the contractor is aware of the “killer” clauses contained in the proposed contract, it can make an informed business decision to either:

- (a) execute the contract and accept these risks,
- (b) walk away, or
- (c) execute the contract and manage around the assumed risks.

This is *contractual risk management*. It should be as common as safety loss control - both prevent losses, don't they?

Consider the Following Basic “Killer” Clauses:

Term of Agreement

Killer Clause

"This Service Agreement shall be for a term one (1) year, provided however, that Owner shall have the absolute right to cancel this Agreement at any time for any reason or no reason by giving Service Contractor thirty

(30) days prior written notice to Contractor's address as set forth below by Certified Mail, Return Receipt Requested, of its intentions to so cancel. Provided that Service Contractor is not in default of this Agreement, Owner shall pay Service Contractor for the months up to and including the month of cancellation and thereafter neither party shall have any further obligation to the other."

Clause to Die For

"This Service Agreement shall be for a term of one (1) year except as the term may be sooner terminated as set forth below.

(a) Owner shall have the right to terminate this service Agreement during the term or any renewal term hereof for a material deficiency in service by service contractor, but only after Owner provides to Service Contractor, certified mail, return receipt requested, a written complaint reciting the precise nature of the deficiency, and only if Service Contractor has failed to correct or to commence to correct any such deficiency complained of within thirty (30) days after receipt of the complaint.

(b) If Owner breaches this Agreement either by failing to pay the compensation due and owing Service Contractor hereunder or, for any other reason, Service Contractor shall have the right to terminate this Agreement after thirty (30) days' notice, whereupon Service Contractor shall be entitled to receive, in addition to any compensation due and owing for services rendered through the date of termination, an amount equal to the payment due Service Contractor under this

Agreement for _____ months as liquidated damages and not as a penalty."

Service Contractor's Indemnity

Killer Clause

"(a) Service Contractor shall defend, indemnify and hold harmless Owner, Manager and their affiliated entities, parents, subsidiaries, successors and assigns, and the invitees, licensees, tenants, employees and agents of Owner, Manager and their affiliated entities (collectively, the "Indemnified Parties"), from all losses, claims, suits, actions, damages, fines, penalties, costs, expense and liabilities of any nature or character caused by, resulting from, arising out of or incurring in connection with the Work or Service Contractor's failure to fully and completely carry out the terms of this Service Agreement. If any such claims, damage or injury be made or asserted or threatened or incurred, whether or not such claims, damage or injury are based upon one or more Indemnitees' alleged, active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of any Indemnatee, Service Contractor agrees to defend, indemnify and hold harmless the Indemnitees from and against all claims, demands, liabilities, interest, loss, damage, injury, attorneys fees, costs and expenses of whatever kind or nature, whether direct or consequential, whether for property damage or personal injuries (including death) to any and all persons, whether employees of Service Contractor or others, which the Indemnitees or any of them may directly or indirectly sustain suffer or incur or which are otherwise caused or occasioned thereby or

resulting from the foregoing claims, damage or injury made, asserted, threatened or incurred. In furtherance to but not in limitation of the indemnity provisions in this Service Agreement, Service Contractor hereby expressly and specifically waives any statutory or constitutional immunity it enjoys from suits by its own employees from limitations of liability or recovery under workers' compensation laws.

(b) In the event that any such claims, loss, cost, expense, liability, damage or injury arise, or are made, asserted or threatened against the indemnitees or any of them, the Owner shall have the right to withhold from any payments due, or to become due, to the Service Contractor an amount sufficient in Owner's sole discretion to protect and indemnify the Indemnitees from and against any and all such claims, loss, cost, expense, liability, damage, or injury, including legal fees and disbursements.

(c) Service Contractor, for the price provided in this Service Agreement, further accepts and assumes full and exclusive liability for, and shall defend, indemnify and save the Indemnitees harmless from and against, the payment of any and all taxes and contributions or premiums for unemployment insurance, workers' compensation, retirement, health and welfare or disability, and any similar benefits, which may now or hereafter be imposed by law or by collective bargaining agreement measured upon the payroll, income, wages, salaries or other remuneration of employees, by whomsoever employed, engaged in the performance of the Work included in this Service Agreement and all sales, use or other taxes levied or assessed against any Indemnitees, including but not limited to, taxes on any kind of materials, articles or equipment. Owner may, in its sole discretion, request

production by Service Contractor of evidence satisfactory to Owner that all obligations described in this paragraph have been paid in full as a condition to making any payment hereunder.

(d) The intent of this paragraph is to absolve and protect the Indemnitees from any and all costs, expenses, damages, loss, and attorneys fees by reasons of the premises set forth in this paragraph."

Negotiated Clause

"(a) Service Contractor shall defend, indemnify and hold harmless Owner, [Manager and their affiliated entities, parents, subsidiaries], **its** successors and assigns, [and the invitees, licensees, tenants, employees and agents of Owner, Manager and their affiliated entities] ("collectively, the "Indemnified Parties"), from all losses, claims, suits, actions, damages, fines, penalties, costs, expense and liabilities of any nature or character caused by, resulting from, arising out of or incurring in connection with the [Work or] Service Contractor's failure to [fully and completely carry out] **perform in accordance with** the terms of this Service Agreement. If any such claims, damage or injury be made or asserted or threatened or incurred, [whether or not] **unless** such claims, damage or injury are based upon one or more Indemnitees alleged, active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of any Indemnitee, Service Contractor agrees, **to the extent of its negligence in the execution of the Work or failure to perform in accordance with the terms of this Service Agreement,** to defend, indemnify and hold harmless the Indemnitees from and against all claims,

demands, liabilities, interest, loss, damage, injury, attorneys fees, costs and expenses of whatever kind or nature, [whether direct or consequential,] whether for property damage or personal injuries (including death) to any and all persons, whether employees of Service Contractor or others, which the Indemnitees or any of them may directly [or indirectly] sustain [suffer or incur] or which are [otherwise] caused or occasioned [thereby] or resulting from the foregoing [claims, damage or injury made, asserted, threatened or incurred. In furtherance to but not in limitation of the indemnity provisions in this Service Agreement, Service Contractor hereby expressly and specifically waives any statutory or constitutional immunity it enjoys from suits by its own employees from limitations of liability or recovery under workers' compensation laws.]

(b) In the event that any such claims, loss, cost, expense, liability, damage or injury arise, or are made, asserted or threatened against the indemnitees or any of them, the Owner shall have the right to withhold from any payments due, or to become due, to the Service Contractor an amount sufficient in Owner's sole discretion to protect and indemnify the Indemnitees from and against any and all such claims, loss, cost, expense, liability, damage, or injury, including legal fees and disbursements.]

(c) Service Contractor, for the price provided in this Service Agreement, further accepts and assumes full and exclusive liability for, and shall defend, indemnify and save the Indemnitees harmless from and against, the payment of any and all taxes and contributions or premiums for unemployment insurance, workers' compensation, retirement, health and welfare or disability, and any similar benefits, which may now or hereafter be

imposed by law or by collective bargaining agreement measured upon the payroll, income, wages, salaries or other remuneration of employees, by whomsoever employed, engaged in the performance of the Work included in this Service Agreement and all sales, use or other taxes levied or assessed against any Indemnitees, **arising out of the Service Contractor's work**, including [but not limited to,] taxes on any kind of materials, articles or equipment. Owner may, in its sole discretion, request production by Service Contractor of evidence satisfactory to Owner that all obligations described in this paragraph have been paid in full as a condition to making any payment hereunder.

[(d) The intent of this paragraph is to absolve and protect the Indemnitees from any and all costs, expenses, damages, loss, and attorneys fees by reasons of the premises set forth in this paragraph.]"

Clause to Die For

"To the extent of the proceeds of the coverages afforded by the policies of insurance required of Service Contractor as set forth herein, Service Contractor shall indemnify and hold the Owner harmless from and against any and all claims, damages, losses and expenses, including attorney's fees, arising out of the performance of the Work under this Service Agreement, if and to the extent that any such claim, damage, loss or expense is caused by the negligence of any employees or agents of Service Contractor."

Subcontractor Considerations

Incorporation by Reference

The construction/service contracting process is characterized by a large volume of documents. Incorporating by reference a number of documents into a single document is a typical part of the modern construction contract.

Aside from being a matter of convenience, the use of incorporation by reference represents efforts to ensure consistency of obligations throughout the various tiers of the contracting process.

A concept closely related to that of "incorporation by reference" is the use of a "conduit" clause. The conduit clause is most commonly used in subcontracts and provides that the subcontractor agrees to assume toward the prime contractor all of the obligations and responsibilities the prime contractor assumes toward the owner in the construction contract. There are variations: it may include provisions making available to the subcontractor against the contractor the same rights and remedies available to the contractor against the owner; it may provide that the contractor assumes toward the subcontractor the same duties and responsibilities assumed by the owner toward the contractor. Another variation of the "conduit" clause is one that purports to bind the subcontractor to the determination of a dispute between the contractor and the owner. Because the scope and limitations of incorporation by reference and conduit clauses are varied, careful review, understanding and negotiation of these clauses is recommended.

Service Contractor's Form of Conduit Clause

"With respect to the work to be performed and furnished by the Subcontractor hereunder, the Subcontractor agrees to be bound to the Owner and to Service Contractor by each and all of the terms and provisions of the Service Agreement and the other Contract Documents, and to assume toward the Owner and Service Contractor all of the duties, obligations and responsibilities that Service Contractor by the Contract Documents assumes toward the Owner, and the Subcontractor agrees further that the Owner and Service Contractor shall have the same rights and remedies against the Subcontractor as the Owner under the terms and provisions of the Service Agreement and the Contract Documents has against Service Contractor with the same force and effect as though every such duty, obligation, responsibility, right or remedy were set forth herein in full. The terms and provisions of this Subcontract with respect to the work to be performed and furnished by the Subcontractor hereunder are intended to be and shall be in addition to and not in substitution for any of the terms and provisions of the Service Contract and the other Contract Documents."

Subcontractor's Form of Conduit Clause

"The Subcontractor shall be bound to the Service Contractor by the terms of this Subcontract and, to the extent that provisions of the Contract Documents between the Owner and the Service Contractor apply to the work of the Subcontractor as defined in this Subcontract and have been provided to Subcontractor prior to the execution and delivery of this Subcontract, the Subcontractor shall assume toward the Service Contractor all the obligations

and responsibilities which the Service Contractor, by the Contract Documents, assumes toward the Owner, and shall have the benefit of all rights, remedies and redress against the Service Contractor which the Service Contractor, by the Contract Documents, has against the Owner, insofar as applicable to this Subcontract, provided that where any provision of the Contract Documents between the Owner and Service Contractor is inconsistent with any provision of this Subcontract, this Subcontract shall govern."

Bankruptcy Considerations

Once bankruptcy is initiated by an owner or a subcontractor, a stay of all proceedings is automatically entered. This "automatic stay" prevents a service contractor from initiating any action against an owner or subcontractor. It also prevents the service contractor from declaring a breach of contract.

In order to pursue one's rights it is necessary to file a petition with the Court to seek relief from the automatic stay. There is a need to act quickly in filing this motion to compel the debtor to either assume or reject the Contract. There may be a need for emergency relief to replace a Subcontractor who is unable to perform. In order for the debtor to be permitted to assume the Contract it must demonstrate its ability to perform its obligations under the Contract.

There is a risk upon the service contractor for failure to follow these procedures. For instance, a service contractor who continues to work for an owner without undertaking these procedures could face a suit by the owner's

trustee in bankruptcy for money paid to the service contractor in excess of the fair value of the service contractor's services. To avoid this risk, good judgment dictates the need to file a motion to compel the debtor to either assume or reject the contract.

Conclusion

In conclusion, service contractors are being called to a higher standard of contract administration and ignorance is no excuse. It is *inconceivable* that some service contractors go to work after notice to proceed without a signed contract. After they have been paid for their first invoice, service contractors have, unless previously stated, all but agreed to the entire contract.

SERVICE AGREEMENT

THIS SERVICE AGREEMENT is made on this _____ day of _____, 200_, by and between _____ (hereinafter called the "Owner"), a _____ corporation having offices at _____, and _____ (hereinafter called the "Service Contractor"), a _____ corporation having offices at _____.

W I T N E S S E T H:

WHEREAS, Owner is the owner of a certain building situated at _____ (hereinafter called the "Facility"); and

WHEREAS, Owner desires to engage Service Contractor to perform certain building operations services at the Facility, and Service Contractor agrees to perform such services, subject to and in accordance with the terms and conditions set forth in this Agreement.

NOW, THEREFORE, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Scope of Services. Service Contractor shall perform certain building operations services at the Facility, subject to the terms and conditions set forth in this Agreement, in accordance with the drawings and/or specifications identified on Schedule I attached to this Agreement (hereinafter referred to collectively as the "Work").

2. Supplies and Equipment. Service Contractor shall provide uniforms and tools for its employees. All other supplies or equipment shall be furnished by Owner.

3. Other Owner Responsibilities. Owner will provide, at its expense, adequate secured storage areas at the Facility for use by Service Contractor, together with adequate water, plumbing, electrical and other services for use by Service Contractor as Service Contractor shall deem necessary. Owner shall be responsible for compliance with all federal, state and local safety and health laws and regulations with respect to the Facility and also will provide adequate trash disposal facilities.

4. Term of Agreement. This Agreement shall be for the term specified in Schedule II attached hereto except as the term may be sooner terminated as set forth below.

(a) Owner shall have the right to terminate this Agreement during the term or any renewal term hereof for a material deficiency in service by Service Contractor, but only after Owner provides to Service Contractor, in accordance with the terms of Paragraph 8 below, a written complaint reciting the precise nature of the deficiency, and only if Service Contractor has failed to correct or to commence to correct any such deficiency complained of within thirty (30) days after receipt of the complaint.

(b) If Owner breaches this Agreement either by failing to pay the compensation due and owing Service Contractor under Paragraph 5 below or, for any other reason, Service Contractor shall have the right to terminate this Agreement after thirty (30) days' notice,

whereupon Service Contractor shall be entitled to receive, in addition to any compensation due and owing for services rendered through the date of termination, an amount equal to the payment due Contractor under this Agreement for _____ months as liquidated damages and not as a penalty.

5. Compensation to Service Contractor. In consideration for the Work to be performed by Service Contractor under this Agreement, Owner shall pay Service Contractor a monthly fee in the amount, and at the times, set forth in Schedule III attached hereto.

6. Unavoidable Delays. Except for compensation due and owing Service Contractor, the time for performance hereunder shall be extended for any delays or interruptions caused by strikes, lock outs, labor troubles, inability to procure materials, riots, insurrection, war, fire or other casualty, acts of God or other reasons not attributable to the party delaying in performing work or doing acts required under this Agreement.

7. Engagement of Subcontractors. Owner hereby agrees that Service Contractor shall have the right, in its sole discretion, at any time and from time to time during the term of this Agreement, to subcontract any part or all of the Work to be performed under this Agreement to one or more subcontractors.

8. Notices. Any notices required hereunder shall be sufficient if they are in writing and given by certified mail, return receipt requested, or by personal delivery, addressed to the party at its address set forth at the beginning of this Agreement or at such other address as the party may provide by notice similarly given.

9. Entire Agreement. This Agreement, together with the Schedules attached hereto, constitute the entire agreement of the parties hereto and supersede and rescind any and all prior understandings between the parties either written or oral relative thereto. Neither this Agreement nor any part hereof shall be changed, modified, amended or altered except by a writing signed by both the parties hereto.

10. Binding Effect. This Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective heirs, executors, administrators, successors and assigns.

11. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the state in which the Facility is located.

IN WITNESS WHEREOF, the undersigned parties have executed this Agreement on the day and year first above written.

OWNER: _____

SERVICE CONTRACTOR: _____

By: _____
President

By: _____
President

ATTEST: _____
Secretary

ATTEST: _____
Secretary

(CORPORATE SEAL)

(CORPORATE SEAL)

SCHEDULE I

SCOPE OF SERVICES

[Note: Reference Service Contractor's
proposal for maintenance and operations
dated _____, 20____.]

SCHEDULE II

TERM OF AGREEMENT

The initial term shall be for a period of one (1) year commencing _____ and ending _____, and shall renew automatically for an additional one (1) year term and so on from year to year unless the Owner shall have provided Service Contractor ninety (90) days prior written notice of intent to terminate effective as of the expiration date of the then current term.

SCHEDULE III

COMPENSATION PAYABLE TO SERVICE CONTRACTOR

[Note: In addition to inserting the amount of the monthly fee payable to Service Contractor, please also insert the due dates for Service Contractor's receipt of payments from the Owner.]