Contract Guide Course for Design Professionals:

Part 3

Presented by:

J. Kent Holland, J.D.

Construction*Risk, LLC*

Kent@ConstructionRisk.com
703-623-1932

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.

Redesign Obligations (the problem)

- DPs are increasingly being required to redesign projects due to construction costs exceeding the owner's budget.

- Since the DP has no control over material escalation costs or the bids submitted by potential contractors, it is not possible to guarantee that the bids received will not exceed the budget, or that as a result of normal change orders during construction, the payment budget will not be exceeded.

Redesign (The AIA B 101 approach)

- AIA B101, §6.7 states:
  - "If the Owner chooses to proceed under Section 6.6.4, the Architect, without additional compensation, shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. The Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6."

Redesign due to Constructability Issues (per ConsensusDOCS)

- ConsensusDOCS 245, §6.1.2 takes a similar approach to constructability issues:
  - "Architect/Engineer must promptly revise without compensation those documents which have not been approved by the Owner and to which the Owner has reasonable objections or which present constructability [sic] problems."

Redesign Costs (the solution)

- Revise the redesign clauses of contracts to state that unless the budget was exceeded due to the negligent performance of services by the DP, any additional services for redesign will be compensated.

Rejection of Contractor's Work

- Injured employees of construction contractors sometimes argue that the DP's authority to reject work of the contractor renders the DP liable for not rejecting unsafe work that contributed to the individuals injuries.

- Courts generally recognize that the responsibility of the architect is for the benefit of its client and not for the benefit of third parties.

Rejection of Work – The AIA approach

- AIA B101 at §3.6.2.2 addresses rejection of work and clearly establishes that the Architect owes no duty to the Contractor or its employee as follows:

  - "The Architect has the authority to reject Work that does not conform to the Contract Documents. … However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons or entities performing portions of the Work.

Reliance on Information Provided by Others (the problem)

- Some Owners fail to provide all information they have.
- Some contracts state information is for your general information only and not to be relied upon.
- By agreeing to language disclaiming the reliability of site information and other information provided by the Owner, DP may be forfeiting the right to recover costs or damages resulting from use of such information if it turns out to be incomplete or incorrect.
- In most cases, this transfer of liability from Owner to DP is not appropriate because the Owner has actually retained others to investigate the site and provide the information before retaining the DP.

Reliance on Information (AIA approach)

- AIA B101-2007, at §3.1.2 provides a reasonable basis for reliance as follows:

  - "The Architect shall coordinate its services with those services provided by the Owner and the Owner's Consultants. The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and the Owner's Consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information."

Reliance on Information (EJCDC)

- EJCDC E-500 (2008), §6.01.D likewise provides for reasonable reliance as follows:

  - *"Reliance on Others:* Subject to the standard of care set forth in Paragraph 6.01.A, Engineer and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards."

Responsibility for the Services of Others (problem)

- Some contracts impose duty to coordinate services of others than should not be accepted by the DP. ConsensusDOCS 240, par. 3.2.6 , e.g., states that DP must coordinate the services "*of all design consultants for the Project, including those retained by the Owner*."

- This is a problem because if the Owner's DPs do not properly perform, the Owner could claim that the Consultants contributed to the problem by failing to properly coordinate the services of Owner's Consultants.

Responsibility for Coordination (AIA approach)

- AIA B101, §5.6, provides that the Owner is responsible for coordinating its Consultants services with those of the architect. It provides the following:
  - "The Owner shall coordinate the services of its own Consultants with those services provided by the Architect. Upon the Architect's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's Consultants…."

Right of Entry (the problem)

- Some Owner-generated contracts contain clauses putting the entire burden for obtaining access rights, rights of way or easements, on the DP. An example of such an unfortunate clause is as follows:

  - "DP shall obtain all necessary easements, rights of way, rights of entry, permits and licenses to enter the proposed site for the purpose of performing services under this Agreement, including to conduct tests and collect data."

Right of Entry (the solution)

- Owner should accept that responsibility in the contract. The contract clause might then provide:

  - *"Permits and Rights of Entry.* DP shall assist the Owner to obtain all necessary permits and licenses directly related to services required to be performed by DP under this Agreement. . . . Owner shall provide a reasonable right of entry and any easements and all authorizations needed to enter upon property to perform services required under this Agreement."

Schedule
(Timeliness of Performance)

- Avoid "time of the essence" clauses. They suggest absolute guarantee of completion by a specific date.

- AIA B101-2007, at §2.2, addresses time for performance as follows:

  - "The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project."

  - Under this clauses, if DP fails to meet the schedule it will not automatically be liable to the client for damages on a warranty type basis

Time Limitations on DP's Response to Contractor RFI

- A specified time for responding to RFI's may be unreasonable and create an impossibility. Despite diligent efforts by the DP, it may be impossible to analyze the situation and respond within such a short time frame.

- At a minimum, when a time frame is specified, an exception should be added to the time requirement to permit additional time as necessary for the Architect to review the matter and act in a manner consistent with the Standard of Care.

Scope of Services

- One of the biggest causes for contention between parties to a contract is disagreement over what was intended to be included in the DP's Scope of Services.
- It is of utmost importance in any contract to carefully define the services that are included under the contract.
- Agreeing to "provide all services and permits necessary to complete the project," for example, can have significant liability consequences.
- The description of services in the contract should describe the specific services ("Basic Services") that will be provided.
- Include provision for "additional services" and also "excluded services."

Scope of Services & the Changes Clause

- The “Changes” clause should authorize the Owner to seek only such changes as are within the general scope of the services expressly contemplated by the contract.

- If the “Changes” clause gives the Owner exceptionally broad authority, the Scope of Services clause may be rendered meaningless or significantly less valuable.

Severability

- The "severability" clause specifies the intent of the parties to preserve the enforceable provisions of the contract and for the Court to limit the non-enforcement of the contract to the offending provision by "severing" the offending provision from the contract. An example of such a clause is as follows:

  - EJCDC E-500 (2008), §6.11.C. "*Severability*: Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Engineer, which agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision."

Shop Drawings

- Are they “reviewed” or “approved?” Does it really matter?
- What is vital is that the role and purpose of the DP performing the review and providing “approval” is clearly defined in the contract and stated on the stamp.
- Some contracts put the DP in a bad position by using unfortunate language such as:
  - “DP shall review and approve shop drawings. DP’s review and approval shall include a determination of whether the work complies with all applicable laws, statutes, ordinances and codes, and a determination of whether the work, when completed, will be in accordance with requirements of the Contract Documents.”

Shop Drawings: (EJCDC Approach)

- EJCDC E-500 (2008), §A1.05.A, 11.
  - *"Shop Drawings and Samples:* Review and approve or take other appropriate action in respect to Shop Drawings and Samples and other data which Contractor is required to submit, but only for conformance with the information given in the Contract Documents and compatibility with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. Such reviews and approvals or other action will not extend to means, methods, techniques, sequences, or procedures of construction or to safety precautions and programs incident thereto. Engineer shall meet any Contractor's submittal schedule that Engineer has accepted."

Shop Drawing Review Stamp

- A shop drawing review stamp might read as follows:
  - "Review and approval of the within drawing are only for conformance with the general design concept of the Project as generally expressed in the Contract Documents. Review and approval of the within drawing are not conducted for the purpose of determining the accuracy and completeness of details, like dimensions or quantities, or for substantiating instructions for the installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The DP's review and approval shall not constitute approval of any construction means, methods, techniques, sequences, or any safety precautions or procedures, and approval of a specific item shall not indicate approval of any assembly of which the item is a component."

Shop Drawings (AIA Approach)

- AIA Document B101 – 2007 at §3.6.4.1 uses the word "approved" but spells out the limited purpose of the review as follows:
  - "[T]he Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences, or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component."

Site Safety

- DP contract with the Owner should expressly state the limitations upon DP's role concerning jobsite safety responsibility, but your in-field activities must mirror whatever limitations are contained in the contract.

Site Safety (EJCDC Approach)

- EJCDC E-500, Exhibit A, §A1.05.C addresses the issue as follows:
  - "Engineer shall not be responsible for the acts or omissions of any Contractor, Subcontractor or Supplier, or other individuals or entities performing or furnishing any of the Work, for safety or security at the Site, or for safety precautions and programs incident to Contractor's Work, during the Construction Phase or otherwise. Engineer shall not be responsible for the failure of any Contractor to perform or furnish the Work in accordance with the Contract Documents."

Site Safety (more from EJCDC)

- EJCDC E-500 (2008), Article 6.01.H, provides:
  - "Engineer shall not at any time supervise, direct, or have control over any contractor's work, nor shall Engineer have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor or the safety precautions and programs incident thereto, for security or safety at the Site, for safety precautions and programs incident to the Contractor's work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work."

Site Safety – Clarify Owner and Contractor Responsibilities

- *"Site Safety.* Owner agrees that, in accordance with generally accepted construction practices, each Contractor or Subcontractor not retained by DP shall be solely and completely responsible for working conditions on the job site, including safety of all persons and property during the performance of their work. This obligation shall include providing any and all safety equipment or articles necessary for employee personal protection and compliance with OSHA regulations. These requirements will apply continuously on the job site and will not be limited to normal working hours. Any monitoring of the Contractor's or Subcontractor's procedures conducted by DP in this role is not intended to include review of the adequacy of the Contractor's or Subcontractor's safety measures in, on, adjacent to, or near the construction site."

Site Safety (ConensusDOCS problem)

- ConsensusDOCS 240 includes the following sentence in its description of the DP's responsibility:
  - *"If the Architect/Engineer has actual knowledge of safety violations, the Architect/Engineer shall give prompt written notice to the Owner (§3.2.8.4)."*
- This ConsensusDOCS provision is troublesome because not all states require the DP to provide notice to its client, or take other action, when it has actual knowledge of Safety violations. But this ConsensusDOCS makes *Carvalho vs. Toll Brothers* a universal requirement.

Site Safety

- **Conclusion:** Affirmatively state in the contract that you are not responsible for the safety program and procedures of the general contractor or of the project site.

- Also be careful of what actions you take in the field so that you do not insinuate yourself into site safety responsibility via your actions.

Standard of Care (problem)

- Owners are demanding perfection.
- Professional liability coverage is for Negligence and is not for each and every error or omission.
- Owners are sometimes including language in their contracts requiring the DP to perform to a standard greater than the generally accepted standard. For example, one such clause states:
  - *"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 (ConsensusDOCS problem)

- The ConsensusDOCS 240 increases the standard of care by requiring more complete construction drawings from those generally provided.
- Contractors and DPs frequently debate whether disputed Work is reasonably inferable from the Construction Documents.
- ConsensusDOCS 240 requires these Documents to "completely describe all work necessary to bid and construct the Project."
  - This is contrary to industry practice of what is actually expected of DP's when it comes to drafting plans and specifications.

Standard of Care (solution)

- For the first time the AIA B101 Owner-Architect Agreement explicitly states the standard of care to which the architect must perform. 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)

- You might also add at the end of the standard of care clause a brief statement that the contract is not intended to create any guarantees or warranties on the part of the DP. An example is as follows:
  - "No warranty or guarantee, either express or implied, is made or intended by this Agreement."

Standard of Care (solution 3)

- In instances where the Owner has refused to delete the "highest standard" language after having been engaged in the above discussion, some Owners have agreed to add a sentence to the end of their "highest standard" clause stating:
  - "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."

Termination (EJCDC on Expenses)

- EJCDC E-500, §6.05.D-2
  - *"Suspension and Termination.* In the event of termination by Owner for convenience or by Engineer for cause, Engineer shall be entitled, in addition to invoicing for those items identified in Paragraph 6.05.D.1, to invoice Owner and to payment of a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Engineer's consultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C."

Termination (AIA on Expenses)

- AIA B101-2007, §9.7 addresses termination expenses as follows:
  - "Termination Expenses are in addition to compensation for the Architect's services and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect."
- Note that an astute project owner will strike the allowance of "anticipated profit." This is unique to AIA and is not allowed under federal contracts, state contracts, EJCDC or ConsensusDOCS.

Third Party Beneficiaries

- Claims by individuals or corporations against DPs with whom they have no contract are becoming more common.
- Avoid these by using contract language such as the following:
- AIA B101-2007, §10.5 :
  - "Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect."

Time Limitations to Filing Suit

- Rather than rely exclusively on statutes of limitations or statutes of repose, you may consider establishing, by contract, a specific time frame limiting the time in which the Owner may bring claims against you.
- An example of a clause limiting the time by which the Owner can sue the DP follows:
  - *"Time Bar to Litigation.* Any actions by either party against the other party for any cause of action whatsoever whether known or unknown, including but not limited to claims for breach of this Agreement, or for the failure to perform in accordance with the applicable standard of care, howsoever stated, shall be barred two (2) years from the time claimant knew or should have known of its claim, but in any event, not later than four (4) years after substantial completion of DP's services."

Time Limitations to Legal Action

- A good example of time limitations is provided by AIA B101, §8.1.1 Statute of Repose, as follows:
  - "The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1."

Underground Utilities

- Owners occasionally include a clause in the DP's contract concerning underground utilities that is based on language typical of the Contractor's contract.

- An example of an unfortunate owner generated underground utility clause follows.

  – *"DP shall locate all underground utilities and obstructions prior to the commencement of intrusive operations at the project site, such as drilling or excavating, and shall be responsible for damage to such utilities or structures caused by its operations, including data collection, soil and ground water sampling, and any excavating."*

Underground Utilities (Better language)

- In the clause below, the DP is entitled to rely on information and use the standard of care rather than giving a warranty.
  - **"Underground Utilities.** Owner shall advise and provide DP with all information and data in its possession concerning the type and location of all underground utilities, both public and private. DP shall be entitled to rely on the information provided being complete and accurate. The Owner-Contractor Agreement shall make Contractor responsible for locating all underground utilities. To the extent that DP performs any services to locate underground services, it shall use reasonable means to identify and locate underground utilities and structures, such as complying with state "one call" laws, and shall exercise reasonable precautions to avoid damage to the utilities."

Warranties and Guarantees

- By agreeing to warrant that your professional services will produce any other result, including but not limited to an error-free design, you may be contractually liable based on breach of warranty even though you were not negligent in your performance.

- An example is the following:

  – *"Architect represents and warrants that it will take total responsibility for errors and omissions on its documentation and will rectify all such instances at no additional cost to Owner."*

- The architect, pursuant to the above warranty, agrees to a higher standard of care than the normal negligence standard. The firm is agreeing to perfection.

Warranties & Guarantees (2)

- EJCDC E-500, (2008) §6.01.A. similarly establishes the Standard of Care and disavows any warranties as follows:
  - "The standard of care for all professional engineering and related services performed or furnished by Engineer 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. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services."
- When it comes to warranties and guarantees, design firms need to explain to their clients that the warranty exclusion of the professional liability policy will deny them coverage for costs related to such warranties and guarantees.

QUESTIONS?

- Contact Information:

Kent@ConstructionRisk.com
703-623-1932

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CONTACT Information & DISCLAIMER

- Contact Information: **Kent Holland**

Email: Kent@Construction*Risk*.com
WEBSITE: www.Construction*Risk*.com - Free Risk Report
Phone: 703-623-1932

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Questions?

J. Kent Holland, Esq.

Construction*Risk* Counsel, PLLC

1950 Old Gallows Rd, Ste 750

Vienna, VA 22182

(703) 623-1932

Kent@ConstructionRisk.com

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