Contract Risk Management for Airport Agreements

DETAILS

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CONTRACT RISK MANAGEMENT FOR AIRPORT AGREEMENTS

This digest was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 06-02, this digest was prepared by Robert Alfert, Jr., and Douglas E. Starcher, Broad and Cassel, Orlando, Florida.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Research reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Foreword

Airports enter into a variety of agreements with numerous vendors and tenants, such as leases and other agreements that provide access to the airfield, concession agreements, ground transportation agreements, construction contracts, and professional services, among others. All of them generate varying degrees of risk that can be addressed through risk sharing and shifting or insuring. The management of risk can also be addressed by drafting airport agreements that include explicit statements of legal obligations so as to mitigate and manage the risk.

This legal digest provides a general overview of the types of agreements that are typically used by airports of all sizes. It identifies primary risks associated with each type of agreement, and the appendices provide sample language from four organizations illustrating how they manage and mitigate those risks. The appendices can be found at www.trb.org/acrp. This digest can be very useful in guiding airport management as they seek legal counsel for applicable state and federal laws.

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CONTRACT RISK MANAGEMENT FOR AIRPORT AGREEMENTS

By Robert Alfert, Jr., and Douglas E. Starcher, Broad and Cassel, Orlando, Florida

INTRODUCTION

The operation of airports involves significant risk. Some of the busiest airports in the United States generate annual travelers in excess of 30 million, spawning a multitude of economic activity, construction and expansion, and general maintenance and operational needs. With safety and security being the paramount concern, the additional risks that arise from normal operations span from the basic context of tenancies and ground transportation to complex capital improvement programs. These risks apply to airports of all sizes; the variations usually are just a question of degree or order of magnitude.

A significant portion of the risk that arises in airport operations can be addressed through risk-shifting and risk-sharing provisions in standard aviation sector agreements and through the use of tailored insurance programs. The purpose of these provisions is to shift a manageable portion of the risk to those entities that are being retained for that very purpose, whether it is the contractor that contracts to build a facility or the insurance company that contracts to cover certain risks. The end goal is a balanced risk-management approach that equitably allocates risk among the appropriate parties. Given the potential breadth of this topic, this digest focuses on a body of standard aviation sector agreements that form the core of airport operations. It is impossible to capture every possible agreement that an airport may utilize, but the agreements highlighted in this digest constitute the vast majority of operations and incident risk. These agreements will include the following topics in the order presented:

A. Professional Services Agreements.
B. Construction Agreements.
C. Repair/Maintenance Agreements.
D. Tenant/User Agreements.
E. Airline Signatory Agreements.
F. Ground Transportation Agreements.
G. Vendor/Purchasing Agreements.
H. Software/Information Technology (IT) Agreements.

As each agreement provides enough of a topic for a separate Airport Cooperative Research Program (ACRP) digest, the purpose of this digest is to identify the primary risks associated with each agreement. The identification of risk will be correlated to specific contractual provisions used by airports to address, shift, or allocate the risk presented. The digest will focus on several representative agreements used by major airports to provide a cross section of approaches and will then propose ways to contractually mitigate each category of risk.

This ACRP digest will also address the primary insurance instruments used by airports to manage and allocate risk.[1] Every agreement will carry specific insurance, with the primary question being whether the appropriate insurance vehicles are being used and whether the required insurance thresholds are commensurate with risk. The authors of this digest recently completed a comprehensive survey of coverage limits used by airports in infrastructure agreements (construction and professional services) and concluded that the vast majority of large-scale projects are underinsured. This digest, therefore, will also propose recommended limits of coverage.

An important point before commencing the contract discussion is that every state tends to have distinct positions on some legal issues, indemnity law being a prime example. This digest only provides a general overview and does not supplant the need for legal counsel on local law. To the extent that federal funding for any contract type applies, federal law should be reviewed as well.

CONTRACT TYPES

A. Professional Services Agreements

A substantial volume of services performed for airports is generally done through the use of professional services.[2] These professional services can range from design, engineering, and owner's

[1] *ACRP Synthesis 30: Airport Insurance Coverage and Risk Management,* Transportation Research Board (2011), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_syn_030.pdf, provides a synthesis study of variables that affect insurance purchasing and identifies the range of practices that exist among U.S. airports for coverage selection, choosing deductibles and limits, and risk retention.

[2] *ACRP Report 87: Procuring and Managing Professional Services at Airports,* Transportation Research Board (2013), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_087.pdf, provides guidance for procuring and managing professional services at airports and processes for managing professional services contracts.

construction administration representation to security, financial services, and so on. Although not a direct risk issue, the success of these agreements turns on the clear delineation of three key points: scope, schedule, and price. Lack of clarity as to any of these primary contractual points may result in ancillary risks to airports in the form of cost increases or contractual disputes.

The primary risk associated with professional services agreements is ensuring the satisfactory performance of work. Deficiencies in the performance of work, while adding cost, also create more significant risk in the form of defects, damages to, or loss of real or personal property or injury to people. For example, structural load calculations on support beams that are deficiently performed by an engineer can result in costs to repair the defect, or in the more serious event of a collapse, costs to repair damaged property, impacts to operations, and potentially even injury or death to the traveling public, employees, or tenants. If the deficiency is discovered during construction, it creates the additional risk of impacts to the contractors' operations, translating into change orders for additional compensation and time to complete the project.

The risks attendant to professional services are addressed through contractual provisions and a variety of insurance instruments. All additional risk to the airport is essentially self-insured.

Identification of Risk

The risks and risk mitigation strategies under the majority of these agreements are similar. The primary ones include:

1. Standard of Care/Faulty Work.—Professionals must perform their work in accordance with an acceptable standard of care, one that is generally governed by their licensing or certification organization and local law. Professionals generally cannot be held accountable for every error or omission in the performance of their work, but instead only for errors or omissions that violate the applicable standard of care. The level of care required can be escalated by contract, but it then becomes more difficult to insure. It is therefore critical to every professional services agreement to succinctly define the standard of care applicable to that contract.

Example/Sample Provision

The following is an example of how the standard of care may be addressed to mitigate risk in a professional services agreement:

> Standard of Care: In addition to its duties and obligations under this Agreement, the Consultant and the Consultant's selected staff shall exercise the degree of skill, competence, quality, and professional care rendered by the leading and most reputable companies performing the same or similar type services in the United States, and shall cooperate with City [Owner] and other parties in furthering the interests of the City in connection with the Project.
>
> Reasonable Compliance with and Identification of Applicable Service Standards: Listing of certain standards in this section does not relieve the Consultant from complying with all applicable standards whether or not listed here. The Consultant's work on the Project shall comply with the following: 1) Any special design standards specified in Exhibit C; 2) The Americans with Disabilities Act; 3) All other applicable building codes, laws, or regulations; 4) All applicable City standards.
>
> *See* Appendix A-1, Salt Lake City International Airport.

Appendix A-1 provides a survey of additional contractual provisions used by other airports to address standard of care or faulty work.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to standard of care or faulty work:

- Define the provision with specific reference to the services performed, especially specialty projects.
- Include an industry-specific standard applicable to that professional.
- Define a geographic market (note that the Salt Lake City, Utah, provision defines the market as the entire United States, as the project is an airport terminal of national scale and use).

2. Liability and Damages.—Professional services agreements should specify the category of damages for which the professional shall be liable. The contract ideally will succinctly provide for the recovery of all "actual" and "consequential" damages, as that broadly covers any damage scenario that reasonably and foreseeably flows from the performance of work. Some specialty services, such as architecture and engineering, have industry group contracts that specify waivers of consequential damages. Airports should consider avoiding or limiting these waivers, when possible. A compromise could involve capping liability for damages, or just consequential damages, to a specified amount, which could include the limits of insurance coverage or the project value on large-scale projects. Although it is not recommended that any damages be waived or limited, in the event such compromise is necessary, the limitation or capping should be reasonably commensurate with the project value, risk, and complexity, and there should be a clear understanding of worst-case scenario events.

Example/Sample Provision

The following is an example of how damages for delay may be addressed to mitigate risk in a professional services agreement:

> The Architect/Engineer shall promptly review and approve shop drawings, samples, and other submissions of the Contractor(s) for conformance with the design concept of the Project Element(s) and for compliance with the information given in the Contract Documents. The Architect/Engineer shall render decisions, issue interpretations, and issue correction orders within the times specified in the Contract Documents or, absent such specification, on such timely basis so as not to delay the progress of Work as depicted in the approved construction schedule. Should the Architect/Engineer fail to perform these services within the time frames specified in the Contract Documents or, if no time frames are specified, in a timely manner so that such failure causes a delay in the progress of the Work, the Architect/Engineer shall be liable for any damages to the Owner resulting from such delay including, but not limited to, damages related to delays and inefficiencies incurred by the Contractor for which the Owner may be responsible.

See Appendix A-2, Miami International Airport.

Appendix A-2 provides a survey of additional contractual provisions used by other airports to address liability and damages.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to liability and damages:

- Limit or avoid the capping of liability.
- Minimize or avoid waivers of consequential damage (sometimes difficult in the context of specialty trades).
- If damages are limited or capped, a clear understanding of worst-case scenarios, which become self-insured, is critical.

3. Dispute Resolution.—Customized dispute resolution provisions are a core staple of a well-designed risk mitigation strategy. Rather than allowing disputes to automatically devolve into litigation, professional services agreements could provide for pre-suit dispute resolution options, such as tiered-negotiation and/or mediation. Consideration of the proper mechanism for resolving disputes, whether litigation or arbitration, should be made, as litigation is not always the best course of action. More technical matters may be better suited to arbitration with a panel of industry experts.

Example/Sample Provision

The following is an example of how dispute resolution may be addressed to mitigate risk in a professional services agreement:

> Any claim, dispute or other matter in question arising out of or relating to this Agreement or the breach thereof shall, as an express condition precedent to the filing of a lawsuit, first be subject to mandatory mediation under the auspices of a mediator to be selected by the parties to be set at a mutually agreeable time, but in no event greater than thirty (30) days after the claim or dispute arises. Discovery prior to the scheduled mediation shall be limited to one (1) request for production of documents and two (2) depositions per party not exceeding 8 hours total time per deposition. Each party shall equally bear the costs of mediation and shall be solely responsible for its own attorneys' fees and other legal costs prior to and during the mediation process. In the event the case does not settle at mediation, the parties may re-depose either or both witnesses on non-repetitive matters.

See Appendix A-3, Orlando International Airport.

Appendix A-3 provides a survey of additional contractual provisions used by other airports to address dispute resolution.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to dispute resolution:

- Specify governing law.
- Specify exclusive venue and jurisdiction.
- Require pre-suit dispute resolution options.
- Specify arbitration or litigation for final mode of resolution.
- Specify right to reimbursement of attorneys' fees and costs.
- If allowed by state law, contractually limit statutes of limitation and repose to a commercially reasonable duration.

4. Indemnity.—Airports are frequently sued by parties injured or damaged as a result of the negligence of their professionals. For example, an error in the design of a public facility could result in personal injury to a member of the public, property damage to a tenant, or delay and impact damages to a contractor that is performing work in accordance with the design documents. A broad indemnity provision is important to limit risk and shift it to the appropriate parties, and if allowed by state law, also to require a duty to defend any ensuing litigation. It is important for airports to understand the distinctions between the two duties: The duty to indemnify encompasses the carriers' duty to pay for a covered event up to the policy limits, whereas the duty to defend is broader, encompassing the carriers' obligation to assume the defense (legal fees and costs) of the claim itself. Not all states allow duty-to-defend clauses for architectural or engineering services.

Example/Sample Provision

The following is an example of how indemnity and duty to defend may be addressed to mitigate risk in a professional services agreement:

> A. Consultant hereby agrees to defend, indemnify, and hold harmless City [Owner], its appointed and elected officials, agents, and employees against all liabilities, claims, judgments, suits, or demands for damages to persons or property arising out of, resulting from, or relating to the work performed under this Agreement ("Claims"), unless such Claims have been specifically determined by the trier of fact to be due to the sole negligence or willful misconduct of the City. This indemnity shall be interpreted in the broadest possible manner to indemnify the City for any acts or omissions of Consultant or its subcontractors.
>
> B. Consultant's duty to defend and indemnify City shall arise at the time written notice of the Claim is first provided to City regardless of whether suit has been filed and even if Consultant has not been named as a Defendant.
>
> C. Consultant will defend any and all Claims which may be brought or threatened against City and will pay on behalf of City any expenses incurred by reason of such Claims including, but not limited to, court costs and attorney fees incurred in defending and investigating such Claims or seeking to enforce this indemnity obligation. Such payments on behalf of City shall be in addition to any other legal remedies available to City and shall not be considered City's exclusive remedy.
>
> D. Insurance coverage requirements specified in this Agreement shall in no way lessen or limit the liability of the Consultant under the terms of this indemnification obligation. The Consultant shall obtain, at its own expense, any additional insurance that it deems necessary for the City's protection.
>
> E. This defense and indemnification obligation shall survive the expiration or termination of this Agreement.
>
> *See* Appendix A-4, Denver International Airport.

Appendix A-4 provides a survey of additional contractual provisions used by other airports to address indemnity and duty-to-defend.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to indemnity and duty-to-defend:

- Include broad-form indemnity, hold harmless, and duty-to-defend to fullest extent allowed by state law.
- Cover negligence and improper intentional conduct.
- In general, avoid mutual indemnity obligations; all indemnity should flow to the airport only.

5. Termination.—Professional services agreements must afford the airport the unequivocal right to terminate for cause and for convenience. A "for cause" termination can include termination for a contract violation like faulty work or safety or security violations, or for fraudulent billing practices. A "for convenience" termination allows for termination for any reason or no reason, with no cause stated, which affords the airport the opportunity to terminate the project entirely, bring in a replacement professional, or terminate when suspicion of cause exists but may not be fully developed. These termination provisions allow an airport to control risk scenarios without breaching the contract and allow for broad remedies such as assuming control of the subconsultants to expedite completion and withholding payment to cover any increased costs or damages.

Example/Sample Provision

The following is an example of how contract termination may be addressed to mitigate risk in a professional services agreement:

> A. City Termination. City [Owner] may terminate this Agreement at any time for any reason or no reason upon seven (7) calendar days written notice.
>
> B. Termination for Cause by City. City may terminate this Agreement for cause if the Consultant fails to cure any defect in the Consultant's performance of the work under this Agreement within seven calendar days after receiving written notice to cure.
>
> C. Work Project Termination. City may terminate the Consultant's work on a specific work project initiated under this Agreement pursuant to this Article. If City designates any termination as a "work project termination," only the Consultant's work on the specific project shall be terminated and such notice shall not constitute a termination of this Agreement.
>
> D. Termination by Consultant. If City materially fails to meet its responsibilities and obligations under this Agreement, the Consultant shall notify City of such failure. If City fails to cure its material breach, the Consultant may, after thirty (30) days written notice, terminate its performance under this Agreement.
>
> E. Payment for Termination. In the event of termination, City shall pay the Consultant a percentage of the fee specified in Exhibit D based upon the ratio of work satisfactorily completed and reasonable costs incurred to the total work required as determined by City, less any appropriate damages as City may determine.
>
> *See* Appendix A-5, Salt Lake City International Airport.

Appendix A-5 provides a survey of additional contractual provisions used by other airports to address contract termination.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to contract termination:

- Maintain the unequivocal right to terminate for cause and for convenience (for any reason or no reason).

• Distinguish between termination of all or part of project.

• Address how compensation will be determined in event of termination for cause and termination for convenience ("For cause" termination should allow the right to withhold payment in an amount that reasonably covers damages and impacts to the airport, while "for convenience" termination should allow compensation only for work performed and perhaps reasonable termination expenses, such as demobilization).

• The airport should not allow, under either termination scenario, for lost profits or anticipated profits on uncompleted work. An express disclaimer of this damage component should be written into the termination provisions.

Insurance and/or Bonds

Professional liability and commercial general liability (CGL) insurance policies are critical components in addressing risk that arises from errors and omissions. Very few professional services firms have sufficient assets to cover a large negligence judgment, and many insulate liability through corporate limited liability vehicles. The insurance policies effectively become the funding source for any errors and omissions that can be charged back to the professional. Absent policies with limits of coverage that are commensurate with the risk, it is very difficult to recover damages even in clear cases of error. Professional liability policies can also be supplemented by the airport owner through the use of an umbrella policy, as discussed in the following section, and through builder's risk with a specialty LEG-3 endorsement (an endorsement first developed by the London Engineering Group).

A common misstep on most major design and construction projects is using standard form coverages with limits that are far below the value of the project or the risk entailed. Many airports use standard $1 million to $5 million coverage limits even on large-scale projects where the value and risk exceed coverage thresholds by significant multiples. This critical component of risk control is unfortunately often an afterthought.

a. Professional Liability Policies.—Professional liability policies cover deficiencies and damages that arise from errors and omissions committed by the professional. The standard of care applies directly to what is covered. Not every error or omission actually constitutes a violation of the standard of care. A professional's liability, and the measure of liability that is insured, arises only if the error or omission violates the standard of care set forth in the contract and dictated by the applicable custom of the trade. For example, an architect's errors and omissions that cost a client an extra $1 million in construction work may not be a compensable error on a $100 million job as the error rate (1 percent) on the project was within an acceptable threshold for errors. So although the airport clearly suffered a damage of $1 million, the applicable standard of care may not allow for recovery, and this portion of the loss becomes self-insured. The prevailing law in most states is that design contracts do not impose strict liability, but instead only impose liability for errors and omissions that violate the standard of care.

A professional liability policy checklist should:

1. Ensure that coverage limits (per claim and aggregate) are commensurate with project value and risk (taking into account that these policies are declining balances, meaning that defense costs incurred by the carrier reduce coverage limits accordingly).

2. Evaluate whether a practice policy (i.e., one that covers all of the professional's ongoing projects), or a project-specific policy with tail coverage for latent defects, is appropriate. A project-specific policy is far more protective but comes at a substantial price increase, so an analysis of risk and cost is necessary.

3. Evaluate whether the project is of a sufficient size and level of risk that an "umbrella" policy in the form of Owner's Protective Professional Indemnity (OPPI) is justified. OPPI is a project-specific umbrella policy that an owner can obtain to supplement the professional liability policy of its professional, usually with tail coverage that is coextensive with the statutes of limitation for latent defect work.

b. CGL Policies.—A standard CGL policy provides limited coverage for professionals in the performance of their professional duties, contrasted with the value that such policies afford contractors. Simply stated, CGL policies generally do not cover deficiencies or damages that flow from professional errors and omissions. CGL policies for professionals cover damages and injuries that flow from nonprofessional negligence that causes personal injury, property damage, or death. For example, a surveyor leaves his instruments of service on airport property, and the instruments damage an airplane that was taxiing. That damage would likely not be covered by CGL as it flows from the professional's services; professional liability coverage would apply instead. If that same surveyor casually leaves his instruments of service on the sidewalk leading to his office while he is unpacking the truck, and airport employees trip over the instruments while attending a meeting, injuring themselves and damaging personal property, the CGL would apply. So although a CGL may not be a primary coverage instrument in most

cases, it is an important adjunct to the professional liability policy.

A CGL policy checklist should:

1. Ensure that coverage limits (per occurrence and aggregate) are commensurate with project value and risk.
2. Evaluate whether the Completed Operations coverage is necessary, and if so, in what amount and duration.
3. Evaluate whether excess coverage through an umbrella policy is necessary, dependent also on project value and risk.
4. Ensure that the airport owner is identified as an "Additional Insured" on a primary and noncontributory basis under the policy, thus having direct rights of action against the carrier.

B. Construction Agreements

Construction services agreements range from traditional design–bid–build delivery with a general contractor, design–build with an integrated design and construction team, or construction management at risk or agency. Regardless of the delivery method, most construction agreements are supported by a similar set of "general conditions" that provide the basic legal framework for the contractual relationship. The base contract will commonly spell out the scope, schedule, and price, and the general conditions will outline all key terms governing the relationship itself. For example, the industry archetype construction forms, issued by the American Institute of Architects (AIA), use the same A201 General Conditions of Contract, or similar standard terms, to support the various construction contracts for design–bid–build, design–build, and construction management. The salient contractual terms that relate to risk are found in these general conditions.

As with professional services agreements (previously discussed in Section A), the primary risk associated with construction services agreements is ensuring the timely and satisfactory performance of work and managing change. The majority of claims in the construction sector arise directly from these three sources, all of which create risk of escalated costs to the airport, impacts to operations, and endangerment to the safety of the traveling public.

A comprehensive set of general conditions, backed by insurance and bonds, can be customized to each project to ensure maximum coverage for the primary risks.

Identification of Risk

1. Standard of Care / Quality of Work.—Similar to professional services agreements, construction contracts should define the expectations with regard to standards of performance and quality of work. The departure from professional services agreements is that, in most states, general contractors are not excused by minor errors, and instead, the work must be performed as specified by the contract documents. Performance provisions must, therefore, clearly identify that the work shall be performed in accordance with the requirements of the 1) contract, plans, and specifications; 2) requirements of law, such as applicable codes and regulations; and 3) workmanship standards expected of contractors who perform similar work in the community.

It must be noted that contractors carry some degree of protection under the *Spearin* Doctrine, which provides that a contractor is not liable to an owner for defects arising solely from the architectural or engineering plans. *See United States v. Spearin,* 248 U.S. 132 (1918). The *Spearin* Doctrine generally only applies in the context of design specifications, where the contractor is obligated to follow the design, and not in performance specifications, where the contractor applies its skill in achieving an objective standard of performance.

Where the professional services standard of care starts to intersect with construction contracting is in the use of special project delivery methods such as design–build and construction management at risk. In the design–build context, the professional services team (architect and engineer) work with the construction contractor under a single contract. All professional services work associated with the contract will in fact be governed by a professional services standard of care. The contract must clearly define that standard and which services fall under that level of performance. The better argument is that the *Spearin* Doctrine does not apply in this context, as the contractor was involved in the design development process.

Construction management at risk contracts are a bit trickier, as the contractor acting as a construction manager (CM) does not stand in the shoes of the architect and engineer, but does in fact assume professional services duties with respect to the design. Under this delivery method, the contractor becomes engaged during the design process to review the design for constructability, conflicts, scheduling and phasing issues, and cost issues. These are professional services typically handled by licensed professionals employed by the contractor, and the standard of care will be a similar professional standard of care, as defined by the construction management community. Few contracts adequately spell out exactly how this distinction works; clarity in that respect is important to ensure that the owner airport receives full value

and protection for the services it contracted. The bottom line is that the contract should clearly provide that the CM bears a secondary level (behind the architect/engineer) of responsibility and liability for the performance of the design and primary responsibility for the construction.

Example/Sample Provision

The following is an example of how the standard of care or quality of work may be addressed to mitigate risk in a construction agreement:

> The Contractor acknowledges and declares that the Contract Documents are sufficient to enable the Contractor to complete the Work as shown in the Contract Documents or, if not specifically shown, to perform the activities which may be reasonably inferred as necessary for completion of the Work in accordance with the requisite time frame, applicable laws, statutes, building codes, regulations, or as otherwise required by the Contract Documents.

See Appendix B-1, Orlando International Airport.

Appendix B-1 provides a survey of additional contractual provisions used by other airports to address standard of care or quality of work.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to standard of care or faulty work:

- Work must be done in conformity with plans and specifications.
- What will be the system for inspection to ensure that work conforms to plans and specifications?
- The contractor is responsible for supervision and direction of the work, including supervision of subcontractors.
- Under what circumstances will the contractor pay for uncovering work, correcting work, and removing unacceptable work?
- When and how may the owner suspend the work?

2. Schedule Control and Impacts.—Next to the quality of the work, the timeliness of the work is of near equal, paramount concern. Most construction contracts are critically schedule-dependent, and thus should have detailed "time is of the essence" clauses and supporting provisions. These provisions must address all attributes of the establishment of a schedule, modification and tracking, and the consequences and corrections if the schedule slips. At a minimum, these provisions should include: 1) The manner in which the schedule will be set, updated, and managed and how the schedule itself should be incorporated into the contract, at the very least with specified completion dates and milestones; 2) Liquidated damages that establish fixed consequences for schedule delays; for example, a set daily per diem for each calendar day of delay that the contractor fails to achieve the contract substantial completion date; 3) Identification of weather events that may entitle the contractor to an equitable adjustment in the contract schedule, versus anticipated, minor weather issues that would not; 4) Clear identification of which unforeseen conditions may give rise to an equitable adjustment to the schedule, versus conditions that should have been anticipated or readily determinable by reference to as-built documentation or some site investigation; 5) Identification of events that are well outside the ability of the contractor to anticipate or plan for in its schedule ("force majeure"), such as war, terrorism, strikes, etc.; and 6) Remedies provided to the contractor when a delay event occurs, which may be limited to time extension only (a more balanced approach is generally the better course, allowing for some relief from the schedule impacts, such as a day-for-day extension of the schedule and recovery of actual, direct costs but a limitation of indirect impacts such as home office overhead, loss of revenue, and the like).

Example/Sample Provision

The following is an example of how the delays and extensions of time may be addressed to mitigate schedule control and impacts risk in a construction agreement:

> 8.2.1 The Contract Time shall be adjusted only by CO [Change Order, as defined in the contract], CCD [Construction Change Directive, as defined in the contract] or FCO [Field Change Order, as defined in the contract] in accordance with the limitations of the Owner's Policies.
>
> 8.2.2 RCOs [Request for Change Order, as defined in the contract] and Claims relating to Contract Time shall be made in accordance with applicable provisions of Paragraph 4.3 and Article 7.
>
> 8.2.3 If any portion of the Work remains uncompleted after the expiration of the Contract Time, as adjusted by Contract Modifications, if any, the Owner will incur substantial injury, including loss of use or facilities and inconvenience to the public. Damages arising from such injuries cannot be calculated with any degree of certainty. It is agreed that if Substantial or Final Completion is not achieved within the established Contract Time as adjusted by Contract Modifications, if any, the Contractor and the Contractors Surety shall be liable to the Owner for Liquidated Damages as identified in the Instructions to Bidders. Allowing the Contractor to finish the Work after the expiration of the Contract Time established by the Contract Documents shall in no way operate as a waiver by the Owner of any of its rights under this Contract or allowed by law.
>
> 8.2.4 The Work under this Contract is only a part of the Owner's construction program. As a result, Work under this Contract may be required to be completed by certain milestone dates set forth in the Contract Documents ("milestone dates") in order to interface with the work on other components of the Owner's construction program.

> The schedule for the Owner's construction program or the specification of milestone dates is not intended to take the place of complete Work scheduling by the Contractor, but is provided to show certain critical milestone dates for various phases of the Work on which the Contractor's Baseline Schedule or Progress Schedules must be based. There shall be no changes in the milestone dates, except by CO, FCO or CCD. In the event that the Contractor fails to complete any required portions of the Work by the milestone dates, the Contractor and its Surety shall be liable to the Owner for the Liquidated Damages identified in the Instructions to Bidders. In the event that the Contractor completes any required portions of the Work ahead of the milestone dates or is precluded from doing so by acts of the Owner or third parties, the Contractor shall not be entitled to damages against the Owner for completing or failing to complete the Work earlier.
>
> 8.2.5 The Contractor shall cooperate with the OAR [Owner's Authorized Representative] in order to maintain the progress of the Work in accordance with the Contractors current accepted schedule and Contract Time requirements. In addition to the requirements of Paragraph 3.9.3 regarding Progress Schedule updates, if the Owner or OAR determines that the Contractor is failing to maintain the progress of the Work, through no fault of the Owner, the Contractor must, within seventy-two (72) hours of written request of the OAR, submit a written response detailing the Contractors plan of action to recover lost time in order to maintain the progress of the Work in accordance with the Contractors current accepted schedule or Contract Time requirements. In such event, the Contractor shall comply with the OAR's written orders to take whatever steps are necessary to recover lost time and maintain the progress of the Work. These steps may include, but are not limited to, re-sequencing the Work activities, increasing the number of Contractor's shifts, workforce, supervision, work days, overtime operations, equipment resources, or expediting delivery of materials or equipment. Regardless of the manner in which the schedule is recovered, the Contractor shall not be entitled to additional compensation for actions that relate to the recovery of the schedule.
>
> 8.2.6 In addition to other remedies available to the Owner, if the Contractor fails to maintain the progress of the Work in accordance with the Contractor's current accepted schedule or Contract Time requirements, the Owner may, upon seven (7) days written notice to the Contractor and its Surety, order the Contractor to suspend or cease all or a portion of the Work and the Owner may demand that the Contractor's Surety prosecute all or a portion of the Work in accordance with the Contract Documents. Failure of the Surety to so perform within seven (7) days of receipt of such notice shall be grounds for the Owner to prosecute the Work at Surety's and Contractor's expense.
>
> *See* Appendix B-2, Orlando International Airport.

Appendix B-2 provides a survey of additional contractual provisions used by other airports to address schedule control and impacts.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to schedule control and impacts:

- The manner in which the schedule will be set, updated, and managed, including specified completion dates and milestones.
- Liquidated damages for each day of delay.
- Weather impacts.
- Unforeseen conditions.
- Force majeure.
- Limitations of remedy (i.e., "No Damages for Delay Clause").

3. Scope and Change.—Change orders are the bane of any construction contract. Owners fear them; contractors love them. The truth is somewhere in the middle, as most construction projects experience some modification through change orders to account for a myriad of occurrences that can impact any job. Some changes are actually positive, when, for example, an owner enhances the project with additional features or scope. Some changes address the consequences of architectural errors and omissions. Some changes arise from contractor performance issues, discovery of unforeseen conditions, or weather impacts. Detailed provisions regarding how and under what terms the contract can be modified are a significant part of the contract and the risk mitigation strategy.

Example / Sample Provision

The following is an example of how an owner's change may be addressed to mitigate risk in the form of a change order in a construction agreement:

> 2. CHANGE ORDERS (CO)
>
> A CO is a written contract modification signed by the Owner and Contractor stating their agreement upon all of the following:
>
> a. a change in the Work or the Contract Documents; and
>
> b. the amount of the adjustment in the Total Contract Price, if any; and
>
> c. the extent of the adjustment in the Contract Time, if any.
>
> Provided the Contractor executes the CO, the Owner may issue a CO Notice to Proceed in accordance with the Owner's Policies. The CO Notice to Proceed authorizes the CO work pending the Owner's execution of the CO.
>
> *See* Appendix B-3, Orlando International Airport.

Appendix B-3 provides a survey of additional contractual provisions used by other airports to address schedule scope and change orders.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to schedule control and impacts:

- Scope identification covered by the change.
- Basis for change/contract modification, covering owner change, contractor change, and errors and omissions.
- Remedy/limitations of remedy/pricing of change.
- The change order should be a complete "mini-contract" covering all elements of scope, cost, and time.

4. Remedies.—An often overlooked section of construction contracts deals with remedies. This is a major section of any construction contract given the numerous issues that can, and often do, arise on any job. The contract may include detailed provisions that provide for the contractor to correct defective or deficient work during the course of construction and for a period thereafter. The normal post-completion warranty on construction contracts is 1 year, with specially manufactured goods commonly being warranted by the subtrade or supplier for an extended period (for example, an elevator may carry a 10-year warranty with corresponding maintenance provisions). Note that in most states, the period of the warranty is not the duration of the contractor's exposure for latent defects, as many states allow legal actions to recover damages for a period that extends beyond the warranty.

The contract should also clearly identify which damages are recoverable and those that are disclaimed. For the owner, it is often best not to limit recovery, with no limitations of actual damages or waivers of consequential damages if possible (note that the standard AIA Document A201 mutually disclaims consequential damages, which is rarely in the best interest of an airport owner). Conversely, the financial remedies allowed a contractor should be defined, and limited, to avoid inflated claims for alleged losses of efficiency, future opportunities, and revenue and home office overhead, for example. The objective is to create a fair, balanced contract that provides adequate redress to the airport for impacts caused by the contractor, while circumscribing which remedies a contractor may obtain. As in professional services contracts, a broad indemnity provision is important in limiting risk and shifting it to the appropriate parties, and if allowed by state law, also in requiring a duty to defend any ensuing litigation.

The rights each party has to terminate for causation can also be identified in the contract, with limited rights to cure if possible. For example, the owner should be permitted to terminate for events such as persistently poor or untimely performance, significant safety or security violations, bankruptcy, and nonpayment of subcontractors; whereas the contractor should be permitted to terminate based on nonpayment, persistent late payment, or suspensions of a certain duration. The key, then, is to define which rights and remedies are available on termination, including the owner's right to withhold retainage and future payments to offset impacts attributable to termination. The owner should also reserve the right, in a separate provision, to terminate for convenience, which allows the owner to terminate the project for any reason or no reason at all. On such a termination, the contractor should be expressly limited to payment for actual work performed and limited compensation for shutting down the job and demobilizing, while waiving any rights to compensation and profit on work not performed.

Example/Sample Provision

The following is an example of how to address the effect of owner cancellation or termination in order to mitigate risk in a construction agreement:

> If the Owner cancels or terminates the Contract, the Contractor shall stop all work on the date specified in the Notice of Cancellation or Termination and shall:
>
> A. Cancel all orders and Subcontracts which may be terminated without costs;
>
> B. Cancel and settle other orders and Subcontracts where the cost of settlement will be less than costs which would be incurred were such orders and subcontracts to be completed, subject to prior approval of the Field Representative,
>
> C. Transfer to the Owner, in accordance with directions of the Field Representative, all materials, supplies, work in progress, facilities, equipment, machinery or tools acquired by the Contractor in connection with the performance of the work and for which the Contractor has been or is to be paid;
>
> D. Deliver to the Field Representative As-Built Documents, complete as of the date of cancellation or termination, Plans, Shop Drawings, Sketches, Permits, Certificates, Warranties, Guarantees, Specifications, three (3) complete sets of maintenance manuals, pamphlets, charts, parts lists, spare parts (if any), operating instructions required for all installed or finished equipment or machinery, and all other data accumulated by the Contractor for use in the performance of the work.
>
> E. The Contractor shall perform all work as may be necessary to preserve the work then in progress and to protect materials, plant and equipment on the site or in transit thereto.
>
> F. Cancellation or termination of the Contract or a portion thereof shall neither relieve the Contractor of its responsibilities for the completed work nor shall it relieve its Surety of its obligation for and concerning any just claim arising out of the work performed.
>
> G. In arriving at the amount due the Contractor under this Article, there will be deducted, (1) any claim which the Owner may have against the Contractor in connection with this Contract and (2) the agreed price for, or the proceeds of sale of materials, supplies or other items acquired by the Contractor or sold, pursuant to the provisions of this Article, and not otherwise recovered by or credited to the Owner.

See Appendix B-4, Miami International Airport.

Appendix B-4 provides a survey of additional contractual provisions used by other airports to address available remedies.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to available remedies:

- Provide clearly defined warranty and corrective work provisions.
- Outline that the owner is entitled to recover all actual and consequential damages.
- Clearly specify all rights and remedies of each party on termination.
- Provide for broad-form indemnity.

5. Claims Presentation and Dispute Resolution.—The claims presentation and dispute resolution clauses to a construction contract are a significant component of a risk mitigation strategy. These provisions can collectively frame the issues in dispute, create a process for early resolution, and if final adjudication is necessary, create a process with boundaries and some semblance of control. It is important for the airport to envision these clauses working during the performance of the contract and not just after completion of the project.

The contract will ideally require notice of a claim within a very short period of time of the claim arising, along with detailed presentation requirements such as a claim narrative, schedule analysis if time is requested, and a computation of the quantum sought with backup documentation. For example, if midway through the project the contractor encounters a major subsurface condition, it should be required to immediately notify the airport owners so that appropriate and timely evaluation and corrective measures can be implemented. If the contractor believes it has been impacted, either in time, costs, or both, it should be required to present and substantiate its claims for thorough evaluation, which is critical to an airport for various reasons, budget control being first and foremost. Failure to provide this information should bar the claim. The intent is to define the issues in a timely manner so that prompt resolution can be attempted.

The contract should also provide a structure for pre-suit or pre-arbitration resolution, whether that structure includes requirements for executive-level personnel to meet and attempt resolution and/or early mediation. The contract should clearly specify the final mode of resolution—i.e., litigation (jury or nonjury or arbitration) and preferably the venue and jurisdiction where the matter will be heard. Consideration should be given to the complexity of the project, as the larger and more complex construction projects perhaps are best suited for arbitration before a panel of experts, or if being litigated, a nonjury trial. Larger, complex construction or infrastructure projects may justify advanced resolution techniques such as the empaneling of a dispute resolution board with construction industry professionals being engaged at project commencement to assist in the resolution of a dispute, in situ, when it arises. Although this topic of advanced resolution is beyond the scope of this digest, additional information can be found at www.drb.org/.

Example / Sample Provision

The following is an example of how to address the claims process to mitigate risk in a construction management at risk agreement:

> *15.2 Claims Process.* The Owner's liability to CM@R [Construction Manager at Risk] for any claims arising out of or related to the subject matter of this Agreement, (including, but not limited to, claims for extension of construction time, for payment by the Owner of the costs damages or losses because of concealed conditions as defined in Article 10 or for additional work), shall be governed by the following provisions:
>
> (1) If a CR [Contingency or Time Request] is denied and the CM@R disagrees with the denial, the CM@R must submit a written Notice of Claim to the OAR, copying the Owner's Senior Director of Planning, Engineering and Construction, within 5 business days of receipt of the notice of the denial. The Notice of Claim must include a copy of the denial and a detailed statement of all elements of the claim, a description of the work affected, a timeline or schedule of events related to the claim and an itemized, detailed cost breakdown sufficient to analyze the value and time impact of the claim, specifically describing all cost and time impacts. The CM@R shall follow the protocol that is established for its delivery of notices of claims, which must include a transmittal signed by the Program Director or designee. The CM@R waives all claims and releases the Owner from all liability for potential claims when a Notice of Claim is not timely submitted. Daily reports, Applications for Payments and other administrative documents required by this Agreement do not constitute written notice of a claim.
>
> (2) For any claim made by the CM@R against the Owner, the basis of which includes a claim by a subcontractor, or any other person or entity under the CM@R's control, for acts or omissions allegedly attributable to the Owner, the CM@R must certify by affidavit that it has carefully examined each subcontractor's claim and has verified the accuracy and contract compliance of each claim. Such certification under oath must be made by the CM@R prior to the submission of any subcontractor claim to the Owner and shall constitute an express condition precedent to the CM@R having a cause of action against the Owner that includes a subcontractor's claim. A copy of such certification shall be provided to the Owner contemporaneous with the submission of any subcontractor claim to the Owner. The Owner will not consider any claim that has not been properly certified by the CM@R.
>
> (3) The CM@R's compliance with the CR requirements of Article 10.2 [Request for Contract Modifications] and the Notice of Claim and documentation requirements set forth

in Paragraphs 15.2 (1) and (2) is an express condition precedent to the CM@R having a cause of action against the Owner and to any other dispute resolution process in this Agreement. The failure to comply with Paragraphs 10.2 and 15.2 (1) and (2) shall constitute a waiver of the claim.

(4) The parties shall make every effort to work in good faith and cooperate to fully resolve any claim and agree upon a Contract Modification.

(5) If an agreement cannot be reached on a properly submitted claim, either party may provide written notice of the unresolved dispute to the Chair of the Dispute Review Board (DRB), within 10 business days after a final decision has been reached on the dispute (i.e., the Owner's denial of the claim or any portion thereof). The Owner, OAR, CM@R, and Consultant shall all be provided a copy of the notice. The notice shall state clearly and in detail the specific issue to be addressed by the DRB, the basis for the party's objection to the final decision made by the other party, and the requested recommendation of the DRB.

See Appendix B-5, Orlando International Airport.

Appendix B-5 provides a survey of additional contractual provisions used by other airports to address dispute resolution.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to dispute resolution:

- Claim-presentation timing requirements for notice and substantiation options (for example, notice within 15 days of event and substantiation 30 days later).
- Pre-suit mediation or tiered-negotiation options for pre-suit resolution.
- Claim audit rights and/or limited discovery rights.
- Litigation or arbitration as final resolution option (specifying jury versus nonjury, or if arbitration, the number of panelists, plus governing law, venue, and jurisdiction).
- Consider Advanced Alternative Dispute Resolution (ADR) or Dispute Resolution Boards for larger, complex construction or infrastructure projects.
- If allowed by state law, contractually limit statutes of limitation and repose to a commercially reasonable duration.

Insurance and Bonds

Comprehensive insurance coverage is a cornerstone to a risk mitigation strategy in any construction contract. Airport owners must thoroughly evaluate the risks—project size and complexity versus possible and worst-case damages scenarios—in order to customize the insurance and coverage limits to the project and risk. Section A on Professional Services Agreements generally outlines the salient issues on professional liability and CGL policies; thus this section is limited to specific issues relevant to construction contracts.

a. Professional Liability Policies.—Professional liability coverage is not generally necessary for standard construction contracts using a general contractor or design–bid–build delivery method. As the contractor in this context has no responsibility for design, professional services coverage is not necessary. When advanced delivery methods such as design–build or construction management at risk are employed, professional liability coverage in the name of the contracting entity (not just in the name of any sub-tier design firm, if retained) is a necessity. The contract must provide adequate professional liability coverage to insure design defects and other errors and omissions of the contractor while providing any professional services, whether that be actual design on a design–build job or preconstruction services such as design and constructability review and conflict coordination.

b. CGL Policies and Wrap Policies.—CGL coverage in an amount commensurate with the project value and risk and naming the airport owner as an additional insured on a primary and noncontributory basis, coupled with completed operations coverage for the period of limitations under the applicable state law, is the gold standard for insurance coverage for construction. On larger projects, an Owner Controlled Insurance Program (OCIP) or Contractor Controlled Insurance Program (CCIP)—sometimes referred to as "Wrap Coverage"—affords greater and more comprehensive coverage at a better price, rolling in all subtrades, auto coverage, workers' compensation, and sometimes pollution coverage. Airport owners should seek counsel from a sophisticated insurance consultant to assist the legal team in devising a comprehensive, customized program for these larger projects.

c. Builder's Risk.—The airport owner should carry property insurance or builder's risk insurance to protect the construction project from casualty events like fire, storm, or other catastrophes during the course of construction. This is a risk for which the airport owner is responsible, so coverage should be procured. For example, if a project collapses during construction because of an accident or other casualty event, a contractor's CGL policy may not cover the incident, whereas a builder's risk policy should. More complex projects carrying greater risks may also justify broader builder's risk coverage with a LEG-3 endorsement, providing coverage for some design and construction errors occurring during construction.

d. Subguard.—Subguard is a specialty product commonly promoted by contractors on larger jobs, in

which they procure a subcontractor default policy to cover the defaults and deficiencies of the subcontractors. This is a risk that a contractor carries, but the coverage does provide an ancillary benefit to the airport owner, as a carrier will step in to cover a subcontractor default. As the airport owner is generally well protected by bonds and insurance coverage on the contractor, this additional level of coverage is not typically something the airport should pay for or require.

e. Bonds.—Most states require public construction projects to be secured by payment and performance bonds. These bonds provide an additional layer of security that the construction contract will be faithfully performed and that all subcontractors and suppliers will be paid. The bonds are triggered when a contractor defaults. Even absent a state law requirement, it is strongly recommended that airport owners bond all public improvement projects, as every construction project carries risk, and recovery from a contractor in default can prove to be difficult.

If permitted by state law, the performance bond should have explicit language providing for recovery of not just actual damages, but any incidental and consequential damages, liquidated damages, and attorneys' fees and costs, in the event of a default. The performance bond should also provide coverage for latent construction defects for a period that is commensurate with the exposure of the contractor for such deficiencies. Not all states automatically interpret performance bonds to cover latent deficiencies arising postcompletion.

C. Repair/Maintenance Agreements

Repair and maintenance agreements are essential to ensure that the airport's operational equipment and premises continue to function effectively, reliably, and safely.[3] Equipment such as automated people movers, lift systems, and jetway bridges are integral to successful airport operations. When items like these are not repaired or maintained properly, other airport operations are stressed and overused, causing an unwanted and costly ripple effect on the rest of airport operations.

As a consequence, the primary risk associated with repair and maintenance agreements is the impact to operations and damages associated with the subject equipment being out of operation for any length of time.

[3] Specific strategies, legal and regulatory conditions, and the objectives, advantages, and disadvantages associated with the use of private-sector companies for airport maintenance services are discussed in *ACRP Report 36: Airport/Airline Agreements—Practices and Characteristics,* Transportation Research Board (2010), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_036.pdf.

Identification of Risk

1. Standard of Care/Faulty Work.—Quality and routine maintenance can prevent accidents and a shutdown of activity. When repair is needed, quality and prompt repair can similarly prevent future maintenance or repair issues or prolong the need for such maintenance or repair. All of these elements protect an airport from unnecessary liabilities and costs. It is therefore important for every repair and maintenance agreement to succinctly define the standard of care.

Example/Sample Provision

The following is an example of how the standard of care or faulty work may be addressed to mitigate risk in a repair and maintenance agreement:

> 4.2.1. Standard of Performance
>
> Contractor shall perform the Services with that degree of skill and care required to satisfactorily meet the requirements as set forth in the Detailed Specifications and to the satisfaction of the CPO [Chief Procurement Officer]. The Contractor will, at all times, act in the best interest of the City [Owner].
>
> 4.2.8. Work Performed on City Property
>
> Contractor's personnel will exercise safe and sound business practices with the skill, care, and diligence normally shown by professional technicians employed in the type of Services required under this Contract. The Contractor will employ only competent and efficient employees, and whenever, in the opinion of the Commissioner, any employee is careless, incompetent, obstructs the progress of the Services, acts contrary to instructions or conducts themselves improperly, the Contractor will, upon the request of the Commissioner, remove the employee from the premises and will not employ such employee again for the Services under this Contract, except with the written consent of the Commissioner. While on City premises, the Contractor will not store any equipment, tools or materials without prior written authorization from the Commissioner. The City will not be responsible for or liable to pay the Contractor for any loss of equipment, tools or materials stored in unsecured areas without proper authorization.
>
> *See* Appendix C-1, Chicago O'Hare/Chicago Midway Airports.

Appendix C-1 provides a survey of additional contractual provisions used by other airports to address standard of care or faulty work.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to standard of care or faulty work:

- Claim presentation requirements.
- Pre-suit mediation or tiered-negotiation.
- Litigation or arbitration.
- Consideration of Advanced ADR or Dispute Resolution Boards for larger, complex construction or infrastructure projects.

2. Liability and Damages.—Maintenance and repair agreements should explicitly provide for the recovery of all "consequential" damages, when possible. Consequential damages that arise from an unnecessarily extended period of downtime for the equipment at issue will almost always be the largest damage that arises from repair or maintenance. This being said, some specialty or unique equipment can have such a monopoly on the market that there may be an attempt to negotiate limitations on consequential damages. These limitations should be avoided whenever possible. A compromise could involve capping liability for consequential damages to a heightened but specified amount, which could include the limits of insurance coverage. Although it is not recommended that any damages be waived or limited, in the event such compromise is necessary, the limitation or capping must be reasonably commensurate with the equipment's nonmonetary value, and there must be a clear assessment of worst-case scenario events.

Example/Sample Provision

The following is an example of how the liability and damages may be addressed to mitigate risk in a repair and maintenance agreement:

> 4.1. The Contractor shall be responsible for the prompt payment of any fines imposed on Authority or Contractor by the FAA [Federal Aviation Administration], Transportation Security Administration (TSA) or any other federal, state or local governmental agency as a result of Contractor's, or its subcontractors (or the officers', directors', employees' or agents' of either), failure to comply with the requirements of any law or any governmental agency rule, regulation, order or permit. The liability of the Contractor under this Section 4 is in addition to and in no way a limitation upon any other liabilities and responsibilities which may be imposed by applicable law or by the indemnification provisions of Section 5 hereof, and such liability shall survive the expiration or earlier termination of this Contract.
>
> 4.2. The Contractor's liability to Authority hereunder shall be limited to Ten Million Dollars ($10,000,000.00).* In addition, neither party shall be liable for indirect or consequential damages arising out of this Agreement. Such limitations and exclusions shall not apply (a) to claims for bodily injury or death (including obligations of indemnification from claims against the Authority for bodily injury or death) and (b) to claims arising under Section 5 hereof (Indemnification and Insurance) and related insurance obligations.
>
> 4.3. The Contractor shall not be responsible for any costs, damages or losses of any nature whatsoever, including but not limited to delays, penalties, outages or downtime, arising from or caused by work being performed under Contract BPS-10Q, whether or not caused by the act or omission of a party to that Contract or a third party, except for Contractor's and its subcontractors' percentage of fault, if any, for such costs, damages, losses, delays, penalties, outages and downtime.
>
> *See* Appendix C-2, Orlando International Airport. **Note that this damage limitation was a non-negotiable for the vendor and, due to the complexity of the service, was required. This provision exemplifies how to limit damage caps to insurance coverage.*

Appendix C-2 provides a survey of additional contractual provisions used by other airports to address liability and damages.

Methods to Contractually Mitigate Risk

The following is a key issue to consider when drafting or reviewing a contractual provision related to standard of care or faulty work:

- Consider capping liability for consequential damages to a heightened, but specified, amount if unlimited consequential damages are not available.

3. Dispute Resolution.—Due to the highly technical nature of most foreseeable disputes, maintenance and repair agreements should provide for pre-suit dispute resolution options, such as mandatory pre-suit formal discussions and mediation or arbitration. Because highly technical matters might be better suited to arbitration with a panel of industry experts, mandatory arbitration should be carefully considered. In any event, the contract should provide that, during the pendency of any dispute and at the owner's option, the provider should continue to perform its obligations under the contract. This will help to prevent additional equipment from falling into disrepair and prevent consequential damages from accruing.

Example/Sample Provision

The following is an example of how mandatory mediation may be used to mitigate risk in a repair and maintenance agreement:

> 2.7 In the event of any dispute under or in connection with the Contract, authorized representatives of Contractor and Authority shall meet in person in Orlando, Florida, no later than fifteen (15) calendar days after delivery of either party's request for a face-to-face good faith negotiation. If the parties meet and the dispute cannot be resolved within fifteen (15) days after commencing good faith negotiations, either party may declare an impasse and the parties shall proceed with the dispute resolution procedure set forth below.
>
> 2.7.1 If a dispute arises concerning this Contract which cannot be resolved by the procedure as set forth in Section 2.7 above, then each party shall submit a written statement of its contentions to a certified mediator designated by the Authority's Executive Director, within fifteen (15) days after the end of the forty-five (45) days after either party's request for a meeting under the provisions of Section 2.7.
>
> 2.7.7 Unless otherwise agreed in writing, the Contractor shall carry on the Work and maintain its progress during any court proceedings or arbitration, and the Authority shall continue to make undisputed payments to the Contractor in accordance with the Contract Documents.
>
> *See* Appendix C-3, Orlando International Airport.

Appendix C-3 provides a survey of additional contractual provisions used by other airports to address dispute resolution.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to dispute resolution:

- Consider mandatory arbitration before an expert in highly technical services.
- Require ongoing performance of obligations while dispute is pending.

4. Indemnity.—Airports are frequently sued by parties injured or damaged as a result of improperly maintained equipment. Personal injuries to members of the public or property damage to a tenant are common consequences. A broad indemnity provision is critical to limit risk and shift it to the appropriate parties, and if allowed by state law, also to require a duty to defend.

Example / Sample Provision

The following is an example of how indemnification may be addressed to mitigate risk in a repair and maintenance agreement:

> Contractor must defend, indemnify, keep and hold harmless the City [Owner], its officers, representatives, elected and appointed officials, agents and employees from and against any and all Losses (as defined below), including those related to: (i) injury, death or damage of or to any person or property; (ii) any infringement or violation of any property right (including any patent, trademark or copyright); (iii) Contractor's failure to perform or cause to be performed Contractor's covenants and obligations as and when required under this Agreement, including Consultant's failure to perform its obligations to any Subcontractor; (iv) the City's exercise of its rights and remedies under this Contract; and (v) injuries to or death of any employee of Contractor or any subcontractor under any workers compensation statute. "Losses" means, individually and collectively, liabilities of every kind, including monetary damages and reasonable costs, payments and expenses (such as, but not limited to, court costs and reasonable attorneys' fees and disbursements), claims, demands, actions, suits, proceedings, judgments or settlements, any or all of which in any way arise out of or relate to the negligent or otherwise wrongful errors, acts, or omissions of Contractor, its employees, agents and subcontractors.
>
> At the City Corporation Counsel's option, Contractor must defend all suits brought upon all such Losses and must pay all costs and expenses incidental to them. However, the City has the right, at its option, to participate, at its own cost, in the defense of any suit, without relieving Contractor of any of its obligations under this Contract. Any settlement may only be made with the prior written consent of the City Corporation Counsel, if the settlement requires any action or obligation on the part of the City. To the extent permissible by law, Contractor waives any limits to the amount of its obligations to indemnify, defend or contribute to any sums due to third parties arising out of any Losses, including but not limited to any limitations on Contractor's liability with respect to a claim by any employee of Contractor arising under the Workers Compensation Act, 820 ILCS 305/1 et seq. or any other related law or judicial decision (such as, *Kotecki v. Cyclops Welding Corp.*, 146 III. 2d 155 (1991)). The City, however, does not waive any limitations it may have on its liability under the Illinois Workers Compensation Act, the Illinois Pension Code or any other statute. The indemnities in this section survive expiration or termination of this Contract for matters occurring or arising during the term of this Contract or as the result of or during the Contractor's performance of work or services beyond the term. Contractor acknowledges that the requirements set forth in this section to indemnify, keep and save harmless and defend the City are apart from and not limited by the Contractor's duties under this Contract, including the insurance requirements set forth in the Contract.

See Appendix C-4, Chicago O'Hare/Chicago Midway Airports.

Appendix C-4 provides a survey of additional contractual provisions used by other airports to address indemnity.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to indemnity:

- Use broadest language possible.
- Require duty to defend where permitted.

5. Extension and Termination.—Because maintenance and repair agreements are, by their nature, continuing agreements, extension periods and termination are important provisions that must be carefully written. The number of extensions should be explicit, provide the method for invoking an extension, and avoid automatic, indefinite extensions. A maintenance and repair agreement will ideally provide for immediate termination by the owner for cause or violation of the contract terms, which can include bankruptcy of the owner, a force majeure event not remedied within a certain amount of time, or a violation of the law by the provider that may have a material adverse effect on the maintenance or operation of the facilities. The agreement should also provide for termination by the owner for other reasons, with a notification period. These "other reasons" can include the provider exceeding the owner's budget for reimbursable costs or simply that the owner does not wish to extend the agreement. These extension and termination provisions allow an airport to control risk scenarios and manage maintenance costs without breaching the contract.

Example / Sample Provision

The following is an example of how termination may be addressed to mitigate risk in a repair and maintenance agreement:

> A. The City [Owner] has the right to terminate this Agreement, in whole or in part, without cause, on thirty (30) days written notice to the Contractor, and with cause on ten (10) days written notice to the Contractor. However, nothing herein shall be construed as giving the Contractor the right to perform services under this Agreement beyond the time when such services become unsatisfactory to the Manager.
>
> B. If this Agreement is terminated by the Contractor, or if this Agreement is terminated by the City for cause, the Contractor's compensation in such event shall be limited to (1) the sum of the amounts contained in invoices which it has submitted and which have been approved by the City, (2) the reasonable value to the City of the work which the Contractor performed prior to the date of the termination notice, but which had not yet been approved for payment, and (3) the cost of any work which the Manager approves in writing which he determines is needed to accomplish an orderly termination of the work. If this Agreement is terminated for the convenience of the City and without the fault of the Contractor, the Contractor shall also be compensated for any reasonable costs it has actually incurred in performing services hereunder prior to the date of the termination.
>
> C. If this Agreement is terminated, the City shall take possession of all materials, equipment, tools and facilities owned by the City which the Contractor is using by whatever method it deems expedient, and the Contractor shall deliver to the City all drafts or other documents it has completed or partially completed under this Agreement, together with all other items, materials and documents which have been paid for by the City, and these documents and materials shall be the property of the City.
>
> D. Upon termination of this Agreement by the City, the Contractor shall have no claim of any kind whatsoever against the City by reason of such termination or by reason of any act incidental thereto, except for compensation for work satisfactorily performed as described herein.
>
> E. The Contractor has the right to terminate this contract with cause by giving not less than thirty (30) days prior written notice to the City.
>
> *See* Appendix C-5, Denver International Airport.

Appendix C-5 provides a survey of additional contractual provisions used by other airports to address extension and termination.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to extension and termination:

- Avoid automatic, indefinite extensions.
- Provide for immediate termination by owner for cause and identify those causes.

Insurance

Commercial general, automobile, workers' compensation, and employer's liability policies should be mandatory. For each category of insurance, the owner should assess the risks and the value of protected assets and equipment or the magnitude of possible loss in setting coverage minimum amounts.

A CGL policy checklist should:

1. Ensure that coverage limits (per occurrence and aggregate) are commensurate with asset value and risk.
2. Evaluate a monetary limit on a self-insured retention policy or deductible without separate owner approval.
3. Ensure that the airport owner is identified as an "Additional Insured" on a primary and noncontributory basis under the policy, thus having direct rights of action against the carrier.
4. Ensure that all required insurance policies provide that they are the primary insurance with respect to any other valid insurance the owner may possess and that in any circumstance, the owner's insurance policy will be considered excess insurance only.

D. Tenant and User Agreements

Tenant and user agreements set the parameters under which various airline and nonairline operators are allowed to occupy, develop, and use space at the airport, subject to FAA guidances and grant assurances. These agreements run the gamut from rights of entry, easements, basic space and use agreements (often licenses), and long-term hangar or warehouse leases to Fixed Base Operator (FBO) agreements, fueling leases, developer agreements for those developing and leasing space at the airport, and standard commercial operator leases. Because tenant and user agreements cover such a broad range of uses, they often vary greatly in the type and depth of risk and liability issues that need to be addressed.[4] Although the specific use of any airport tenant or user will have a major impact in analyzing the appropriate risk management provisions in a given agreement, some of the more predominant risks, coverages, and ways to allocate or limit risk are discussed below.

Identification of Risk

1. Occupancy Liability and Indemnity.—Regardless of the type of tenant or user agreement, the tenant should remain liable for occurrences related to its occupancy or any negligence by the tenant or any tenant parties (employees, contractors, agents,

[4] *ACRP Report 47: Guidebook for Developing and Leasing Airport Property,* Transportation Research Board (2011), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_047.pdf, provides an in-depth discussion on key issues associated with leasing airport land and summarizes best practices. Key issues in concession agreements and multiple use facility contracts are also addressed by *ACRP Report 33: Guidebook for Developing and Managing Airport Contracts,* Transportation Research Board (2011), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_033.pdf.

licensees, etc.). The agreement should include broad language in which the tenant agrees to hold harmless and indemnify the airport, its officers, board, employees, and representatives from and against any loss (including all costs for investigation and defense of any litigation) that may be incurred by the airport to the extent that such loss 1) resulted from or arose out of the construction, use, occupancy or maintenance of the premises, the tenant's operations thereon, or the acts or omissions of the tenant, resulting in damage to or destruction of any property or injury to or death to any person; 2) arose out of any breach of the lease by the tenant; or 3) was imposed on or assessed against the airport arising out of any act or omission on the part of the tenant or any other person acting by, through, or for the tenant.

Example/Sample Provision

The following is an example of how indemnification may be addressed to mitigate risk in a tenant/user agreement:

> 8.02 INDEMNIFICATION
>
> The Airline agrees to indemnify and save harmless the City, its officers, and employees, from and against (A) any and all loss of or damage to property, or injuries to, or death of, any person or persons, including property and officers, employees and agents of the City; and (B) all claims, damages, suits, costs, expense, penalties, liability, actions or proceedings of any kind or nature whatsoever, of or by anyone whomsoever; which, with respect to clauses (A) and (B) hereof, in any way result from, or arise out of, Airline's operations in connection herewith, or its use or occupancy of any portion of the Airport and the acts, omissions, or wrongful conduct of officers, employees, agents, contractors or subcontractors of the Airline including without limitation, the provision or failure to provide security as herein required and the use, disposal, generation, transportation or release of pollutants, including but not limited to oil, glycol, toxic or hazardous materials at Denver International Airport by the Airline, its contractors, employees, agents, customers, or anyone claiming or acting by or through the Airline.
>
> Airline further agrees that if a prohibited incursion into the Air Operations Area occurs, or the safety or security of the Air Operations Area, the Airfield, the Baggage System or other sterile area safety or security area is breached by or due to the negligence or willful act or omission of any of Airline's employees, agents, or contractors and such incursion or breach results in a civil penalty action being brought against the City by the U.S. Government, Airline agrees to reimburse the City for all expenses, including attorney fees, incurred by the City in defending against the civil penalty action and for any civil penalty or settlement amount paid by the City as a result of such incursion or breach of airfield or sterile area security. The City shall notify Airline of any allegation, investigation, or proposed or actual civil penalty sought by the U.S. Government for such incursion or breach. Civil penalties and settlement and associated expenses reimbursable under this Paragraph include but are not limited to those paid or incurred as a result of violation of Federal Aviation Administration (FAA) regulations or Transportation Security Administration (TSA) regulations, as they may be amended, or any similar law or regulations intended to replace or compliment [sic] such regulations.
>
> Without limitation, the terms of this indemnity include an agreement by Airline to indemnify, defend and hold harmless the City from and against any and all expense, loss, claim, damage, or liability suffered by City by reason of Airline's breach of any environmental requirement existing under federal, state or local law, regulation, order or other legal requirement in connection with any of Airline's acts, omissions, operations or uses of property relating to this Agreement, or such a breach by the act or omission of any of Airline's officers, employees, agents, or invitees, whether direct or indirect, or foreseen or unforeseen, including (but not limited to) all cleanup and remedial costs actually and reasonably incurred to satisfy any applicable remediation obligation required by federal, state or local law, and reasonable legal fees and costs incurred by City in connection with enforcement of this provision, but excluding damages solely relating to diminution in value of City real property.
>
> Provided however, the City agrees that (I) the Airline need not save harmless or indemnify the City against damage to or loss of property, or injury to or death of persons, caused by the negligence or willful acts of the City, its officers, employees, contractors and agents, and (II) the City will give prompt written notice to the Airline of any claim or suit and the Airline shall have the right to assume the defense and compromise or settle the same to the extent of its own interest. Provided, however, the indemnity provided for herein shall apply only to the extent the City is not reimbursed out of insurance proceeds.
>
> *See* Appendix D-1, Denver International Airport.

Appendix D-1 provides a survey of additional contractual provisions used by other airports to address occupancy liability.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to occupancy liability:

- The language must be broad enough to encompass the current tenant/user, its subtenants, and the respective employees, contractors, agents, licensees, successors, and assigns claiming by and through such parties.
- If the lease allows leasehold financing, the leasehold mortgagee will often seek to take free of any lease obligations or liabilities in the event of a leasehold mortgage foreclosure or assignment to the lender or third-party successor in lieu of foreclosure. The lease language must be binding upon such assignees without waiving any existing claim against the original tenant.
- In negotiation of leases, airports and tenants may offset up-front costs and burdens to the tenant by providing other remedies in the leases, which may include "self-help" rights to the airport (see further discussion in the following remedies upon default section). Airports should also take into

consideration the creditworthiness of tenants and may adjust charges and required security and insurance accordingly based on their analysis of the risk. In such analysis, when allowed by applicable law, airports may allow self-insurance of certain risks in a given circumstance, such as when the tenant/user is a governmental entity or has an extremely high net worth or when the tenant has a significant investment in on-airport improvements that will vest in the airport.

2. Maintenance and Repair.—The airport should generally pursue a net lease or at least establish bright-line limitations of the airport's liability for maintaining and repairing the structural portions of the building or any improvements, regardless of cause. The parties must also address obligations to restore the leased premises after casualty loss and allow the airport to act without written notice in the event of an emergency. The agreement should also address general obligations for security and compliance with laws and other obligations imposed by FAA or others having jurisdiction over the premises.

Example/Sample Provision

The following is an example of how a tenant's maintenance and repair obligations may be addressed to mitigate risk in a tenant/user agreement:

> 9. MAINTENANCE AND REPAIR
>
> 9.2 Tenant's Maintenance Obligations. Tenant, at all times during the Term and at Tenant's sole cost and expense, shall keep the Premises and every part thereof in good condition and repair, and in compliance with applicable Laws, including the replacement of any facility of City [Owner] used by Tenant which requires replacement by reason of Tenant's use thereof, excepting (a) ordinary wear and tear, and (b) damage due to casualty with respect to which the provisions of Section 14 [Damage or Destruction] shall apply. Tenant hereby waives all right to make repairs at the expense of City or in lieu thereof to vacate the Premises as provided by California Civil Code Section 1941 and 1942 or any other law, statute or ordinance now or hereafter in effect. In addition, if it becomes reasonably necessary during the term of this Lease, as determined by Director, Tenant will, at its own expense, redecorate and paint fixtures and the interior of the Premises and improvements, and replace fixtures, worn carpeting, curtains, blinds, drapes, or other furnishings. Without limiting the generality of the foregoing, at all times, Tenant shall be solely liable for the facade of the Premises separating the Premises from the Terminal common areas, including the external face thereof, all windows and display areas therein, and all finishes thereon. As provided below in Section 15.4 [City's Right to Perform], in the event Tenant fails to perform its maintenance and repair obligations hereunder, City shall have the right to do so, at Tenant's expense. The parties acknowledge and agree that Tenant's obligations under this Section are a material part of the bargained-for consideration under this Lease. Tenant's compliance obligations shall include, without limitation, the obligation to make substantial or structural repairs and alterations to the Premises (including the Initial Improvements), regardless of, among other factors, the relationship of the cost of curative action to the Rent under this Lease, the length of the then remaining Term hereof, the relative benefit of the repairs to Tenant or City, the degree to which curative action may interfere with Tenant's use or enjoyment of the Premises, the likelihood that the parties contemplated the particular requirement involved, or the relationship between the requirement involved and Tenant's particular use of the Premises. No occurrence or situation arising during the Term, nor any present or future requirement, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against City. Tenant waives any rights now or hereafter conferred upon it by any existing or future requirement to terminate this Lease, to receive any abatement, diminution, reduction or suspension of payment of Rent, or to compel City to make any repairs to comply with any such requirement, on account of any such occurrence or situation.
>
> *See* Appendix D-2, San Francisco International Airport.

Appendix D-2 provides a survey of additional contractual provisions used by other airports to address maintenance and repair.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to maintenance and repair:

- It will be important to define and delineate the limits of the airport's obligations for any structural maintenance, repairs, or replacements. This includes who is responsible for improvements on-premises and off-premises.
- The airport should limit liability for maintenance, repair, or replacement of any facilities maintained by or under the control of third parties, such as public or private utilities, and for matters of force majeure.
- In particular regard to casualty insurance, the airport should obtain waivers of subrogation from the tenant and its insurers.

3. Buildout.—If the tenant is performing a buildout, this opens a broad range of risk management issues that must be addressed by the airport landlord. When the tenant is responsible for construction, the airport should retain rights of plan and permit approval and inspection and approval of construction while making it clear that through the exercise of such rights, the airport does not incur any liability for ultimate design or construction of the improvements. With regard to any airport buildout, the lease should establish very strict provisions for punch-list repair of any defects and a strict and short duration period (if any) for the airport's liability to the tenant for the condition of the airport's premises improvements. The lease should ideally

provide that if the tenant takes possession, it is deemed to have accepted the premises "as is." The agreement should also address general obligations for security and compliance with laws and other obligations imposed by FAA or others having jurisdiction over the premises.

Example / Sample Provision

The following is an example of how a tenant's buildout due diligence obligations may be addressed to mitigate risk in a tenant/user agreement:

> Within thirty (30) days from the date of the execution of this Lease, Concessionaire shall submit to Board the final plans and specifications for the construction of Concessionaire's location in accordance with Board's current design criteria. Concessionaire shall commence construction of said project within thirty (30) days from the date Board approves Concessionaire's plans and issues its permit and construction approval letter to Concessionaire, and Concessionaire shall diligently proceed with construction so as to complete said project and open for business on or before 90 days from issuance of the approval letter. Concessionaire acknowledges that the financial success of the Airport depends, in part, on both (i) the completion of the construction, remodel and renovation of the Premises as herein required; and, (ii) Concessionaire's opening for business in a timely manner, and that Board's damages arising from Concessionaire's failure to do so are extremely difficult and impracticable to fix. Therefore, should Concessionaire fail to either complete said project as required or open the Premises for business as required, Concessionaire shall pay to Board as liquidated damages and not as a penalty, upon receipt of invoice, the sum of Two hundred Fifty Dollars ($250.00) per day per any and all locations not in compliance. Concessionaire agrees that said amount of Two hundred Fifty Dollars per day per location is fair compensation to Board for said liquidated damages.
>
> *See* Appendix D-3, Dallas/Fort Worth International Airport.

Appendix D-3 provides a survey of additional contractual provisions used by other airports to address buildout.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to buildout:

- The lease must make clear which party is responsible for each element of design, permitting, and construction of improvements and to what extent the other party has review or approval rights. The airport should retain final rights of approval.
- The airport should also retain reasonable rights of approval of the tenant's contractors and subcontractors. In addition, see the following discussion regarding issues of liability, builder's risk and other insurance coverages, and payment and performance bonds that should be required for any tenant buildout.

4. Remedies for Default.—For a monetary default, the airport should always reserve all rights available to it pursuant to state law, which usually include the options of terminating the lease and retaking possession or terminating tenant's right to possession, retaking possession, and recovering the unpaid rent as it becomes due, without terminating the lease. In some instances, the airport will be able to accelerate rent due until the end of the lease term, but it will usually be discounted to present value. If a tenant has incurred a nonmonetary default, the airport should have the right to cure the default on the tenant's behalf and to "monetize" the claim by collecting the cost of such performance as additional rent payable under the lease. If the tenant fails to pay the additional rent in a timely manner, the airport can then claim a monetary default and pursue any other remedies allowed under the lease or at law, including eviction. The airport should also have an express reservation of the airport's right to pursue litigation for damages of not only the rent and additional rent, but also costs incurred in retaking, restoring, and reletting the premises, including attorney's fees and costs.

Example / Sample Provision

The following is an example of how remedies upon default may be addressed to mitigate risk in a tenant/user agreement:

> Article 13 City Remedies
>
> 13.03 Remedies. Upon the occurrence of any event enumerated in Section 13.01 and after any applicable notice and cure periods, the following remedies shall be available to City:
>
> 13.03.1 City may exercise any remedy provided by law or in equity, including but not limited to the remedies hereinafter specified.
>
> 13.03.2 City may cancel this Agreement, effective upon the date specified in the notice of cancellation. Upon such date, Operator shall be deemed to have no further rights hereunder and City shall have the right to take immediate possession of the Operator Premises.
>
> 13.03.3 City may reenter the Operator Premises and may remove all Operator persons and property. Upon any removal of Operator property by City hereunder, Operator property may be stored at a public warehouse or elsewhere at Operator's sole cost and expense.
>
> 13.03.4 City may relet Operator Premises and any improvements thereon or any part thereof, at such rentals, fees, and charges and upon such other terms and conditions as City, in its sole discretion, may deem advisable, with the right to make alterations, repairs of improvements on said Operator Premises.
>
> 13.03.5 In the event that City relets Operator Premises, rentals, fees, and charges received by City from such reletting shall be applied: (i) to the payment of any indebtedness, other than rentals, fees, and charges due hereunder, from Operator to City; (ii) to the payment of any cost of such

releting; and (iii) to the payment of rentals, fees, and charges due and unpaid hereunder. The residue, if any, shall be held by City and applied in payment of future rentals, fees, and charges as the same may become due and payable hereunder. If that portion of such rentals, fees, and charges received from such releting and applied to the payment of rentals, fees, and charges hereunder is less than the rentals, fees, and charges as would have been payable during applicable periods by Operator hereunder, then Operator shall pay such deficiency to City whenever rentals, fees or charges are due to City hereunder. Operator shall also pay to City, as soon as ascertained, any reasonable costs and expenses incurred by City in such releting not covered by the rentals, fees, and charges received from such releting.

13.03.6 No reentry or releting of Operator Premises by City shall be construed as an election on City's part to cancel this Agreement unless a written notice of cancellation is given to Operator.

See Appendix D-4, Salt Lake City International Airport.

Appendix D-4 provides a survey of additional contractual provisions used by other airports to address remedies for default.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to remedies for default:

- Airports should be clear that the exercise of any remedy is not exclusive of other remedies. The lease should also include clear "non-waiver" language so that any concession to the tenant, acceptance of part payment or performance, or failure to immediately exercise any rights or remedies by the airport is not deemed to waive a default or create a satisfaction and accord.
- Airports must be mindful of state and local landlord tenant statutes or ordinances, and even bankruptcy, which may prescribe or limit a landlord's rights or remedies in a given circumstance.
- As previously noted, leasehold mortgagees will often seek to limit the rights and remedies of the landlord in the event of a leasehold mortgage foreclosure or sale or assignment in lieu of foreclosure. Airports should be careful that rights and remedies apply to any occupant/use under the lease and that they do not limit, waive, or modify any rights or remedies in the lease or any subsequent tenant- or lender-requested estoppels or consents. Lenders will often seek to rewrite lease terms in such documents.

5. Hazardous Materials.—Tenants/users engaged in fueling, aircraft maintenance, and other uses that involve hazardous or environmentally regulated substances should be required to provide explicit, separate environmental indemnities to the airport. These provisions are often hotly contested, especially in brownfield airport locations, and may require very detailed language and procedures for the parties to establish an environmental baseline condition at the beginning of the lease term, a formal system for auditing environmental conditions during the term, and a method for determining the condition upon expiration or termination of the lease term. The users may similarly have to address procedures for monitoring and/or remediation and the impact on possession and use during the term of the lease. The lease should permit the airport to recover the cost of any remediation as additional rent. This may require parties to address liability for loss of rent and the necessity for the tenant/user to maintain business interruption insurance coverage. The lease language should limit the airport's environmental liability only to actual damages caused to the tenant by environmental contamination caused by the airport. The airport should not separately contractually obligate itself to environmental remediation obligations or indemnify the tenant against environmental conditions caused by third parties.

Example / Sample Provision

The following is an example of how a baseline audit related to hazardous materials may be addressed to mitigate risk in a tenant/user agreement:

8.04 Baseline Audit: The County has provided Lessee with a copy of an environmental audit of the Premises, conducted to identify any Recognized Environmental Conditions associated with the Premises, which audit may include analyses of soil and groundwater samples (the initial "Baseline Audit"). Except to the extent Lessee previously occupied the Premises, the County shall be responsible for any Recognized Environmental Conditions within the meaning of ASTM E 1527-05, or most recent version, disclosed by the Baseline Audit. Except to the extent Lessee previously occupied the Premises, Lessee may terminate this Agreement within sixty (60) days of receipt of the Baseline Audit if Lessee, in its sole discretion, determines that the Recognized Environmental Conditions disclosed in such Baseline Audit are unacceptable. To the extent Lessee previously occupied the Premises, Lessee, subject to its right to invoke the dispute resolution provision of 8.15, shall be responsible for all Recognized Environmental Conditions disclosed in the Baseline Audit, which are not otherwise Baseline Environmental Conditions, unless Lessee demonstrates to the County's satisfaction that the Recognized Environmental Conditions originated from (1) a discharge, disposal or release outside of the Premises, unless such discharge, disposal or release was caused by Lessee, Lessee's agents employees, contractors or invitees; or (2) a discharge, disposal or release of Hazardous Material on the Premises prior to Lessee's first occupancy of the Premises and not caused by Lessee, Lessee's agents, employees, contractors, invitees, or Trespassers.

See Appendix D-5, Miami International Airport.

Appendix D-5 provides a survey of additional contractual provisions used by other airports to address hazardous materials.

Methods to Contractually Mitigate Risk

The following are key issues to consider when drafting or reviewing a contractual provision related to hazardous materials:

- Tenants will usually seek to limit liability to matters caused by the tenant during the term of the lease. The lease should have language to establish the baseline environmental condition at the commencement of the lease and the condition upon expiration or earlier termination of the lease. The airport should not assume any liability for damages or cleanup costs caused by an environmental condition caused by a third party (unless, perhaps, if environmental laws may already impose such obligations on the airport).
- Airports should require that the tenant has an affirmative duty to inspect, report, and remediate, if necessary, any recognized environmental condition that arises on the premises from time to time. The airport should also reserve the right to inspect the premises and conduct environmental testing or remediation as may be required or that the airport deems appropriate from time to time during the term.
- Environmental risk may vary widely according to the proposed use and may be mitigated through the purchase of pollution insurance, as discussed in the following section.

Insurance and Bonds

Each lease or user agreement will require particular types of insurance and bonds based on the proposed use, rights, and obligations under the agreement. Note that specialized airport uses will require broader and more in-depth analysis of the risk, insurance, and indemnity obligations. For example, tenants/users or their licensees operating in an Aircraft Operations Area (AOA) will likely require additional coverages, aviation liability insurance, and much higher coverage limits. International carriers may be required to have terrorism risk coverage as well.

Because insurance requirements and regulations will vary based on state law and the type of use, it is important to involve insurance and risk management consultants when reviewing contractual provisions and evidence of coverage. Certain federal or state regulations or grants may also require airports to include specific additional coverages or security. Some of the typically required documents and coverages are as follows:

a. Insurance.—All coverages should name the airport as an additional insured on a primary and noncontributory basis and should include waivers of subrogation language. Tenants need to provide copies of the policies (not just certificates) upon request. The policies should also have limited deductibles or self-insurance provisions in most cases. When permitted by law, airports may consider allowing self-insurance of certain risks in given circumstances, such as when the tenant/user is a governmental entity, has an extremely high net worth, or has a significant investment in on-airport improvements that will vest in the landlord. Airport landlords should always maintain the right to review and approve any insurance policy and require changes in coverage when necessary.

1. CGL Policies (Wrap Policies).—Almost all agreements will require the tenant/user and any other party operating under the tenant/user's rights to maintain CGL insurance in a per-occurrence coverage amount adequate to protect the landlord. Usually coverage of at least $5 million is required for users having AOA access.

2. Vehicle Coverage for Owned and Nonowned Vehicles.—There should be separate automobile liability insurance required for all automobiles, whether owned or nonowned, used in connection with the tenant/user's operations, with a Combined Single Limit covering each motor vehicle operated on the premises. Typically, this coverage will be at least $1 million. Higher limits may be required for any vehicles operating within the AOA.

3. Workers' Compensation.—Most leases (and usually federal or state requirements) will impose an obligation for tenants/users to maintain workers' compensation or similar insurance that affords the required statutory coverage and requisite statutory limits. Coverages are often at least $500,000 for each of the "each accident," "disease policy limit," and "disease each employee coverage" categories, or a tenant/user can maintain a self-insured program with comparable coverage.

4. Construction-Related Coverage.—For any tenant/user who performs construction on site, the agreement should require builder's risk coverage. Builder's risk is a property insurance policy that is designed to cover property during the course of construction, usually on an all-risks basis. The estimated completed value of the project is generally used as the limit of the builder's risk coverage. The airport must carefully review the tenant's insurance obligations and compliance. In general, it will not be adequate just to require baseline coverages and certificates of insurance. In a net lease for improved property, the tenant/user can be required to maintain broad-form casualty coverage for all the improvements on the premises. Airports should require the

coverages to be maintained on a replacement cost basis (without deduction for depreciation).

5. Pollution.—During construction projects, and depending on the permanent use, the agreements should require the tenant/user and/or its contractors to maintain broad coverage pollution insurance, covering costs related to insurance, including liabilities related to injury, death, or property damage caused by pollution and costs related to environmental assessment, reporting, cleanup, and other actions. Tenants/users handling hazardous or environmentally regulated substances should also be required to provide pollution coverage.

6. Specialty.—Tenants who operate maintenance hangars or aircraft storage, repair, and refueling services may need to maintain hangar keeper's liability insurance to cover the risk of damage to any aircraft or other property not owned by the tenant. Furthermore, even though many agreements will already require standard environmental liability insurance, those who provide maintenance or refueling services should provide separate environmental impairment liability insurance to cover the cost of liability incurred, along with environmental assessment and cleanup costs associated with pollution incidents. Depending on the scope of services offered, FBOs may need to provide all of the above-referenced insurance coverages and more. For instance, if the FBO is offering its own lounge, club, or restaurant facilities, it may be required to provide liquor liability or dram shop coverage.

b. Bonds.—In addition to insurance coverages, the agreements will often require tenants/users to provide bonds or other forms of security-backing performance of their obligations, particularly if the tenant/user will be performing construction. Airports must reserve the right to review and approve any bonds and require additional bond protection when necessary.

1. Contract Bonds.—Depending on the obligations under the lease, the financial wherewithal of the tenant/user, and other circumstances, the agreement may need to include a letter of credit, security deposit, or contract bond backing all of the tenant/user's obligations under the lease, including payments.

2. Buildout and Construction-Related Bonds.—Negotiation of the form of these bonds up front is crucial to avoid any conflicts as to the adequacy and scope of these bonds. In particular, the performance bonds must not be conditioned in any way, including payment (unless the airport is paying for the improvements). The bonds should also be of adequate scope and duration to cover any construction defect issues.

Construction Payment Bonds.—If the tenant/user is performing construction, it should be required to maintain construction payment bonds to ensure payment of all contractors, subcontractors, suppliers, and laborers and to comply with all applicable prompt payment and/or lien laws. Specific project grants or funding agreements may have various specific requirements as well.

Construction Performance Bonds.—The tenant/user may also need to provide separate construction performance bonds that ensure completion of the project and protect against construction defects. One particular issue that often arises in lease agreements is that the tenant attempts to pass the bonding obligation on to its general contractor through a standard payment and performance bond. Because these bonds generally condition completion of the work on payment of the contractor, they do not adequately protect the airport in the event of a tenant default. The construction performance bond should, in general, be provided by the tenant/user, rather than the contractor, and should not be conditioned on payment so that the landlord may step in to complete the project if necessary.

3. Letter of Credit.—Because of the complex issues of private construction on public airport property and its potential conflicts with construction lien laws, another alternative to bonds may be to provide security through a letter of credit. Tenants/users, however, may object to the use of letters of credit because of the cost or required collateral.

E. Airline Signatory Agreements

Airline signatory agreements are typically multiyear arrangements between an airport and air carriers that make the most significant use of the airport for flight operations. These agreements establish the terms of use of the airfield and terminals by airlines, including rates and charges payable by airlines for such use,[5] long-term rental commitment to the airport in exchange for committed space, favorable pricing, and sharing of excess revenues generated by the airport.

Rates and charges under a signatory agreement may be imposed under two basic ratemaking models, a residual model or a compensatory model. Under a residual model, the airlines that are parties to the signatory agreement ("Signatory Airlines") agree to pay rates and charges sufficient to cover any operational shortfall in the airport's nonairline

[5] Other issues that are critical for airline agreements are discussed in *ACRP Report 33: Guidebook for Developing and Managing Airport Contracts,* Transportation Research Board (2011), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_033.pdf.

revenues. Under the compensatory model, airlines do not merely pay the shortfall, but instead pay rates and charges calculated to pay the costs of the facilities they use, whether or not other revenues are sufficient to pay the costs of facilities not being used by the airlines.

Rates and charges for all airfields (e.g., runways, aprons, etc.) are calculated pursuant to the residual model. Rates and charges for the use of the terminal may be residual or compensatory, based on the terms of the signatory agreement.

Identification of Risk

The risks attendant to airline signatory agreements arise out of the structure of the airport/airline relationship and are addressed through contractual provisions and a variety of insurance instruments. The risks that exist in such relationships are numerous, but four are likely to be found in any signatory agreement: vacancy risk, airline bankruptcy, damages to the premises, and environmental risk.

1. Vacancy.—For agreements that calculate terminal rental rates using a compensatory method (as opposed to a residual method), the airport does not recover the costs of unused space or equipment. For example, if all terminal costs are included in the formula used to calculate terminal rents, and the terminal is only 50 percent leased, then the airport would recover from the airlines using the terminal only 50 percent of the costs of building, operating, and maintaining the terminal. If nonairline revenue, such as concessions and parking, were not sufficient to cover the balance, the airport would be operating its terminal at a loss and would likely be in violation of its bond covenants.

Example/Sample Provision

The following contractual provision, known as "Extraordinary Coverage Protection," is an example of how vacancy risk may be addressed in a compensatory airline signatory agreement.

> The Signatory Airlines shall pay, as additional rental payments, an amount necessary in any Fiscal Year to satisfy AUTHORITY's rate covenant, as set forth in Section XXX of the Bond Resolution, or any successor thereto ("Extraordinary Coverage Protection"). Any shortfalls in annual receipts required by the AUTHORITY's rate covenant shall not be satisfied with prior year surpluses or AUTHORITY cash balances, even if such exist; but shall be satisfied by the Extraordinary Coverage Protection payments described herein. AIRLINE's share of such Extraordinary Coverage Protection payments shall equal the total required payment times a fraction, the numerator of which is the estimated number of annual Enplaned Passengers for Airline for the Fiscal Year such payment is due and the denominator of which is the estimated number of annual Enplaned Passengers of all Signatory Airlines that actually make an Extraordinary Coverage Protection payment. The estimated number of Enplaned Passengers and the required amount of the Extraordinary Coverage Protection payment shall be determined by AUTHORITY in its reasonable discretion. All Extraordinary Coverage Protection payments shall be due within fifteen (15) days after notice from AUTHORITY. The AUTHORITY may provide notice of the requirement for Extraordinary Coverage Protection payments at any time, and from time to time, during a Fiscal Year that it appears, in the AUTHORITY's reasonable discretion, that such payments will be required pursuant to the terms hereof; provided, however, that the AUTHORITY shall afford the Signatory Airlines a reasonable opportunity to discuss the requirement with the AUTHORITY prior to requiring such payment.
>
> *See* Appendix E-1, Orlando International Airport.

Appendix E-1 provides a survey of additional contractual provisions used by other airports to address the risk of vacancy.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to vacancy risk:

- If necessary, use the residual ratemaking model, knowing that such downside protection comes with a loss of control and authority over airport capital decisions.
- Under the compensatory model, try to divide the terminal into sub-cost centers whenever possible. For example, recover the costs of loading bridges or baggage systems or passenger processing equipment separate from the cost of the terminal. Borrowing from the example above, if the terminal were 50 percent leased and the cost of the baggage system were in the terminal costs, an airport would only recover 50 percent of the cost of the baggage system. If the baggage system were charged separately, with its costs allocated to the airlines based on proportionate users, however, an airport may recover all or substantially all of its baggage system costs, thereby reducing its risk of shortfall due to terminal vacancy.

2. Airline Bankruptcy.—Closely connected to vacancy risk is the all-too-common reality of an airline bankruptcy. Signatory agreements, and thus airport planning, are based on the principle that certain airlines have made long-term financial commitments to the airport. When an airline files for bankruptcy protection, it is permitted to terminate and alter that commitment, in addition to having debt erased or restructured. Airports cannot react after the fact, but must contemplate this eventuality at the time the signatory agreement is structured.

For example, many airports require payment security, such as a performance bond, in the

approximate amount of 3 months' payments. If an airline is going to file for bankruptcy protection, chances are the airline will be delinquent in its payments. A few months' worth of bonded security will allow the airport to recover payments that might otherwise be forgiven in the bankruptcy proceeding.

Example / Sample Provision

The following contractual provision is an example of how airline bankruptcy risk may be addressed in an airline signatory agreement.

> SECTION 5.16 SECURITY DEPOSITS
>
> If AIRLINE has not maintained continuous scheduled air service at the Airport for at least two (2) years prior to this Agreement, or if, AIRLINE or any of AIRLINE's Affiliates fail to timely pay Rents or Landing Fees twice in a twelve (12) month period, AIRLINE will provide DFW [Dallas/Fort Worth International Airport] with a security deposit equal to Rents and Landing Fees that DFW estimates AIRLINE and its Affiliates will incur during the following three month period, which requirement will be suspended upon completion of one year of continuous scheduled air service at the Airport without another payment default by AIRLINE or any of its Affiliates. The security deposit may be either a letter of credit or a surety bond, issued by an institution and in a form acceptable to DFW, and DFW will at all times be authorized to apply any security deposit towards any outstanding obligations of AIRLINE or any of its Affiliates at the Airport. If AIRLINE's security deposit is used to cure a monetary obligation or to cure any other event of default, AIRLINE will promptly replenish the depleted security deposit to an amount equal to its security deposit obligation pursuant to this Agreement. DFW reserves the right to waive the requirement of a security deposit.
>
> *See* Appendix E-2, Dallas/Fort Worth International Airport.

Appendix E-2 provides a survey of additional contractual provisions used by other airports to address the risk of airline bankruptcy.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to airline bankruptcy risk:

- Require airlines to deposit at least 3 months of estimated rental charges to be applied in the event of any default in payment.
- Require airlines to obtain a payment bond with a third-party surety that will pay rent in the event of default.
- Make sure that any benefits, such as revenue sharing, do not apply during any period that an airline is in default in paying rent.

3. Damage to the Premises.—Airline operations often include the use of heavy equipment, the installation of proprietary equipment, the remodeling of exclusive or preferential use space, and the risk of fire or other damage. Signatory agreements must allocate responsibility for these risks, as well as address continuing rental payments when space is not available for use.

Example / Sample Provision

The following contractual provision is an example of how risk of damage to the premises may be addressed in an airline signatory agreement.

> *Section 911 Damages and Destruction.* A. Partial Damage. If any part of the Demised Premises shall be partially damaged by fire or other casualty, but these circumstances do not render the Demised Premises untenantable as reasonably determined by City, the same shall be repaired, constructed or renovated to usable condition with due diligence by the parties as provided in Section 911(D) below.
>
> B. Substantial Damage. If any part of the Demised Premises shall be so extensively damaged by fire or other casualty as to render any portion of the Demised Premises untenantable, but capable of being repaired, as reasonably determined by City, the same shall be repaired to usable condition with due diligence by the parties as provided in Section 911(D). City shall use commercially reasonable efforts to provide Airline with comparable temporary alternative facilities sufficient to allow Airline to continue its operations while repairs are being completed, at a rental rate applicable to such alternative facilities; provided, however, that Airline shall not be required to lease more alternative space than was rendered untenantable in accordance with this Section.
>
> C. Destruction. (i) If any part of the Demised Premises shall be damaged by fire or other casualty, and is so extensively damaged as to render any portion of the Demised Premises untenantable and not economically feasible to repair, as reasonably determined by City, City shall notify Airline within a period of forty-five (45) days after the date of such damage of its decision whether said space should be reconstructed or replaced; provided, however, City shall be under no obligation to reconstruct or replace such premises.
>
> (ii) If City elects to replace or reconstruct the affected Demised Premises, the same shall be replaced or reconstructed to usable condition with due diligence by the parties as provided in Section 911(D), and City shall use commercially reasonable efforts to provide Airline with comparable temporary alternative facilities sufficient to allow Airline to continue its operations while reconstruction or replacement facilities are being completed; provided, however, that Airline shall not be required to occupy and pay for more alternative space than was rendered untenantable in accordance with this Section.
>
> (iii) If City elects to not reconstruct or replace the damaged Demised Premises, City shall either relocate Airline pursuant to Section 210 above, or if no premises are available to accomplish such relocation, amend this Agreement to remove the damaged facilities. City agrees to amend this Agreement effective as of the date of damage or destruction to reflect such changes, additions and deletions to the Demised Premises. If Airline is not relocated and, after amendment of this Agreement as to the damaged facilities, the remaining tenantable portion of the Demised Premises is not sufficient to maintain operations at the Airport, Airline may terminate this entire Agreement upon at least thirty (30) days advance notice given within sixty (60) days after receipt by Airline of notice of amendment of this Agreement as to the damaged facilities.

D. Allocation of Responsibility for Reconstruction. (i) In the event any Alterations in the Exclusive Use Space or Preferential Use Space included in the Demised Premises are to be reconstructed or repaired following damage by any casualty described in Sections 911(A), (B) or (C) above, Airline shall repair such damage to its Alterations, at its sole cost and expense, and this Agreement shall continue in full force and effect. In the event such damage occurs to Alterations in Exclusive Use Space or Preferential Use Space that is open or available to the public, Airline shall use commercially reasonable efforts to cause such repair to be performed within ninety (90) days. If the damage occurs to Alterations in Exclusive Use Space or Preferential Use Space that is not open or available to the public, Airline shall use commercially reasonable efforts to cause such repair to be performed within one hundred and eighty (180) days.

(ii) In the event any improvements in the Joint Use Space included in the Demised Premises are to be reconstructed or repaired following damage by any casualty described in Sections 911(A), (B) or (C) above, such damage shall be repaired as follows: all Joint Use Space which is an Air Carrier's responsibility pursuant to Exhibit C hereof shall be repaired by the Air Carriers operating in such Joint Use Space, at their sole cost and expense; and all Joint Use Space which is City's responsibility pursuant to Exhibit C hereof shall be repaired by City.

(iii) Any replacement, repair or reconstruction not described in Section 911(D)(i) or (ii) shall be completed by City.

E. No Abatement of Rent; Airline's Remedies. If the Demised Premises is wholly or partially destroyed or damaged, Airline shall have no claim against City for any damage suffered by reason of any such damage, destruction, repair or restoration. Airline waives California Civil Code Sections 1932(2) and 1933(4) providing for termination of hiring upon destruction of the thing hired. In no event will Airline be entitled to an abatement of rent resulting from any damage, destruction, repair, or restoration described herein; provided, however, that Airline shall not be charged rent for both untenantable Demised Premises and temporary alternative facilities.

F. Reporting of Damage to Airport Property. Neither Airline nor any Airline Entity shall destroy or cause to be destroyed, injure, deface, or disturb in any way, property of any nature on the Airport, nor willfully abandon any personal property on the Airport. If Airline or Airline Entity is aware of any injury, destruction, damage or disturbance of property on the Airport (regardless of responsibility therefor), Airline shall file a written report with City describing the incident and damage within twenty four (24) hours after discovery, and, if such damage was caused by Airline or any Airline Entity, upon demand by the Director, shall reimburse the City for the full amount of such damage within sixty (60) days. Failure to file any written reports required by this Section shall constitute an Event of Default under this Agreement and a violation of Airport Rules subject to fines under Section 1507, as applicable.

See Appendix E-3, San Francisco International Airport.

Appendix E-3 provides a survey of additional contractual provisions used by other airports to address the risk of damage to the premises.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to the risk of damage to the premises:

- Make sure to address partial damage, substantial damage, and total destruction of airport property.
- Specify the allocation of responsibility between the airline and the airport for reconstruction and repair costs and include a timeframe for the completion of such reconstruction and/or repair.
- Require the airline to continue to pay rent during the reconstruction and/or repair period and require the airline to waive any and all claims against the airport for damages suffered by reason of any damage, destruction, repair, or restoration of the airport premises.
- Allow the airline to permanently or temporarily move the airline to alternative space without rent abatement.

4. Environmental.—Airline operations inevitably run the risk of fuel or oil spills and other environmental problems. Airports should of course require an airline's compliance with all applicable environmental laws.

Despite such contractual obligations, environmental issues will still happen. An airport should make sure that all unreimbursed costs to clean up or remediate environmental issues in the airfield, including the apron, be included in the airfield cost center and thereby recovered in the residual landing fees paid by all airlines.

If an airport has a fuel farm agreement with airlines, in addition to requiring environmental insurance, the fuel farm agreement should require joint and several indemnification of the airport by all consortium or participating airlines for all environmental costs. As a backstop, all environmental liability not covered by insurance should also be an airfield cost center expense, payable from landing fees.

Example / Sample Provision

The following contractual provision is an example of how environmental risk may be addressed in an airline signatory agreement.

17.5 Environmental.

(a) General Conditions. Each Airline must:

(i) be knowledgeable of all applicable federal, state, regional, and local environmental laws (including common law), ordinances, rules, regulations and orders, which apply to Airline's operations at the Airport (collectively, "Environmental Laws") and acknowledge that such Environmental Laws change from time-to-time. Each Airline must keep informed of any such future changes.

(ii) comply with all applicable Environmental Laws which apply to Airline's operations. Each Airline shall hold harmless and indemnify the Authority for any violation by such Airline of such applicable Environmental Laws and for any non-compliance by such Airline with any permits issued to Airline or to the Authority (to the extent applicable to Airline) pursuant to such Environmental Laws, which hold harmless and indemnity shall include, but not be limited to, enforcement actions to assess, abate, remediate, undertake corrective measures or monitor environmental conditions and for any monetary penalties, costs, expenses, or damages, including natural resource damages, imposed against Airline, its employees, invitees, suppliers, or service providers or the Authority by reason of such Airline's violation or non-compliance.

(iii) cooperate with any investigation, audit or inquiry by the Authority or any governmental or quasi-governmental agency, regarding possible violation by Airline of any Environmental Law upon the Airport, to the extent applicable or potentially applicable to Airline.

(iv) promptly provide to the Authority any notice of violation, notice of non-compliance, or other enforcement action relating to the Airport promptly after receipt by Airline or Airline's agent.

(b) Stormwater.

(i) Each Airline shall observe and abide by all stormwater rules and regulations as may be applicable to Airline and its use of the Authority's property.

(ii) Any stormwater discharge permit issued to the Authority may name such Airline as a co-permitee. Each Airline shall closely cooperate with the Authority to ensure compliance with any applicable stormwater discharge permit terms and conditions. Each Airline shall undertake such actions necessary to minimize the exposure of stormwater to "significant materials" generated, stored, handled or otherwise used by such Airline, as such term may be defined by applicable stormwater rules and regulations, by implementing and maintaining "best management practices" as that term may be defined in applicable stormwater rules and regulations.

(iii) Within ten (10) days after receipt of any written notice from the Authority or any governing authority relating to stormwater discharge requirements applicable to Airline, an Airline shall notify the Authority in writing if it disputes any of the stormwater permit requirements it is being directed to undertake. If an Airline does not provide such timely notice, such Airline shall undertake at its sole expense, unless otherwise agreed to in writing between the Authority and Airline, those stormwater permit requirements for which it has received written notice from the Authority, and Airline will hold harmless and indemnify the Authority for any violations or non-compliance by such Airline with any such permit requirements.

(c) Solid and Hazardous Waste.

(i) Each Airline shall comply with all applicable federal, state and local laws relating to such Airline's transportation, handling, storage, treatment or disposal of solid or hazardous waste at the Airport, and any rules and regulations promulgated thereunder, including but not limited to, ensuring that the transportation, storage, handling and disposal of such hazardous wastes are conducted in full compliance with applicable law.

(ii) Each Airline shall provide the Authority, or, at Authority's option, make available for review by the Authority, upon request, copies of all hazardous waste permit application documentation, permits, monitoring reports, transportation, responses, storage, disposal and contingency plans and material safety data sheets applicable to Airline's operations at the Airport, within ten (10) days after any such requests by the Authority, all of which shall be maintained in compliance with applicable Environmental Laws. Each Airline shall have, and shall implement as needed, to the extent required by applicable Environmental Laws, a written plan addressing containment and cleanup of fuel and/or oil spills.

(d) Air Quality. Each Airline agrees to comply with all applicable Environmental Laws relating to the quality of air in any confined or indoor spaces.

See Appendix E-4, Orlando International Airport.

Appendix E-4 provides a survey of additional contractual provisions used by other airports to address environmental risk.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to environmental risk:

- Include an indemnification provision that survives the termination of the agreement.
- Require the airlines to cooperate with any investigation or audit of the airport by any governmental agency regarding possible violations of environmental laws.
- Include nonreimbursed environmental costs in the airfield cost center.

F. Ground Transportation Agreements

Ground transportation agreements at an airport govern rights of access, rights to dwell, and rights to pick up and drop off passengers for commercial ground transportation companies.[6] These agreements seek to organize a highly competitive and crowded field and generate revenue to the airport through the granting of licenses. Any time heavy motor vehicle and pedestrian traffic are both present, risk of injury and property damage exist.

Identification of Risk

The risks attendant to ground transportation agreements are addressed through contractual

[6] Specific strategies, legal and regulatory conditions, and the objectives, advantages, and disadvantages associated with the use of private-sector companies for ground transportation and park services are discussed in *ACRP Report 36: Airport/Airline Agreements—Practices and Characteristics.* Ground transportation agreements are also addressed by *ACRP Report 33: Guidebook for Developing and Managing Airport Contracts,* Transportation Research Board (2011), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_033.pdf.

provisions and a variety of insurance instruments. The risks and risk mitigation strategies under the majority of these agreements are similar: the primary ones include unauthorized solicitation of passengers, personal injury to passengers and drivers, property damage, and performance.

1. Unauthorized Solicitation of Passengers.—Airports contract with numerous transportation providers (e.g., taxi cabs, hotel shuttles, public buses, etc.) to provide transportation services for their passengers. Ground transportation agreements must clearly delineate the areas that transportation providers are permitted to solicit passengers in an effort to maintain order among transportation providers and to ensure that airport passengers are being accommodated efficiently and without the use of pressured sales tactics. By granting licenses and permits to operate on airport property, the airport creates a revenue-generating enterprise and reduces injuries due to accident as a result of lack of organization.

Although not addressed by any of the example provisions provided in this digest, the growing popularity and prevalence of ride-hailing services, such as Uber and Lyft, have created both regulatory and monetary issues for airports. Ride-hailing companies and their drivers could seek to circumvent the regulations and fees imposed, through ground transportation agreements, on other licensed ground transportation providers by avoiding commercial lanes and instead dwelling in and using noncommercial pick-up and drop-off lanes. The covert nature of these operations increases traffic in noncommercial lanes, creates a competitive disadvantage for fee-paying licensed commercial transportation providers, and reduces revenue to the airport. Airports must balance the passenger's desire for greater and more convenient ground transportation choices (i.e., allowing Uber and Lyft to freely use the airport premises) with the need to maintain control and regulation over the ground transportation providers that use the airport's premises. Commercial ride-hailing services should follow the same rules as other commercial transportation companies, including entering into and abiding by ground transportation agreements and rules.

Example/Sample Provision

The following contractual provision is an example of how risk associated with the unauthorized solicitation of passengers may be addressed in a ground transportation agreement.

> *3.02. Use of Concession Space.* Concessionaire may use the Concession Space only for the operation of a non-exclusive concession for providing commercial ground transportation services to the public and for no other purposes, unless explicitly permitted to do so by this Agreement or otherwise authorized in writing by the Manager. Concessionaire shall not sell or offer for sale any service or merchandise not authorized by the Manager, nor shall Concessionaire place, maintain, or use in its operations hereunder, fixtures or furnishings in any areas located outside the Concession Space, regardless of whether such areas are adjacent to the Concession Space. Concessionaire covenants and agrees to operate its Concession in strict conformity with the Permitted Use.
>
> Express Restrictions. Unless otherwise authorized in writing by the Manager, Concessionaire shall not offer for sale items expressly restricted on the Summary Page; nor shall Concessionaire offer for sale any merchandise, services, or engage in any activity not specifically provided for under the terms of this Agreement.
>
> No Displays Outside the Concession Space. Concessionaire shall not place, install, maintain or use any racks, stands or other display of merchandise, trade fixtures or furnishings in or upon any areas located outside the Concession Space, regardless of whether such areas are adjacent to the Concession Space.
>
> No Solicitation Outside the Concession Space. In no event will Concessionaire engage in any activity on the Airport outside of the Concession Space for the recruitment or solicitation of business.
>
> 6.04 Operations. Concessionaire agrees to conduct its business to accommodate the public using the Airport and to operate the concession in the following manner:
>
> I. Concessionaire's employees and agents shall not engage in "high pressure" sales tactics or unfair or deceptive trade practices in the operation of the concession. Additionally, Concessionaire's employees and agents shall not engage in solicitation for or in connection with any services offered on or about the Airport by Concessionaire or any other party, except for offering Concessionaire's services to persons at the Concession Space. No payment shall be made to individuals, such as skycaps, for the purpose of diverting customers to Concessionaire's counter or vans. Concessionaire will not interfere with the operations of adjoining or other Airport tenants. Without limiting the foregoing, Concessionaire will not attempt to divert passengers who are waiting in line to obtain service from its competitors or who have pre-booked travel arrangements with any other ground transportation company. Failure by Concessionaire to comply with the provisions of this Section 6 shall constitute a material breach of this Agreement.
>
> *See* Appendix F-1, Denver International Airport.

Appendix F-1 provides a survey of additional contractual provisions used by other airports to address the risks associated with the unauthorized solicitation of passengers.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to the risks associated with the unauthorized solicitation of passengers:

- Clearly delineate the areas where the transportation providers are permitted to solicit passengers and conduct their operations.

• Specifically prohibit certain types of signage/displays and solicitation practices outside of designated areas.

• Require all commercial transportation providers to use commercial lanes and abide by all ground transportation rules.

2. Personal Injury to Passengers and Drivers.—The operation of motor vehicles in areas with heavy passenger and vehicle traffic (e.g., arrival and departure lanes) will invariably result in injuries to passengers and drivers. Airports must allocate liability for injuries incurred by third parties between themselves and the transportation providers that service the airport. Airports benefit from the broad indemnification obligations of the transportation provider (i.e., transportation providers indemnify for all liability and risk except where the injury or damage is caused by the airport's sole negligence) and from limiting their own indemnification obligations. Most important, the airport should require all commercial transportation companies to maintain acceptable levels of liability insurance, naming the airport as an additional insured under such policies.

Example/Sample Provision

The following contractual provision is an example of how risks associated with personal injury to passengers and drivers may be addressed in a ground transportation agreement.

9.01. Indemnity.

(a) Concessionaire hereby agrees to defend, indemnify, reimburse and hold harmless City, its appointed and elected officials, agents and employees for, from and against all liabilities, claims, judgments, suits or demands for damages to persons or property arising out of, resulting from, or relating to, directly or indirectly, its operations in connection herewith work performed under this Agreement, its construction of the Concession Improvements, or its use or occupancy of any portion of the Airport and including acts and omissions of officers, employees, representatives, suppliers, invitees, contractors, subcontractors, and agents of the Concessionaire; ("Claims"), unless such Claims have been specifically determined by the trier of fact to be the sole negligence or willful misconduct of the City. This indemnity shall be interpreted in the broadest possible manner to indemnify City for any acts or omissions of Concessionaire or its subcontractors either passive or active, irrespective of fault, including City's concurrent negligence whether active or passive, except for the sole negligence or willful misconduct of City.

(b) Concessionaire's duty to defend and indemnify City shall arise at the time written notice of the Claim is first provided to City regardless of whether Claimant has filed suit on the Claim. Concessionaire's duty to defend and indemnify City shall arise even if City is the only party sued by claimant and/or claimant alleges that City's negligence or willful misconduct was the sole cause of claimant's damages.

(c) Concessionaire will defend any and all Claims which may be brought or threatened against City and will pay on behalf of City any expenses incurred by reason of such Claims including, but not limited to, court costs and attorney fees incurred in defending and investigating such Claims or seeking to enforce this indemnity obligation. Such payments on behalf of City shall be in addition to any other legal remedies available to City and shall not be considered City's exclusive remedy.

(d) Insurance coverage requirements specified in this Agreement shall in no way lessen or limit the liability of the Concessionaire under the terms of this indemnification obligation. The Concessionaire shall obtain, at its own expense, any additional insurance that it deems necessary for the City's protection.

(e) This defense and indemnification obligation shall survive the expiration or termination of this Agreement.

See Appendix F-2, Denver International Airport.

Appendix F-2 provides a survey of additional contractual provisions used by other airports to address the risks associated with personal injury to passengers and drivers.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to risks associated with personal injury to passengers and drivers:

• Obtain indemnity from ground transportation providers for all operations, regardless of fault.

• Require ground transportation providers to maintain appropriate insurance coverage, naming the airport as an additional insured to cover liability related to personal injury that results from their operations on the airport premises.

3. Property Damage.—With the high volume of transportation vehicles that utilize airport property, damage to airport or private property is inevitable. Airports must therefore allocate responsibility among the parties for damages to airport property. Airports benefit from broad indemnification obligations of the transportation provider (i.e., transportation providers indemnify for all liability and risk except where damage is caused by the airport's sole negligence) and from limiting their own indemnification obligations. Most important, the airport should require all commercial transportation companies to maintain acceptable levels of liability insurance, naming the airport as an additional insured under such policies.

Example/Sample Provision

The following contractual provision is an example of how property damage risk may be addressed in a ground transportation agreement.

11.2 *Liability Insurance.* Company, at its own cost and expense, shall obtain and maintain or cause to be

obtained and maintained throughout the term of this Agreement, the following types of insurance naming the Authority, the City and the members including, but without limitation, all members of the governing board of the Authority, the Orlando City Council and the advisory committees of each), officers, agents and employees of each as additional insured's.

11.2.1 *Automobile.* Automobile Liability insurance (any auto, including owned autos, non-owned autos and hired autos). Limits for automobile liability insurance shall not be less than: (i) ONE MILLION AND NO/lOO DOLLARS ($1,000,000.00) for injuries and property damage per occurrence or accident, or (ii) such limits as the City of Orlando may from time to time require, whichever are higher, with such deductible as may be acceptable to the Executive Director. The Executive Director shall have the right to alter the monetary limits or coverage's herein specified from time to time during the term of this Agreement, and Company shall comply with all reasonable requests of the Executive Director with respect thereto.

11.2.2 *Commercial General Liability.* Limits of commercial general liability insurance shall not be less than ONE MILLION AND NO/lOO DOLLARS ($ 1,000,000.00), combined single limit or its equivalent, per occurrence, with contractual liability coverage for Company's covenants to and indemnification of the Authority and the City under this Agreement with such deductible as may be acceptable to the Executive Director. The Executive Director shall have the right to alter the monetary limits or coverage's herein specified from time to time during the term of this Agreement, and Company shall comply with all reasonable requests of the Executive Director with respect thereto.

11.2.3 *Workers' Compensation Insurance.* If the nature of Company's use of the Premises or business operations at the Premises are such as to place any or all of its employees under the coverage of workers' compensation or similar statutes, Company shall also purchase workers' compensation and employer's liability insurance or similar insurance with a company or companies acceptable to the Authority affording the required statutory coverage and containing the requisite statutory limits to be effective at least twenty (20) days prior to the Commencement Date or the commencement of any construction or installation on the Premises, whichever first occurs, and to be maintained by Company throughout the term of this Agreement. Employer's liability insurance limits shall be not less than FIVE HUNDRED THOUSAND AND NO/lOO DOLLARS ($500,000.00) for each of the "each accident," "disease policy limit," and "disease each employee" coverage's.

11.2.4 *Standards.* Such insurance shall provide that it is primary insurance as respects any other valid and collectible insurance Company may possess, as applicable, and that any other insurance the Company does possess shall be considered excess insurance only.

11.2.5 *Evidence of Insurance.* Company shall provide, upon execution of this Agreement, and at least thirty (30) days prior to the expiration of any insurance policy or policies theretofore provided hereunder, an original certificate or certificates of insurance as evidence that all coverage required hereunder is in effect. Such certificate provided by Company shall name the Authority, Company, the City and the members (including, without limitation, members of the governing Board of the Authority and the Orlando City Council, and members of the advisory committees of each), officers, employees and agents of each as additional insured to the extent applicable as described above, and shall provide that the policy or policies may not be canceled or modified nor the limits thereunder decreased without thirty (30) days' prior written notice thereof to the Authority. Company shall also provide the Authority with copies of such endorsements and other evidence of the coverage set forth in the certificate of insurance as the Authority may reasonably request.

11.3 *Property Insurance.* The Authority may, at its option, maintain property insurance on the Terminal Complex, but it is expressly understood that such insurance shall not cover Improvements, furnishings, trade fixtures, signs, equipment or other property of Company.

11.3.1 Company shall, without expense to the Authority, obtain and maintain in effect throughout the term of this Agreement, for the benefit of Company, the Authority and the trustee of certain of the Authority's outstanding Airport revenue bonds, as their interests may appear, property insurance on the Ml insurable value of all Improvements, furnishings, trade fixtures, signs and equipment hereafter installed on the Premises by Company, on a replacement cost basis, in such form and with such company or companies as the Executive Director shall approve. Such insurance shall be effective at least twenty (20) days prior to the Commencement Date or the commencement of any construction or installation on the Premises, whichever first occurs, and shall be maintained by Company throughout the term of this Agreement.

11.3.2 Upon execution of this Agreement or at least twenty (20) days prior to commencement of any construction or installation on the Premises, whichever first occurs, and at least thirty (30) days prior to the expiration of any policy or policies theretofore provided by Company under this Article 11.3, Company shall cause one or more original certificates of insurance to be furnished to the Executive Director evidencing such coverage, and such certificates shall name the Authority, Company and the trustee of certain of the Authority's outstanding Airport revenue bonds as loss payees as their interests may appear, and shall provide that the policy or policies will not be cancelled or reduced without thirty (30) days prior written notice thereof to the Authority.

11.3.3 Company, on behalf of itself and its insurance carrier, hereby waives any and all rights of recovery which it may have against the Authority or the City for any loss of or damage to property it may suffer as a result of any fire or other peril normally insured against under a policy of property insurance. The Authority, on behalf of itself and its insurance carrier(s), hereby waives any and all rights of recovery which it may have against Company for any loss of or damage to property it may suffer as the result of any fire or other peril to the extent such fire or other peril arises as a result of any act or omission of Company's licensees or invitees and the Authority is compensated for such loss or damage from the proceeds of any applicable policy of property insurance carried by the Authority; provided, however, that such waiver shall not apply with respect to the acts or omissions of Company's officers, partners, employees, agents, contractors or subcontractors, and shall apply only to the extent permitted by such applicable insurance policy without loss of any insurance coverage.

See Appendix F-3, Orlando International Airport.

Appendix F-3 provides a survey of additional contractual provisions used by other airports to address the risk of property damage.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to property damage risk:

- Obtain indemnity from ground transportation providers for all operations, regardless of fault.
- Require ground transportation providers to maintain appropriate insurance coverage, naming the airport as an additional insured to cover liability related to property damage that results from their operations on the airport premises.

4. Performance.—Satisfactory performance of airport agreements is critical to airport operations. A transportation provider's failure to perform its duties or the unsatisfactory performance of its duties and obligations under the ground transportation agreement creates significant risks for airports in the form of default and nonpayment. Through the bidding process, competitors have been excluded or limited from the airport, and therefore, the nonperformance and/or nonpayment by any one ground transportation provider will adversely affect airport revenue and result in insufficient transportation options to and from the airport for passengers. The risks associated with deficient performance of ground transportation agreements can be addressed through clarity in the scope of services and the inclusion of a performance bond to insure satisfactory performance.

Example/Sample Provision

The following contractual provision is an example of how performance risk may be addressed in a ground transportation agreement.

> *Article 10 Contract Bond or Letter of Credit.* Company shall provide to the Authority on the execution of this Agreement, a Contract Bond or, at the option of Company (and subject to certain additional requirements as described below), an irrevocable standby Letter of Credit ("Letter of Credit") in the form attached hereto as Item III-A and Item III-B. Such Contract Bond or Letter of Credit shall be effective as of the Commencement Date hereof and shall be maintained by Company throughout the Term of this Agreement in an amount equal to fifty percent (50%) of the initial Minimum Annual Concession Fee during the Initial Period, fifty percent (50%) of the initial Minimum Annual Concession Fee during the next Agreement Period, and during each subsequent Agreement Period, fifty percent (50%) of the Minimum Annual Concession Fee of the immediately preceding Agreement Period (in each event the amount of the Contract Bond or Letter of Credit shall be rounded to the nearest One Thousand Dollars ($1,000.00)). Such Contract Bond or Letter of Credit shall guarantee the faithful performance by Company of all of its obligations under this Agreement, including, without limitation, the payment by Company of all Concession Fees, Privilege Fees, Dwell Time Fees and other amounts due hereunder. Such Contract Bond or Letter of Credit shall be on a form provided by the Authority. Any Contract Bond shall be on a form to be provided by the Authority and shall be written by a company licensed to do business in the State of Florida, which is acceptable to the Executive Director. Any Letter of Credit provided hereunder shall be on a form provided by the Authority and shall be issued by a bank, acceptable to the Executive Director, which is located within Orange County, Florida (unless the Executive Director waives such requirement in writing). In the event that any Contract Bond or Letter of Credit provided under this Article 10 shall be for a period of less than the full Term of this Agreement, or in the event the amount of the Contract Bond or Letter of Credit is to be increased or decreased, Company shall provide a renewal or replacement Contract Bond or Letter of Credit which complies with the requirements of this Article 10 at least one hundred eighty (180) days prior to the date on which the previous Contract Bond or Letter of Credit expires. The Letter of Credit must contain a condition that it shall be deemed automatically extended without amendment for one (1) year from the expiration date herein, or any future expiration date, unless ninety (90) days prior to any expiration date the Bank on which the Letter of Credit is drawn, shall notify the Authority by Registered Mail that such Bank elects not to consider the Letter of Credit renewed for any such additional period. Company's failure to timely provide a replacement Contract Bond or Letter of Credit hereunder shall constitute a default under this Agreement and the Authority shall be entitled to any remedies provided hereunder, and may, without limitation, proceed to recover under Company's existing Contract Bond or draw on the full amount of its existing Letter of Credit. If Company provides the Authority with a Letter of Credit or Contract Bond, Company shall maintain such Letter of Credit or Contract Bond in effect for at least one (1) year after the expiration or earlier termination of the Term hereof in the amount required for the last Agreement Period. However, the Authority shall release any existing Letter of Credit or Contract Bond provided by Company upon the Authority's receipt of a replacement Letter of Credit or Contract Bond that complies with the requirements of this Article 10.

See Appendix F-4, Orlando International Airport.

Appendix F-4 provides a survey of additional contractual provisions used by other airports to address performance risk.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to performance risk:

- Provide for and perform an audit of performance and payment at the discretion of the airport, as fees based on self-reporting of trips and dwell time may be difficult to track.
- Require ground transportation providers to obtain a payment and performance bond with a third-party surety to cover events of default.

G. Vendor/Purchasing Agreements

The primary risk associated with vendor/purchasing agreements is ensuring that airports acquire goods and services necessary for the safe and efficient operation of the airport. Most acquisition of goods and services is accomplished through bid or proposal processes conducted by purchasing departments. The resulting agreements are often standardized and are entered into with a low bidder.

Identification of Risk

The risks attendant to vendor/purchasing agreements are addressed through contractual provisions and a variety of insurance instruments. The risks under the majority of these agreements are similar, with the primary ones including performance, federal security violations, personal injury, and property damage.

1. Performance.—Satisfactory performance of airport agreements is critical to safe and efficient airport operations. A vendor's failure to perform, or the insufficient performance of its duties and obligations under the vendor/purchasing agreement, creates risks for airports that result from necessary goods and services being inadequate or otherwise not available when needed.

It is not uncommon for a bidder to submit pricing in connection with an airport solicitation that does not allow the bidder to perform profitably. Underbidding may be the result of a misunderstanding of the scope, a mistake in pricing calculations, or a desire to enhance the bidder's reputation and resume by "buying the job."

An airport must be careful about judging a bidder's ability to perform per the pricing submitted. If the bid is dramatically lower than the airport's own estimate, however, the airport should consider consulting the bidder to confirm the bid.

To prevent bidders from taking shots at winning contracts with low bids only to withdraw once they decide they cannot perform profitably, the airport could require bid bonds with the solicitation. A bid bond pays the airport its damages if the low bidder refuses to perform at the submitted price.

Whether or not a bid bond is required, a performance bond is highly recommended, so that if the bidder refuses or fails to perform, the airport can require replacement goods and services on an emergency basis at what will almost certainly be a higher price.

Example/Sample Provision

The following contractual provision is an example of how performance risk may be addressed in a vendor/purchasing agreement.

> *7.03 Security for Performance and Payment.* Prior to execution of this Concession Lease, Concessionaire Tenant shall provide City a Performance Bond or Letter of Credit acceptable to the City Attorney's Office, in an amount equal to the first years MAG [Minimum Annual Guarantee], payable to City. Thereafter, Concessionaire Tenant shall at all times maintain such letter or other security in an amount equal to the amount of the Minimum Annual Guarantee applicable to each Contract Year. Said letter of credit or other security shall be conditioned to ensure the faithful and full performance by Concessionaire Tenant of all covenants, terms, and conditions of this Concession Lease and to stand as security for payment by Concessionaire Tenant of all valid claims by City against Concessionaire Tenant. Such guarantee will serve as a surety or security for the full and faithful performance of all terms, covenants, and conditions of this Concession Lease including but not limited to the rentals, fees, and charges to be paid, throughout the entire term of this Concession Lease. The form of all required letters of credit or other security and their surety company must be satisfactory to City Attorney's Office.
>
> *See* Appendix G-1, Salt Lake City International Airport.

Appendix G-1 provides a survey of additional contractual provisions used by other airports to address the risk of performance.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to performance risk:

- Prepare a clear scope and specifications.
- Require vendors to obtain a performance bond with a third-party surety or provide a letter of credit that will secure payment in the event of default.
- Consider a bid bond to discourage bidders from underbidding jobs and withdrawing if they decide the job is not profitable.

2. Federal Security Violations.—Airport security is a top priority, and airports must ensure that vendors' employees who access secure areas of the airport have been properly vetted and are complying with all federal security regulations imposed on the airport and its employees and contractors. Federal regulations apply to vendors' employees the same as any other airport employee. As a result, vendor agreements must detail the measures vendors must take to ensure compliance with federal security standards. Vendors must agree to reimburse the airport for any fines imposed on the airport in the event of a security violation by a vendor's employee or contractor.

Example/Sample Provision

The following contractual provision is an example of how risks associated with federal security violations may be addressed in a vendor/purchasing agreement.

14.19. Security. A. Concessionaire's Security Procedures. Concessionaire shall submit its written operating and security procedures for its operations hereunder to the City for review at least thirty (30) days prior to the Rent Commencement Date, or if Concessionaire Opens for Business earlier than the Required Opening Date, at least seven (7) days prior to the Required Opening Date. Concessionaire shall revise such operating and security procedures as necessary to obtain the City's approval.

B. Compliance. Concessionaire shall cause its officers, contractors, agents, and employees to comply with all existing and future security regulations adopted by the City pursuant to Part 107, Federal Air Regulations of the Federal Aviation Administration, as it may be amended from time to time. With respect to Airport security, it is a material requirement of this Agreement that Concessionaire shall comply with all rules, regulations, written policies, and authorized directives from the City and/or the Transportation Security Administration ("TSA"). Violation by Concessionaire or any of its employees of any rule, regulation, or authorized directive from the City or TSA with respect to Airport Security shall constitute a material breach of this Agreement. Any person who violates such rules may be subject to revocation of his/her access authorization. Concessionaire will fully reimburse the City for any fines or penalties levied against the City for security violations as a result of any actions on the part of Concessionaire, its agents, contractors, suppliers, guests, customers, or employees. Concessionaire will also fully reimburse the City for any attorney fees or related costs paid by the City as a result of any such violation.

C. Changes in Security Status. Concessionaire understands and acknowledges that its ability to remain open and sell its authorized items under this Agreement is subject to changes in alert status as determined by TSA, which is subject to change without notice. If the security status of the Airport changes at any time during the Term (or any extended term) of this Agreement, Concessionaire shall take immediate steps to comply and assist its employees, agents, independent contractors, invitees, successors, and assigns in complying with security modifications that occur as a result of the changed status. At any time, Concessionaire may obtain current information from the Airport Security Office regarding the Airport's security status in relation to Concessionaire's operations at the Airport.

D. Access Keys and Badges. Concessionaire shall return to the City all access keys or access badges issued to it for any area of the Airport, whether or not restricted once this Agreement expires or terminates or upon the City's demand. If Concessionaire fails to do so, Concessionaire shall be liable to reimburse the City for all the City's costs for work required to prevent compromise of the Airport security system. The City may withhold funds in the amount of such costs from any amounts due and payable to Concessionaire under this Agreement.

See Appendix G-2, Denver International Airport.

Appendix G-2 provides a survey of additional contractual provisions used by other airports to address the risks associated with federal security violations.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to risks associated with federal security violations:

- Require vendors to provide written operating and security procedures for their operations, which should be subject to airport approval.
- Require vendors and their officers, contractors, agents, and employees to comply with FAA regulations and to maintain authorized security status from TSA.
- Require vendors to indemnify the airport for fines and costs arising out of a security violation by a vendor or its employee or contractor.

3. Personal Injury.—Airports must allocate liability between themselves and the vendors utilizing space or performing services in the airport for injuries incurred by third parties or vendor employees. Airports benefit from the broad indemnification obligations of the vendor (i.e., vendors indemnify for all liability and risk except where the injury or damage is caused by the airport's sole negligence) and from limiting their own indemnification obligations. Most important, the airport should require all vendors to maintain acceptable levels of liability insurance, naming the airport as an additional insured under such policies.

Example / Sample Provision

The following contractual provision is an example of how personal injury risk may be addressed in a vendor/purchasing agreement.

5.11 Safety. Concessionaire Tenant agrees to take necessary safety precautions within its reasonable control and comply with applicable provisions of federal, state and local safety laws and building codes to prevent accidents or injury to any of its employees, agents, customers or others on, about or adjacent to the Premises or any parking areas. This safety requirement shall not relieve any contractor or consultant performing work for Concessionaire Tenant from complying with the safety requirements of its contract or applicable law. City may, but is not obligated to, stop Concessionaire Tenant's operations if safety laws or safe work practices are not being observed.

7.01 Indemnity Provisions. (a) Concessionaire Tenant shall, at its sole cost and expense, indemnify and hold City and its officers, board members, departments, representatives, City authorized representative(s), agents, employees, affiliates, successors and assigns harmless from and against all losses, claims, demands, suits, actions, legal or administrative proceedings, damages, costs, charges and causes of action of every kind or character whatsoever, including, but not limited to, reasonable attorney's fees and other legal costs such as those for paralegal, investigative, legal support services and the actual costs incurred for expert witness testimony, (collectively "Claims") directly or indirectly arising from, related to or connected with, in whole or in part, Concessionaire Tenant's work under the Agreement, including but not limited to Claims directly or indirectly arising from, related to or connected with, in whole or in part: any act, omission, fraud, wrongful or reckless conduct, fault or negligence by Concessionaire Tenant or its officers, directors, agents, employees,

subcontractors or suppliers of any tier, or by any of their employees, agents or persons under their direction or control; violation by Concessionaire Tenant or Concessionaire Tenant's officers, directors, agents, subcontractors or suppliers of any tier, or by any of their employees, agents and persons under their direction or control, of any copyright, trademark or patent or federal, State or local law, rule, code, regulation, policy or ordinance; nonpayment to any of Concessionaire Tenant's subcontractors or suppliers of any tier, or if any officers, agents, consultants, employees or representatives of Concessionaire Tenant or its subcontractors or suppliers of any tier; and, any other act, omission, fault or negligence, whether active or passive, of Concessionaire Tenant or anyone acting under its direction or control or on its behalf in connection with or incidental to the performance of this Agreement (collectively "Acts and Omissions"). This indemnification obligation includes any penalties or fines assessed by the Federal Aviation Administration or Transportation Security Administration as well as any other costs to the City, such as investigation and security training, incurred as a result of any violation of federal security regulations, including the Airport security plan, by the Concessionaire Tenant, its subcontractors, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable.

(h) The indemnification obligations of this Agreement shall not be reduced by a limitation on the amount or type of damages, compensation or benefits payable by or for the Concessionaire Tenant, a subconsultant or subcontractor under workers' compensation acts, disability benefits acts, or other employee benefit acts.

See Appendix G-3, Salt Lake City International Airport.

Appendix G-3 provides a survey of additional contractual provisions used by other airports to address the risk of personal injury.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to personal injury risk:

- Obtain indemnity from vendors for all operations, regardless of fault.
- Require vendors to maintain appropriate insurance coverage, naming the airport as an additional insured to cover liability related to personal injury that results from their operations on the airport premises.

4. Property Damage.—As part of many vendor/purchasing agreements, vendors are permitted to build-out and occupy space within the airport. Vendors' activities in developing their space and the continued use of that space may result in damage to airport property. Airports must allocate responsibility among the parties for damages to airport property.

Example/Sample Provision

The following contractual provision is an example of how property damage risk may be addressed in a vendor/purchasing agreement.

15.3 General Provisions. The Contractor shall, during the term of this Contract, repair any damage caused to real or personal property of the Authority and/or its tenants, wherever situated on the Airport, caused by the intentional, reckless, or negligent acts or omissions of the Contractor's officers, agents, or employees, and any subcontractors and their officers, agents, or employees, or, at the option of the Authority, the Contractor shall reimburse the Authority for the cost of repairs thereto and replacement thereof accomplished by or on behalf of the Authority.

See Appendix G-4, Orlando International Airport.

Appendix G-4 provides a survey of additional contractual provisions used by other airports to address property damage risk.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to property damage risk:

- Obtain indemnity from vendors for all operations, regardless of fault.
- Require vendors to maintain appropriate insurance coverage, naming the airport as an additional insured to cover liability related to property damage that results from their operations on the airport premises.

H. Software/IT Agreements

Software systems are critical to airport operations, including such functions as the airport's financial systems and passenger flight information displays. Software that does not conform to the desired specifications, and thus fails to perform to the standards required by the airport, can significantly hinder airport operations, and ultimately, airport revenues.

In addition, many software solutions today do not reside on airport servers but are hosted remotely and accessed through the Internet. Although this configuration may reduce airport hardware costs, it creates the additional risk that, even if the software meets specifications, the server farm host may lose power, go out of business, suffer a fire or other calamity, etc. As a result, airports need redundant software systems and/or source code escrows to allow for continued operations, despite access disruption to cloud-based systems.

Identification of Risk

The risks attendant to software/IT agreements are addressed through contractual provisions and a variety of insurance instruments. The risks and risk mitigation strategies under the majority of these agreements are similar, with the primary ones including system downtime, system security, performance, and obsolescence.

1. System Downtime.—One of the primary risks associated with software/IT agreements is the impact on airport operations related to software systems being out of operation for any length of time. System downtime can result in flight delays, communication issues, and compromised airport security. Airports must ensure that the software/IT agreements provide safeguards against system failures and backup systems in the event of system failure. One such safeguard that can help minimize system downtime, especially with regard to remote cloud-based software systems, is the implementation of redundant software systems, which provide a backup in the event of a system failure. Another contractual safeguard used by many airports is a source code escrow, whereby the software or system developer places the source code for the software in escrow and permits access to the source code under certain circumstances as necessary.

Example/Sample Provision

The following contractual provision is an example of how risk associated with system downtime may be addressed in a software/IT agreement.

> A.2. Source Code. Consultant hereby grants to City a license to use all source code for the entire Software Program and PMSS ("Source Code") for the purposes described in this Agreement. This Source Code will be placed in an agreed to escrow account with the City identified as beneficiary and be accessible to the City on the terms and conditions set forth in the Escrow Agreement ("Escrow Agreement") and the beneficiary registration form ("Beneficiary Registration Form"), which shall be attached hereto and be part of this Agreement as Attachment 6 at such time as each is properly and fully executed. The Source Code shall be kept current with the latest release of the Software Program in use by the City.
>
> a. City Access to Source Code. City may gain access to the Source Code by requesting the release of deposit materials ("Deposit Materials") listed in Appendix 1 of the Beneficiary Registration Form. City will follow the release process set forth in the Escrow Agreement, and the release conditions as set forth in Appendix 1 of the Beneficiary Registration Form.
>
> b. Adequacy of Deposit Materials. The escrow company acts as a depository only of the Deposit Materials. Consultant shall be responsible for, without limitation, the completeness, accuracy, suitability, state, format, quality content, correctness of the Deposit Materials. Consultant shall be responsible for any loss of Deposit Materials due to defective, outdated, unreliable storage media (e.g., CD ROMs, magnetic tape, disks, and other such media) and for the degradation of storage media. If the City is aware or believes that the Source Code or any Deposit Materials identified in Appendix 1 of the Beneficiary Registration Form are incomplete or inadequate Consultant shall resolve the matter as soon as reasonably practical to City's satisfaction.
>
> c. Verification of Deposit Materials. The escrow company providing the escrow services for Consultant under the Escrow Agreement will not be responsible for verifying the completeness, accuracy, suitability, state, format, safety, quality, or content of the Deposit Materials. However, at the request of the City, Consultant shall instruct and pay for the escrow company to conduct technical verifications of the Deposit Materials for the City in accordance with a technical verification addendum to the Beneficiary Registration Form and at the escrow company's then current fees plus expenses for the technical verifications.
>
> d. Fees.
>
> 1) Beneficiary Fee. Consultant will be responsible for paying annual beneficiary fees. Consultant will pay the beneficiary fees to the escrow company on behalf of City in accordance with the terms and fee schedule attached to the Beneficiary Registration Form as Exhibit A.
>
> 2) Release Fee. In the event that City requests and is granted a release of the Deposit Materials, City shall pay to the escrow company the Release Fee as described in Section 16(c) of the Escrow Agreement. If the Deposit Materials are released to the City at the instruction of Consultant as described in Section 16(f) to the Escrow Agreement, the Consultant shall pay the release fee to the escrow company.
>
> 3) Release Costs. City shall pay the escrow company for reasonable costs incurred by the escrow company in releasing, copying and delivering the Deposit Materials to the City. All other out-of-pocket costs reasonably incurred by the escrow company in connection with the Escrow Agreement are reimbursable to the escrow company by, 1) the City if it requests the release or, 2) by Consultant if it instructs the escrow company to release the Deposit Materials.
>
> e. In the event that Consultant changes its current escrow services provider to a different provider, Consultant will inform City in writing prior to such change. Consultant will be responsible for establishing an escrow service agreement acceptable to City.
>
> f. In the Escrow Agreement this Agreement document is referred to as the "License Agreement." The Parties hereby agree that any reference to City's License Agreement in the Escrow Agreement and Beneficiary Registration Form will hereby mean this Agreement document.
>
> g. Dispute resolution. Paragraph 20 of the Escrow Agreement states certain conditions for resolutions of disputes; however, Consultant agrees that all actions between City and Consultant in connection with the Escrow Agreement, including without limitation court proceedings, administrative proceedings, arbitration and mediation proceedings, shall be initiated within Salt Lake County as stated under Article 34 of this Agreement, and that the provisions of Paragraph 20 of the Escrow Agreement are not applicable to any such actions between the City and Consultant.
>
> *See* Appendix H-1, Salt Lake City International Airport.

Appendix H-1 provides a survey of additional contractual provisions used by other airports to address the risk associated with system downtime.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to risk associated with system downtime:

• Obtain indemnity from contractor for all loss, damages (direct and consequential), and costs incurred by the airport as a result of system downtime, regardless of fault.

• Include uptime guarantees, coupled with downtime penalties, in the agreement.

• Negotiate source code escrows and/or redundant host systems for Web-based hosted software.

2. Software Security.—Airport software/IT systems are no doubt the subject of numerous attempted cyberattacks, any one of which could shut down airport operations or endanger the safety of the airport passengers. Proper security of airport software/IT systems should include both software and hardware security solutions, including data encryption, data masking, and routine backups of data. Software/IT agreements must explicitly provide that any software and/or hardware installed and utilized by the airport must be compliant with all federal security standards.

Example / Sample Provision

The following contractual provision is an example of how risk associated with software security may be addressed in a software/IT agreement.

> I. Security Premises, Equipment, Data and Personnel. Vendor and/or Order Fulfiller may, from time to time during the performance of the Contract, have access to the personnel, premises, equipment, and other property, including data, files and/or materials (collectively referred to as "Data") belonging to the Customer. Vendor and/or Order Fulfiller shall use their best efforts to preserve the safety, security, and the integrity of the personnel, premises, equipment, Data and other property of the Customer, in accordance with the instruction of the Customer. Vendor and/or Order Fulfiller shall be responsible for damage to Customer's equipment, workplace, and its contents when such damage is caused by its employees or subcontractors. If a Vendor and/or Order Fulfiller fails to comply with Customer's security requirements, then Customer may immediately terminate its Purchase Order and related Service Agreement.
>
> *See* Appendix H-2, Dallas/Fort Worth International Airport.

Appendix H-2 provides a survey of additional contractual provisions used by other airports to address the risk associated with software security.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to risk associated with software security:

• Explicitly provide that any software installed and utilized by the airport must be compliant with all federal security standards.

• Allocate responsibility for damages incurred by the airport or third parties, of any kind, that results from breaches of the software system to the vendor.

• Ensure that the software and/or hardware used include data encryption and routine data backups.

3. Performance.—Satisfactory performance of airport software/IT agreements is critical to airport operations. It is imperative to airport operations that software and IT systems perform as intended. A software program failure or its failure to perform in accordance with its specifications creates significant risks for airports in the form of potential system downtime and compromised airport security. The risks associated with deficient performance of software/IT agreements can be addressed through clarity in the scope of services and specifications and the inclusion of a performance bond to insure satisfactory performance.

Example / Sample Provision

The following contractual provision is an example of how performance risk may be addressed in a software/IT agreement.

> ARTICLE 12. LETTER OF CREDIT OR PERFORMANCE BOND
>
> Prior to execution of this Agreement, Consultant shall provide City a letter of credit or performance bond in an amount equal to $500,000, payable to City. Thereafter, Consultant shall at all times maintain such letter of credit or performance bond in an amount equal to $500,000 during the term of this Agreement. Said letter of credit or performance bond shall be conditioned to ensure the faithful and full performance by Consultant of all covenants, terms, and conditions of this Agreement and to stand as security for payment by Consultant of all valid claims by City against Consultant. Such guarantee will serve as a surety or security for the full and faithful performance of all terms, covenants, and conditions of this Agreement for the configuration, implementation including all required testing, training and related service requirements of Attachments 1 and 2 through the Final Acceptance Date, as such term is defined in Attachment 1. The form of the required letter of credit or performance bond and their surety company must be satisfactory to the City Attorney's Office. Letter of credit or performance bond is only required for the implementation phase (through the Final Acceptance Date) of the contract as defined in Attachment 1 and not required for the support and maintenance phase of the contract.
>
> *See* Appendix H-3, Salt Lake City International Airport.

Appendix H-3 provides a survey of additional contractual provisions used by other airports to address the risk associated with performance.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to performance risk:

• Ensure that the scope of services and specifications are clearly delineated.

• Require the vendor to obtain a performance bond to insure satisfactory performance.

• Obtain a copy of the source code for all software programs.

4. Obsolescence.—Technology is changing faster than ever, making the risk of software obsolescence that much more prevalent. Airports must ensure that software/IT agreements provide for frequent, if not constant, updates to airport systems in order to mitigate the risk of having out-of-date software and IT systems.

Example/Sample Provision

The following contractual provision is an example of how obsolescence risk may be addressed in a software/IT agreement.

> *10. Maintenance and Support.*
>
> a. Maintenance and Support Services. After Acceptance of the Licensed Software and subject to the terms, conditions, and charges set forth in this Section, Contractor will provide City with maintenance and support services for the Licensed Software as follows: (i) Contractor will provide such assistance as necessary to cause the Licensed Software to perform in accordance with the Specifications as set forth in the Documentation; (ii) Contractor will provide, for City's use, whatever improvements, enhancements, extensions and other changes to the Licensed Software Contractor may develop, and (iii) Contractor will update the Licensed Software, as required, to cause it to operate under new versions or releases of the operating system specified in the Authorization Document so long as such updates are made generally available to Contractor's other Licensees.
>
> b. Changes in Operating System. If City desires to obtain a version of the Licensed Software that operates under an operating system not specified in the Authorization Document, Contractor will provide City with the appropriate version of the Licensed Software, if available, on a 90-day trial basis without additional charge, provided City has paid all maintenance and support charges then due. At the end of the 90-day trial period, City must elect one of the following three options: (i) City may retain and continue the old version of the Licensed Software, return the new version to Contractor and continue to pay the applicable rental or license fee and maintenance charges for the old version; (ii) City may retain and use the new version of the Licensed Software and return the old version to Contractor, provided City pays Contractor the applicable rental or license fee and maintenance charges for the new version of the Licensed Software; or (iii) City may retain and use both versions of the Products, provided City pays Contractor the applicable rental or license fee and maintenance charges for both versions of the Licensed Software. City will promptly issue the necessary Authorization Document(s) to accomplish the above.

See Appendix H-4, San Francisco International Airport.

Appendix H-4 provides a survey of additional contractual provisions used by other airports to address obsolescence risk.

Methods to Contractually Mitigate Risk

The following list provides topics and issues to address when drafting or reviewing a contractual provision related to obsolescence risk:

• Require the contractor to update the licensed software to cause it to operate under new versions or releases of the airport's operating system.

• Require the contractor to provide the airport with improvements, enhancements, extensions, and other changes to the licensed software as it is developed by the contractor.

CONCLUSION

Although the operation of airports involves significant risk, a well-prepared airport can minimize risk through the use of risk-shifting and risk-sharing provisions in its standard agreements and the use of tailored insurance vehicles. This digest highlights primary risks associated with standard aviation agreements and ways to address that risk. Airports should also consider, however, any unique circumstances and applicable laws when assessing new contract and insurance requirements, as the variations in airport finances, governance, size, or location can impact the options that are available. Once an airport can identify areas and opportunities to mitigate risk in its daily operations and then shift that risk to the appropriate entity, the airport, and as a result, the traveling public, will benefit.

APPENDICES

The following appendices are available online at www.trb.org by searching for *ACRP LRD 30*.

Appendix A: Professional Services Agreements
Appendix B: Construction Agreements
Appendix C: Repair/Maintenance Agreements
Appendix D: Tenant and User Agreements
Appendix E: Airline Signatory Agreements
Appendix F: Ground Transportation Agreements
Appendix G: Vendor/Purchasing Agreements
Appendix H: Software/IT Agreements

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