

Contract Guide Course for Design Professionals:

Part 3

Presented by:

J. Kent Holland, J.D.

ConstructionRisk, LLC

Kent@ConstructionRisk.com
703-623-1932

Termination (EJCDC on Expenses)

- EJCDC E-500, §6.05.D-2
 - “*Suspension and Termination.* In the event of termination by Owner for convenience or by Engineer for cause, Engineer shall be entitled, in addition to invoicing for those items identified in Paragraph 6.05.D.1, to invoice Owner and to payment of a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Engineer’s consultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.”

Termination (AIA on Expenses)

- AIA B101-2007, §9.7 addresses termination expenses as follows:
 - “Termination Expenses are in addition to compensation for the Architect’s services and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect’s anticipated profit on the value of the services not performed by the Architect.”
- Note that an astute project owner will strike the allowance of “anticipated profit.” This is unique to AIA and is not allowed under federal contracts, state contracts, EJCDC or ConsensusDOCS.

Third Party Beneficiaries

- Claims by individuals or corporations against DPs with whom they have no contract are becoming more common.
- Avoid these by using contract language such as the following:
- AIA B101-2007, §10.5 :
 - “Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.”

Time Limitations to Filing Suit

- Rather than rely exclusively on statutes of limitations or statutes of repose, you may consider establishing, by contract, a specific time frame limiting the time in which the Owner may bring claims against you.
- An example of a clause limiting the time by which the Owner can sue the DP follows:
 - *“Time Bar to Litigation.* Any actions by either party against the other party for any cause of action whatsoever whether known or unknown, including but not limited to claims for breach of this Agreement, or for the failure to perform in accordance with the applicable standard of care, howsoever stated, shall be barred two (2) years from the time claimant knew or should have known of its claim, but in any event, not later than four (4) years after substantial completion of DP’s services.”

Time Limitations to Legal Action

- A good example of time limitations is provided by AIA B101, §8.1.1 Statute of Repose, as follows:
 - “The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.”

Underground Utilities

- Owners occasionally include a clause in the DP's contract concerning underground utilities that is based on language typical of the Contractor's contract.
- An example of an unfortunate owner generated underground utility clause follows.
 - *“DP shall locate all underground utilities and obstructions prior to the commencement of intrusive operations at the project site, such as drilling or excavating, and shall be responsible for damage to such utilities or structures caused by its operations, including data collection, soil and ground water sampling, and any excavating.”*

Underground Utilities (Better language)

- In the clause below, the DP is entitled to rely on information and use the standard of care rather than giving a warranty.
 - **“Underground Utilities.** Owner shall advise and provide DP with all information and data in its possession concerning the type and location of all underground utilities, both public and private. DP shall be entitled to rely on the information provided being complete and accurate. The Owner-Contractor Agreement shall make Contractor responsible for locating all underground utilities. To the extent that DP performs any services to locate underground services, it shall use reasonable means to identify and locate underground utilities and structures, such as complying with state “one call” laws, and shall exercise reasonable precautions to avoid damage to the utilities.”

Warranties and Guarantees

- By agreeing to warrant that your professional services will produce any other result, including but not limited to an error-free design, you may be contractually liable based on breach of warranty even though you were not negligent in your performance.
- An example is the following:
 - *“Architect represents and warrants that it will take total responsibility for errors and omissions on its documentation and will rectify all such instances at no additional cost to Owner.”*
- The architect, pursuant to the above warranty, agrees to a higher standard of care than the normal negligence standard. The firm is agreeing to perfection.

Warranties & Guarantees (2)

- EJCDC E-500, (2008) §6.01.A. similarly establishes the Standard of Care and disavows any warranties as follows:
 - “The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer’s services.”
- When it comes to warranties and guarantees, design firms need to explain to their clients that the warranty exclusion of the professional liability policy will deny them coverage for costs related to such warranties and guarantees.

QUESTIONS?

- Contact Information:

Kent@ConstructionRisk.com

703-623-1932

Disclaimer

This risk management workshop was provided as an accommodation service. 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 Zurich policy.

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.

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*”