

Contract Guide Course for Design Professionals:

Part 1

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Learning Objectives

- Learn about key contract clauses creating risks;
- Learn to negotiate contract clauses to allocate risk more appropriately;
- Study and learn contractual risk transfer issues from case studies

Basic Elements of a Contract

- Key elements of any contract include:
- (1) scope of service,
- (2) performance schedule,
- (3) fee schedule, and
- (4) the general terms and conditions.

Key Principles for Contract Language

- Make the contract language clear and concise.
- Negotiate a “Reasonable” contract.
 - Who is best capable of managing the various risks?
 - Who can insure the risks?
 - What is the fee in relation to the risk?
 - What is the history of the client?
- Professional services contracts should not be on purchase order forms or construction contract forms.

Key Clauses of Concern (1)

- Advertising
- Americans with Disabilities Act
- As-built Drawings
- Certification
- Changes
- Compliance with Law
- Confidentiality
- Cost Estimates
- Damages
- Dispute Resolution
- Electronic Media/BIM + CADD
- Environmental Conditions and Services

Key Clauses of Concern (2)

- Green Design
- Incorporation by Reference
- Indemnification
- Inspection
- Insurance
- Limitation of Liability
- Notice Requirements
- Owner's Responsibilities
- Ownership of Documents
- Payment
- Permits and Licenses
- Redesign Obligations
- Rejection of Work
- Reliance on Information Provided by Others

Key Clauses of Concern (3)

- Responsibility for the Services of Others
- Right of Entry
- Schedule
- Scope of Services
- Severability
- Shop Drawings
- Site Safety
- Site Visits (see Inspection)
- Standard of Care
- Supplemental Terms and Conditions
- Survival
- Termination
- Third-Party Beneficiaries
- Time Limitations to Legal Action
- Underground Utilities
- Warranties and Guarantee

Advertising (problem)

- Beware of language in a contract that expressly forbids promotional use. E.g.,
 - *“No public announcement. DP shall not make any public announcement or publicity release regarding the Project or its Services under this agreement without Owner's prior written approval and shall not use any of the Contract Documents for public relations or promotional efforts without Owner's prior written approval.”*

Advertising (solution)

- AIA B101-2007, §10.7:
 - “The Architect shall have the right to include photographic or artistic representations of the design of the Project among the Architect’s promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations.... The Owner shall provide professional credit for the Architect in the Owner’s promotional materials for the Project.”

Americans with Disabilities Act (problem)

- Beware of a contract clause warranting the design will meet all laws and codes, such as ADA. E.g., example of such a clause is the following:
 - *“The Architect shall at all times observe and comply with all city, federal and state laws and regulations and shall defend the City...against any claim or liability arising from or based on the violations of any law or regulation.”*

ADA (solution)

- Agree only to the normal standard of care. E.g.,
- “DP agrees that, consistent with the standard of care applicable to this agreement, it will identify, interpret and apply the design requirements of applicable laws, regulations and ordinances, including the Americans with Disabilities Act (ADA).”
- See EJCDC Document E-500 (2008), 6.01 E on next slide

EJCDC Document E-500 (2008), 6.01 E

- “Engineer and Owner shall comply with applicable Laws and Regulations and Owner-mandated standards that Owner has provided to Engineer in writing. This Agreement is based on these requirements as of its Effective Date. Changes to these requirements after the Effective date of this Agreement may be the basis for modifications to Owner’s responsibilities or to Engineer’s scope of services, times of performance, and compensation.”

As-Built Drawings (solution)

- Call them “Record Drawings” instead. E.g., EJCDC.
- *“Record Drawings – Drawings depicting the completed Project, prepared by Engineer as an Additional Service and based solely on Contractor’s record copy of all Drawings, Specifications, addenda, change orders, work change directives, field orders, and written interpretations and clarifications, as delivered to Engineer and annotated by Contractor to show changes made during construction.”*

Certification (problem)

- Beware of language requiring certification of contractor's compliance with all plans and specs. E.g.,
 - *“Upon completion of the construction, the DP shall certify that the work was completed in accordance with the plans, specifications, and drawings.”*

Certification (AIA solution – knowledge within contract scope)

- AIA B101-2007, §10.4 set limits on signing certificates as follows:
 - “The Architect shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.”

Certification (EJCDC Solution – Only ascertainable conditions)

- EJCDC Document E-500 (2008) §6.01.F:
 - “Engineer shall not be required to sign any documents, no matter by whom requested, that would result in the Engineer having to certify, guarantee, or warrant the existence of conditions whose existence the Engineer cannot ascertain.”

Certification (solution – to best of knowledge instead of absolute)

- Instead of making certificate an absolute certainty of fact, condition it on “the best of knowledge, information and belief.” E.g.,
 - “To the best of our knowledge, information and belief, the project was constructed in general conformance with the design concept of the contract documents.”

Certificates of Payment (solution – best of knowledge)

- An example of an appropriate payment certification clause is the AIA B101-2007, §3.6.3.1, which provides in part:
 - “The Architect’s certification for payment shall constitute a representation to the Owner, based on the Architect’s evaluation of the Work as provided in Section 3.6.2 and on the data comprising the Contractor’s Application for Payment, that, to the best of the Architect’s knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents.”

Changes in DP's Services (problem)

- There is no limit here to what Owner can unilaterally assign to DP.
 - *“Owner may, at any time, by written notice, make changes in the Services to be provided, including changes in specifications and/or drawings, omit or add work, changes in the schedule, etc.”*
- *Change this by stating changes can only be made if within the general scope.*

Changes in DP Services (AIA solution)

- Architect is not to perform additional services until authorized by the Owner. Section 4.3.1 provides in pertinent part:
 - “Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following services until the Architect receives the Owner’s written authorization:
 - .1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including, but not limited to, size, quality, complexity, the Owner’s schedule or budget for Cost of the Work, or procurement or delivery method;

Compliance with Law (problem)

- This clause creates warranty of compliance.
 - *“Regardless of where services are to be performed, DP warrants that it shall at all times comply with any and all applicable foreign, federal, state, and local government laws, ordinances, statutes, standards, rules, regulations, and guidance, including but not limited to those relating to working hours, working conditions, health and safety, and the environment.”*

Compliance with Law (problem with indemnity)

- This clause creates liability if non-compliance with law was not intentional or negligent.
 - *“The DP shall indemnify and hold harmless the owner against any claims, damages and losses of any kind caused by, arising out of, or related to failure to comply with any laws, ordinances or regulations.”*

Compliance with Law (Apply Negligence Standard)

- Make compliance subject to the Standard of Care instead of an absolute. E.g.,
 - “DP and Owner will apply the reasonable standard of care to comply with applicable laws in effect at the time the services are performed hereunder, which to the best of their knowledge, information and belief, apply to their respective obligations under this Agreement.”

Compliance with Law (change in law – the solution -)

- A reasonable clause may be the following:
 - “In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Consultant and which result in a substantive change to the construction documents, the Consultant shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes.”

Confidentiality (problem)

- Example absolute prohibition on disclosing information learned while performing services:
 - *“The Architect agrees that all knowledge and information not already considered within the public domain which the Architect may acquire from the Owner or by virtue of performing services hereunder, will be regarded as strictly confidential and held in confidence and shall not be disclosed to anyone without the Owner’s prior written consent to such disclosure.”*

Confidentiality (solution)

- A reasonable approach to confidentiality is presented in the following clause:
- “The DP shall maintain the confidentiality of information specifically designated as confidential by the Owner or discovered by the DP during performance of its services, unless withholding such information would violate the law, create the risk of significant harm to the public or prevent the DP from establishing a claim or defense in an adjudicatory proceeding. The DP shall require of the DP’s Design consultants similar agreements to maintain the confidentiality of information specifically designated as confidential by the Owner.”

Cost Estimates (problem)

- Example problem clause:
 - *“The DP shall provide Owner with a Project Budget estimate. . . . If costs of construction exceed the estimate, the DP shall redesign the Project as necessary to meet the Owner's Project budget requirements at no additional cost to Owner.”*
- Here the DP is required to redesign even if it was not negligent.

Bid Overruns (problem)

- An example of an onerous clause applicable to post bidding is the following:
 - *“In the event that the lowest responsive bid exceeds the Fixed Limit of Construction Cost, the DP, if directed by Owner, shall redesign the Project with the assistance of the Construction Manager in order to bring the Project within budget. DP shall not be entitled to additional compensation for this redesign or any services required for the re-bidding of the Project. The DP shall be responsible for any and all costs incurred by the Owner which are attributable to the redesign or re-bidding of the Project.”*

Cost Estimate (solution)

- Revise above clauses so redesign is free only if redesign is due to negligent performance by DP.
- For example, insert language shown below:
- *In the event that the lowest responsive bid exceeds the Fixed Limit of Construction Cost, the DP, as the result of DP's negligence, the DP, if directed by Owner, shall redesign the Project”*

Cost Estimate (EJCDC solution)

- Section 5.01.A of EJCDC E-500 (2008) :
 - “Engineer’s opinions of probable Construction Cost are to be made on the basis of Engineer’s experience and qualifications and represent Engineer’s best judgment as an experienced and qualified professional generally familiar with the construction industry. However, because Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors’ methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by Engineer....”

Damages (problem)

- Beware of Liquidated Damages (LD) clauses.
 - LD's might be excluded from coverage deemed to be based on warranty of schedule (warranty exclusions) or if deemed to have been created only by contract promise and would not have been awarded by court in absence of contract language. (Contractual liability exclusion).

Damages (solution – waive Consequential damages)

- Include Waiver of Consequential Damages Clause, EJCDC E500 (2008), §6.10.E:
 - *Mutual Waiver*: To the fullest extent permitted by law, Owner and Engineer waive against each other, and the other's employees, officers, directors, members, agents, insurers, partners, and DPs, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project.

Damages (mutual waiver of consequential damages in AIA)

- A mutual waiver of consequential damages is provided at AIA B101-2007, §8.1.3 as follows:
 - “The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination of this Agreement, except as specifically provided in Section 9.7.”

Dispute Resolution (to litigate or arbitrate?)

- The introductory language to the AIA check-box in Section 8.2.4 states:
- “If the Owner and Architect do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.”

Dispute Resolution (consolidation)

- AIA §8.3.4.1 states:

- “Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).”

Dispute Resolution (prevailing party attorney's fees)

- *“Recovery of Litigation Costs.* In the event that legal action is brought by either party against the other in the Courts (including action to enforce or interpret any aspect of this agreement), the prevailing party shall be reimbursed by the other for the prevailing party's legal costs, in addition to whatever other judgments or settlement sums, if any, may be due. Such legal costs shall include, but not be limited to, reasonable attorney's fees, court costs, expert witness fees, and other documented expenses, in addition to any other relief to which it may be entitled.”

Electronic Documents (problems)

- EJCDC Document E-500 (2008) at §6.03 provides in relevant part:
- “C. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data’s creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files.

AIA – Electronic Model Elements.

- §4.1 *Reliance on Model Elements:*
- §4.1.1. “The Model Element Table at Section 4.3 identifies (1) the LOD required for each Model Element at the end of each Project phase, and (2) the Model Element Author responsible for developing the Model Element to the LOD identified. Each Model Element Author’s content is intended to be shared with subsequent Model Element Authors and Model Users throughout the course of the Project.”
- §4.1.2. “It is understood that while the content of a specific Model Element may include data that exceeds the required LOD identified in Section 4.3 for a particular phase, Model Users and subsequent Model Element Authors may rely on the accuracy and completeness of a Model Element consistent only with the content required

AIA – Electronic Model Elements continued, §4.1.3

- “Any use of, or reliance on, a Model Element inconsistent with the LOD indicated in Section 4.3 by subsequent Model Element Authors or Model Users shall be at their sole risk and without liability to the Model Element Author. To the fullest extent permitted by law, subsequent Model Element Authors and Model Users shall indemnify and defend the Model Element Author from and against all claims arising from or related to the subsequent Model Element Author’s or Model User’s modification to, or unauthorized use of, the Model Element Author’s content.”

Environmental Conditions

- The AIA B101-2007, §10.6:
- “Unless otherwise required in this Agreement, the Architect shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.”
- EJCDC Document E-500 (2008) at §6.09 similar clause

Green Design (problems)

- AIA B101-2007, §3.2.3 provides:
 - “The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches. The Architect shall reach an understanding with the Owner regarding the requirements of the Project.”

Green Design (problems) Watch the AIA language

- AIA B101-2007, §3.2.5.1 states:
 - “The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner’s program, schedule and budget for the Cost of Work. The Owner may obtain other environmentally responsible design services under Article 4.”

Green Design (solution)

- Clause stating DP does not warrant LEED certification is the following:
 - “The Project shall be designed in order to enable it to achieve LEED silver certification (except to the extent that the Owner directs otherwise in writing) and with a possible target of achieving LEED gold certification. The Owner shall render decisions concerning LEED certification prior to the completion of the Design Development Documents. The Owner acknowledges that many of the elements required to achieve any LEED certification are controlled by the Owner or third parties not under the control of Architect, and that the Architect does not warrant or guaranty that the Project will be LEED certified.”

Standard of Care (problem)

- The following clause in an owner-generated contract requires greater than the generally accepted standard.
 - *“DP represents that its services will be performed in a manner consistent with the highest standards of care, diligence and skill exercised by nationally recognized consulting firms for similar services.”*

Standard of Care (solution)

- AIA B101-2007, Section 2.2 reads as follows:
 - “The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.”

Standard of Care (solution 2)

- If the contract seems to contain language that might be interpreted as warranties and guarantees, consider adding a catch-all sentence to the “Standard of Care” section stating something like this:
 - “No warranty or guarantee, either express or implied, is made or intended by this Agreement.”

Standard of Care (solution 3)

- If “highest standard” language cannot be deleted, consider adding a clause like this:
 - “The performance standard is not intended to create a warranty, guarantee or a strict liability standard, and it is expressly agreed that DP is agreeing only that its services will not be performed negligently or with willful or reckless misconduct.”

CONTACT Information & DISCLAIMER

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Disclaimer: This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

Questions?

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