

# Contract Guide Course for Design Professionals:

## Part 1

*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

# 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

## Advertising (problem)

- Beware of language in a contract that expressly forbids promotional use. E.g.,
  - *“No public announcement. DP shall not make any public announcement or publicity release regarding the Project or its Services under this agreement without Owner's prior written approval and shall not use any of the Contract Documents for public relations or promotional efforts without Owner's prior written approval.”*

## Advertising (solution)

- AIA B101-2007, §10.7:
  - “The Architect shall have the right to include photographic or artistic representations of the design of the Project among the Architect’s promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations.... The Owner shall provide professional credit for the Architect in the Owner’s promotional materials for the Project.”

## Americans with Disabilities Act (problem)

- Beware of a contract clause warranting the design will meet all laws and codes, such as ADA. E.g., example of such a clause is the following:
  - *“The Architect shall at all times observe and comply with all city, federal and state laws and regulations and shall defend the City...against any claim or liability arising from or based on the violations of any law or regulation.”*

# ADA (solution)

- Agree only to the normal standard of care. E.g.,
- “DP agrees that, consistent with the standard of care applicable to this agreement, it will identify, interpret and apply the design requirements of applicable laws, regulations and ordinances, including the Americans with Disabilities Act (ADA).”
- See EJCDC Document E-500 (2008), 6.01 E on next slide

## EJCDC Document E-500 (2008), 6.01 E

- “Engineer and Owner shall comply with applicable Laws and Regulations and Owner-mandated standards that Owner has provided to Engineer in writing. This Agreement is based on these requirements as of its Effective Date. Changes to these requirements after the Effective date of this Agreement may be the basis for modifications to Owner’s responsibilities or to Engineer’s scope of services, times of performance, and compensation.”

# As-Built Drawings (solution)

- Call them “Record Drawings” instead. E.g., EJCDC.
- *“Record Drawings – Drawings depicting the completed Project, prepared by Engineer as an Additional Service and based solely on Contractor’s record copy of all Drawings, Specifications, addenda, change orders, work change directives, field orders, and written interpretations and clarifications, as delivered to Engineer and annotated by Contractor to show changes made during construction.”*

## Certification (problem)

- Beware of language requiring certification of contractor's compliance with all plans and specs. E.g.,
  - *“Upon completion of the construction, the DP shall certify that the work was completed in accordance with the plans, specifications, and drawings.”*



## Certification (AIA solution – knowledge within contract scope)

- AIA B101-2007, §10.4 set limits on signing certificates as follows:
  - “The Architect shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.”

## Certification (EJCDC Solution – Only ascertainable conditions)

- EJCDC Document E-500 (2008) §6.01.F:
  - “Engineer shall not be required to sign any documents, no matter by whom requested, that would result in the Engineer having to certify, guarantee, or warrant the existence of conditions whose existence the Engineer cannot ascertain.”

## Certification (solution – to best of knowledge instead of absolute)

- Instead of making certificate an absolute certainty of fact, condition it on “the best of knowledge, information and belief.” E.g.,
  - “To the best of our knowledge, information and belief, the project was constructed in general conformance with the design concept of the contract documents.”

## Certificates of Payment (solution – best of knowledge)

- An example of an appropriate payment certification clause is the AIA B101-2007, §3.6.3.1, which provides in part:
  - “The Architect’s certification for payment shall constitute a representation to the Owner, based on the Architect’s evaluation of the Work as provided in Section 3.6.2 and on the data comprising the Contractor’s Application for Payment, that, to the best of the Architect’s knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents.”

## Changes in DP's Services (problem)

- There is no limit here to what Owner can unilaterally assign to DP.
  - *“Owner may, at any time, by written notice, make changes in the Services to be provided, including changes in specifications and/or drawings, omit or add work, changes in the schedule, etc.”*
- *Change this by stating changes can only be made if within the general scope.*

## Changes in DP Services (AIA solution)

- Architect is not to perform additional services until authorized by the Owner. Section 4.3.1 provides in pertinent part:
  - “Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following services until the Architect receives the Owner’s written authorization:
    - .1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including, but not limited to, size, quality, complexity, the Owner’s schedule or budget for Cost of the Work, or procurement or delivery method;

## Compliance with Law (problem)

- This clause creates warranty of compliance.
  - *“Regardless of where services are to be performed, DP warrants that it shall at all times comply with any and all applicable foreign, federal, state, and local government laws, ordinances, statutes, standards, rules, regulations, and guidance, including but not limited to those relating to working hours, working conditions, health and safety, and the environment.”*

## Compliance with Law (problem with indemnity)

- This clause creates liability if non-compliance with law was not intentional or negligent.
  - *“The DP shall indemnify and hold harmless the owner against any claims, damages and losses of any kind caused by, arising out of, or related to failure to comply with any laws, ordinances or regulations.”*



## Compliance with Law (Apply Negligence Standard)

- Make compliance subject to the Standard of Care instead of an absolute. E.g.,
  - “DP and Owner will apply the reasonable standard of care to comply with applicable laws in effect at the time the services are performed hereunder, which to the best of their knowledge, information and belief, apply to their respective obligations under this Agreement.”

## Compliance with Law (change in law – the solution - )

- A reasonable clause may be the following:
  - “In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Consultant and which result in a substantive change to the construction documents, the Consultant shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes.”

# CONTACT Information & DISCLAIMER

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# Questions?

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