

Contract Guide Course for Design Professionals:

Part 1

Presented by:

J. Kent Holland, J.D.

ConstructionRisk, LLC

Kent@ConstructionRisk.com
703-623-1932

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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

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.”

CONTACT Information & DISCLAIMER

- Contact Information: **Kent Holland**

Email: Kent@ConstructionRisk.com

WEBSITE: www.ConstructionRisk.com - Free Risk Report

Phone: 703-623-1932

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?

J. Kent Holland, Esq.

ConstructionRisk Counsel, PLLC

1950 Old Gallows Rd, Ste 750

Vienna, VA 22182

(703) 623-1932

Kent@ConstructionRisk.com

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