

# Contract Guide Course for Design Professionals:

## Part 3

*Presented by:*

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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.

## 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.

# QUESTIONS?

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# Questions?

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