

Contract Guide Course for Design Professionals:

Part 3

Presented by:

J. Kent Holland, J.D.

ConstructionRisk, LLC

Kent@ConstructionRisk.com
703-623-1932

Severability

- The “severability” clause specifies the intent of the parties to preserve the enforceable provisions of the contract and for the Court to limit the non-enforcement of the contract to the offending provision by “severing” the offending provision from the contract. An example of such a clause is as follows:
 - EJCDC E-500 (2008), §6.11.C. *“Severability: Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Engineer, which agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.”*

Shop Drawings

- Are they “reviewed” or “approved?” Does it really matter?
- What is vital is that the role and purpose of the DP performing the review and providing “approval” is clearly defined in the contract and stated on the stamp.
- Some contracts put the DP in a bad position by using unfortunate language such as:
 - “DP shall review and approve shop drawings. DP’s review and approval shall include a determination of whether the work complies with all applicable laws, statutes, ordinances and codes, and a determination of whether the work, when completed, will be in accordance with requirements of the Contract Documents.”

Shop Drawings: (EJCDC Approach)

- EJCDC E-500 (2008), §A1.05.A, 11.
 - “*Shop Drawings and Samples*: Review and approve or take other appropriate action in respect to Shop Drawings and Samples and other data which Contractor is required to submit, but only for conformance with the information given in the Contract Documents and compatibility with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. Such reviews and approvals or other action will not extend to means, methods, techniques, sequences, or procedures of construction or to safety precautions and programs incident thereto. Engineer shall meet any Contractor’s submittal schedule that Engineer has accepted.”

Shop Drawing Review Stamp

- A shop drawing review stamp might read as follows:
 - “Review and approval of the within drawing are only for conformance with the general design concept of the Project as generally expressed in the Contract Documents. Review and approval of the within drawing are not conducted for the purpose of determining the accuracy and completeness of details, like dimensions or quantities, or for substantiating instructions for the installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The DP’s review and approval shall not constitute approval of any construction means, methods, techniques, sequences, or any safety precautions or procedures, and approval of a specific item shall not indicate approval of any assembly of which the item is a component.”

Shop Drawings (AIA Approach)

- AIA Document B101 – 2007 at §3.6.4.1 uses the word “approved” but spells out the limited purpose of the review as follows:
 - “[T]he Architect shall review and approve or take other appropriate action upon the Contractor’s submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals 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. The Architect’s review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences, or procedures. The Architect’s approval of a specific item shall not indicate approval of an assembly of which the item is a component.”

Site Safety

- DP contract with the Owner should expressly state the limitations upon DP's role concerning jobsite safety responsibility, but your in-field activities must mirror whatever limitations are contained in the contract.

Site Safety (EJCDC Approach)

- EJCDC E-500, Exhibit A, §A1.05.C addresses the issue as follows:
 - “Engineer shall not be responsible for the acts or omissions of any Contractor, Subcontractor or Supplier, or other individuals or entities performing or furnishing any of the Work, for safety or security at the Site, or for safety precautions and programs incident to Contractor’s Work, during the Construction Phase or otherwise. Engineer shall not be responsible for the failure of any Contractor to perform or furnish the Work in accordance with the Contract Documents.”

Site Safety (more from EJCDC)

- EJCDC E-500 (2008), Article 6.01.H, provides:
 - “Engineer shall not at any time supervise, direct, or have control over any contractor’s work, nor shall Engineer have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor or the safety precautions and programs incident thereto, for security or safety at the Site, for safety precautions and programs incident to the Contractor’s work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor’s furnishing and performing the Work.”

Site Safety – Clarify Owner and Contractor Responsibilities

- “*Site Safety.* Owner agrees that, in accordance with generally accepted construction practices, each Contractor or Subcontractor not retained by DP shall be solely and completely responsible for working conditions on the job site, including safety of all persons and property during the performance of their work. This obligation shall include providing any and all safety equipment or articles necessary for employee personal protection and compliance with OSHA regulations. These requirements will apply continuously on the job site and will not be limited to normal working hours. Any monitoring of the Contractor’s or Subcontractor’s procedures conducted by DP in this role is not intended to include review of the adequacy of the Contractor’s or Subcontractor’s safety measures in, on, adjacent to, or near the construction site.”

Site Safety (ConsensusDOCS problem)

- ConsensusDOCS 240 includes the following sentence in its description of the DP's responsibility:
 - *“If the Architect/Engineer has actual knowledge of safety violations, the Architect/Engineer shall give prompt written notice to the Owner (§3.2.8.4).”*
- This ConsensusDOCS provision is troublesome because not all states require the DP to provide notice to its client, or take other action, when it has actual knowledge of Safety violations. But this ConsensusDOCS makes *Carvalho vs. Toll Brothers* a universal requirement.

Site Safety

- **Conclusion:** Affirmatively state in the contract that you are not responsible for the safety program and procedures of the general contractor or of the project site.
- Also be careful of what actions you take in the field so that you do not insinuate yourself into site safety responsibility via your actions.

Standard of Care (problem)

- Owners are demanding perfection.
- Professional liability coverage is for Negligence and is not for each and every error or omission.
- Owners are sometimes including language in their contracts requiring the DP to perform to a standard greater than the generally accepted standard. For example, one such clause states:
 - *“DP represents that its services will be performed in a manner consistent with the highest standards of care, diligence and skill exercised by nationally recognized consulting firms for similar services.”*

Standard of Care (ConsensusDOCS problem)

- The ConsensusDOCS 240 increases the standard of care by requiring more complete construction drawings from those generally provided.
- Contractors and DPs frequently debate whether disputed Work is reasonably inferable from the Construction Documents.
- ConsensusDOCS 240 requires these Documents to “completely describe all work necessary to bid and construct the Project.”
 - This is contrary to industry practice of what is actually expected of DP’s when it comes to drafting plans and specifications.

Standard of Care (solution)

- For the first time the AIA B101 Owner-Architect Agreement explicitly states the standard of care to which the architect must perform. AIA B101-2007, Section 2.2 reads as follows:
 - “The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.”

Standard of Care (solution 2)

- You might also add at the end of the standard of care clause a brief statement that the contract is not intended to create any guarantees or warranties on the part of the DP. An example is as follows:
 - “No warranty or guarantee, either express or implied, is made or intended by this Agreement.”

Standard of Care (solution 3)

- In instances where the Owner has refused to delete the “highest standard” language after having been engaged in the above discussion, some Owners have agreed to add a sentence to the end of their “highest standard” clause stating:
 - “The performance standard is not intended to create a warranty, guarantee or a strict liability standard, and it is expressly agreed that DP is agreeing only that its services will not be performed negligently or with willful or reckless misconduct.”

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CONTACT Information & DISCLAIMER

- Contact Information: **Kent Holland**

Email: Kent@ConstructionRisk.com

WEBSITE: www.ConstructionRisk.com - Free Risk Report

Phone: 703-623-1932

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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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