Contract Guide Course for Design Professionals:

Part 3

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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?

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Questions?

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