

A PRACTICAL NON-TEXTBOOK GUIDE TO NEGOTIATIONS

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OVERVIEW

- The Contract is all about apportioning risk.
- Do not be afraid to negotiate.
- The design professional's agreement is of immeasurable value in avoiding some liability situations (but not all).
- Discussion of topics where design professional can protect itself through contract language.
- Particularly important to review these topics where owner is providing the Agreement and does not use standard AIA forms as the template.

SCOPE OF WORK

One of the most important upon which professional liability or non-liability hinges is the scope of services undertaken by the professional.

By documenting the design professional's scope of services in a clear and definite manner in the governing agreement, an design professional can reduce exposure to claims for services he or she was not required to provide.

SCOPE OF WORK

EXCLUDING SERVICES NOT PART OF DESIGN PROFESSIONAL'S SCOPE OF WORK

- Means and Methods Exclusion – critical that a design professional's contract include language specifically excluding the means and methods of construction and safety responsibilities from the design professional's responsibilities for the Project. The means and methods of construction and responsibility for safety procedures are the Contractor's responsibility.

SCOPE OF WORK

CLEARLY DEFINE CONSTRUCTION ADMINISTRATION SERVICES

- Construction Administration Services – if the design professional is providing CA Phase services, the design professional’s limited responsibility to visit the site to determine, in general, if the Work is being performed in general conformance with the design professional’s construction documents.
- If the design professional is not providing CA Phase services for a particular project, then this should be clearly set forth in the governing contract.

STANDARD OF CARE

- Agreement should include reference to appropriate standard of care.
- Negligence Standard – services shall be provided in accordance with customary standards exercised by a reasonably skilled design professional performing design services on projects of similar size, scope and complexity in the community where design professional is providing such services at the time such services are provided.

STANDARD OF CARE

➤ Cautionary Point – beware of language that heightens or increases the standard of care:

- Expert
- Highest standards
- Warrants
- Ensures

PAYMENT PROVISIONS

DEFINING AND DISTINGUISHING BASIC SERVICES AND ADDITIONAL SERVICES

- Contract should state Design Professional's negotiated Basic Services Fee.
- Important that Design Professional clearly define the services that are to be compensated as Additional Services in the Agreement so that owner cannot try to include services that are typically Additional Services (or considered by the Design Professional to be Additional Services) as part of Basic Services.

PAYMENT PROVISIONS

REDESIGN TO MEET BUDGET/VALUE ENGINEERING

- Typically these services are defined as additional services following the completion of the Schematic or Design Development Phase.
- Design Professional should be aware of Owner's attempts to change the milestone that defines when these services are compensated as Additional Services.
- Oftentimes the Owner will insist that redesign and value engineering services are Basic Services through the completion of the construction phase, which can result in significant amount of additional work for the design professional. If this is the case, the design professional should factor these redesign and value engineering services into the Basic Services Fee.

PAYMENT PROVISIONS

TALKING POINTS

- Timing of Payments and “Pay-when Paid” Provisions – beware of provisions governing the timing and conditions on payment.
- No Withholding or Offsetting of Payments - owner cannot withhold or offset payments unless design professional has been adjudged liable.
- Design professional should retain right to suspend performance of services if not timely paid, but continue performance in the event of a good faith dispute as to payment.

PAYMENT PROVISIONS

TALKING POINTS (CONTINUED)

- Continuation of Services During Dispute
 - Beware of onerous language that requires design professional to provide continued services during any claim or dispute to avoid the situation where the design professional is required to continue to provide services when it is owed substantial sums.
 - Threshold Amount – include a limit or maximum amount that can be withheld while design professional is required to continue providing services. This applicability of any such provision should further be limited to only “good faith” disputes of the Owner.
 - Dispute Mechanism – provide a dispute mechanism and/or specific timeframe for resolving disputes.

OWNERSHIP OF INSTRUMENTS OF SERVICE

Generally:

Design Professionals do not want to give up their ownership rights to their Instruments of Service.

Typically the design professional will grant the owner a non-exclusive right to use its Instruments of Services solely for purposes of the Project.

INSTRUMENTS OF SERVICE

STANDARD DETAILS EXCEPTION

Owner's Ownership of the Drawings – Owner may however insist on ownership. This is particularly true with City of State owners. If Owner insists on ownership, an exclusion must be carved out for the design professional's "Standard Details" to preserve the design professional's right and ability to use them on other projects.

- Standard Details – include the design details, depictions, instructions and specifications regularly issued by the design professional in the ordinary course of his/her practice.

OWNERSHIP OF DOCUMENTS

TALKING POINTS

1. Payment Issues –ownership rights must be contingent upon Owner’s payment for the design professional’s services.
2. Liability and Indemnity – you should be protected from and against claims resulting from the owner’s use and misuse of the Instruments of Service without his/her involvement.
3. Limit to Project Use Only –limit the Owner’s ability to use the Instruments of Service solely in connection with the Project.
4. Publicity Issues – include a provision allowing you to reference the project for promotional purposes.

LIMITATIONS OF LIABILITY

- Limitation of overall Project Liability – limit design professional’s total liability in connection with the contract.
 - Limit to fee for the Project;
 - Limit to available professional liability insurance proceeds at the time of any settlement or judgment;
or
 - Limit to specific dollar amount appropriate for size and scope of the Project.

LIMITATIONS OF LIABILITY

- No Personal Liability
- Waiver of Consequential Damages
- No Liability for Hazardous Materials
- Include Design Professional as Additional Insured on Builder's Risk and Contractor General Liability Policies
- Indemnities – from Owner, Construction Manager and Contractor

SCHEDULE

TIME IS OF THE ESSENCE

- No Time is of the Essence Language – heightens standard of care by creating a strict liability situation that does not recognize delays caused by factors outside the design professional's control.

SCHEDULE

FAST-TRACK DISCLAIMER

- Fast-track Disclaimer – if an agreement allows an Owner to implement a fast-track schedule, then a disclaimer needs to be added:
 - (1) Limiting the design professional's liability for problems that may arise as a result of the decision to proceed on a fast-track basis; and
 - (2) Allowing for additional fees for the additional efforts required and the redesign work which always follows when fast-track schedules is implemented on a Project.

SCHEDULE

DELAYS NOT CAUSED BY DESIGN PROFESSIONAL

- No Responsibility for Delays Outside Design Professional's Control – language should be added stating that the design professional should not be responsible for delays due to causes outside of its control, including, without limitation, delays caused by the Owner, the Contractor, other consultants, government agencies and Force Majeure Events.

LIABILITY FOR CONSULTANTS

- Design Professional's responsibility for consultants should be limited to coordinating its services with the work product of the other design professionals, whether retained by the design professional or the owner.
- A design professional should not be responsible for the technical sufficiency of the services of other consultants as it is not trained or licensed in such disciplines.
- A design professional should be entitled to rely on the professional expertise and judgment of other consultants even when it holds the contract.

DISPUTE RESOLUTION

PROS AND CONS OF ARBITRATION (VS. LITIGATION)

- Pros—
 - Semi-informal procedure may result in quicker resolution
 - Relaxed rules of evidence
 - Confidential and private
 - Parties may select an arbitrator or panel of arbitrators with expertise in a certain subject matter
- Cons—
 - Lack of full-range discovery
 - Relaxed rules of evidence
 - Nearly impossible to appeal an arbitration decision
 - No jury
 - Arbitration fees may be substantial in complex cases
 - Arbitrators may “split the difference” when making an award
 - Lack of written opinions or explanatory documents

DISPUTE RESOLUTION

- Choice of Law and Forum – recommend including provision stating the governing law and venue for dispute resolution.
- Consolidation or Joinder of Parties.