

Contract Guide Course for Design Professionals:

Part II

Presented by:

J. Kent Holland, J.D.

ConstructionRisk, LLC

Kent@ConstructionRisk.com
703-623-1932

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Owner's Responsibilities (AIA)

- AIA B101, article 5, includes twelve paragraph description of duties assumed by the owner, including:
 - “Provide information regarding requirements for the Project, including a written program (§5.1); Periodically update the budget (§5.2); Render decisions and approve the Architect’s submittals in a timely manner (§5.3); Furnish services of geotechnical engineers (§5.5); Coordinate the services of its own Design Professionals with those services provided by the Architect (§5.6); Furnish tests, inspections and reports required by law or the Contract Documents, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials (§5.7).”

Owner's Responsibilities (EJCDC)

- The EJCDC E-500 (2008), Exhibit B,
 - “B2.01 In addition to other responsibilities of Owner as set forth in this Agreement, Owner shall at its expense:
 - A. Provide Engineer with all criteria and full information as to Owner's requirements for the Project, including design objectives and constraints, space, capacity and performance requirements, flexibility, and expandability, and any budgetary limitations; and furnish copies of all design and construction standards which Owner will require to be included in the Drawings and Specifications; and furnish copies of Owner's standard forms, conditions, and related documents for Engineer to include in the Bidding Documents, when applicable.”

Owner Responsibilities (for Substitutions)

- One issue that gives design firms cause for concern is a decision by the Owner to accept substitution of equipment- such as “or equal” products instead of the brand name.
- AIA B101-2007, §3.1.4 addresses this issue by providing the architect some level of protection as follows:
 - “Owner Decisions
“The Architect shall not be responsible for an Owner’s directive or substitution made without the Architect’s approval.”

Ownership of Documents

- Contracts such as the AIA Document B101 - 2007, and EJCDC Document E-500 (2008), state that that Instruments of Service belong to the DP that created them.
- Owners are more frequently demanding that they be granted copyright ownership and that can can reuse documents at will for any purpose.
 - Creates potential additional liability risk for DP, not to mention the business risk.
- How to protect the DP against such risk. See next slides.

Ownership of Documents (bad clause)

- An example of an unfortunate Owner contract clause requiring transfer of ownership follows:
 - *“All plans, drawings, tracings, specifications, programs, reports, models, mock-ups, designs, calculations, schedules, technical information, data, CADD documents and other material (collectively the “Documents”) prepared, furnished, or obtained by Design Professional, or Design Professional’s consultants under or for the Project, shall be the property of the Owner whether the Project is completed or not If this Agreement is terminated for any reason prior to Final Completion of the entire Project, the Documents may be used by Owner and its agents, employees, representatives and assigns, in whole or in part, or in modified form, for all purposes they may deem advisable in connection with completion and maintenance of, and additions to, the Project, without further employment of, or payment of any compensation to, Design Professional...”*

Owner Reuse of Documents – (Solution Hold Harmless and Indemnify DP)

- If Owner insists on taking copyright ownership it should grant release from liability and also an indemnity to DP., E.g.,
- AIA B 101, §7.3.1
 - “In the event the Owner uses the Instruments of Service without retaining the author of the Instruments of Service, the Owner releases the Architect and Architect’s Consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its Consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner’s use of the Instruments of Service under this Section 7.3.1....”

Ownership of Documents (A/E Reuse After Transferring to Owner)

- ConsensusDOCS 240, §10.1.4
 - “Where the Architect/Engineer has transferred its copyright interest in the Documents under Subparagraph 10.1.1, the Architect/Engineer may reuse Documents prepared pursuant to this Agreement in its practice, but only in their separate constituent parts and not as a whole.”

Ownership of Documents (Protecting DP Rights to Its Design Details)

- When Owner is given copyright it should not get copyright to existing practice library details of the consultant.
- “Client expressly acknowledges and agrees that the documents and data to be provided by Consultant under the Agreement may contain certain design details, features and concepts from Consultant’s own practice detail library, which collectively may form portions of the design for the Project, but which separately, are, and shall remain, the sole and exclusive property of Consultant. Nothing herein shall be construed as a limitation on Consultant’s right to re-use such component design details, features and concepts on other projects, in other contexts or for other clients.”

Payment (problem - Withholding Fees)

- AIA B101-2007, §11.10.3 addresses withholding of fees as follows:
 - “The Owner shall not withhold amounts from the Architect’s compensation to impose a penalty or liquidated damages on the Architect, or to offset sums requested by or paid to contractors for the cost of changes in the Work unless the Architect agrees or has been found liable for the amounts in a binding dispute resolution proceeding.”

Payment (problem - Withholding Fees)

- Use clause like this to prevent client from arbitrarily withholding fee. It provides that deductions in invoices may only be made by if it has been determined by a dispute resolution process that the client is entitled to do so.
- *“Objections to Invoices/No Deductions.* It is important for the Consultant to be promptly informed of problems. If the Client objects to any portion of an invoice, the Client shall notify the Consultant in writing within twenty days of the invoice’s receipt. The Client agrees to pay any undisputed portions of an invoice. No deductions shall be made from the Consultant’s compensation on account of penalty, liquidated damages, or other sums withheld from payment to contractors, except as may be determined by mediation, arbitration, or other dispute resolution mechanism to which the Consultant is a party.”

Payment (What to do if Late)

- *“Payment.* Owner agrees to pay DP’s invoice within 30 days of receipt. For any payment not received within that time, Owner shall pay a service charge on the past due amount, including interest at the prevailing legal rate [or ____%], and reasonable attorneys fees and expenses if collected through an attorney or collection agency...”

Permits (Problem clause)

- An example of a clause that may create extraordinary risk to the DP is as follows:
 - *“DP shall obtain all required permits, licenses, agency approvals, and other necessary documentation in order to complete the project.”*

Permits (Solution clause)

- DP may agree to assist the Owner in obtaining permits needed by the Owner to design and construct the project (without undertaking responsibility for obtaining the permits). An example follows:
 - *“Permits.* DP shall assist the Owner in connection with Owner’s responsibility for applying for permits, licenses and approvals needed for the Project and in connection with filing documents required for the approval of governmental authorities having jurisdiction over the Project.”

Standard of Care (problem)

- 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)

- 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)

- AIA B101, Sec. 2.2., states the standard of care to which the architect must perform 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)

- DP might also add at the end of the standard of care clause include 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)

- If the Owner insists on a “highest standard of care” the DP might be able avoid warranty liability or other uninsurable contractual liability by clarifying the contractual intent as follows:
 - “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.”

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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