



Five Frustrating But Controllable Aspects of Contracts

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Course Description

“

By all means, shake hands on a deal, but then make sure to ask your lawyers to record the details. It could be the best bill you ever pay!

”

- Richard Branson

This course is designed to introduce and review five standard contract provisions, explore their implications for your services, and propose some key considerations in negotiating more favorable contracts.

Learning Objectives

Participants in this session will:

- 1 Identify five typical contract provisions and understand whether they favor or disfavor design professionals;
- 2 Examine the ways in which contracts impact project liabilities;
- 3 Explore case law demonstrating the implications of poorly drafted contracts; and
- 4 Use their understanding of contracts to draft or negotiate terms that are critical in avoiding future liabilities.

Sample Standard Agreements



AIA



1

Updated regularly

2

Coordinated documents

3

Easy to modify



Standard Terms

Entire Agreement	Suspension/ Termination	Certifications
Right of Entry	Changes or Delays	Third Parties
Standard of Care	Indemnification	Limitation of Liability
Hazardous Materials	Dispute Resolution	Ownership of Documents
Approvals	Consequential Damages	Billing and Payment
Compliance	Reliance	Site Visits

Five Issues

Today We Will Be Discussing:



Scope of Services

Standard of Care

Right to Rely

Suspension/Termination

Indemnity



First Provision:

Scope of Services

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Scope of Basic Services

Scope of Basic Services Provision

Scope of basic services should address the following:

- 1** Basic Services that are provided
- 2** Services that may be provided for additional fee
- 3** Services not being provided

Avoid Broad and/or Vague Language

Be wary of language that states:

Design firm will provide any and all
design services necessary
for the completion of the project.”



Scope of Services

E500 - 2014 §1.01

“

[Design Professional] shall provide, or cause to be provided, the services set forth herein and in Exhibit A.

”

Additional Services

AIA B101-2017 §4.1

“

Additional Services listed below are not included in Basic Services but may be required for the Project. The Architect shall provide the listed Additional Services only if specifically designated in the table below as the Architect's responsibility, and the owner shall compensate the Architect as provided in Section 11.2.

”

Second Provision:

Standard of Care

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Standard of Care Defined

Standard of Care for Professionals

Exercise the degree of skill and care ordinarily exercised by other **design professionals** practicing under similar circumstances.

*Failure to meet this standard of care constitutes professional negligence

Elements – Negligence Claim

Whether or not you owe a duty, and whether or not you met that duty of care is determined, in part, by the standard of care.

- 1** **Duty** Duty of care
- 2** **Breach** Violation of duty of care
- 3** **Causation** Actual and proximate cause
- 4** **Damages** Harm suffered

Perfection is NOT required!

“

The undertaking of a [design professional] implies that s/he possesses skill and ability, including taste, sufficient to enable him/her to perform the required services at least ordinarily and reasonably well; and that he will exercise an apply in the given case, his/her skill and ability, his/her judgment and taste, reasonably and without neglect. But the **undertaking does not imply or warrant a satisfactory result**. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. **An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.**

”

Coombs v. Beede, 89 Me. 187, 188-89 (1896).

Perfection is NOT required!

“

Architects, doctors, engineers, attorneys, and others, deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional services people to gauge them with complete accuracy in every instance. Thus, just as doctors can't be certain that every operation will be successful...architects and engineers cannot be certain that a structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

”

City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978).

Key Terms

Terms to look for

“Ordinarily”
“Reasonable”
“Same or similar”

“Ordinarily used or provided”
“Same or similar circumstances”
“Same locality”

Phrases to look for

Standard of Care Sample Provision

AIA B101-2017 §2.2

“

The [Design Professional] shall perform their services consistent with the professional **skill and care ordinarily provided** by [Design Professionals] practicing **in the same or similar locality under the same or similar circumstances...**

”

Standard of Care Sample Provision

EJCDC E-500 §6.01

“

The standard of care for all professional [services] and related services performed or furnished by [Design Professional] under this Agreement will be **the care and skill ordinarily used** by members of the subject profession practicing under similar circumstances at the same time and in the same locality. [Design Professional] makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by [Design Professional].

”

Red Flag Terms to Avoid

Terms to avoid

“Highest”
“Best”
“Superior”
“First-Class”

“Highest standards in the profession”
“Best professional standards”
“Superior standard of care”

Phrases to avoid

Policy Exclusions

Contractual Liability

This Policy does not apply to any Claim(s):

as a result of **liability assumed by the Insured under any contract or agreement**. This Exclusion does not apply to liability for Damages that the Insured would have had in the absence of the contract or agreement.

Policy Exclusions

Express Warranties or Guarantees

This Policy does not apply to any Claim(s):

Based upon or arising out of any express warranties or guarantees. However, this Exclusion does not apply to a warranty or guarantee by the Insured that the Insured's Professional Services are in conformity with the standard of care applicable to that Professional Service.

Quiz #1

Standard of Care Warranty Provision

The [Design Professional] warrants and guarantees that its services under this agreement shall be performed in conformance with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

Answer #1

Standard of Care Warranty Provision

The [Design Professional] warrants and guarantees that its services under this agreement shall be performed in conformance with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

Third Provision:

Right to Rely

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Right to Rely

Establish Your Right to Rely

Clarify that you have the right to rely upon information furnished by or on behalf of the Owner. Otherwise, you may be inadequately compensated for any changes that result from an unforeseen condition. This becomes especially critical if you are taking over for a terminated design firm.

Right to Rely

AIA B101-2017 §3.1.2

“

...The [Design Professional] shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of services and information furnished by the Owner and Owner's consultants...

”

Claim Example

Metcalf Construction Company won a contract to design and build housing units for a Marine Corp Base in Hawaii.

Differing soil conditions caused Metcalf to incur more than
\$4.8 million in additional work.

Q15: This requires an independent investigation after award. Should we infer from this that any unforeseen soil conditions or variances from the Government's soil report will be dealt with by change order?

Answer: Yes, if there's a major disparity from the Government's soil reconnaissance report.



Fourth Provision:

Suspension & Termination Rights

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Suspension and Termination Rights

Suspension & Termination Provision

Suspension & Termination rights provision should address the following:

- 1** Your right to suspend or terminate services
- 2** Client's right to suspend or terminate services
- 3** Rights and obligations of the parties in the event of a suspension or termination.

Right to Suspend

AIA B101-2017 §9.1



If the Owner fails to make payments to the [Design Professional] in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement...



Disclaimer

AIA B101-2017 §9.1

“

...In the event of a suspension of services, the [Design Professional] shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Owner shall pay the [Design Professional] all sums due prior to suspension and any expenses incurred in the interruption and resumption of the [Design Professional's] services. The [Design Professional's] fees for the remaining services and time schedules shall be equitably adjusted...

”

Payment Upon Project Suspension

AIA B101-2017 §9.2



If the Owner suspends the Project, the [Design Professional] shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the [Design Professional] shall be compensated for expenses incurred in the interruption and resumption of the [Design Professional's] services. The [Design Professional's] fees for the remaining services and the time schedules shall be equitably adjusted.



Payment Upon Termination

AIA B101-2017 §9.6



If the Owner terminates this Agreement for its convenience pursuant to Section 9.5 or the [Design Professional] terminates this Agreement pursuant to Section 9.3, the Owner shall compensate the [Design Professional] for **services performed prior to termination, Reimbursable Expenses incurred, and costs attributable to termination**, including the costs attributable to the [Design Professional's] termination of consultant agreements.



License

AIA B101-2017 §7.3



The [Design Professional] grants to the Owner a nonexclusive license to use the [Design Professional’s] Instruments of Services solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations under this Agreement, including prompt payment of all sums due pursuant to Article 9 and Article 11...If the [Design Professional] rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.



Case Law

LifeCare Hospice
Client

Eberhard Architects, LLC
Design Professional



Bogart Architecture Inc., et al.
Client's Consultants,
Contractors and
Subcontractors

Design firm filed suit for infringement after Client and client's other consultants, contractors and subcontractors continued to use their Instruments of Services after the contract was terminated for Client's non-payment of fees.

Terms of the Non-Exclusive License



Upon execution of the Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service...provided that the Owner substantially performs its obligations, including prompt payment of all sums due, under this Agreement...If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.



Fifth Provision:

Indemnification

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Indemnification



We probably receive **more calls concerning indemnification** provision than any other single contract clause...



ACS Lawyers

Definition

Indemnity:

Security against hurt, loss, or damage.

*An indemnitor secures and indemnitee against hurt, loss, or damage.



Common Issues

1 Overbroad Parties

Indemnified **parties** are unnecessarily broad.

2 Overbroad Claims

Indemnified **claims** are unnecessarily broad.

3 Duty to Defend

Duty to defend goes **beyond** the design professional's **negligence**.

Overbroad Parties

Limit the duty to indemnify
to your client(s).

Clarify that this duty is owed only to your client(s).

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Red Flag Words

Beware of terms/phrases such as:

“agents”

“representatives”

“affiliates”

“servants”

“members”

“insurers”

“lenders”

“consultants”

“subconsultants”

“contractors”

Or any such extended list of indemnitees

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Overbroad Claims

Limit the duty to indemnify to your negligence.

Clarify that the duty to indemnify only arises once your negligence has been established.

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Over Inclusive Claims

Over Inclusive for 2 Reasons:

- 1) No limitation on **scope of triggering events**
 - a) “Any” connection with;
 - b) Non negligent acts; OR

- 2) No limitation on the **scope of liability**

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Broad Scope of Triggering Events

Beware of terms/phrases such as:

Not directly caused by your negligence:

“arising out of/from”
“in any way connected with”
“regardless of”
“whether or not caused by”
“allegedly caused”
“solely liable and responsible”

Not negligent acts:

“intentional fraud or misconduct”
“recklessness”
“willful misconduct”
“tortious misconduct”
“intentional acts”
“other improper conduct”

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Broad Scope of Liability

Beware of terms/phrases such as:

“any”, “all”, “any and all” ... claims, etc.

“suits or causes of action”

“fines or penalties”

“attorneys’ fees and defense costs”

“other liabilities”

“other obligations”

“any other kind of expense”

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Personal Liability - Engineers

Florida Statute § 471.023

*Similar statutes for Architects and Landscape Architects can be found at Florida Statute §§ 481.219 & 481.319.

(3) Except as provided in s. 558.0035, the fact that a licensed **engineer** practices through a business organization does not relieve the licensee from **personal liability for negligence**, misconduct, or wrongful acts committed by him or her...Any officer, agent, or employee of a business organization other than a partnership shall be **personally liable** and accountable only **for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control, while rendering professional services on behalf of the business organization...**

*See also Florida Statute § 558.0035, allowing design professionals to limit their individual liability in certain instances.

Personal Liability – Case Law



In *Gerhardt M. Witt v. La Gorce Country Club Inc.*, the Court affirmed a judgment holding the **design professional, personally liable for damages in excess of \$4 million** to La Gorce Country Club.

Duty to Defend

No duty to defend.

Steer clear of the duty to defend which arises regardless of any negligence.

Duty to Indemnify

ONLY arises **once negligence has been established.**

Duty to Defend

Arises **regardless of negligence.**

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Quiz #2

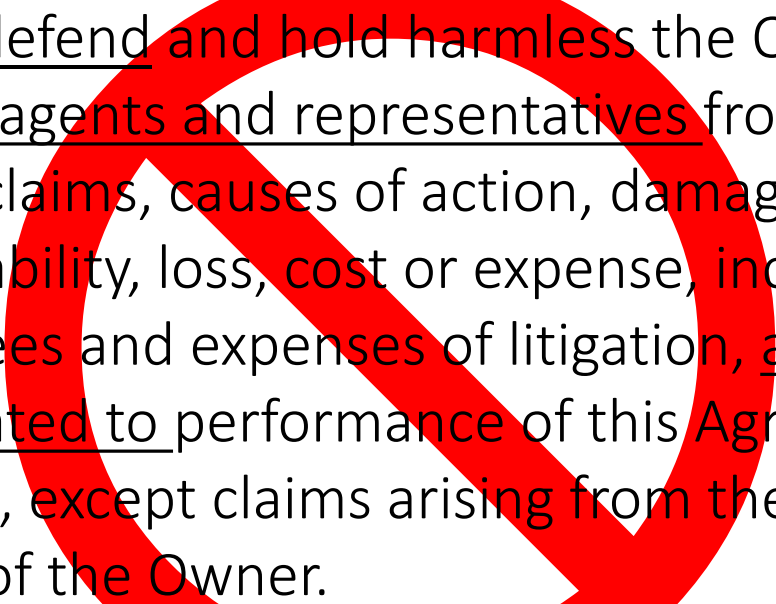
Design Professional agrees to:

indemnify, defend and hold harmless the Owner, its officers, employees, agents and representatives from and against any and all claims, causes of action, damages, claims for damages, liability, loss, cost or expense, including reasonable attorneys' fees and expenses of litigation, arising out of or in any way related to performance of this Agreement by Design Professional, except claims arising from the sole gross negligence of the Owner.

Answer #2

Design Professional agrees to:

indemnify, defend and hold harmless the Owner, its officers, employees, agents and representatives from and against any and all claims, causes of action, damages, claims for damages, liability, loss, cost or expense, including reasonable attorneys' fees and expenses of litigation, arising out of or in any way related to performance of this Agreement by Design Professional, except claims arising from the sole gross negligence of the Owner.



Indemnification

AIA B103-2017 §8.1.3



The [Design Professional] shall indemnify and hold the Owner and Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but **only to the extent they are caused by the negligent acts or omissions of the [Design Professional], its employees and its consultants in the performance of professional services under this Agreement.** The [Design Professional]'s obligation to indemnify and hold the Owner and the Owner's officers and employees harmless **does not include a duty to defend.** The [Design Professional]'s duty to indemnify the Owner [] shall be limited to the available proceeds of the insurance coverage required by this Agreement.



Limit Liability to

1

Set Fee

“not to exceed \$__ amount.”

shall not exceed the total amount of \$____ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

2

Contract Price

“not to exceed contract price.”

shall not exceed the total compensation received by Engineer under this Agreement.

3

Insurance Coverage

“to the extent such provisions or indemnity is covered by the design professional’s professional liability insurance.”

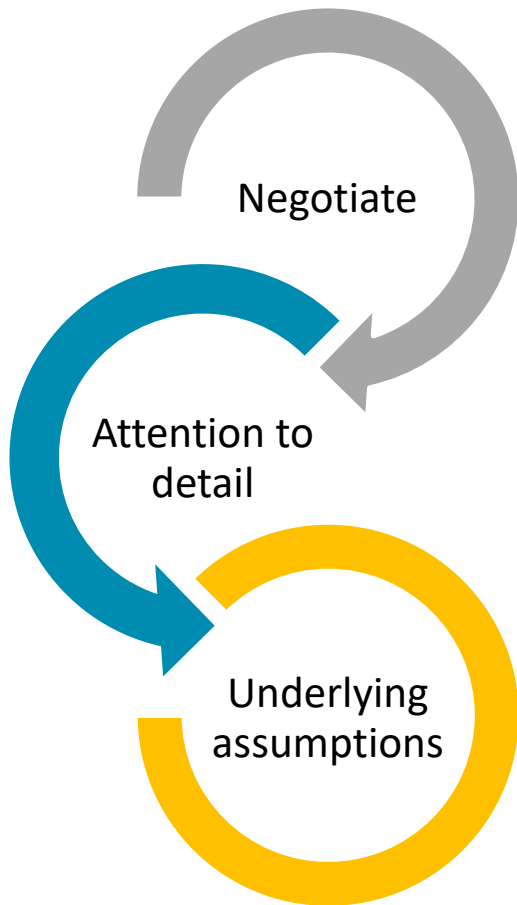
shall not exceed the total insurance proceeds paid on behalf of or to Engineer by Engineer’s insurers in settlement or satisfaction of Owner’s Claims under the terms and conditions of Engineer’s insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal).

Limitation of Liability

EJCDC E500-2014, Exhibit I

To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer’s officers, directors, members, partners, agents, employees, and Consultants, to Owner and anyone claiming by, through, or under Owner for any and all injuries, claims, losses, expenses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project, Engineer’s or its Consultants services or this Agreement from any cause or causes whatsoever, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied of Engineer or Engineer’s officers, directors, members, partners, agents, employees, or Consultants shall not exceed the total amount of \$ _____ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

Drafting Considerations



Specifically tailored to reflect each client's needs

Sufficient specificity to determine agreed upon scope

Note underlying assumptions

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
Continuing Education Systems Program

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