

Contract Guide Course for Design Professionals:

Part 1

Presented by:

J. Kent Holland, J.D.

ConstructionRisk, LLC

Kent@ConstructionRisk.com
703-623-1932

AIA Registered Course

This program is registered with the The American Institute of Architects Continuing Education Systems (AIA/CES) for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to specific materials, methods, and services may be addressed at the conclusion of this presentation by contacting the instructor.

Copyright information © 2011-2012

- This presentation is protected by US and International copyright laws. Reproduction, distribution, display and use of the presentation for internal use of attendees is granted. Other use without written permission is prohibited.

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

Environmental Conditions

- The AIA B101-2007, §10.6:
- “Unless otherwise required in this Agreement, the Architect shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.”
- EJCDC Document E-500 (2008) at §6.09 similar clause

Green Design (problems)

- AIA B101-2007, §3.2.3 provides:
 - “The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches. The Architect shall reach an understanding with the Owner regarding the requirements of the Project.”

Green Design (problems) Watch the AIA language

- AIA B101-2007, §3.2.5.1 states:
 - “The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner’s program, schedule and budget for the Cost of Work. The Owner may obtain other environmentally responsible design services under Article 4.”

Green Design (solution)

- Clause stating DP does not warrant LEED certification is the following:
 - “The Project shall be designed in order to enable it to achieve LEED silver certification (except to the extent that the Owner directs otherwise in writing) and with a possible target of achieving LEED gold certification. The Owner shall render decisions concerning LEED certification prior to the completion of the Design Development Documents. The Owner acknowledges that many of the elements required to achieve any LEED certification are controlled by the Owner or third parties not under the control of Architect, and that the Architect does not warrant or guaranty that the Project will be LEED certified.”

Standard of Care (problem)

- The following clause in an owner-generated contract requires greater than the generally accepted standard.
 - *“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 (solution)

- 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)

- If the contract seems to contain language that might be interpreted as warranties and guarantees, consider adding a catch-all sentence to the “Standard of Care” section stating something like this:
 - “No warranty or guarantee, either express or implied, is made or intended by this Agreement.”

Standard of Care (solution 3)

- If “highest standard” language cannot be deleted, consider adding a clause like this:
 - “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

Disclaimer: This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

Questions?

J. Kent Holland, Esq.

ConstructionRisk Counsel, PLLC

1950 Old Gallows Rd, Ste 750

Vienna, VA 22182

(703) 623-1932

Kent@ConstructionRisk.com

- For case notes and articles on design-build decisions and other case law, visit: www.ConstructionRisk.com. For research or for free newsletter, visit: “*ConstructionRisk.com Report*”