



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

EJCDC®
ENGINEERS JOINT CONTRACT
DOCUMENTS COMMITTEE

2

Coordinated documents



3

Easy to modify

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).

State Specific Standard

Missouri

20 CSR § 2030-2.010(3)(A)

To satisfy the standard of care, design professionals must:

“...act with reasonable care and competence, and shall apply the technical knowledge and skill which are ordinarily applied by [design professionals] of good standing, practicing in Missouri...”

State Specific Standard

California

16 CCR § 404(dd)

To satisfy the standard of care, design professionals must:

“...use the care ordinarily exercised in like cases by duly licensed [design professionals] in good standing...”

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

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

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.

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...**



Case Law

In *Thompson v. Gordon*, the Supreme Court of Illinois upheld a Circuit Court holding finding that the contract between the Design Professional and their Client did not require an elevated standard of care.



Contract Language: Scope of Services

Scope of services set forth in Attachment A, Article 2A & 2B

Article 2A Roadway Design

Final design and contract preparation for the Phase I, Stage A I-94/Grand Avenue interchange improvements will be provided.

*The proposed roadway **improvements** are as described below:*

- *Redesign Ramp B to two lanes, but maintain one lane at merge to southbound I-94.*
- *Provide lane drop recovery area on eastbound Grand Avenue east of Ramp B diverge.*
- *Improve Ramp E alignment.*
- *Proposed improvements are to tie to the widening of Grand Avenue, which is to be done by others.*

Additional related services to be provided include drainage design, roadway lighting design, and utility adjustments”

Article 2B Structural Design

*Final structural design plans will be provided for deck **replacement** of the existing Grand Avenue bridge over I-94. Final structural design plans will also be prepared for a proposed overhead cantilever sign truss on eastbound Grand Avenue, west of Ramp B.*

Contract Language: Standard of Care

Standard of care clause set forth in Article 4A of the Contract:

The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services. The ENGINEER will re-perform any services not meeting this standard without additional compensation.

Compare

Which is the appropriate standard of care?

- A *The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants replacing a bridge deck.*
- B *The standard of care applicable to ENGINEER's services will be the highest degree of skill and diligence employed by professional engineers or consultants replacing a bridge deck.*
- C *The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants improving a bridge deck.*

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...

”

Case Law

Metcalfe 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.

”

Fifth Provision:
Indemnification

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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**.

Red Flag Words - Parties

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

Red Flag Words - Claims

Beware of terms/phrases such as:

“arising out of/from”

“in any way connected with”

“regardless of”

“whether or not caused by”

“allegedly caused”

“solely liable and responsible”

“intentional fraud or misconduct”

“recklessness”

“willful misconduct”

“tortious misconduct”

“intentional acts”

“other improper conduct”

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Red Flag Words – 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

Case Law



In *UDC Universal Development v. CH2M Hill* the Court held an indemnity clause obligated an engineering firm to defend its client, a developer, despite a jury finding of non-negligence by the engineering firm in the performance of its services.

Contract Language: Indemnity Clause



Consultant [CH2M Hill] shall indemnify and hold Owner, Developer ...free and harmless from and **against any and all** claims...losses and expenses of any kind, including reasonable fees of attorneys fees... **to the extent they arise out of or are in any way connected with** any negligent act or omission by Consultant...whether such claims, liens, demands, damages, losses or expenses are based upon a contract...or upon **any other legal or equitable theory** whatsoever. Consultant agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to **defend any suit, action or demand** brought against Developer or Owner **on any claim or demand covered herein....**



Holding

“

[A] duty to defend arises ... as soon as the litigation commences and regardless of whether the indemnitor is ultimately found negligent.

”

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.

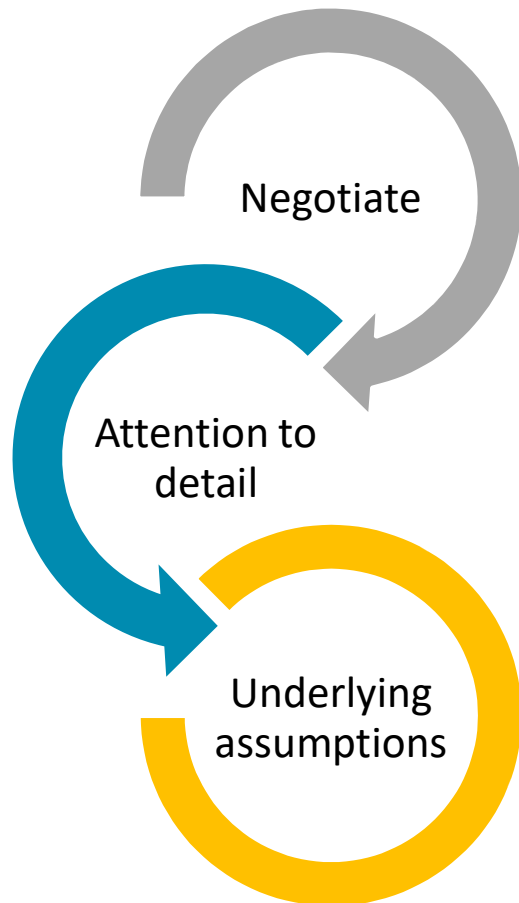
3

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).

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
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