

# Contract Guide Course for Design Professionals:

## Part II

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# Inspection (the problem)

- An example of a problematic clause is the following:
  - *“DP shall make visits to the site to inspect the progress and quality of the executed work of the Contractor and its Subcontractors, and to determine if such work is proceeding in accordance with the Contract Documents. . . . DP shall keep the Owner informed of the progress and quality of the work and shall exercise the utmost care and diligence in discovering and promptly reporting to the Owner any defects or deficiencies.”*

# Inspection (Solution) –

- AIA B101-2007, §3.6.2.1, “The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.3.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work.

# Inspection – (Sometimes it really is “inspection”)

- If you use the term “inspection”, define it narrowly. E.g., AIA B101-2007, at §3.6.6 “Project Completion”:
  - The Architect shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion; receive from the Contractor and forward to the Owner, for the Owner’s review and records, written warranties and related documents required by the Contract Documents and assembled by the Contractor; and issue a final Certificate for Payment based upon a final inspection indicating the Work complies with the requirements of the Contract Documents.

# Insurance (problem)

- Beware of contract like ConsensusDOCS 240 that requires DP to give copies of policies to the client.
  - Only certificates of insurance are typically required.
  - The terms and conditions (particularly endorsements) are often unique to the DP firm and not something to be shared with others..
  - Note also that DP might choose to reveal coverage of only what the contract calls for instead of the full amount of coverage carried by the DP.

# Insurance – (problem – no coverage specifically for indemnity)

- Owner-generated contracts sometimes state that the DP is to procure a professional liability policy with contractual liability coverage for the project owner. E.g.,
  - *“The Engineer’s contractual liability coverage must, at a minimum, protect the Owner to the extent of the following hold harmless agreement....”*
- Note that under the typical contractual liability exclusion, indemnity is not excluded from coverage so long as a court would have imposed the liability even in the absence of the indemnity provision. But insurance is not expressly written to cover indemnity clauses. So delete that language.



# Insurance (problem - Naming Owner as Additional Insured is not Possible)

- My recent Zurich a/e Briefings provides a full explanation for why project owners and other clients are not named as additional insureds on a DP's policy.
  - [http://www.zurichna.com/internet/zna/sitecollectiondocuments/en/products/construction/designprofessional/aebriefings/aebriefing\\_2012\\_fall.pdf#page=1](http://www.zurichna.com/internet/zna/sitecollectiondocuments/en/products/construction/designprofessional/aebriefings/aebriefing_2012_fall.pdf#page=1)
- Just say NO when asked to name someone as an additional insured.

# Limitation of Liability (EJCDC)

- EJCDC Document E-500 (2008) at Exhibit I, 6.10.A.-1:
- *“Limitation of Engineer’s Liability ... To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer’s officers, directors, members, partners, agents, employees, and Design Professionals, to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied of Engineer or Engineer’s officers, directors, members, partners, agents, employees, or Design Professionals shall not exceed the total compensation received by Engineer under this Agreement.”*

# Limitation of Liability (good example)

- *“Limitation of Liability:* To the fullest extent permitted by law, the total liability, in the aggregate, of DP, DP’s officers, directors, partners, employees, agents, and subconsultants, to Client, and anyone claiming by, through, or under Client for any claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way related to this Project or Agreement from any cause or causes, including but not limited to negligence, professional errors and omissions, strict liability, breach of contract, or breach of warranty, shall not exceed the total compensation received by DP or \$50,000 whichever is greater. The Client may negotiate a higher limitation of liability for a reasonable additional fee, which is necessary to compensate for the greater risk assumed by DP.

# Limitation of Liability (ConsensusDOCS problem)

- Beware of ConsensusDOCS 240, which has a prohibition upon certain LoL clauses in DP contracts. Section 3.5 of that contract states that the Architect/Engineer is prohibited from entering into an agreement with a DP that includes any limitation of liability, at least without the prior written approval of the Owner.
- ConsensusDOCS 240 also provides that the Owner “*shall be considered the intended beneficiary of the performance*” of the DP’s services, which could support a direct claim by the Owner against a DP (§3.6.12).

# Limitation of Liability (Waiver of Consequential Damages)

•**Waiver of Consequential Damages.** Notwithstanding anything in this Agreement to the Contrary, it is agreed that Consultant shall not be liable in any event for any special or consequential damages suffered by the client arising out of the services hereunder. Special or consequential damages as used herein shall include, but not be limited to, loss of capital, loss of product, loss of use on any system, or other property, or any other indirect, special or consequential damage, whether arising in contract, tort (including negligence), warranty or strict liability.”

# Waiver of Consequential Damages

## AIA and EJCDC Approaches

- 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.”
- Similarly, EJCDC E500 (2008), §6.10.E, provides  
“*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 Design Professionals, 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.”

# CONTACT Information & DISCLAIMER

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