

A Guide to EPC Agreement Provisions

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pillsbury



Robert A. James

Partner | San Francisco & Houston

+1.415.983.7215

+1.713.276.7689

rob.james@pillsburylaw.com

Engineering, procurement and construction (EPC) agreements are among the most complex of contracts. Including their voluminous and imposing attachments, they often sprawl across several three-ring binders and cardboard drawing tubes. Reviewing the terms and conditions is a slog even for experienced personnel, because the order and depth of coverage of topics vary among forms and drafters, and because provisions in one place may be undercut by provisions lurking elsewhere.

This Guide is a compilation and summary of legal terms and conditions often found in a fixed-price EPC agreement for a large private industrial work of improvement—especially a highly detailed agreement that is subject to project financing or other rigorous stakeholder review. In addition to these generic provisions, any given EPC agreement may include customized clauses addressing distinctive features of the project's financing (particularly by export credit agencies); permitting, regulatory, local law and customer requirements; integration with direct suppliers to the owner of specialized equipment and technology; and coordination with landlord, interconnection, operation, maintenance and offtake arrangements.

Despite their complexity and variation, EPC agreements address the following half-dozen categories of topics:



Parties & Definitions



Scope



Time & Money



Completion

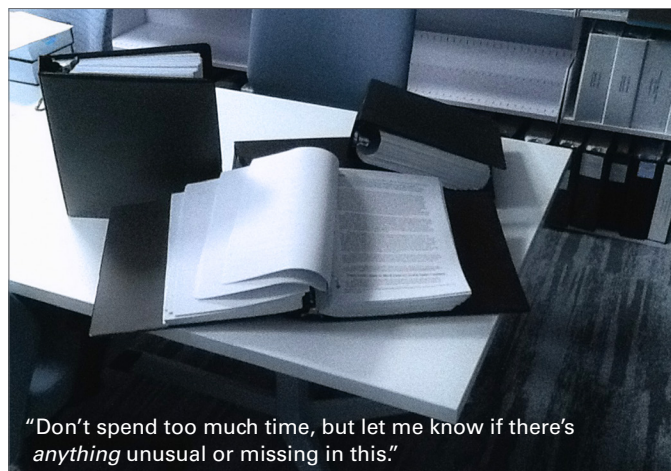


Liability



Defaults, Disputes & General

Common EPC clauses are gathered and color-coded here into those six categories. (Few agreements would have all such clauses, and many make explicit what would already be implied.) When reviewing an EPC agreement, the user can check this Guide and see (i) if the topic is covered in the agreement under review and (ii) if so, whether that agreement's scope description and risk allocation are appropriate for the project in question.



"Don't spend too much time, but let me know if there's anything unusual or missing in this."



0 PREAMBLE & RECITALS

- 0.1 Owner name and address, identity of members of owner joint venture if applicable.
- 0.2 Contractor name and address, identity of members of contractor joint venture if applicable, and Contractor's license number if applicable.
- 0.3 Recital briefly describing Project.
- 0.4 Recital briefly describing elements furnished by Owner or other contractors or vendors (for example, specialized equipment or technology furnished directly to Owner by separate manufacturer). Reference to split contracts where onshore and offshore work are segregated into two agreements.
- 0.5 Recital briefly describing role of Engineer, Architect, Construction Manager or other entities who, under separate contract with Owner, manage or coordinate Contractor's services.
- 0.6 Recital of consideration and intent to be legally bound.

1 DEFINITIONS & INTERPRETATION

- 1.1 **Defined Terms.** Key definitions with inherent business issues include:
 - 1.1.1 "Contract Documents" – usually includes the documents forming the Owner-Contractor relation, inclusive of the EPC Agreement terms; the General, Special or Supplementary Conditions; the Drawings and Specifications (after approval by Owner); and Exhibits, Appendices, Schedules and other Attachments.
 - 1.1.2 "Project Documents" – often, the entirety of the agreements relating to EPC to which the Owner is subject, including not only the Contract Documents but also equipment supply agreements, land leases, utility interconnection agreements, pipeline tariffs, offtake agreements, and other contracts whose execution may be conditions precedent to the EPC Agreement notice to proceed.
 - 1.1.3 "Applicable Laws" – usually includes laws, regulations, and codes. May include permits and government approvals.
 - 1.1.4 "Requirements" – usually includes Applicable Laws and the requirements of the Project Documents applicable to EPC and to Contractor's scope.

- 1.1.5 "Prudent Industry Practice" – usually includes practices consistent with Requirements that a prudent EPC contractor for this type of improvement would observe.
- 1.1.6 "Changes in Law" – may include, or exclude, changes relating to means and methods of construction; changes in tax laws; and changes in interpretation of existing statutes or regulations. May be limited to changes with an impact over \$x/occurrence, or (in cross-border deals) to changes in the laws only of the country where the work is undertaken.
- 1.1.7 "Force Majeure" – the typical general force majeure clause may be supplemented by construction-specific features. May define excessive periodic precipitation or other kinds of qualifying weather events, perhaps requiring an impact over \$x/occurrence or a number of days in aggregate to qualify. May address threatened weather events that do not materialize (e.g., hurricane evacuation) and other events beyond Contractor's reasonable control. May include wars, civil unrest, terrorism, expropriation and other political events. May exclude from force majeure treatment certain occurrences, such as supply chain interruptions, macroeconomic conditions, labor disputes, or failures to pay money.
- 1.1.8 "Subcontractors" – may include subcontractors of any tier and vendors to onsite subcontractors. May include or exclude vendors to vendors, or vendors to offsite subcontractors.
- 1.1.9 "Affiliates" – may require customized definition, especially where either Contractor or Owner is a joint venture.
- 1.2 **Interpretation Standards.** "Including" is not exclusive, and other drafting conventions.
- 1.3 **Priority.** May state that in case of conflict, which of EPC Agreement terms, General Conditions, and other Attachments has priority. In case of conflict among Contract Documents, Contractor may be required to bring conflicts to Owner's attention promptly.

2 OWNER, CONTRACTOR & SUBCONTRACTOR RELATIONS

- 2.1 **Independent Contractor Status.** Contractor and Subcontractors are independent contractors. Owner may be generally prohibited from communicating directly with Subcontractors, but permitted to do so in defined circumstances (in case of emergencies and liens, with copies of communications to Contractor; or in case of default, termination or assignment, without such copies).

- 2.2 **Contractor Key Personnel and Organization Chart.** Contractor designates Contractor Representative authorized to receive notices and take actions required under this agreement. Contractor not to redeploy key personnel without Owner consent. Owner may be entitled to require replacement of unsatisfactory personnel in defined circumstances.
- 2.3 **Subcontractor Status.** Subcontractors are not third-party beneficiaries of the EPC Agreement. Contractor is liable for their performance or nonperformance.
- 2.4 **Subcontractors and Awards.** List of previously approved Subcontractors. Process for advertising for new subcontracts, review of proposals by Contractor, review of proposals and Contractor's recommendation by Owner, award by Contractor. Ability of Contractor to award small Subcontracts without formal process (where there is a fixed EPC price). Owner may be entitled to require replacement of unsatisfactory Subcontractor in defined instances. Contractor may be required to flow down clauses into Subcontracts, including financier cooperation duties and execution of conditional assignments.
- 2.5 **Prior Engineering.** Relation of the work under the EPC Agreement to the "design basis" or "design package," or to the work performed under a front-end engineering design (FEED) agreement or other existing contracts.
- 2.6 **Review of Documents.** Contractor acknowledges it has reviewed and accepts the scope descriptions and risk allocations in the Project Documents.
- 2.7 **Review of Conditions.** Contractor acknowledges it has reviewed the site conditions and industry and economic conditions. Contractor may or may not be entitled to rely on the Geotechnical Report, land survey and other materials provided by Owner. Special provisions for existing piles or foundations and for subsurface conditions.
- 2.8 **Review of Laws.** Contractor acknowledges that it has reviewed both Applicable Laws and other laws (e.g., tax laws), that such laws may change, and that it accepts the risk of such changes, subject to the Change Order provisions.

Criteria and pass the Performance Test. Includes all items or activities reasonably inferable from Project Documents. Basic Project description scope document included as Attachment is illustrative. But Work excludes defined Owner-furnished items (which may include Owner Permits, Owner-supplied inputs such as turbine supply, Geotechnical Report, and site survey).

- 3.2 **Specifically.** Contractor provides engineering, procurement, construction, rectification of defects, subcontractor award and responsibility, inspection, Contractor Permits, information needed or requested for Owner Permits, and training for operation and maintenance (O&M) personnel or contractor. May include or exclude responsibility for receiving, installing and commissioning turbine or other specialty equipment furnished under separate contract to Owner.
- 3.3 **Engineering.** Contractor conducts all needed design and engineering (subject to, or not subject to, "design basis," "design package" or FEED agreement outputs), finishes site survey and geotechnical investigations relying (or not relying) on Owner's site survey and Geotechnical Report, reviews Owner-provided designs, prepares Drawings and Specifications for Owner review per timetable schedule (with Owner having x days to respond, and a defined process for addressing its comments), proposes value engineering options, holds all needed engineering registrations and licenses, uses proper computer-aided design (CAD) and building information management (BIM) systems and protocols, and prepares all piping and instrumentation diagrams (P&IDs) and as-built drawings.
- 3.4 **Procurement.** Contractor conducts all needed procurement of materials and equipment (subject to allowances in Contract Price for Owner spare part decisions, and except Owner-procured items). Contractor responsible for clearance of customs, payment of duties and other charges for imports; responsible for local content and hiring compliance, and may request relevant information from Owner, to be provided reasonably and promptly.
- 3.4.1 Process for proposing and securing Owner's approval to substitute "or equal" items for items specified.
- 3.4.2 Provisions regarding transportation, delivery, receipt and storage of materials and equipment. Responsibility for protection and proper storage. Shop inspections of offsite fabrication or manufacturing. Receipt and use of Owner-furnished items.
- 3.4.3 Contractor proposes spare parts list. Owner decides which ones Contractor should purchase. Adjustment via Change Order to

3 CONTRACTOR'S RESPONSIBILITIES

- 3.1 **Generally.** Contractor performs all Work required for Mechanical, Substantial and Final Completion of the Project, all in accordance with Project Documents, Requirements and Prudent Industry Practice, so as to meet the Minimum Acceptance



spare parts allowance in fixed price. (Or capital spares may be fixed and included in price, while operating spares may be extra.) Owner right to purchase surplus items.

3.5 **Construction.** Contractor conducts all needed construction.

3.5.1 **Environmental.** Contractor proposes, Owner approves (without thereby assuming liability), and Contractor implements health, safety and environment plan (HSE Plan). Plan includes management and consolidation of waste materials. Contractor complies with Applicable Laws for Work and for offsite disposal of materials. Contractor complies with particular requirements of regulators (Homeland Security, FERC, etc.). Contractor notifies Owner of any releases or claims.

3.5.2 **Hazardous Materials (Hazmats).** Contractor not to introduce Hazmats (including explosives) onsite except as required for Work and in compliance with Laws. Contractor disposes of Hazmats in accordance with Applicable Laws. If Contractor encounters existing Hazmats, it must notify Owner promptly and avoid disturbing condition; Agreement may provide that Owner will then arrange for treatment or disposal. If Contractor does not so notify, Contractor bears consequent impacts to its work and associated liability (sometimes up to a monetary sub-ceiling).

3.5.3 **Minimize Input Loss.** Contractor minimizes loss of gas or other stored materials during maintenance and startup testing.

3.5.4 **Security and Site Rules.** Contractor proposes, Owner approves (without thereby assuming liability) and Contractor implements plan for security of and access to jobsite. Particular requirements of regulators (Homeland Security, etc.). (Owner security and access obligations, if project is part of Owner's larger complex.)

3.5.5 **Employment.** Contractor responsible that skilled and qualified personnel are used by Contractor and Subcontractors. Contractor will redeploy personnel objected to by Owner (without Owner thereby assuming liability). Contractor complies with local hiring, prevailing wage or other labor law requirements. Contractor and Subcontractor personnel are not Owner employees or eligible for Owner benefits. Contractor is responsible for immigration and visa requirements. Contractor to provide labor resources plan with database of personnel information, subject to privacy

laws. Contractor to implement policies regarding subjects such as drug tests and use of cellular telephones.

3.5.6 **Labor Relations.** Contractor endeavors to avoid labor relation issues that could impair performance. Contractor to notify Owner of relevant events in labor relations. Contractor to execute and comply with Project Labor Agreement and require Subcontractors to do so.

3.5.7 **Construction Equipment.** Contractor provides needed equipment in new, good and compliant condition. Contractor liable for damage to rented equipment.

3.5.8 **Coordination and Access.** Contractor coordinates its Work with other contractors on site and with parties performing interconnection work. Provisions for scheduled and unscheduled interruptions at sites, including turnarounds. Contractor coordinates work of its team including Subcontractors. Contractor not to interfere with operations of Owner on adjacent facilities or with activities of other contractors. Contractor provides access to site for Owner, financier and government personnel, subject to site safety and security rules. Provisions for shared use of common facilities such as ports or railroad spurs.

3.5.9 **Cleanup.** Contractor keeps site clean and free of surface water and waste—throughout construction, not just at completion. Owner may remedy default and backcharge Contractor.

3.5.10 **Temporary Items.** Contractor provides permanent or temporary utilities, access roads, storage, staging and laydown facilities, and office space (including specified space and amenities for Owner and Lender representatives).

3.5.11 **Emergencies.** Contractor takes action and provides notices in response to emergencies. Owner may remedy default and backcharge Contractor.

3.5.12 **Training Program.** Contractor may be required to provide O&M training materials and train Owner O&M personnel or contractor.

3.5.13 **Maintenance of Project.** Contractor responsible for maintenance of Project until Substantial (or Final) Completion. Any O&M personnel or contractor during that time report to Contractor, and Contractor is liable for their performance, except where they violate a direct express Contractor instruction.



- 3.5.14 **Inspections and Testing.** Contractor arranges for inspection and testing of Subcontractors' work by independent entities. Owner and Lender rights to make and attend inspections. Review is not acceptance or waiver.
- 3.5.15 **QA/QC.** Contractor to propose, Owner to review (without thereby assuming liability) and Contractor to implement quality assurance and quality control program, meeting ISO 9000 requirements where applicable.
- 3.6 **Administrative.** Contractor provides all necessary administration for Work.
- 3.6.1 **Permits.** Contractor obtains Contractor Permits (defined in Attachment) by specified times. Contractor provides information to Owner needed or requested for Owner to obtain Owner Permits (defined in Attachment) by specified times.
- 3.6.2 **Payment.** Contractor to pay Subcontractors promptly under the terms of their subcontracts, and pay Owner promptly for sums due under this Agreement (often unless reason for nonpayment is Owner failure to make payment required under this Agreement).
- 3.6.3 **Meetings and Reports.** Contractor convenes meetings on agreed timetable. Contractor prepares minutes of meetings, provides immediate reports of HSE events, emergencies or Force Majeure occurrences, and provides monthly progress reports.
- 3.6.4 **Books, Records, Audits.** Contractor and Subcontractors maintain accurate and complete books and records for specified duration. Owner, financiers and public agencies have rights of access and audit. Procedures for objections and adjustments based on audits.
- 3.6.5 **Subordination of Liens.** If permitted by law, Contractor subordinates its lien and stop notice rights, and requires Subcontractors to subordinate their lien and stop notice rights, to the rights of the project financier.
- 3.6.6 **Taxes.** Contractor files all needed tax returns and pays own taxes. Other taxes (such as sales, use and excise tax and VAT, but excluding Owner's income or property tax) are either included in price or broken down separately. Contractor is liable for any claims relating to nonpayment or nonreporting of taxes for which it is responsible.
- 3.6.7 **Information for Accounting.** Contractor promptly provides information and equipment lists as required by Owner for tax and financial

accounting, including information needed for tax exemptions, rebates, abatements and incentive programs.

- 3.6.8 **No Commercial Activities.** Contractor conducts no activities onsite that are not needed for Project and is not to store items needed for other Contractor jobs. Non-solicitation of Owner personnel (sometimes bilateral, so Owner cannot solicit Contractor personnel).
- 3.6.9 **Financer Provisions.** Cooperation with Owner financing. Cooperation with financier's Independent Engineer. Provision of legal, financial and other information. Financer Acknowledgment and Consent per Attachment to be signed by Contractor and all major Subcontractors. If export credit agencies (ECAs) are involved, the agreement may require Contractor to verify procurement from designated countries at specified levels.

4 OWNER'S RESPONSIBILITIES

- 4.1 **Payment and Funding.** Owner pays Contractor the sums provided in this Agreement. Owner provides evidence of funding at outset, and may be required to provide periodic confirmations of funding and notice of intervening adverse changes in funding.
- 4.2 **Owner Permits.** Owner obtains Owner Permits as described in Attachment by specified times. If not, Contractor may be eligible for Change Order (unless failure is related to information Contractor was to provide).
- 4.3 **Access to Site.** Owner furnishes access to site and access to agreed offsite areas. If not, Contractor may be eligible for Change Order.
- 4.4 **O&M Personnel or Contractor.** Owner furnishes skilled O&M personnel or contractor for Contractor training, and for operation following Substantial Completion. May include Contractor right to require replacement of unsatisfactory O&M personnel.
- 4.5 **Taxes.** Owner responsible for taxes imposed in the name of Owner if not included in Contractor obligations or fixed price. If Owner is pursuing exemptions, rebates, abatement or incentives, Contractor furnishes Owner with necessary or requested information.
- 4.6 **Site Survey and Geotechnical Report.** Owner furnishes described reports. Owner provides other technical or process data. Contractor may, or may not, be entitled to rely on these reports and data.



- 4.7 **Existing Hazmats.** Owner responsible for treating or disposing of existing Hazmats if notified by Contractor and as and to the extent required by Applicable Law. Legal requirement may be set as limit of responsibility, even if further treatment or disposal would benefit Contractor.
- 4.8 **Owner-Provided Items.** Often these include turbines or modules, utilities, feed gas, diesel, telecommunications, storage, staging and laydown areas (either cleared or “as is”), vessels or railcars for lifting, community communications or emergency plan, import assistance and management systems software. Failure to provide by specified times may be grounds for Change Order.
- 4.9 **Owner Representative.** Owner designates representative authorized to receive notices and take actions under this agreement. Limitations on representative’s authority, beyond which approval of Owner management (and financiers) may be required.

5 COMMENCEMENT & SCHEDULE

- 5.1 **Limited Notice to Proceed (LNTF).** Provided limited defined conditions are satisfied, Owner may issue LNTF and Contractor is thereupon obligated to commence defined LNTF work.
- 5.2 **Full Notice to Proceed (NTP).** Provided full defined conditions are satisfied (typically including financing), Owner may issue NTP and Contractor is thereupon obligated to commence full scope of work.
- 5.3 **Consequences of Delayed NTP.** May be grounds for Change Order or escalation of costs; ultimately may be grounds for suspension or termination by Contractor.
- 5.4 **Schedule Obligation.** Contractor performs Work in accordance with a defined Schedule. May impose commercially reasonable efforts obligation to achieve Target Substantial Completion Date; a covenant to achieve Guaranteed Substantial Completion Date; and a covenant to achieve Final Completion within specified number of days after actual Substantial Completion Date.
- 5.5 **CPM.** Contractor to prepare, Owner to review (without thereby assuming liability) and Contractor to implement critical-path method (CPM) schedule with specified features. Contractor notifies Owner of any delay or change in critical path elements. Monthly updates, submittals, process for review.

- 5.6 **Recovery Plan.** If Work falls behind schedule, Owner may require and Contractor then must implement plan for recovering delay at Contractor’s expense. (subject to applicable Change Order grounds)
- 5.7 **Acceleration Plan.** If Owner desires acceleration, Owner may request and Contractor then must propose plan for acceleration at Owner’s expense.

6 PRICE & PAYMENT

- 6.1 **Contract Price.** The Contract Price is a fixed price of \$x. (Or Agreement may set a defined fixed or monthly preconstruction or LNTF scope compensation, and a process for subsequently defining the definitive fixed price, to be proposed by Contractor, reviewed by Owner, and upon agreement added to the EPC Agreement by Change Order.) Contract Price is inclusive of all customs duties and all taxes other than specified items. Common exclusions from the Contract Price include taxes payable by Owner measured by Owner’s net income or by property value of Facility after Substantial Completion.
- 6.2 **Allowances.** Included in the Contract Price may be allowances or provisional sums for spare parts, currency, fuel prices, etc. Actual amounts confirmed and Contract Price adjusted by Change Order.
- 6.3 **Payment on LNTF.** Pre-Mobilization Payment. Timing of remainder of payment for LNTF scope.
- 6.4 **Payment on NTP.** Mobilization Payment.
- 6.5 **Progress Payments.**
 - 6.5.1 **Monthly Progress Applications for Payment (AfP).** Part (x%) may be based on attached Schedule of Values of actual work completed during month. Other part (x%) may be based on monthly schedule of separately priced items defined in Attachment, such as General Conditions items.
 - 6.5.2 **Progress AfP Form and Attachments.** AfP form often in Attachment. AfP must be accompanied by specified invoice, certificates, unconditional lien waivers for prior period, conditional lien waivers for current period, evidence of Owner title for offsite items, and other documents. Consolidated or separate invoices for Change Order work.
 - 6.5.3 **Owner and Lender Review of Progress AfP.** Timing, right to require further information, impact of request or response on timing of payment obligation.

- 6.5.4 **Retention.** Percentage, application to entire sum or to sum exclusive of fee, grounds for partial or total release on completion or exjuration of warranty period. (Or zero or reduced retention, in consideration of standby letter of credit or other security.)
- 6.5.5 **Payment.** Owner to pay undisputed amounts in Progress AfP within x days. Late charges.
- 6.6 **Final Payments.**
- 6.6.1 **Final AfP.** Release of retention, other sums.
- 6.6.2 **Final AfP Form and Attachments.** AfP form in Attachment. AfP must be accompanied by specified invoice, certification, unconditional lien waivers for prior period, conditional lien waivers for current period, and other documents. Consolidated or separate invoices for Change Order work.
- 6.6.3 **Owner and Lender Review of Final AfP.** Timing, right to require further information, right to inspect work, impact of request or response or inspection on timing of payment obligations.
- 6.6.4 **Payment.** Owner to pay undisputed amounts in Final AfP within x days. Late charges.
- 6.7 **Resolution of Disputed Items.** May require expedited process for resolving disputes over completion or progress.
- 6.8 **Reconciliation of Accounts and Erroneous Payments.** May include offshore bank account payment arrangement for foreign-sourced cash flow.
- 6.9 **Liens and Stop Notices.** Contractor removes or bonds against liens and stop notices (often unless due to Owner's failure to make payment). Owner may remedy default and backcharge Contractor.
- 6.10 **Withholding and Setoff.** Owner may withhold sums for specified nonperformance by Contractor and for sums due. May be bilateral.
- 6.11 **Payment Not Waiver of Rights.** Owner still has rejection and warranty claims, rights regarding liens, claims and remedies regarding unpaid claimants.

7 CHANGES

- 7.1 **Owner-Initiated Changes.** Owner may direct a change in the work consistent with the project scope. Owner may also request Contractor to study a proposed change and promptly provide a cost and schedule proposal, often at Owner's expense subject to a budget. Owner may direct

that work proceed while parties resolve whether the directive is a change, or the extent of its cost and schedule impact.

- 7.2 **Contractor-Initiated Changes.** Usually only for Changes in Law, Force Majeure, acceleration, other specific provision referencing Change Order eligibility, delays in getting property insurance proceeds, Owner suspension of EPC work, Owner delay or interference with Work, errors in Geotechnical Report, site survey or other Owner-furnished items on which this agreement provides Contractor may rely, existing Hazmats for which Contractor gave prompt notice, delayed NTP beyond date stated in EPC Agreement, and allowance items. Force Majeure sometimes only affords schedule relief and not cost relief.
- 7.3 **Pricing for Changes.** Agreed fixed price, or force account with unit rates for labor, equipment, subcontractors with defined margins per Attachment.
- 7.4 **Review and Approval of Changes, Disputes.** Timing, process.
- 7.5 **Price Adjustment for Change Order.** Reference to Attachments regarding unit costs, Contractor fee, General Conditions item costs, and defined markups on subcontracts.
- 7.6 **Time Adjustment for Change Order.** Provisions regarding CPM analysis, "ownership" of float.
- 7.7 **Funding.** Change Order Work conditioned on evidence of additional Owner funding.
- 7.8 **Adjustments Only by Change Order.** Change Order is accord and satisfaction. No further compensation for ripples or impacts.
- 7.9 **Mitigation.** Contractor endeavors to mitigate impact of Force Majeure or other events leading to Change Order.

8 COMPLETION & ACCEPTANCE

- 8.1 **Substantial Completion.** Usually requires that Work meets Mechanical Completion or other Minimum Acceptance Criteria; Performance Test has been run and either (i) Performance Standards are met or (ii) Contractor pays Performance Liquidated Damages; all Work is completed except agreed Punchlist; Contractor provides certificate of completion; all Contractor Permits are obtained and in effect; and all ordered Spare Parts and required manuals, warranties and other documents are delivered to Owner or Owner's O&M contractor.



- 8.2 **Contractor Notice of Substantial Completion.** Notice to Owner. May require notice to agency (e.g., FERC for feed gas, production of LNG, other activities).
- 8.3 **Verification of Milestone Criteria and Minimum Acceptance Criteria.** Process for inspection and requests for information.
- 8.4 **Performance Test.** Procedures. Provision of inputs. Conduct of test. Metrics (output, efficiency, emissions, etc.) measured per Attachment. If test failed, Contractor may within x days perform work and notify and re-run performance test. If Contractor declines to do so or if Performance Test again not met, Contractor pays liquidated damages per Attachment.
- 8.5 **Operation by Contractor prior to Substantial Completion, including during Performance Tests.** Owner responsible for operation following Substantial Completion. Owner right to accept a portion of the facilities and assume liability related thereto.
- 8.6 **Punchlist Items and Final Completion.** Contractor not to interfere with Owner operations. Reduction in retention to a defined multiple (e.g., 150% or 200%) of estimated punchlist and defect correction costs. Owner review of punchlist completion, issuance of Final Acceptance. Acceptance not waiver of rights.

- 9.4 **Extended Warranty.** For replacement parts or warranty Work. Handling of statutes of repose.
- 9.5 **Assignment.** Contractor warranty assignable by Owner to other Project owners and financiers. Contractor obtains warranties from Subcontractors and assigns the warranty rights to Owner.
- 9.6 **Disclaimer.** Conspicuous disclaimer of implied warranties.

10 LIQUIDATED DAMAGES

- 10.1 **Milestone Liquidated Damages.** Milestone Mechanical Completion Delay Liquidated Damages (and bonuses, in each case where applicable). Often this and the subsequent LD provisions are specified in Attachments.
- 10.2 **Substantial Completion Liquidated Damages.**
- 10.3 **Final Completion Delay Liquidated Damages.**
- 10.4 **Performance Test Liquidated Damages.**
- 10.5 **Payment of or Withholding for Liquidated Damages.**
- 10.6 **Not Penalty.** Liquidated damages are not a penalty; liquidated damages are exclusive of other remedies for delay or performance test non-attainment. Potential bonuses for early completion or for surpassing certain performance standards.

9 WARRANTY

- 9.1 **Warranties.** In addition to Minimum Acceptance Criteria and Performance Test, Contractor warrants Work free of defects and violations of Requirements for Warranty Duration (often earlier of (i) x months after Substantial Completion, or (ii) x months after delivery and installation of particular equipment). Standard of professional care for design and engineering services.
- 9.2 **Correction Before Completion.** Owner rights of correction prior to Substantial Completion. Contractor obligation to correct. Owner may remedy default and backcharge.
- 9.3 **Correction After Completion.** Owner rights of correction after Substantial Completion. Contractor may have obligation to correct, or the right to correct if it would not interfere with operation. Owner right to remedy and backcharge. Repeated or systemic defects of a part may not require actual failures of all such parts for Contractor to be obligated to replace them.

11 LIMITATIONS OF LIABILITY

- 11.1 **Limitations.** Contractor's liability under agreement may, or may not be, be limited to (i) \$X for Delay LDs, (ii) \$X for Performance Test LDs, and (iii) \$X for other obligations of Contractor under the Agreement—except indemnities, gross negligence or willful misconduct, failure to complete Work, or other exclusions.
- 11.2 **Waiver of Consequential Damages.** May exclude such remedies, except as covered in indemnities and except as compensated in liquidated damages. Waiver may be unilateral by Contractor only, or bilateral.
- 11.3 **Exclusivity.** Exclusivity of remedies, waiver of implied remedies.
- 11.4 **Scope of Liability.** Liability allocations apply even in the event of negligence of the benefitted party.
- 11.5 **Survival of Liabilities.** Liabilities survive for the time periods specified in the agreement.

12 TITLE & RISK OF LOSS

- 12.1 **Title.** Contractor warrants that Owner receives title to the Facility and all supplies, equipment and spare parts free of encumbrances. Title may pass on payment for item; or on delivery of item to site; or on earlier, or later, of payment and delivery. If title passes offsite, Contractor is to safeguard Owner's title and to provide evidence of protections (UCC-1 Statements, e.g.).
- 12.2 **Risk of Loss.** If Contractor is to procure project property insurance, Contractor bears risk of loss of or damage to all of the Facility and all materials and equipment prior to Substantial Completion, except (i) certain "Special Risks" items excluded from an all-risk policy like war, nuclear and "Windstorm Damage" over \$x, (ii) Change Order relief for these exceptions, and (iii) Change Order relief for Owner actions or Force Majeure per EPC Agreement. Owner bears risk of loss of or damage to the Facility following Substantial Completion, subject to Contractor's warranties and Contractor's negligence in Final Completion and performance of warranty work. (An alternative allocation is that some or all of the risk of loss to the project is retained by Owner, if Owner insures the risk or uses its self-administered claims program. In this case, Contractor usually bears some deductible exposure and risk of loss to tools and consumables.)
- 12.3 **Found Materials.** If Contractor produces soil, aggregates, minerals or treasure, they belong to Owner but Contractor may incorporate found soil and aggregates in the Work on the site.

13 INSURANCE & SECURITY

- 13.1 **Contractor and Owner Insurance Program.** In accordance with detailed Attachment. Specifies types of policies, credit rating of issuers, endorsements, and minimum limits.
[Simplified examples:
- 13.1.1 **EXAMPLE 1.** Contractor procures Workers' Compensation (WC), Employer Liability (EL), Commercial General Liability (CGL), Auto, Aviation, Marine, Umbrella, Builder's All Risk (BAR), Delayed Startup BAR endorsement.
- 13.1.2 **EXAMPLE 2.** Contractor procures the foregoing liability insurance but Owner procures the Builder's All Risk Coverage.

- 13.1.3 **EXAMPLE 3.** Owner procures project Owner-Controlled Insurance Program, while Contractor provides CGL, Auto for offsite work.
- 13.2 **Insurance Requirements.** Maximum deductibles, named and additional insureds, waiver of subrogation, prohibition or notice of cancellation, certificates, what happens if insurance changes or is unavailable.
- 13.3 **Owner Security.** Owner obligation to provide parent guaranty or parent guaranties. (Or standby letter of credit, bank guarantee, or other collateral.) Process for replacing or adjusting such security. Periodic financial reports, obligation to provide requested information as to guarantor's or bank's condition.
- 13.4 **Contractor Security.** Contractor obligation to provide suerty bonds, parent guaranty or parent guaranties. (Alternatively or in addition, obligation to provide standby letter of credit, bank guarantee, or other collateral.) Process for replacing or adjusting such security. Periodic financial reports, obligation to provide requested information as to guarantor's or bank's condition.

14 RELEASES & INDEMNITIES

- 14.1 **General Indemnity.** EPC agreements vary widely in their risk allocations, based largely on the ability and willingness of the owner and its credit sources to efficiently bear, transfer or distribute risks that occur in the engineering, procurement and construction process.
- 14.1.1 **EXAMPLE:**
- 14.1.1.1 Contractor indemnifies Owner for injuries and property damage to third parties (being those other than Contractor, Subcontractors, Owner or their employees) arising from Contractor's negligence; for damage to Owner's existing property or the Work after Substantial Completion arising from Contractor's negligence up to \$x/occurrence (or proceeds of insurance, if less); or Contractor law violations, Contractor IP infringement, Contractor Hazmat releases, failure to pay Contractor taxes, or failure to pay Subcontractors regardless of negligence.
- 14.1.1.2 (a) So-called "knock for knock" indemnity.
(b) Contractor indemnifies Owner for injuries and property damage to Contractor, Subcontractor and their employees (Contractor Group), and Owner indemnifies Contractor for injuries and property damage to Owner and its employees (Owner Group), in each case without regard to fault.



- 14.1.1.3 *If Owner is to procure project property insurance, Owner indemnifies Contractor for damage to existing property or the Work after Substantial Completion over \$x/occurrence (or proceeds of insurance, if less), and for Owner IP infringement.*
- 14.1.1.4 *Owner indemnifies Contractor for Owner law violations and for landowner claims (subject to Contractor's indemnities of Owner).*

14.2 **Indemnification Procedures.** Right to appoint counsel, right to approve settlement or arbitration.

14.3 **IP Indemnities.** In case of IP indemnities, obligation of indemnitor to seek settlement or lifting of injunction, obligation to furnish non-infringing alternative.

14.4 **Indemnification against Liens and Stop Notices.** Contractor obligation to bond against or remove liens and stop notices. Owner may remedy default and backcharge.

14.5 **Scope of Indemnities.** Indemnities apply regardless of sole or concurrent negligence, to full extent permitted by applicable statutes.

15 OWNERSHIP & CONFIDENTIALITY OF INFORMATION

15.1 **Ownership of Work Product.** Either by Contractor subject to Owner license for the Project, or by Owner subject to broader Contractor license. In either case rights of licensee are fully paid. Owner's rights assignable to purchaser of facility.

15.2 **Transfer of Work Product.** Contractor and subcontractors obligated to provide assignment or license of technology, and deliver tangible forms of such technology. Building information modeling provisions.

15.3 **Contractor Confidentiality.** Definition of Owner confidential information, obligation, duration.

15.4 **Owner Confidentiality.** Definition of Contractor confidential information, obligation, duration.

15.5 **Exceptions.** Disclosures to financier, potential purchasers. Rights if court or agency requires disclosure.

15.6 **Duration.** Indefinite, or expiring on completion of after x years.

16 REPRESENTATIONS

16.1 **Contractor Representations.** Corporate matters, solvency, rights in intellectual property.

16.2 **Owner Representations.** Corporate matters, solvency.

17 DEFAULT, SUSPENSION & TERMINATION

17.1 **Owner Rights on Contractor Default.** Definition of Contractor Default. Owner may remedy defaults and backcharge, or may suspend, or may terminate. Special rules for insolvency event. If work terminated, Owner takes possession and receives assignment of subcontractors; Contractor pays Owner the difference in completion cost; Contractor discontinues work and turns over all of Owner's materials and equipment and information to Owner or its contractor. Specified additional remedies for Contractor Default.

17.2 **Owner's Right to Terminate for Convenience.** Owner may be entitled to terminate contract for convenience. If so, Owner takes possession and receives assignment of subcontractors; Contractor discontinues work and turns over all materials and equipment and information to Owner; but Owner pays for all work performed to date, costs in demobilizing and shutting down operations, and in some cases some compensation relating to the unperformed work.

17.3 **Owner's Right to Suspend Work for Convenience.** Entitlement of Contractor to Change Order. Contractor right to suspend after extended period.

17.4 **Contractor's Right to Suspend for Owner Default.** Definition of Owner Default. Entitlement of Contractor to Change Order.

17.5 **Contractor's Right to Terminate for Owner Default.** Specified remedies for Owner Default.

17.6 **Rights to Terminate for Extended Force Majeure.** May be unilateral or bilateral.

17.7 **Rights to Terminate for Delayed NTP.** Contractor right after extended period. Owner may or may not be able to prevent Contractor termination by paying standby costs.

17.8 **No Other Suspension or Termination Rights.**

18 DISPUTE RESOLUTION

- 18.1 **Negotiations.** Discussion by higher-level executives of parties.
- 18.2 **Mediation.** Ad hoc or institutional, definition of rules. Specified time period before or during binding resolution process.
- 18.3 **Binding Dispute Resolution and Consent to Joinder.** Arbitration may be ad hoc or institutional, pursuant to selected rules. Specified time period. Rules, location, number, nationality and independence or partiality of arbitrators, selection, discovery, award requirements, injunctive relief pending award, enforcement of award. Alternatively, judicial resolution in exclusive form, dispute review board (DRB) or expert resolution.
- 18.4 **Continuation of Performance.** Parties continue to perform agreement during resolution. Sometimes an escrow is established for disputed sums in certain large disputes.

19 GENERAL PROVISIONS

- 19.1 **Entire Agreement.**
- 19.2 **Attachments.**
- 19.3 **Amendments.**
- 19.4 **Joint Drafting.**
- 19.5 **Coordination with Other Project Documents.**
- 19.6 **Controlling Language.**
- 19.7 **Counterparts.**
- 19.8 **Headings.**
- 19.9 **Limited Effect of Waivers.**
- 19.10 **Notices.**
- 19.11 **Announcements.**
- 19.12 **Severability.**
- 19.13 **Successors and Assigns.**

- 19.14 **Assignment.** Pre-approved assignment by Owner to affiliates, financiers, or purchasers of interests, but usually no pre-approved assignment by Contractor.
- 19.15 **No Third-Party Beneficiaries.**
- 19.16 **Governing Law.**
- 19.17 **Agency Requirements.** FERC, PUC or other agency-specific requirements.
- 19.18 **Compliance.** FCPA and unauthorized payments clauses, technology export compliance clauses.
- 19.19 **Joint and Several Liability.** Especially for Owner or Contractor joint venture parties.
- 19.20 **No Partnership or Fiduciary Status.**
- 19.21 **Further Assurances.**
- 19.22 **Survival of Provisions.**



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Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 877.323.4171

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