



20% of the Fee^{and} 80% of the Liability

Navigating the Minefield of Construction Contract Administration



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Course Description

Construction Phase Services

20% of your fee,
80% of your risk

The typical design professional fee is split 80% for the design and construction document creation and 20% for construction contract administration services. While construction contract administration is an essential service offered by design professionals, most claims against design professionals now include an allegation relating to negligence in the construction contract administration services. Owners increasingly expect design professionals to protect them from improper performance of the contractor, or to take risks related to design changes and substitutions intended to modify project cost. This course will explore the risks that design professionals face when providing construction contract administration services. We will identify the sources of these risks and learn how design professionals can mitigate them without compromising public health, safety, and welfare.

Learning Objectives

Participants will learn to:

- 1** Learn about the risks when providing construction contract administration services and how managing client expectations can benefit the parties, as well as the public;
- 2** Analyze claims related to site safety and injuries, common mistakes design professionals make when they observe an unsafe condition, and steps to consider to protect the health, safety, and welfare of the public;
- 3** Understand the risks of liability created by submittal review, proposed substitutions, and rejection of improper contractor work and develop strategies to mitigate those risks; and
- 4** Explore how contract language and proper communication can more clearly address roles and responsibilities during the construction phase of the project.

Defining Construction Phase Services

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Defining Construction Phase Services

Construction phase services may include:



Interpret contractual agreements

Review shop drawings

Coordinate site visits

Answer field questions

Provide status updates

Determine compliance with design intent

Red Flag Term

Be sure to use the right terminology for the services you are providing.

Construction Administration



Construction Administration implies you are overseeing construction and imposes a different set of responsibilities and risks than Construction Contract Administration.

Value of Construction Phase Services

Providing construction phase services allows you to minimize the risks to yourself, the client, and the public in the following ways:

Make clarifications

Minimize the likelihood of the Contractor incorrectly interpreting your documents.

Check conformance

Gauge whether or not the project is being built in accordance with your design intent or technical submissions.

Address changes

Know if any changes being made to your plans or are needed.

Risks of Construction Phase Services

Providing construction phase services poses some risks, such as:

Failure to discover
defective work

Claims alleging damages caused by your failure to discover defective work.

Impact on
Contractor's performance

Claims alleging your responsibility for the contractor's performance (i.e.: means & methods or delays).

Jobsite safety

Claims alleging your responsibility for site safety and job site accidents.

Payment application

Claims alleging damages from your actions on payment applications.

Red Flag Term

Be sure to use the right terminology for the services you are providing.

~~“Inspection”~~
~~“keep [Client] fully informed”~~
~~“endeavor to guard [Client] against
defects and deficiencies in the Work”~~

This language can create an elevated standard of care and/or result in a contractually assumed liability that may pose coverage issues.

Construction Phase Services

Describe your scope of services

AIA B101-2017 § 3.6.2.1

...to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents...

Construction Phase Services

Describe your scope of services

EJCDC E500-2020 § A1.06(B)(11)

Make visits to the Site at intervals appropriate to the various stages of the Work, as Engineer deems necessary, to observe...the progress of Contractor's executed Work. Such visits and observations by Engineer... are not intended to be exhaustive or to extend to every aspect of the Work or to involve detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in this Agreement and the Construction Contract Documents, but rather are to be limited to spot checking, selective sampling, and similar methods of general observation of the Work based on Engineer's exercise of professional judgment, as assisted by its RPR, if any. Based on information obtained during such visits and observations, Engineer will determine in general if the Work is proceeding in accordance with the Construction Contract Documents...

Construction Phase Services

Describe your scope of services

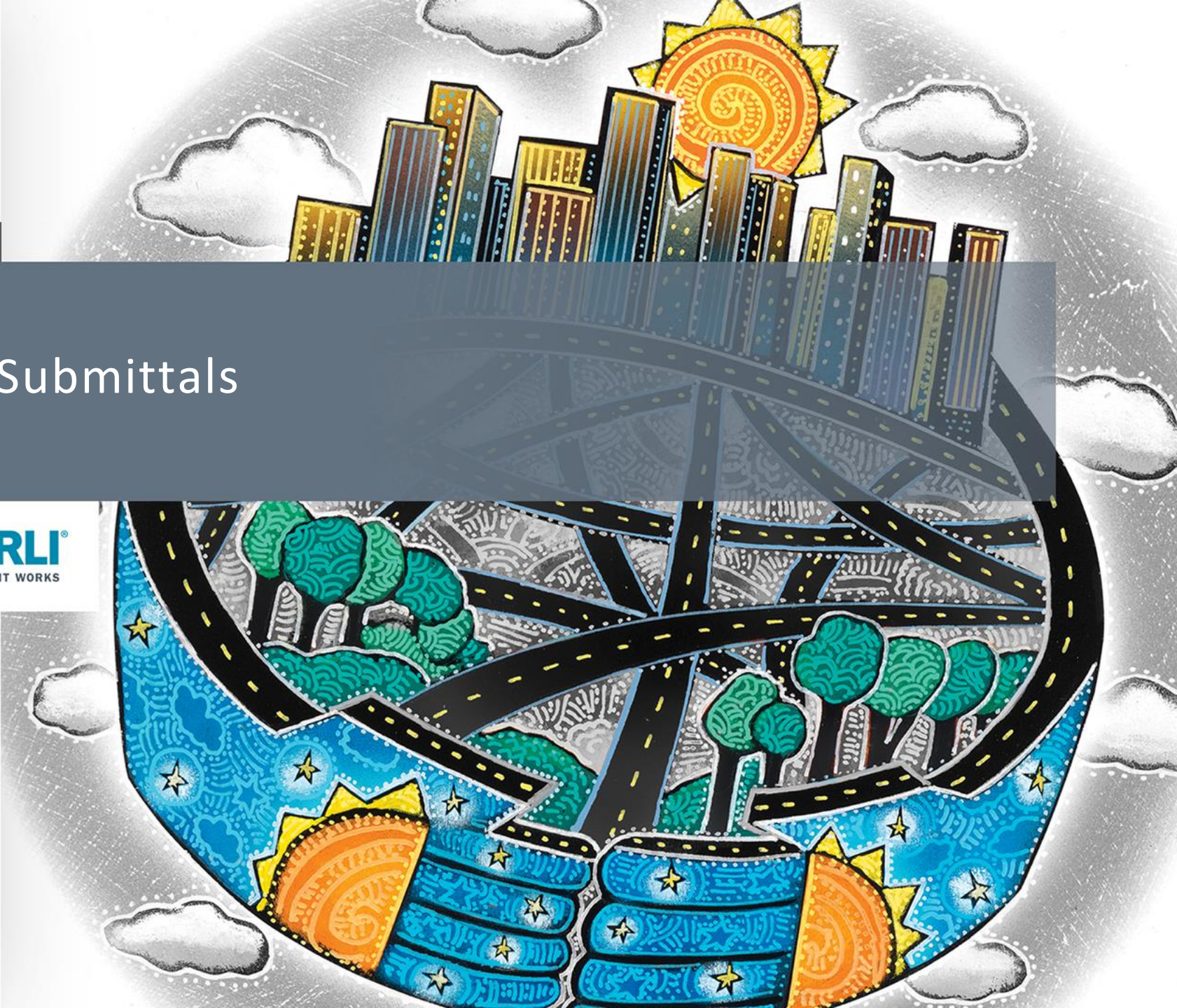
EJCDC E500-2020 §§ 6.01(J) & 6.01(k)

Engineer neither guarantees the performance of any Constructor nor assumes responsibility for any Constructor's failure to furnish and perform the Work in accordance with the Construction Contract Documents.

Engineer shall not be responsible for any decision made regarding the Construction Contract Documents, or any application, interpretation, clarification, or modification of the Construction Contract Documents, other than those made by Engineer.

Submittals

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Submittals & Requests for Information

Thing to Consider...

- ✓ Describe your scope of services
Describe the limited purpose of your services.
- ✓ Secure a schedule
Secure a schedule and allow adequate review time in your contract to respond to requests.
- ✓ Review according to contract
Review only the submittals and RFIs required by your contract with the Client.
- ✓ Maintain detailed records
Maintain a record of the submissions and RFIs received, the response, and any required actions.

AIA B101-2017 § 3.6.4.2

The [Design Professional] shall review and approve, or take other appropriate action upon, the Contractor's submittals....but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review...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...

Submittals

Secure a submittal schedule

AIA B101-2017 § 3.6.4.1

...The [Design Professional]'s action in reviewing submittals shall be taken in accordance with the approved submittal schedule or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time, in the [Design Professional]'s professional judgment, to permit adequate review.

Submittals

Review according to contract

AIA A201-2017 §§ 3.10 – 3.12

Summary

- 1) Contractor establishes the submittal schedule.
- 2) Contractor submits information as required by the [Design Professional's] contract documents.
- 3) Contractor reviews the submissions of the sub-contractors for compliance with the contract documents prior to forwarding such to [Design Professional].
- 4) Contractor develops and manages the project schedule and sequence of work in accordance with the approved submittals.
- 5) Contractor and their sub-contractors, under the contractor's supervision, shall not perform any work on site prior to approval of the submittals.

Submittals

Review according to contract

AIA B101-2017 § 4.2.3

The [Design Professional] shall provide Construction Phase Services exceeding the limits set forth below as Additional Services...

1. () reviews of each Shop Drawing, Product Data item, sample and similar submittals of the Contractor

Submittals

Maintain detailed records

AIA B101-2017 § 3.6.4.5

The [Design Professional] shall maintain a record of submittals and copies of submittals supplied by the Contractor in accordance with the requirements of the Contract Documents.

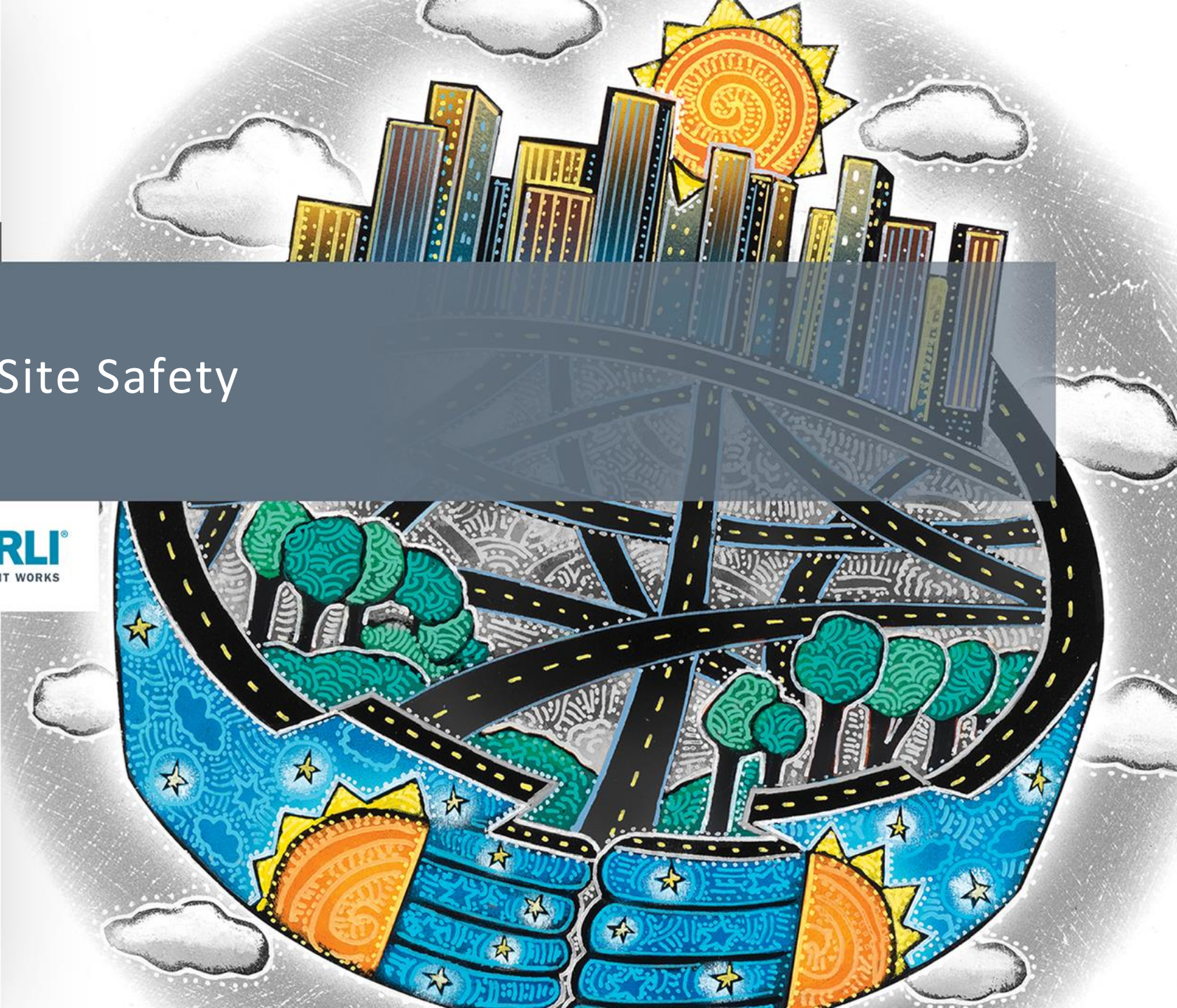
Warning Signs

Proper attention and tracking will help determine if...

- ⊘ The answer is already in the contract documents or duplicative
- ⊘ There is a latent field condition
- ⊘ The RFI is something else:
a statement, not a question; a request for a substitution; or an unrequested design change.
- ⊘ The contractor is building a claim

Site Safety

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Site Safety

Thing to Consider...

- ✓ **Disclaim responsibility for site safety**
Your responsibilities are limited to the safety of your own employees.
- ✓ **Specify who is responsible for site safety**
Generally, jobsite safety is the responsibility of the Contractor.
- ✓ **Avoid assuming responsibility by conduct**
Know what to do and what not to do in the event you discover an unsafe condition.

Site Safety

NY Labor Laws

...No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers...architects...or landscape architects...
who do not directly control the work for activities other than
planning and design...

Site Safety

Common claim scenario

Scenario



Contractor's employee is injured in a trench collapse and subsequently succumbs to his injuries. A claim is filed against the Design Professional (DP) alleging the DP owed a duty of reasonable care for the safety of the worker and that the DP breached this duty.

Is the Design Professional liable?

Case Study

Responsibility for site safety can be assumed expressly or impliedly by conduct.

“

The courts of this Commonwealth have consistently refused to impose a duty on design professionals to protect workers from hazards on a construction site unless there was an undertaking, either by contract or course of conduct to supervise and control the construction and/or to maintain safe conditions on the site.

”



Case Study

“ The factors which would appear to be relevant in any case where an attempt is made to expand the [Design Professional]’s responsibility beyond the specific provisions of the employment contract are set forth:

- (1) Actual supervision and control of the work;
- (2) Retention of the right to supervise and control;
- (3) Constant participation in ongoing activities at the construction site;
- (4) Supervision and coordination of subcontractors;
- (5) Assumption of responsibility for safety practices;
- (6) Authority to issue change orders; and
- (7) The right to stop the work.

”



AIA B101-2017 § 3.6.1.2

...The [Design Professional] shall not have control over, charge of, or responsibility for the construction means methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the [Design Professional] be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents...

Site Safety

Disclaim responsibility for site safety

EJCDC E500-2020 § 6.01(I)

Engineer shall not at any time supervise, direct, control, or have authority over any Constructor's work, nor will Engineer have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, or the safety precautions and programs incident thereto, for security or safety at the Site, nor for any failure of a Constructor to comply with Laws and Regulations applicable to that Constructor's furnishing and performing of its work. Engineer shall not be responsible for the acts or omissions of any Constructor.

Site Safety

Disclaim responsibility for site safety & specify who is responsible for site safety

AIA A201-2017 § 4.2.2

...The [Design Professional] shall not have control over, charge of, or responsibility for the construction means methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

Site Safety

Specify who is responsible for site safety

AIA A201-2017 § 10.1

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract.

Modified AIA A201-2017 § 10.1

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract, including, and without limitation, those related to or required under laws, rules, or regulations pertaining to COVID 19 or any other form of viral, respiratory or health-related pandemic or epidemic.

Site Safety

Avoid assuming responsibility by conduct

Dos and Don'ts...

- ✓ **Give immediate notification**
Immediately alert the party with overall safety responsibility, if appropriate.
- ✓ **Address only specific safety hazards**
Address only the specific safety hazard posing an imminent risk of serious harm.
- ✗ **Do not provide recommendations**
Do not give a recommended solution. That is for the party with responsibility for safety to determine.
- ✓ **Give written notification to your Client**
Follow up your notification by writing to the Client of what you observed, who you notified, and other relevant conditions. Be sure to include the appropriate caveats.

Discovery

If relevant, your posts could be sought as evidence in a lawsuit. Some parties have even been ordered to turn over their login information and password.



“[Social media posts] if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access, just as relevant matter from a personal diary is discoverable.”

Payment Certifications

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Payment Certification

Thing to Consider...

- ✓ Describe your scope of services
Describe the limited purpose of your services.
- ✓ Provide timely reviews
Consider any relevant time restrictions (i.e.: prompt payment laws) to allow for timely reviews.
- ✓ Document decisions
If payment needs to be withheld, document the reasons why and the recommended options discussed with the Client.

Payment Certifications

Describe your scope of services

AIA B101-2017 § 3.6.3.2

The issuance of a Certificate for Payment shall not be a representation that the [Design Professional] has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

Payment Certifications

Describe your scope of services

AIA B101-2017 § 3.6.6.1

The [Design Professional] shall:

...

(4) Issue a final Certificate for Payment based upon a final inspection indicating that, to the best of [Design Professional's] knowledge, information, and belief, the Work complies with the requirements of the Contract Documents.

Payment Certifications

Provide timely reviews

Be aware of the requirements for providing timely reviews.

Prompt Payment Laws

Right to timely payment

A required time frame for payment and a right to interest on unpaid balances.

Notice requirements

A required time frame for notifying the Contractor if payments are to be withheld.

Right to stop work

Right to stop work for non-payment without liability for breach of contract.

Payment Certifications

Provide timely reviews

Be aware of the requirements for providing timely reviews.

New York Revised Gen. Bus. Law 756

Right to timely payment

Owner must pay Contractor within 30 calendar days of approval. Delinquent payments are subject to interest of 1% or higher rate specified in Construction Contract.

Notice requirements

Owner must provide notice of amount to be withheld and reason for withholding payment within 12 days.

Right to stop work

Right to stop work for non-payment without liability for breach of contract after 10 days written notice to delinquent party and opportunity to cure.

Payment Certifications

Provide timely reviews

Payment on public projects may be subject to different “prompt payment” provisions.

New York Quick Guide to Prompt Payment Laws



Private Projects

NY Gen. Bus. Law § 5756 et seq.



From Owner to Prime:

Payment due within 30 days after invoice approval. (Approval required within 12 days of receipt).



From Prime to Subs:

Payment due within 7 days after payment to above.



Public Projects

N.Y. State Fin. Law §§ 139-f, 179-f (pt. of Art. 11-A); Pub. Auth. Law § 2880; Gen. Mun. Law § 106-b; Hwy. Law § 38; NYC Procurement Policy Board Rules § 4-06.



From Owner to Prime:

State contracts: Payment due within 30 days, 15 days (small businesses), 75 days (highway projects).
Municipal contracts: Payment due within 30 calendar days of receipt; 45 days if project requires approval by an elected official.
NYC contracts: Payment due within 30 days of the "Invoice Received or Accepted" date.



From Prime to Subs:

Payment due within 7 days after receipt of payment by above. (Not applicable to Public Authority projects.)

Penalties for slow pay:



Interest fees: 1% per month (parties may agree to higher rate)

Other penalties:
N/A



Penalties for slow payment:

Interest fees: Equal to the interest rate for overpayment set by the State Commissioner of Taxation and Finance.

For NYC projects: Rate set by Comptroller and OMB.

Other penalties:
Attorney fees & court costs.

Payment Certifications

Provide timely reviews

“Prompt payment” requirements may also vary by state.

New Jersey Revised Statutes 2a:30A-2

Right to timely payment

Owner must pay Contractor within 30 calendar days of the billing date. Delinquent payments are subject to interest of prime rate + 1%.

Notice requirements

Owner must provide notice of amount to be withheld and reason for withholding payment within 20 days.

Right to stop work

Right to stop work for non-payment without liability for breach of contract after 7 days written notice to delinquent party.

Payment Certifications

Document decisions

Walk through each of the options with the Client to allow the Client to make an informed decision.

Remedies for Non-Compliant Work

Remove and replace

What impact would replacement have on the project schedule, budget, and/or cost, as well as on the design?

Repair

Is repair viable? Who is responsible for assessing viability and adequacy of repair?

Credit

Is the credit fair and adequate?

Excluding Construction Phase Services

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Excluding Construction Phase Services

Excluding construction phase services also poses risk concerns.

Thing to Consider...

- ✓ **Inform the Client of your role and value**
Review your role and the value this brings during the construction phase of a project with the Client.
- ✓ **Describe your scope of services**
Make it clear in your scope of services that Contract Administration Services are excluded.
- ✓ **Consider other contract provisions**
Other contract provisions may be appropriate, such as those addressing:
 - Ownership & license to use
 - Release and indemnification (against unauthorized changes and misuse)
 - Limitation of liability

Ownership

AIA B101-2017 § 7.3

The [Design Professional] grants to the [Client] a nonexclusive license to use the [Design Professional]'s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the [Client] substantially performs its obligations under this Agreement...

Release and Indemnification

AIA B101-2017 § 7.3.1

In the event the [Client] uses the Instruments of Service without retaining the authors of the Instruments of Service, the [Client] releases the [Design Professional] and [Design Professional]'s consultant(s) from all claims and causes of action arising from such uses. The [Client], to the extent permitted by law, further agrees to indemnify and hold harmless the [Design Professional] and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the [Client]'s use of the Instruments of Services under this Section 7.3.1...

Release and Indemnification

EJCDC E500-2020 § A1.06(A)

Engineer shall be responsible only for those Construction Phase services expressly required of Engineer in Exhibit A Paragraph 1.06, as duly modified. With the exception of such expressly required services, Engineer shall have no design, Submittal (including Shop Drawing) review, or other obligations during construction, and Owner assumes all responsibility for providing or arranging for all other necessary Construction Phase administrative, engineering, and professional services.

Owner waives all claims against Engineer and its officers, directors, members, partners, agents, employees, and Subconsultants, and Engineer's Subcontractors, that may be connected in any way to Construction Phase administrative, engineering, or professional services except for those services that are expressly required of Engineer in Exhibit A...

Limitation of Liability

The enforceability of a limitation of liability clause depends on:
(1) the specific language of the provision; and (2) the jurisdiction.

EJCDC Document E500-2020 § 11.02

To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of [Design Professional (DP) to the Client] and anyone claiming by, through, or under [Client] 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, [DP]'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 [DP] or [DP]'s officers, directors, members, partners, agents, employees, or Consultants shall not exceed the total amount of \$ _____ or the total compensation received by [DP] under this Agreement, whichever is greater. Higher limits are available for an additional fee.

Limit Liability to

1

Set Fee

“not to exceed \$__ amount.”

shall not exceed the total amount of \$____ or the total compensation received by [DP] 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 [DP] 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 [DP] by [DP]’s insurers in settlement or satisfaction of Owner’s Claims under the terms and conditions of [DP]’s insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal).

Thank you for your time!

QUESTIONS?

**This concludes The American Institute of Architects
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