

# Contract Guide for Design Professionals



## About *Contract Guide for Design Professionals*

### What is covered?

We have included discussions addressing 50 contract clauses, including those that have historically cause the greatest liability concerns and result in many claims.

In some sections, we address the subject with only a short discussion and an example clause to demonstrate the points made. In other sections, we describe potential problems and solutions in more detail and review multiple examples of possible contract clauses. In some sections we have included examples of one-sided language from contracts generated by owner/clients. This is for the purpose of familiarizing the reader with potential problem language to look for when reviewing a contract that has been generated by the owner. These samples of one-sided contract language present major risk management problems and will likely foster poor relations between the client and the design professional. Both the client and the professional consultant would be well advised instead to seek a more appropriate and balanced allocation of risk.

### Who should have this book?

Educating our professional consultant insureds is the overriding purpose of this guide. By studying the examples of risk shifting language from owner contracts in this manual, we are hopeful that you and others in your firm will become more aware of what to look out for in the contracts that owners suggest you sign.

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### Continuing Education

The book, with three courses, has been registered with the American Institute of Architects (AIA) for continuing education.



**\$49.95**

# **Contract Guide for Design Professionals**

**Third Edition**

**J. Kent Holland, Jr.**

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Vienna, VA

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Cover photograph by J. Kent Holland – view of the World Trade Center from the window of Zurich's office at One Liberty Plaza

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## **Zurich North America Commercial Markets**

### **To Our Valued Customers and Friends:**

Zurich North America Commercial Markets (“Zurich”) is pleased to provide you this complimentary copy of the *Contract Guide for Design Professionals*. By providing risk management tools such as this Contract Guide as well as newsletters, workshops, contract reviews, and other services, we strive to help our customers avoid the cost, distraction, and time-consuming efforts often associated with professional liability claims.

Through the negotiation of contracts that contain appropriate risk allocation to the early handling of situations that lead to a claim, this Contract Guide helps design professionals to avoid subsequent claims. We hope you find it useful in identifying some of the key contract clauses that deserve special attention when it comes to allocating and managing risks.

For more information on Zurich’s products and services for design professionals, please contact your broker or underwriter or visit our website at [www.zurichna.com/construction](http://www.zurichna.com/construction).

#### **Scott Rasor**

President of Construction  
Zurich North America Commercial  
1400 American Lane  
Schaumburg, IL 60196

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# **Introduction**

## **History of the Book**

This Guide was commissioned by Zurich North America Commercial Markets to be used in conjunction with risk management workshops and educational programs conducted by Zurich North America Construction for its insureds. Clauses provided are examples for educational and discussion purposes only and are not hereby represented as appropriate for use in any specific contract or scenario. The reader is encouraged to review these clauses and the text describing them when negotiating professional services agreements and to seek advice of competent counsel to assist in drafting clauses appropriate to any specific project and situation.

The original Guide was written in 1997. The Second Edition was published in 2005. This Third Edition has been extensively revised and updated to include references to the most current contract document forms of the American Institute of Architects (AIA), Engineer's Joint Contract Documents Committee (EJCDC), and the ConsensusDOCS.

For copies of Zurich's A/E Briefings, a newsletter providing risk management information for Design Professionals, visit [www.zurichna.com](http://www.zurichna.com).

## **Continuing Education**

Three quizzes are located at the conclusion of the guide. In conjunction with reading the guide, they can be used for three courses that have been filed with the AIA by Zurich as a registered provider of continuing education. These courses may be taken, free of charge for Zurich insureds, by following the instructions found with each quiz.

## **What is covered?**

We have included discussions addressing 50 contract clauses. While these are not all the clauses that may be included in a contract, they are the ones that we have found historically cause the greatest liability concerns and result in many claims.

In some sections we address the subject with only a short discussion and an example clause to demonstrate the points made. In other sections, we describe potential problems and solutions in more detail and review multiple examples of possible contract clauses. In some sections we have included examples of one-sided language from contracts generated by owner/clients.

This is to familiarize the reader with potential problem language to look for when reviewing a contract that has been generated by the owner. These samples of one-sided contract language present major risk management problems and will likely foster poor relations between the client and design professional. Both the client and the professional consultant would be well advised instead to seek a more appropriate and balanced allocation of risk.

### **Sample contract language**

In selecting the clauses for this guide, the author chose among a database of many contracts that he has been privy to over the years. They are not intended to represent “the best” clauses from the Consultant's perspective, but are simply representative clauses for the subjects discussed. We reiterate that the clauses are presented solely for educational purposes and to help facilitate an understanding of the issues discussed. These clauses are not intended to be used in any particular contract and no representation is made or intended to suggest that this language is appropriate for use in all your contracts. Example clauses, or portions of clauses, are quoted from AIA, EJCDC, and ConsensusDOCS documents. It is copyrighted language and is not to be used without permission of the applicable organization.

Other clauses in this guide that are not quoted from the AIA or EJCDC documents are taken from a database of contracts reviewed by the author. It is not our intent to copy anyone's copyrighted language but it is possible that some of these contracts have borrowed, without attribution, the language of some other party's copyrighted form without our knowledge. If the reader recognizes any instances of this in the manual, we apologize in advance. You should have legal counsel advise you on what language is appropriate for your contract, on your particular project, and in the specific state where the project is located. State laws, public policy and industry custom may affect how any clause is interpreted and applied in any given situation.

Please do not assume that you can copy the example clauses out of this manual, paste them together, and have a contract. Your risk manager and attorney would not be pleased. The results could be less than satisfactory and create significant problems. It is important that you create an integrated set of contract documents that contain the basic agreement, general terms and conditions, special terms and conditions, and scope of service description.

### **Who should have this book?**

Educating our professional consultant insureds is the overriding purpose of this guide. During our risk management workshops performed at insureds' offices, we are sometimes chagrined to discover that our insureds have

signed a contract that inappropriately shifted major risk to them that should have belonged to the client. The typical reason for this is that the consultant's personnel were not sufficiently familiar with the contract language, what it meant, and how it would be applied in a claim or litigation. By studying the examples of risk shifting language from owner contracts in this manual, we are hopeful that you and others in your firm will become more aware of what to look out for in the contracts that owners suggest you sign.

### **Are design-build contract issues addressed?**

We did not address design-build issues in this guide because it is a unique subject and would not be relevant to all the readers of this particular book. When a design professional performs services under a design-build contract, it assumes greater risks and liabilities than it does under a standard method of contracting. Zurich has a separate risk management workshop exclusively addressing design-build risks, responsibilities and liabilities.



## Contracts Overview

### Get it in Writing

Contracts may be written or oral. For professional consulting contracts it is important that the terms and conditions of the contract be reduced to writing. Without a written agreement, the parties may later have a dispute over the scope of the services and what was agreed upon. There is no way to prove what was agreed to without going into court and presenting testimony by witnesses concerning what the parties believed the agreement was. This is a poor way to do business.

From experience working with consultants, we have found that most will obtain some form of written contract on most of their projects with most of their clients. Some of these contracts will be purchase orders, lacking significant detail. Others will be a short contract, containing little more than basic boilerplate terms. And still other contracts will not be reduced to writing until after the services have initially begun on the basis of an oral understanding. These occur most frequently when the consultant *is* working for a long-term client that it trusts. The Consultant accommodates the client by beginning services on a new project before a final written contract has been executed. In many of these situations a contract is eventually reduced to writing. But in others, the services are completed before there is ever a written contract.

A written contract avoids ambiguities and misunderstandings about what the parties agreed to with regard to the scope of services, and compensation. It also makes it possible for you to focus pre-contract communications with your client to reach mutual understanding of the expectations of the client and yourself on all important issues, including risk allocation.

Certain terms and protections, such as a limitation of liability clause, will not be available to you if you don't get a written contract.

The contract negotiation process is the beginning of the communication between you and your client that should continue throughout the project. If you can't communicate during the contract negotiation and formation process it is not likely that you will communicate any better during the performance of the services under the contract.

Good communication forms the basis for good risk management.

A well written contract is (1) a performance planning mechanism and (2) a contract administration “manual.” It is not a legal sword or shield. Far too often, after getting a written contract, the parties tuck it away in a file drawer and never look at it again until a dispute arises. If that is the case, the contract has failed to accomplish either of the two above-cited purposes. Furthermore, the project managers may have failed to meet notice requirements and perform with specified parameters and conditions if they are not constantly referring to the written contract throughout performance of the Project.

### **Basic Elements of a Contract**

The key elements of any contract include: (1) scope of service, (2) performance schedule, (3) fee schedule, and (4) the general terms and conditions.

#### **(1) Scope of Service**

The scope of your service may be briefly set forth on the first page of the Agreement but is more often included as an attachment to the contract. This provides more space to present specific details concerning the services to be provided. The services may be identified as “Basic Services” which you agree will be performed for the “Basic Fee.” To the extent that “Additional Services” may be a possibility, these can be identified as a separate category for which Additional Fee will be paid to you in the event that the client requests these services. Finally, it may be appropriate to list “Excluded Services” that the client has decided not to have you perform although they may eventually be necessary for the project. Perhaps the client does not believe these services are needed at this time or some other consultant has been contracted to perform them. This can be presented as to what is included as “Basic Services” what can be provided by you as “Additional Services,” and what will be deemed “Excluded Services.” Not everyone agrees that it is necessary or appropriate to specify what is excluded from the service. Some may argue that if you put together a list of what is excluded and forget to include something in that list that was intended to be excluded, it will by inference be deemed among the “Basic Services.”

This may be avoided by using the familiar language: “Services that are expressly excluded, include but are not limited to: .....” As explained in detail in the Scope of Service section of this manual, you may avoid arguments and disputes with your client by identifying excluded services, particularly for matters (such as environmental concerns) that are beyond your normal scope and expertise or for other services that should clearly be performed by someone in order for the project to proceed but which the client has chosen

not to have you perform, such as geotechnical surveys and site assessments. See Discussion at “Scope of Service” on page 135.

Listing specific Owner Responsibilities is another mechanism for identifying the scope of the project, what will be required for the project, and who will be responsible for performing various functions and responsibilities.

## **(2) Performance Schedule**

The performance schedule that is set forth in the agreement establishes the client's expectations as to your timeliness of completion of services. It is important that the expectations of the client, as expressed by the schedule, be realistic, and that the schedule allow for time extensions. Time extensions may be needed because it takes longer than anticipated to accomplish the design. Construction delays by the contractor and other delays completely beyond your control may also delay your ability to complete your services on the schedule originally planned. It may be appropriate for a schedule to slip due to changes you make to your design that are within your control but which are not due to any negligence on your part. If you are not negligent in causing the design changes, it is inappropriate for you to be penalized for schedule slippage resulting from the design change.

Be careful before agreeing to performance dates. If you agree to something that is not realistic and cannot be met without cutting corners in your services and impacting the thoroughness with which you work, you have increased your risk of making a negligent error. Even to the extent that your delay is not caused by negligence, you still stand the very real risk of creating an unhappy client that may choose not to work with you in the future or may sue for breach of the contractually agreed upon performance schedule. If the contract sets forth performance times, be sure that it also provides specific time limits for owner actions such as reviews and decisions.

## **(3) Fee Schedule**

In the fee schedule, you should set forth the basis, method and/or amount of your Basic Services (including rates for performing items within the basic services that may be paid on the basis of something other than a lump sum fee). Your rates for performance of items listed within “additional services” should be separately listed.

A changes clause should permit you to bill your client for additional fees and costs. Be careful that you do not get locked into a fee that cannot increase as the costs are increasing due to changes and delays that are compensable.

Billing your client and receiving prompt payment is one of the keys to managing your contract and your risk. Far too many claims against design professionals are initiated by a design professional suing its client for unpaid fees. Almost inevitably, the client countersues, claiming negligence on the part of the design professional.

Include in the fee schedule (or in a separate clause), a provision entitling you to suspend or terminate services if the client has not paid you on an invoice within a specified period of time. Do not assume that if you continue providing services despite your client's late payments that your client will be honorable and pay you outstanding balances upon completion of the job. Many litigated cases attest to the fact that this is not a reasonable assumption. You may wish to specify lien rights, if applicable, to secure your right to be paid for your work.

#### **(4) General Terms and Conditions**

General terms and conditions comprise the business terms that are often called "boiler-plate." Many contracts include the general terms and conditions as part of the basic Agreement form. Others append the general terms and conditions as a separate attachment. Whichever way it is presented, don't assume that just because these terms are on a pre-printed form they are inconsequential. It is in these clauses that significant risk allocation takes place. For example, it is here that you will typically find clauses dealing with indemnification, limitation of liability, insurance, standard of care, changed conditions, underground utilities, and termination. In the balance of this manual, we present a discussion of 50 clauses that may impact upon your risk in contracting

### **The Various Contract Forms**

#### ***Standard Formal Agreements***

Numerous groups such as the American Institute of Architects (AIA), Engineers Joint Contract Documents Committee (EJCDC), ConsensusDOCS, and others have drafted standard contract forms. Prior to final publication, these forms are reviewed by a cross-section of parties, including owners, consultants and contractors (as well as their counsel) to obtain advice and even endorsement. As a result, they tend to be an even-handed compromise, giving each party reasonable rights and responsibilities. What tends to happen, however, is that attorneys get involved and advise their client that the standard form needs to be modified to provide greater protections to the attorney's client. As a result, the addenda to these contracts may seriously alter the original intent of the document and shift risk dramatically from what



the original drafters expected. When dealing with these documents, pay close attention to any modifications.

A benefit of using the standard form contracts is that many of the clauses in them have been subjected to judicial review during contract disputes. Consequently, there may be case law interpreting and applying a clause that is important in your own dispute and you may be able to obtain a settlement with your client by demonstrating how other courts have applied the questioned clause. In contrast, if the standard clause has been completely revised and rewritten, you may have to convince a court how it is to be interpreted by presenting extensive testimony and proof.

### ***Design Professionals Standard Form Contracts***

Many firms choose not to use the standard contract forms described above but devise their own standard forms instead. This may be the case for a number of reasons. A firm doing specialized consulting services may conclude that it needs to routinely have certain clauses in its standard form contract that are not contained in any of the models. Rather than affixing a supplement or an addendum to the model contract, it may be easier to get a client to sign the consultant's own standard form already containing all the desired language. Whenever using your own form contract, it is advisable to have your attorney and your professional liability insurance carrier periodically review the contract and advise you concerning the enforceability, risk allocation and insurability of the terms and conditions.

### ***Client-Developed Contracts***

Client-developed documents typically create the highest risks for the design professional and have the greatest likelihood of causing uninsurable risks. Many project owners have reacted against the successful efforts by design professionals during the past decade to limit risks through carefully worded contract language. Some of these owners believe that you should be responsible for every little mistake and error you make in the performance of your professional services.

Their contracts include clauses such as (a) “highest standard of care;” (b) indemnification of the owner for all damages, regardless of whether caused by A/E negligence; (c) guarantees and warranties; (d) and to other terms, conditions, and risks that are inappropriate for your profession.

Whenever you are given a client-developed contract to sign, you should study it carefully. Use the balance of this manual as one of your tools to

evaluate the contract. You should also have it reviewed by counsel and your insurance professional.

In negotiating your contract, you should not expect a court to strike out one-sided terms and conditions that you agreed to. Basically, you should be prepared to live with the terms of the contract and not expect a court to help you out of a bad situation. Nor should you anticipate that because of a long-standing relationship with your client, the client will waive a tough clause and not hold you responsible under the terms and conditions. We know of some A/Es that have signed contracts with particularly one-sided, onerous conditions, with the expectation that if a dispute were ever litigated they could successfully argue that they signed the contract under duress and coercion. This is an inappropriate and very risky approach to contract risk management.

As educated men and women, A/Es would not likely get sympathy from a jury or judge being asked to believe that the A/Es did not understand the plain meaning of the contract they signed. Generally speaking, when two commercial entities negotiate a contract at arm's length, a court will enforce the provisions of that contract unless the contract clearly violates some public policy or law. For further discussion concerning this point, see the newsletters at the end of this manual.

### **Contract Language - Things To Do & Things To Avoid**

***Make the contract language clear.*** Some contract drafters seem to think they should use long sentences, and long, convoluted paragraphs containing much legalese. This often leads to confusion and ambiguities. It is particularly important, for example, to use clear and concise language if you intend to require your client to limit your liability or to hold you harmless.

Contracts should include everything pertaining to a particular subject under a heading identifying that subject. Some client-generated contracts have been known to contain an article entitled "Indemnification" but go on to also include indemnification requirements under several more clauses of the contract addressing property damage, employee injuries, and others. This may be sloppy drafting or it may be intentional on the part of owners who are counting on you asking your attorney and insurance company to review only the sections of the contract entitled "indemnification" and "insurance." It is the best practice to give your attorney and insurance professional the entire set of terms and conditions to review rather than selecting only what you believe should be reviewed. It may take longer and cost you slightly more money, but it can be well worth it.

## Terms and Conditions Discussed

This guide presents examples and discussion concerning the following terms and conditions:

Advertising	Payment
Americans with Disabilities Act	Permits and Licenses
As-built Drawings	Redesign Obligations
Certification	Rejection of Work
Changed Conditions	Reliance on Information Provided by Others
Changes in Design Professionals Services	Responsibility for the Services of Others
Change Orders in Construction	Right of Entry
Choice of Law	Schedule
Compliance with Law	Timeliness of Performance
Confidentiality	Scope of Services
Cost Estimates	Severability
Damages	Shop Drawings
Dispute Resolution	Site Safety
Electronic Media/BIM + CADD	Site Visits (see Inspection)
Environmental Conditions and Services	Standard of Care
Governing Law and Jurisdiction	Supplemental Terms and Conditions
Green Design	Survival
Incorporation by Reference	Suspension of Services
Indemnification	Termination
Inspection	Third-Party Beneficiaries
Insurance	Time Limitations to Legal Action
Integrated Written Agreement	Underground Utilities
Limitation of Liability	Waiver of Subrogation
Notice Requirements	Waiver of Terms
Owner's Responsibilities	Warranties and Guarantee
Ownership of Documents	

There are other clauses impacting risk management that could also have been included but which, for reasons of time and space, have not been addressed.



## Advertising

**Issue:** Design Professionals often use drawings, models, sketches, photographs and other materials that are created while performing services for an Owner for the purpose of advertising and marketing services to other potential clients. Displaying such information in brochures, advertisements and the like is a valuable marketing tool and can help demonstrate to a prospective client that you have the necessary qualifications and have performed services of the kind desired. Most Owners appear to be willing to permit some use of this material.

**Discussion:** If the Design Professional decides to use materials such as those described above for marketing, negotiate appropriate language into the contract allowing the use for these purposes.

Beware of language in a contract that expressly forbids such promotional use. An example is as follows:

*No public announcement. Design Professional shall not make any public announcement or publicity release regarding the Project or its Services under this agreement without Owner's prior written approval and shall not use any of the Contract Documents for public relations or promotional efforts without Owner's prior written approval.*

**Conclusion:** Include a clause in the contract expressly authorizing the use of specified documents for the purposes of marketing, promoting, and advertising your services. Such a clause is found in AIA B101-2007, §10.7:

The Architect shall have the right to include photographic or artistic representations of the design of the Project among the Architect's promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations. However, the Architect's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner shall provide professional credit for the Architect in the Owner's promotional materials for the Project.



## Americans with Disabilities Act

**Issue:** Under various federal laws, including but not limited to the Americans with Disabilities Act, the Architectural Barriers Act, the Rehabilitation Act, (hereinafter “accessibility requirements”) and the Fair Housing Act, it is a violation to design and construct a facility not meeting accessibility and usability requirements, unless structurally impractical to do so. For alterations to existing facilities, the altered portions are to be made readily accessible to individuals with disabilities to the maximum extent feasible. These laws may also apply if a project is financed with federal funding. Some of the laws provide for minimum performance standards rather than strict code-like guidelines. A professional judgment must, therefore, be made by the Design Professional, and project Owner, concerning what is required and appropriate for a given facility.

**Discussion:** If you create a design that is constructed by a facility Owner, and that Owner is subsequently sued for alleged accessibility violations arising out of the design, as constructed, the Owner may look to you for damages it sustains in modifying the building and paying possible penalties. If you contractually agreed that your services will be performed in compliance with “all laws, ordinances and regulations” you might be held to have warranted that the design would strictly comply with the accessibility laws and, therefore, have contractual liability to the Owner despite having exercised reasonable care in interpreting and applying accessibility standards to your design.

Not only could you have liability to the Owner, but the U.S. Department of Justice has asserted that the Design Professional’s firm may have independent liability to the government for civil rights violations.

Beware of a contract clause that could create a warranty that the design will meet all laws and codes, such as ADA. An example of such a clause is the following:

*The Architect shall at all times observe and comply with all city, federal and state laws and regulations and shall defend the City...against any claim or liability arising from or based on the violations of any law or regulation.*

**Conclusion:** Do not agree to warrant that your design services will comply with all accessibility requirements. Explain to the Owner that, because of the uncertainties concerning what is required, the best you can do is exercise due diligence to determine what accessibility standard is appropriate for the facility and act reasonably in interpreting and applying accessibility requirements to your professional services. In other words, agree only to the normal standard of care. An example clause is as follows:

Design Professional agrees that, consistent with the standard of care applicable to this agreement, it will identify, interpret and apply the design requirements of applicable laws, regulations and ordinances, including the Americans with Disabilities Act (ADA).

Another example is as follows:

Design Professional will exercise reasonable care to identify, interpret and apply the design requirements under applicable laws, regulations and ordinances, including the Americans with Disabilities Act.

The EJCDC Document E-500 (2008), at Section 6.01 E., provides for code compliance in such a way as to make compliance subject to the general performance standards set forth in the contract. It also goes a step further by protecting the engineer in the event that changes in the requirements become effective after the contract is executed. It provides as follows:

Compliance with Laws and Regulations, and Policies and Procedures:

1. Engineer and Owner shall comply with applicable Laws and regulations.
2. Prior to the Effective Date, if Owner provided to Engineer in writing any and all policies and procedures of Owner applicable to Engineer's performance of services under this Agreement, Engineer shall comply with such policies and procedures, subject to the standard of care set forth in Paragraph 6.01.A, and to the extent compliance is not inconsistent with professional practice requirements. (cont'd)



...

3. This Agreement is based on Laws and Regulations and Owner-provided written policies and procedures as of the Effective Date. Changes after the Effective Date to these Laws and Regulations, or to Owner-provided written policies and procedures, may be the basis for modifications to Owner's responsibilities or to Engineer's scope of services, time of performance, or compensation.

*See also: Compliance with Law*

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## **As-Built Drawings**

**Issue:** The term “approval or review of as-builts” or “as-built drawings” suggests that the Contractor has identified what changes have been made to the Contract Documents. If the Design Professional is required to review such drawings, it is critical that the Contractor has specifically identified anything contained in them that deviates from what was required by the original Contract Documents.

**Discussion:** The term “as-built drawings” may suggest that the Design Professional is assuring the Owner that it has reviewed the drawings provided by the Contractor and observed and measured the construction to determine that the drawings accurately reflect all work performed. Such review and assurance of Contractor's accuracy of drawings is usually beyond the normal and reasonable scope of the services of a Design Professional and is not typically within a Design Professional's ability to perform in any event. Some Owners may assert that by approving “as-builts,” you have warranted that the drawings reflect the correct locations of the items and information portrayed on them, including such things as underground utilities.

Another significant issue is the use of “as-builts” by Design Professionals in the rehabilitation or retrofit of an existing project. To what extent should the Design Professional be able to rely upon the accuracy of the “as-builts” that the Owner provides to it? And what is the responsibility and liability of the Design Professional to the Contractor to whom it provides the “as-builts” for the purpose of preparing the Contractor's bids and how the Contractor will proceed with the work? Answers to the questions should be included in a clause entitling the designer to rely on information provided by the client. (See the “Reliance” section).

**Conclusion:** Shorthand terminology can increase exposure to the Design Professional because of the erroneous expectations that may be generated. Use language that more accurately reflects the nature of the drawings, who is responsible for them, and to what extent they may be relied upon. Instead of terming the drawings “as-builts,” which means different things to different people, title them “record drawings.” If the client's contract refers to “as-built drawings,” consider striking that term and replacing it with “record drawings.” Support this potential change to the contract by discussing with the Owner the practical reasons why the change is necessary and appropriate. On the drawings that are created based on the information reported by the

Contractor, have them marked with the term “record drawings.” The contract and the drawings themselves should indicate that the drawings are prepared by the contractor, and that the information has not been verified by the Design Professional. If verification is required it should be a separate service and the scope of this service should be clearly specified.

Rather than calling these “as built” drawings, it may be more accurate to refer to them as “record drawings.” EJCDC E-500, Article 7.a.A.22 provides as follows:

*Record Drawings* – Drawings depicting the completed Project, prepared by Engineer as an Additional Service and based solely on Contractor’s record copy of all Drawings, Specifications, addenda, change orders, work change directives, field orders, and written interpretations and clarifications, as delivered to Engineer and annotated by Contractor to show changes made during construction.

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## Certification

**Issue:** A contract may contain language requiring you to issue a certification (possibly at the conclusion of your services) stating that the work was completed in accordance with the plans and specifications. An example of such a clause is as follows:

*Upon completion of the construction, the Design Professional shall certify that the work was completed in accordance with the plans, specifications, and drawings.*

This language appears to place an impossible burden on the Design Professional. Unless you watch every move of every laborer of every trade Contractor and Subcontractor every day, you cannot possibly know with certainty whether all the work was completed in strict accordance with the detailed plans and specifications.

**Discussion:** Giving an Owner such a certificate may subject the Design Professional to liability in the event that the work was not performed per the plans and specifications. The cause of action may be brought by the Owner asserting that the certificate constituted a misrepresentation or breach of warranty or guarantee. In recent years, banks and institutions that have lent money to the Owner for the project have been bringing suits against Design Professionals on the basis that they released the final balance of project funds in reliance on such certificates. State agencies have also been requiring similar certificates that could subject the Design Professional to liability to the State, especially on environmental projects where the Design Professional is asked to sign off on the work that was done by the Contractor.

The law applicable to professional services does not expect you to warrant or guarantee perfect results from your services. If, however, you create a contractual obligation to provide this warranty to the Owner the Courts can find you liable for breach of contract even though you rendered services that conformed in all respects to your professional standard of care. A commitment to issue a certification may be deemed a guarantee or warranty as to what is certified.

**Conclusion:** Explain to your client that your Scope of Services is limited. To the extent that you are observing construction work, you are doing so on a periodic or occasional observation basis and you are looking for general

conformance to the contract documents. The Design Professional's scope of service does not include having full-time inspectors on the site every day observing every detail of the execution of the project, nor does it include supervising the contractor's work to assure compliance with the plans and specifications. You can only realistically observe whether the Contractor is in general conformance with the plans and specifications. Be wary of contract language suggesting or stating that you are to do more than that.

A clause explaining this is as follows:

The Design Professional will provide a written report stating whether, in its opinion, based upon site visits, the construction work complies generally with the contract documents.

For similar reasons, if you are being asked to certify that the project complies with all laws, regulations and ordinances, the following clause stating general conformity with the design concept and the contract documents may be appropriate:

Certification: To the best of our knowledge, information and belief, the project was constructed in general conformance with the design concept of the contract documents.

It is important to avoid contract language requiring you to sign certifications of matters for which you do not have personal knowledge or that would require you to go beyond your scope of service to acquire such knowledge. That issue is well addressed in AIA B101-2007, §10.4 as follows:

. . . The Architect shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.

Similarly, the language of EJCDC Document E-500 (2008), at §6.01.F, addresses this issue and adds a prohibition against the Owner pressuring the Engineer to sign a certificate as a condition of resolving any dispute:

Engineer shall not be required to sign any documents, no matter by whom requested, that would result in the Engineer having to certify, guarantee, or warrant the existence of conditions whose existence the Engineer cannot ascertain. Owner agrees not to make resolution of any dispute with the Engineer or payment of any amount due to the Engineer in any way contingent upon the Engineer signing any such documents.

This is a concise way of establishing the contractual basis for declining to execute a certificate given to you by the Owner (or a lending institution) at the conclusion of the project requiring you to certify to details of the Contractor's work, since that requires both knowledge and service beyond the scope of the contract. It may enable you to negotiate with the Owner over the exact wording to be used in an opinion or "certification" when the time comes for executing one. Anytime that you are requested to execute such a document, you should be careful to avoid the use of definitive terms such as certification, or warrant.

The approach used by EJCDC is to include contract language limiting the amount of reliance an Owner can put on the certification. This is done in EJCDC Document E-500 (2008) at Exhibit E, titled "Notice of Acceptability of Work" rather than a "certification." It states that, subject to listed conditions, the Engineer has determined the Contractor's work acceptable. The statement provides in relevant part as follows:

1. This Notice is given with the skill and care ordinarily used by members of the engineering profession practicing under similar conditions at the same time and in the same locality.
2. This Notice reflects and is an expression of the professional judgment of Engineer.
3. This Notice is given as to the best of Engineer's knowledge, information, and belief as of the Notice Date.
4. This Notice is based entirely on and expressly limited by the scope of services Engineer has been employed by Owner to perform or furnish during construction of the Project (including observation of the Contractor's work) under Engineer's Agreement with Owner and under the Construction Contract referred to in this Notice, and applies only to facts that are within Engineer's knowledge or could reasonably

have been ascertained by Engineer as a result of carrying out the responsibilities specifically assigned to Engineer under such Agreement and Construction Contract.

5. This Notice is not a guarantee or warranty of Contractor's performance under the Construction Contract referred to in this Notice, nor an assumption of responsibility for any failure of Contractor to furnish and perform the Work thereunder in accordance with the Contract Documents.

Some states have addressed the question of certifications by statute and have lessened the pitfalls of signing a "certification." Local counsel should be consulted to ascertain if such a statute is applicable to your practice and projects on which you are engaged. For example, the Business and Professional Code of one state makes a land surveyors certification a statement of opinion rather than a warranty by stating: "The use of the word 'certify' or 'certification' by a registered professional engineer in the practice of professional engineering or land surveying constitutes an expression of professional opinion regarding those facts or findings which are the subject of the certification, and does not constitute a warranty or guarantee, either express or implied."

### **Certificates for Payment**

A related issue concerns certificates for payment of the Contractor. These are typically executed throughout the construction of the project by the construction manager or Owner's project representative (either an architect or engineer). It is important that the language contained in these certifications not somehow create a warranty by the Design Professional that the Contractor has performed all the work that is being certified for payment in strict accordance with the plans and specifications. An example of an appropriate payment certification clause is the AIA B101-2007, §3.6.3.1, which provides in part:

The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work as provided in Section 3.6.2 and on the data comprising the Contractor's Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents.



The limitation to knowledge, information and belief precedes and modifies the representation regarding the progress of the Work, rendering it more of a representation regarding the Architect's state of mind than a pure factual representation. The next paragraph at §3.6.3.2 provides further protection for the architect by stating:

The issuance of a Certificate for Payment shall not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

The EJCDC Document E-500 (2008), at Exhibit §A1.05, addresses this issue by stating that the Engineer will "determine the amounts that Engineer recommends Contractor be paid" and that:

Such recommendations of payment will be in writing and will constitute Engineer's representation to Owner, based on such observations and review, that, to the best of Engineer's knowledge, information and belief, Contractor's Work has progressed to the point indicated, the Work is generally in accordance with the Contract Documents...

### **Certificates for Lenders**

Signing certificates to be relied upon by lenders has also been a significant problem for Design Professionals.

The AIA B101-2007, at §10.4 allows the Architect fourteen days of advance review of any certificate before having to sign it. It provides in relevant part:

If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with its Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution.

This reflects the concern that the language of lender's consent is often imprecise or overbroad, requiring negotiation and modification.

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## Changed Conditions

**Issue:** The Design Professional's Scope of Services is typically based on some underlying assumptions concerning the site conditions to be encountered. If a Design Professional has relied upon a geotechnical report finding solid rock 10 feet below the surface, its foundation design will be much different, for example, than it would be if the geotechnical report indicated clay to a depth of 25 feet. Redesign efforts may be required when site conditions materially differ from those represented by the Owner. Will the Design Professional be compensated for the additional design services required, or will the Owner assert that all such services are within the original Scope of Services, and the Design Professional assumes the risk of site conditions?

A related issue concerns the Design Professional's potential responsibility to the Contractor, where the Owner denies the Contractor an equitable adjustment for conditions differing from those represented by the contract. If the Owner-Contractor contract is ambiguous with regard to site conditions and responsibility for site conditions, and the Design Professional assisted in the drafting of that contract, what liability does the Design Professional have?

Some Owners have begun taking this a step further and include language in their contracts requiring the Design Professional to certify that it has learned everything about the site prior to submitting its proposal and that there will, therefore, be no "changed conditions" and no entitlement to equitable adjustment. This may result in the Design Professional providing redesign services at no charge, to accommodate the changed conditions. An example of one such unfortunate clause is as follows:

*Design Professional shall prepare and submit a certified statement to the Owner stating that Design Professional has visited the Site, has made a thorough visual inspection of the Site, paying particular attention to clear dimensions and the adequacy of building systems and has reviewed and verified and is satisfied that all existing drawings and related data furnished by the Owner are accurate with regard to the existing conditions of the Project, and the code analysis study prepared by Owners' Design Professional, and with regard to any other features that present unusual conditions*

*that could adversely affect the design and construction cost of the Project.*

Providing for equitable adjustment in the event of differing site conditions is vitally important as it concerns environmental conditions — and particularly on environmental remediation consulting services. Review carefully, therefore, an Owner-generated contract written by a Potentially Responsible Party (PRP) group that includes a clause such as the following:

*Design Professional represents and warrants that it is familiar with the geological and environmental conditions at the Site and off-Site property and has been granted the right to conduct, and has conducted, all investigations it deems appropriate to determine that it can fulfill the requirements of this Agreement. Notwithstanding any other provision of this Agreement, Design Professional assumes the risk of all conditions, as specified in this Contract, that may affect Design Professional's ability to perform the Services and will, regardless of such conditions, or the expense or difficulty of performing the Services, or the negligence, if any, of Owner, with respect to same, fully complete the Services for the stated contract price without further recourse to Owner or Beneficiaries. Information on the Site and local conditions at the Site and off-Site property furnished by Owner or Beneficiaries is not guaranteed by Owner or Beneficiaries to be accurate, and is furnished only for the convenience of Design Professional.*

By the time you finish reading the clause, your head might be spinning given the breathtaking scope of the potential liability transfer. One reading of the clause might conclude that the Design Professional has created an unconditional warranty and contractual liability for site conditions and damages not caused by its negligence. Even if the data and information given to the Design Professional by the Owner are incorrect, the Design Professional has no recourse. The Owner expressly disavowed reliance upon that data. Design Professional has warranted that it knows all about the site conditions and will assume any risk associated with whatever conditions actually arise. This leaves no room for a change order request based on the discovery of differing site conditions.

**Discussion:** It has long been a basic premise of fixed-price construction contracting that, when a Contractor encounters a “differing site condition” (DSC), it will be compensated by an equitable adjustment to the contract

(time and money where appropriate). “Type 1” conditions are those that differ materially from what was represented by the Contract Documents. “Type 2” conditions are those that differ materially from what a Contractor could have reasonably foreseen for the location where the work was performed. Most DSC claims are of a Type 1 nature. This often results in a debate as to whether site condition information was made a part of the contract. Such information is sometimes specifically excluded from the contract by language stating that it is being provided for general information purposes only, may not be relied upon and is not to be deemed a part of the Contract Documents.

For most construction work, the Owner is generally well-served by including a differing site condition clause in the construction contract to permit an equitable adjustment where appropriate. This will eliminate the need for smart bidders to increase their bids to cover unknown contingencies. Overall, this is considered more cost-effective for Owners. It is for this reason that federal government contracts, most federally assisted contracts, and standard form contracts of the AIA, AGC, DBIA, and EJCDC compensate Contractors for differing site conditions. You should educate the Owner on this contract principle. Similarly, the Owner needs to be educated as to why it is appropriate to compensate the Design Professional for the extra services performed on account of differing site conditions encountered on the project.

**Conclusion:** The construction contract should be drafted to clearly state whether the site information is made a part of the contract or is excluded from it. Including it as part of the contract may be advisable in order to avoid unnecessary duplication of investigation work with its extra costs and to avoid disputes concerning entitlement to an equitable adjustment for what would otherwise be deemed differing site conditions. The contract should also clearly state what, if any, risk the Contractor is required to take concerning site conditions.

The Design Professional contract should make clear in the Scope of Services or elsewhere in the Agreement for Professional Services that the Design Professional will be compensated for extra services related to differing site conditions or will have the right to terminate the contract. A sample clause is as follows:

Owner and Design Professional agree that the discovery of unanticipated or changed conditions may require a renegotiation of the Scope of Services or a termination of Services. Owner shall rely on Design Professional's judgment as to the continued adequacy of this Agreement in light of discoveries that were not anticipated or known. If Design Professional determines that renegotiation is necessary, Design Professional and Owner shall in good faith enter into renegotiation of this Agreement to permit Design Professional to continue to meet Owner's needs. If renegotiated terms cannot be agreed to, Owner agrees that Design Professional has the right to terminate this Agreement. If the Agreement is terminated, Owner shall pay Design Professional for all services conducted and expenses incurred up to and including the date of termination plus reasonable termination costs.

Another clause that spells out the consequences of encountering unforeseen conditions and sets forth the options for dealing with the situation is:

Unforeseen Conditions or Occurrences. It is possible that unforeseen conditions or occurrences may be encountered at the Property which could substantially alter the necessary Services or the risk involved in completing Design Professional's Services. If this occurs, Design Professional will promptly notify and consult with Owner, but will act based on Design Professional's reasonable judgment where risk to Design Professional's personnel is involved. Possible actions could include:

- (a) Complete the original Scope of Services in accordance with the procedures originally intended, if practicable in Design Professional's reasonable judgment;
- (b) Agree with Owner to modify the Scope of Services and the estimate of changes and costs to include study of the unforeseen conditions or occurrences, with such revision and cost adjustment agreed to in writing; or
- (c) In the event that Owner and Design Professional cannot reasonably agree to the actions to be taken, terminate the Services effective on the date specified by the Design Professional in writing.

## Changes in Design Professionals Services

**Issue:** Because changes may be made to the size and scope or design features of a project, the Design Professional's contract should address what authority the Owner will have for making changes and what mechanism there will be for authorizing the changes and paying the Design Professional for them. In the Scope of Services clause, the contract should clearly specify the extent of the services.

If, however, the Changes clause of a contract is written so broadly that the Owner can unilaterally add services to the Design Professional's Scope of Services, the Design Professional may not be adequately protected against project changes it deems unacceptable or for which Design Professional should be paid. Special consideration should be given to what changes environmental conditions may engender.

If the construction contract permits the Owner to direct any change of any magnitude, and the Scope of Services clause in the Design Professional's contract is broadly worded to allow the scope to creep into additional areas, the Design Professional may find that the Owner expects the Design Professional's scope to increase commensurate with the increase in the Contractor's work. An example of an unfortunate clause permitting such changes at the unilateral discretion of the Owner is as follows:

*Owner may, at any time, by written notice, make changes in the Services to be provided, including changes in specifications and/or drawings, omit or add work, changes in the schedule, etc. Should the changes made increase or decrease the cost of the Agreement, an equitable adjustment shall be made in accordance with the time and material proposal, including a detailed cost breakdown.*

The above Changes clause, while providing for an equitable adjustment, fails to give the Design Professional any say in whether it will perform the Additional Services. Other Owners take this a step further and include language in their contracts requiring the Design Professional to certify that it has learned everything about the site prior to submitting its proposal, and there will, therefore, be no "changed conditions" and no entitlement to equitable adjustment. By agreeing to this, you could be required to perform

redesign services at no charge, to accommodate the changed conditions. An example of one such unfortunate clause is as follows:

*Design Professional shall prepare and submit a certified statement to Owner stating that Design Professional has visited the Project Site, has made a thorough visual inspection of the Site, paying particular attention to clear dimensions and the adequacy of building systems, and has reviewed and verified and is satisfied that all existing drawings and related data furnished by the Owner are accurate with regard to the existing conditions of the Project, and the code analysis study prepared by Design Professional, and with regard to any other features that present unusual conditions that could adversely affect the design and construction cost of the Project.*

This provision is far reaching and few Design Professionals would find they have the ability to perform to this type of standard.

**Discussion:** It is important to place limitations on the Owner's ability to make changes such that permissible changes are limited to those within the "general scope" of the original services.

Where additional services are necessitated by circumstances arising during the project, the AIA B101-2007 document states that the Architect will not perform the additional services until authorized by the Owner. Section 4.3.1 provides in pertinent part:

Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following services until the Architect receives the Owner's written authorization:

- .1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including, but not limited to, size, quality, complexity, the Owner's schedule or budget for Cost of the Work, or procurement or delivery method;
- .2 Services necessitated by the Owner's request for extensive environmentally responsible design alternatives, such as unique



system designs, in-depth material research, energy modeling, or LEED® certification;

.3 Changing or editing previously prepared Instruments of Service necessitated by the enactment or revision of codes, laws or regulations or official interpretations;

.4 Services necessitated by decisions of the Owner not rendered in a timely manner or any other failure of performance on the part of the Owner or the Owner's Design Professionals or contractors.

**Conclusion:** In the clause providing for changes, you should limit the client's ability to make changes to those which are within the "general scope" of the original services. For concerns such as hazardous wastes or other contaminants that might be discovered at the site, you should include in the changes clause, or under a "changed conditions" clause, a provision stating that you are not responsible for dealing with environmental conditions and will not be required to increase your services to deal with contaminants that may be discovered at the site. Whether to increase your scope to include services needed to address wastes and contamination discovered at the project site should be your decision to make and should not be left solely to the client to decide.

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## Change Orders in Construction

**Issue:** We are seeing more contracts that are attempting to set certain thresholds on construction change orders deemed reasonable based on a percentage of the construction budget.

**Discussion:** The EJCDC E-500 (2008), Exhibit I, A. 6.10.3 addresses this issue in an interesting manner with a clause providing in part as follows:

Owner recognizes and expects that certain Change Orders may be required to be issued as the result in whole or part of imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies in the Drawings, Specifications, and other design documentation furnished by Engineer or in the other professional services performed or furnished by Engineer under this Agreement (“Covered Change Orders”). Accordingly, Owner agrees not to sue or to make any claim directly or indirectly against Engineer on the basis of professional negligence, breach of contract, or otherwise with respect to the costs of approved Covered Change Orders unless the costs of such approved Covered Change Orders exceed \_\_\_\_\_% of Construction Cost, and then only for an amount in excess of such percentage. Any responsibility of Engineer for the costs of Covered Change Orders in excess of such percentage will be determined on the basis of applicable contractual obligations and professional liability standards. . . .

**Conclusion:** Be careful about agreeing to assume responsibility for costs arising out of change orders that exceed a specified percentage of the project budget. By agreeing to accept responsibility for costs that are not caused by your negligence, you are agreeing to bear costs for which you are not insured.

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## Choice of Law

With more firms and project owners involved in projects that may be in a jurisdiction distant from their home office, it is important to designate what law will be applicable to disputes. The Design Professional may prefer to have the law of the state where it is incorporated, or perhaps where it has its headquarters office, be applicable. In contrast, the project owner may be seeking to have the law of its principal business apply. One resolution to the dilemma is to choose the law where the project is located. The latter choice is the preference stated in the current versions of the standard form contracts. The AIA B101 Document, §10.1 defines the applicable law as that of the “place where the Project is located.” This is a change from the B141-1997 document that stated that the “principal place of business of the Architect” would provide the applicable law.

This issue is treated similarly by ConsensusDOCS 240, §10.1, which provides:

This Agreement shall be governed by the law of the place where the Project is located, except that if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 8.3.

EJCDC E-200 (2008), §6.06 similarly provides, “This Agreement is to be governed by the law of the state or jurisdiction in which the Project is located.”

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## Compliance with Law

**Issue:** Contracts often include a clause stating that the Design Professional shall comply with *all* laws, regulations, codes and ordinances. Although such a clause may seem reasonable at first blush, it can create an absolute warranty and guarantee that your services will comply with laws, regulations and ordinances that you reasonably believed did not apply to the services being rendered.

An example of such an Owner-generated clause is as follows:

*Regardless of where services are to be performed, Design Professional warrants that it shall at all times comply with any and all applicable foreign, federal, state, and local government laws, ordinances, statutes, standards, rules, regulations, and guidance, including but not limited to those relating to working hours, working conditions, health and safety, and the environment.*

Coupled with a clause like the above, some owners include an indemnification clause that requires the Design Professional to indemnify the owner against any claims, damages and losses arising out of non-compliance with laws. An example is the following:

*The Design Professional shall indemnify and hold harmless the owner against any claims, damages and losses of any kind caused by, arising out of, or related to failure to comply with any laws, ordinances or regulations.*

**Discussion:** Note that the above-quoted indemnity clause is not limited to negligence. Indeed, it does not even limit the indemnity to intentional, willful misconduct. Thus, even if in the professional judgment of the Design Professional, it interpreted the law correctly, the fact that a regulator later interprets the law differently and imposes changes or penalties on the owner, it will be the responsibility of the Design Professional under the indemnity agreement, even though this would not have been the case under the common law in the absence of that indemnity agreement.

Consider a situation in which you evaluate the meaning and application of a particular regulation to your services and based upon your interpretation of

that regulation, you create designs and perform other professional services that a regulatory agency later concludes fail to meet the regulatory requirements.

You disagree with the regulator, but the Owner is, nevertheless, required to pay fines, penalties and damages to the government and re-perform the work consistent with the interpretation that the regulators give to the regulations. If you committed to comply with all the laws and regulations you could be liable to the Owner for breach of contract, warranty or guarantee. Such liability is excluded from coverage by most professional liability policies.

Another issue related to compliance with law is whether the Owner or the Design Professional should pay for increased costs of performance necessitated by changes in laws and regulations that occurred after the contract was executed. Unless this is clarified in the contract, the Owner might assert that you are not entitled to any additional compensation for changing your services to comply with newly changed laws and regulations. Some Owners even make it clear that they intend for the Design Professional, without additional compensation, to make any changes necessitated by laws and regulations that change after the services begin. An example of such an unfortunate clause is as follows:

*The Design Professional shall not be compensated for changes in the design necessitated by the enactment or revision of codes, laws, or regulations subsequent to the execution of the Agreement. The Design Professional shall provide input to the Owner regarding adjustments to the Project Budget or Construction Cost to reflect the impact of such changes.*

**Conclusion:** The nature of rendering professional services requires you to exercise your professional judgment concerning the reasonable interpretation and application of law and regulations to the services being performed. Exercising reasonable care to comply with such laws and regulations is all an Owner should realistically expect of you. No Owner really expects to pay you to have a battery of lawyers look over every decision you make interpreting and applying laws and regulations. Owners also understand that government employees can be unreasonable in their interpretation and application of their own regulations. Many of them have been subjected to this difficulty. A more reasonable clause is:



Design Professional and Owner will use reasonable care to comply with applicable laws in effect at the time the services are performed hereunder, which to the best of their knowledge, information and belief, apply to their respective obligations under this Agreement.

By making compliance a mutual requirement, it may be easier to negotiate the reasonable care standard into it. The tactic here is to explain to the Owner that just as the Owner expects you to comply with the law, you are confident that the Owner likewise expects to comply with the law. It is hard for an Owner to disagree with that. You can then explain that the revised clause is fair because it imposes a reasonableness standard on the Owner as well as the Design Professional. Where laws change after the services have begun, it is only reasonable that you should be paid for any increased costs you incur as a result of revising your services to comply with those changes. The following clause addresses payment for increased costs to comply with newly effective regulations (but not specifically changes in interpretation by enforcement officials):

Owner shall pay for any reasonable charges on written change orders from Design Professional for services, modifications, or additions required on the part of Design Professional to comply with laws or regulations that become effective after the date of execution of the Agreement.

The AIA B101-2007, §3.4.2, provides the following:

The Architect shall incorporate into the Construction Documents the design requirements of governmental authorities having jurisdiction over the Project.

**Conclusion:** The Design Professional should be expected to use reasonable care in identifying various laws, regulations, codes and the like, and then, based upon the Design Professional's interpretation, apply them to the project at hand. When Owners understand the problem facing the Design Professional, they will often agree to redraft the compliance with laws section. A sample clause follows:

In performing professional services, Design Professional shall exercise due care in the identification and application of applicable codes, laws, regulations, and standards. Changes in laws and regulations or the application thereof after the execution of this Agreement that were not known or reasonably foreseeable affecting the cost or time of performance may be the subject of a change order.

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## Confidentiality

**Issue:** Beware of a contract clause strictly prohibiting you from reporting information that you learn in the process of performing services. Certain information concerning environmental conditions may be required to be reported pursuant to various federal or state laws and regulations. Information pertaining to public health and safety may be required to be reported pursuant to ethical obligations, government investigations or local Code of Ethics. Some of these obligations may be incorporated into state licensing laws for Design Professionals. Other information may need to be shared with sub-Design Professionals, employees, legal or accounting professionals or lenders in order to efficiently conduct your professional services. Finally, you may find it necessary to reveal information during litigation to defend against third-party suits.

**Discussion:** If you have agreed to contract language barring you from divulging or releasing any information without the consent of the Owner, you may find yourself in the position of having to breach the contract in order to comply with good business, legal or ethical requirements. Many States, for example, require that when a Design Professional working on a site learns of a release of contaminants (such as an underground petroleum tank leak), the Design Professional must report it to the State within a specified period of time (such as 24 to 48 hours). If this is an independent duty of the Design Professional, it cannot be avoided by deferring to the Owner to submit the report to the State.

There may be times when an Owner will not want the governing authorities to know of an environmental release and will, therefore, choose not to report the release on its own. Owners may even threaten you with suit for breach of contract in the event that you independently report such information.

If you fail to comply with State reporting requirements, you may be subjected to fines and penalties. You may also be subject to sanctions under professional licensing statutes.

A confidentiality clause found in Owner contracts may appear to permit adequate disclosure, but on further evaluation it will be seen to be lacking in breadth. An example of such a clause is as follows:

*The Architect agrees that all knowledge and information not already considered within the public domain which the Architect may acquire from the Owner by virtue of performing services hereunder, will be regarded as strictly confidential and held in confidence and shall not be disclosed to anyone without the Owner's prior written consent to such disclosure.*

It is clear that this clause does not authorize the Design Professional to disclose information, such as environmental information, that it learns while performing its services, which information the Design Professional may be required to report as set forth above. It also appears to prohibit the Design Professional from responding to litigation, subpoenas, discovery requests, government investigations and the like.

If you encounter overly strict confidentiality language, explain to the Owner that it must be revised to permit you to report information in certain circumstances. Demonstrate that this is in the best interests of the Owner as well as the Design Professional. Moreover, it is critical that the Owner understands the law may create an independent legal obligation for you to report information. The interests of the Owner may be protected by including a requirement that before you report information, to the extent legally permissible, you will first notify the Owner and afford the Owner an opportunity to report the information. In the case of subpoenas or court orders demanding the information, you agree to afford the Owner an opportunity to oppose the subpoenas and orders by giving the Owner prior notice of your intent to release information.

Another reasonable approach to confidentiality is presented in the following clause:

The Design Professional shall maintain the confidentiality of information specifically designated as confidential by the Owner, unless withholding such information would violate the law, create the risk of significant harm to the public or prevent the Design Professional from establishing a claim or defense in an adjudicatory proceeding. The Design Professional shall require of the Design Professional's Design Professionals similar agreements to maintain the confidentiality of information specifically designated as confidential by the Owner.

Rather than permitting the confidentiality requirement to apply to “all” information furnished by the Owner, or to some unspecified information, require the Owner to physically mark the specific documents considered to be confidential. Rather than placing an eternal ban on releasing confidential information, negotiate some reasonably short expiration time on the confidentiality obligation.

Even if strict language is included in the contract, it might be voided if a court determines that enforcement of the language would be contrary to law or public policy. If there is a fight over the enforceability of the contract language, the Owner and Design Professional will both incur legal expenses, and the fight may so sour their relationship that neither will choose to do business with the other again. A clause providing better protection for the Design Professional is the following:

Design Professional and Owner shall hold confidential all business or technical information obtained from the other or its affiliates under this Agreement for a period of five (5) years after obtaining such information, and during that period shall not disclose such information without the other's consent except to the extent required for (1) performance of services under this Agreement; (2) compliance with professional standards of conduct for preservation of the public safety, health and welfare; (3) compliance with any law, regulation, ordinance, subpoena, court order or governmental request; or (4) protection of the disclosing party against claims or liabilities arising from performance of services under this Agreement. In the event disclosure may be required for any of the foregoing reasons, the disclosing party will, except where immediate notification is required by law or regulation or is, in the judgment of Design Professional's counsel required to limit Design Professional's liability, notify the other party in advance of disclosure. The parties' obligations hereunder shall not apply to information in the public domain or information lawfully acquired on a non-confidential basis from others.

It appears that some Owners have been adopting language somewhat similar to that set forth above, with the apparent intent of creating the appearance of addressing the Design Professional's independent obligation to report, but with the actual result of tying the Design Professional's hands. This appears to be accomplished by stating that the Design Professional may only disclose

information when “it is required to do so by subpoena or court order.” The language fails to state that the Design Professional may disclose information if, in the opinion of the Design Professional or its counsel, the law, regulations or codes of ethics require disclosure. Stating merely that the Design Professional may disclose when required to do so by a court puts the cart before the horse. How can there be a subpoena or court order to disclose what only the Design Professional has discovered? Do not agree to this kind of narrow language. Insist that you be permitted to disclose when, in your professional opinion, you are required to do so by investigatory demand, discovery, ethics standards, laws, or regulations.

**Conclusion:** Design Professionals should not agree to overly broad confidentiality requirements that could require them to breach their contract in order to meet the disclosure requirements of applicable laws, regulations or codes of ethics. Modify the contract language where necessary to provide the owner only those confidentiality protections that are appropriate.

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## Cost Estimates

Issue: Owners sometimes think that when a Design Professional estimates the project costs of either its own consulting fees, or the costs of completing the construction of the project, the Design Professional is guaranteeing its services will be performed for the initial estimate and that the construction will be completed for the estimated construction costs. This expectation on the part of the Owner has led to many lawsuits where the costs exceeded the project budget established by the Owner. More than anything, this is caused by a genuine breakdown in communication. Managing the Owner's expectations about cost estimates is an important risk management tool, especially when construction costs are increasing significantly year after year.

**Discussion:** Many Owner contracts are requiring the Design Professional to essentially guarantee that there will be no costs exceeding the construction cost estimate. Any revisions to plans or changes that have to be made in order to keep the project within the required budget then become the responsibility of the Design Professional. An example of such an unfortunate clause applicable to the design phase is the following:

*The Design Professional shall provide Owner with a Project Budget estimate. . . . If agreement on any of the Project budget estimates cannot be reached between Design Professional and Owner, Design Professional, with the assistance of Owner, shall redesign the Project as necessary to meet the Owner's Project budget requirements at no additional cost to Owner.*

An example of an onerous clause applicable to post bidding is the following:

*In the event that the lowest responsive bid exceeds the Fixed Limit of Construction Cost, the Design Professional, if directed by Owner, shall redesign the Project with the assistance of the Construction Manager in order to bring the Project within budget. Design Professional shall not be entitled to additional compensation for this redesign or any services required for the re-bidding of the Project. The Design Professional shall be responsible for any and all*

*costs incurred by the Owner which are attributable to the redesign or re-bidding of the Project.*

The above clauses could be included under several of the discussions in this Guide. They impact the Standard of Care — making the Design Professional responsible for costs exceeding the budget, regardless of whether caused by the negligence of the Design Professional.

Other contract clauses that may require free design services if the cost estimate is exceeded may be found in sections of the contract dealing with redesign requirements. For example, see AIA B101-2007, §3.1.6, §6.6, and §6.7. See also ConsensusDOCS 240, §3.12.

On even the most basic project, the costs can differ from what was anticipated by the Design Professional because of conditions and situations beyond the Design Professional's control. If environmental remediation is part of the project, the possibility for cost estimates to be exceeded is greater. By using the word “opinion” instead of “estimate” it may be clearer that the Design Professional is exercising its professional judgment in compliance with the professional's general standard of care. This establishes a legal defense that, although the cost opinion proves to be incorrect, the Design Professional is not liable to the Owner since it met the standard of care. To prove otherwise, the Owner would typically have to present expert testimony to the contrary. Contract clauses should clearly state that the cost opinion is not a guarantee of cost either as to the Design Professional's fee or the ultimate construction costs to be paid to others. An example is as follows:

Design Professional shall prepare an opinion of the probable costs of construction. Design Professional has no control, however, over (a) the cost of labor, material, or equipment; (b) the means, methods and procedures of the Contractor's work; or (c) the competitive bidding. Design Professional's opinion of probable cost shall be based on its experience and qualifications and represents its judgment as a Design Professional, but shall not be a guarantee that construction costs will not vary from its opinions of probable cost.

Another good example of a clause protecting the Design Professional is the following:



The Architect's Partial Schematic Design Documents for the Project shall be based on the Construction Cost included in the Owner's budget for the Project, which is attached hereto as Exhibit A; provided, however, that the Architect shall not be responsible if the Construction Cost is exceeded due to factors outside the control of the Architect and the Architect's Consultants.

Section 5.01.A of EJCDC E-500 (2008) explains that the engineer's estimate is only a professional opinion of probable cost and is not a guarantee. It provides in pertinent part as follows:

Engineer's opinions of probable Construction Cost are to be made on the basis of Engineer's experience and qualifications and represent Engineer's best judgment as an experienced and qualified professional generally familiar with the construction industry. However, because Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by Engineer. If Owner requires greater assurance as to probable Construction Cost, Owner must employ an independent cost estimator as provided in Exhibit B.

**Conclusion:** If the Owner desires greater assurance of the accuracy of the estimate, the Owner can obtain an independent cost estimate by another consulting firm. If you believe the Owner will not appreciate, or go along with, the terminology of "cost opinion," you might consider a clause that uses the term "estimate" but qualifies it as only a professional opinion.

Design Professional's estimate of probable Construction Cost is made on the basis of Design Professional's experience and qualifications and shall be deemed to represent Design Professional's opinion and judgment. Design Professional does not guarantee that proposals, bids or actual facility cost will be the same as Design Professional's estimate of probable Construction Cost.

The Owner's budget for the Cost of the Work is provided in Initial Information, and may be adjusted throughout the Project as required under Sections 5.2, 6.4 and 6.5. Evaluations of the Owner's budget for the Cost of the Work, the preliminary estimate of the Cost of the Work and updated estimates of the Cost of the Work prepared by the Architect, represent the Architect's judgment as a design professional. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment; the Contractor's methods of determining bid prices; or competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's budget for the Cost of the Work or from any estimate of the Cost of the Work or evaluation prepared or agreed to by the Architect.

AIA B101-2007, at §6.2 addresses the fact that the architect does not have control over the bids or the actual Project cost. It provides as follows:

Note, however, that AIA B101-2007 permits the Owner to require the Architect to perform redesign services at no cost in order to modify the design and the design documents to get the project to meet the budget – and this is so regardless of whether the initial services by the Architect met the Standard of Care. Section 6.7 reads as follows:

If the Owner chooses to proceed under Section 6.6.4, the Architect, without additional compensation, shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. The Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6.

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## Damages

**Issue:** The typical Design Professional liability policy defines the “damages” that are covered by the policy. Certain types of losses that you may incur may be excluded from coverage pursuant to either the policy definition of “damages” or by one or more exclusions in the policy.

**Discussion:** The Damages that are covered by a professional liability policy of one carrier are defined as follows:

DAMAGES means the monetary amounts for which YOU may be held legally liable, including sums paid as judgments, awards, or settlements, but does not include:

1. The restitution, return, withdrawal or reduction of fees, profits or charges for services rendered or offered or any other consideration or expenses paid to YOU or by YOU for services or products; or
2. Judgments or awards deemed uninsurable by law.

The typical contractual liability exclusion of a Design Professional policy reads as follows:

*This policy does not apply to “claims” ... arising from any contract, warranty, guaranty or promise, unless liability would have attached to the “insured” in the absence of such contract, warranty, guaranty or promise.*

*If you accept a contractual obligation to pay liquidated damages to your client or to pay specific fines and penalties for which you are not liable at common law, you may incur an uninsured loss.*

Some professional liability policies define damages differently than the policy quoted above. Instead of denying coverage for “judgments or award deemed uninsurable by law,” the policy may deny coverage for fines, penalties, and punitive damages. This distinction could become important in determining whether you can recover under your policy for certain losses you may incur, such as those related to alleged violations of the Americans with Disabilities Act and Department of Labor OSHA standards.

***Liquidated Damages:***

Professional liability carriers intend for their policies to cover actual damages. They believe it is possible to evaluate actual damages in most cases involving alleged design error. Furthermore, they believe that liquidated damages are not appropriate for Design Professional contracts. The problem is that project owners who are used to including liquidated damages clauses in their construction contracts sometimes think that the same principles of recovery should apply to design firms. If you agree to be liable for liquidated damages, the carrier may deny coverage pursuant to the contractual liability exclusion of the policy. This would be particularly problematic if the liquidated damages provision has been coupled with a delay clause whereby you agreed to pay liquidated damages for delay in the completion of your services. If the owner recovers against you by summary judgment on those contract provisions without having to prove your negligence or the actual damages, you may find yourself with a denial of coverage by the carrier.

When confronted with these types of clauses in contracts, you may be able to persuade your client that it is also in its best interest to delete such uninsurable provisions since it may defeat your client's ability to recover against you if your carrier is likely to contest the coverage of these "damages."

***Waiver of Consequential Damages:***

Consequential damages are damages that occur because of or as a consequence of your professional services. Economic losses, lost rents, extra expense, loss of production, fines, penalties and consequences of a loss of use of property are examples of consequential damages. Consequential damages are usually best addressed in a specific waiver of consequential damages clause in the contract. A mutual waiver of consequential damages may also appear in the indemnification clause. A consequential damages waiver might also go into the Limitation of Liability clause in the event you are able to include such a clause in your contract. It is better to include it as a standalone clause, in case the Limitation of Liability clause is ruled invalid and stricken from the contract. Many Owners are willing to mutually waive consequential damages.

Paragraph 7.1 of ConsensusDOCS 240 provides for mutual indemnities between the Architect and Owner. Both provisions have been narrowly drafted to encompass only the indemnitor's negligent acts and omissions. In addition, the indemnitor is entitled to be reimbursed for any defense costs paid above its comparative liability.

ConsensusDocs 240, Paragraph 5.4, provides that the Architect/Engineer and Owner mutually waive all claims for consequential damages arising out of or relating to the Agreement. This waiver includes all claims arising in contract, tort, strict liability, or otherwise and includes loss of use, profits, business, reputation, or financing. The clause, however, permits the parties to list specific items of damage that they wish to exclude from the mutual waiver.

A mutual waiver of consequential damages is provided at 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 as follows:

*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.

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## Dispute Resolution

**Issue:** When disputes arise concerning Design Professional services, the resulting dispute resolution (litigation or arbitration) is generally complex and expensive. It is important to carefully consider the disputes provision of a contract. In the pages below, we provide a discussion of some key issues for consideration.

**Litigation.** Litigation is time-consuming and may lead to unpredictable results. Judges and juries may not be experienced with design and/or construction projects and may have difficulty understanding the merits of the highly complex issues. In order to analyze and present a case, it is often necessary to spend many months taking depositions and reviewing documents. If one party is not satisfied with the result, there may be an appeal and the final resolution of the matter may be further delayed. The investment of time, energy and money required for litigation, has fueled the emergence of alternative dispute resolution mechanisms. One factor favoring litigation over other forms of dispute resolution is the requirement that the plaintiff bear the burden of proof to persuade the fact-finder (e.g., the judge or the jury) that the Design Professional performed negligently.

**Arbitration.** Instead of litigating disputes, the parties may agree by contract to submit all disputes to binding arbitration pursuant to the Federal Arbitration Act or the rules of the American Arbitration Association. Generally, arbitration is conducted by a panel of three arbitrators who issue a binding decision. Often, each party can choose one arbitrator and the third would be selected by consensus of the first two. The parties may also agree to have a single individual serve as an arbitrator. Although arbitration can be conducted more quickly and less expensively than litigation in court, it may (and often does) drag out for many months and include limited discovery. Arbitration is not a panacea and in some cases disputes about how the arbitration will proceed become obstacles to even beginning the arbitration, especially when the relationship of the parties has significantly deteriorated. The decision of the panel generally is less than a paragraph long. It identifies which party gets what relief but it does not typically contain any factual or legal explanation. This can be frustrating to one or both parties. Further, the parties have only a limited right of appeal should they disagree with the award. Arbitration can be just as frustrating, therefore, as litigation, with the parties losing control of the dispute to the lawyers and decision makers.

Because of the uncertainties with arbitration, some Design Professionals respond to Owners who demand arbitration by proposing a clause to limit the applicability of arbitration to only relatively smaller claims—such as those less than \$500,000.

**Consolidation and Joinder:** Consider what dispute resolution clauses you will want to flow down to your Design Professionals (and may want to insist that the owner similarly flow the provision to all other necessary parties including, but not limited to the contractor) in order that all disputes (including subcontract disputes) will be submitted to mediation. It bears mention that multiparty mediations can become procedurally and logistically challenging, and the consent of the conditions of your insurance policy may require that the insurance company give it prior consent before expenses are incurred on a mediation. Avoidance of piecemeal dispute resolution and inconsistent results is an important risk management consideration. Work with your counsel to craft a dispute resolution template that provides efficiency and consistency in results.

AIA B101-2007, §8.3.4 provides for consolidation of arbitration proceedings as follows:

§8.3.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§8.3.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

**Alternative Dispute Resolution (ADR).** Alternative Dispute Resolution (ADR) is the general term used to encompass a host of different venues (such as mediation, dispute resolution boards, mini-trials, etc.) for resolving



disputes. The common thread of ADR is that a neutral third party outside of the judicial system presides over the matter and helps to facilitate the parties reaching a mutually acceptable agreement. ADR generally produces a non-binding result. Control over the dispute, consequently, remains with the parties. ADR is not, however, typically used as a fact-finding and claim-asserting expedition. It is more in the nature of a negotiation process.

The parties must have assessed the merits and strengths of their case, as well as their opponent's case, prior to ADR—at least sufficiently to cause them to believe that there is something to negotiate over. For example, in mediation, the parties must come to the table prepared and willing to compromise. If one of the parties comes to the table believing that they will simply explain their position and the other side will accept the explanation and retreat from their position, that party will probably be disappointed to learn otherwise and will have wasted their time and money in having gone through the process.

A sample contract clause is as follows:

*Mediation.* All disputes arising out of, or related to, this Agreement shall be submitted first to non-binding mediation as a condition precedent to litigation. If any dispute submitted to mediation is not successfully resolved, the matter may be resolved through litigation in any court of competent jurisdiction.

AIA B101-2007, §8.2.1 provides mediation as follows:

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by binding dispute resolution.

EJCDC E-500 (2008), §H.6.08.A provides for mediation as follows:

*Mediation:* Owner and Engineer agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement or the breach thereof (“Disputes”) to mediation by [insert name of mediator, or mediation service]. Owner and Engineer agree to participate in the mediation process in good faith. The process shall be conducted on a confidential basis, and shall be completed within 120 days. If such mediation is unsuccessful in resolving a Dispute, then (1) the parties may mutually agree to a dispute resolution of their choice, or (2) either party may seek to have the Dispute resolved by a court of competent jurisdiction.

*Recovery of legal costs.* One tool that may help persuade parties to try mediation before litigation is to require the losing party to pay the other party's litigation costs. The American rule is that each party pays its own legal fees regardless of who prevails. This can be changed by contract, however. A contract provision requiring the losing party to pay the prevailing party's legal fees may cause each party to think twice before getting into litigation, and it should cause parties to be more willing to submit to mediation. You should be aware, however, that should you lose your case and be required to pay the Owner's legal fees, these costs may not be covered by your professional liability policy as “damages.” You may wish to ponder whether a “loser pays” provision benefits the more economically advantaged party (generally the Owner) more often than the less economically advantaged party (generally the Design Professional). A sample clause addressing recovery of litigation costs is as follows:

*Recovery of Litigation Costs.* In the event that legal action is brought by either party against the other in the Courts (including action to enforce or interpret any aspect of this agreement), the prevailing party shall be reimbursed by the other for the prevailing party's legal costs, in addition to whatever other judgments or settlement sums, if any, may be due. Such legal costs shall include, but not be limited to, reasonable attorney's fees, court costs, expert witness fees, and other documented expenses, in addition to any other relief to which it may be entitled.

### **Choice of Binding Dispute Resolution under the AIA Documents**

The new AIA B101 employs a check-box approach to selecting a binding dispute resolution forum. The AIA has structured this provision to establish litigation in court as the default binding dispute resolution method if no boxes are checked. The introductory language to the check-box in Section 8.2.4 states:

“If the Owner and Architect do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.”

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## **Electronic Media/BIM + CADD**

**Issue:** As the use of computer assisted design and drafting (CADD) and transfer of design documentation by electronic media become increasingly common, Owners are requesting that “final” plans and drawings be given to them in electronic format. This may ostensibly be for the purpose of maintenance of the facility for which they were prepared. Because of the ease of making changes to the electronic documents, however, it is a relatively simple matter for the Owner or others to reuse them for other modifications or additions to the project, or even for the design and construction of a new project. This can subject the Design Professional to the risk of potential liability, since the Design Professional has effectively lost control over the use of its documents and may not know they are being modified and reused in a manner that is not appropriate — given the original project parameters, Scope of Services and fees paid. Because of this possibility, consider if electronic documents should ever be sealed or electronically signed or whether electronic documents are always drafts and only paper documents should be sealed and signed.

Even if the Owner does nothing inappropriate with the electronic data, that data may become tainted, damaged or unreadable during storage. For various reasons, the shelf life of electronic media is relatively short and the data may become mixed up, misread and generally untrustworthy. If an Owner or some other party to whom the Owner gives the electronic media relies upon it, that party could suffer from defective design services not because of anything wrong with the original design services, but because of defects in the media as stored and retrieved.

**Discussion:** To determine whether errors alleged by an Owner were in the original Contract Documents or only in the retrieved electronic data (possibly including unauthorized changes by the Owner or others) it is important that you maintain a set of final Contract Documents by which you can benchmark the electronic media to determine whether the data contained in that media are the same as in the final work product you provided to the Owner. This may be done by making duplicate hard copy originals (one for the Design Professional and one for the Owner) of all data that is given to the Owner in electronic form, duly stamped at the time the services were rendered, to compare to the electronic media.

To prevent plans and drawings from being printed from the electronic media and given to third parties who might use them in reliance upon the name and seal of the Design Professional appearing on them, some Design Professionals delete their name and seal from the data that are contained on the electronic media. You may also include a warning statement to the electronic media advising that the document was printed from electronic media, and it is possible the data may have been altered or their integrity impaired due to storage in that media. To protect against the reuse of electronic media, you may add a sentence to the end of the clause of the contract addressing Ownership of Documents to state something similar to the following:

Design Professional shall not be responsible for any alterations, modifications or additions made in the electronic data by the Client or any reuse of the electronic data by the Client or any other party for this project or any other project without the consent of the Design Professional. Client shall defend, indemnify, and hold harmless Design Professional against any claims, damages, or losses arising out of the reuse or distribution of the electronic data without consent of the Design Professional and arising out of alterations, modifications, or additions to the electronic data made by anyone other than Design Professional.

Copies of Documents that may be relied upon by Client are limited to the printed copies (also known as hard copies) that are signed or sealed by the Design Professional. Electronic text, data, graphics, or other files furnished by Design Professional to Client are only for convenience of Design Professional. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.

EJCDC Document E-500 (2008) at §6.03 explains the problems and use of electronic media, and establishes responsibilities on the part of the Owner who intends to use that media. The clause provides in relevant part:

C. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files.

D. When transferring documents in electronic media format, the transferring party makes no representations as to long-term compatibility, usability, or readability of such documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the documents' creator.

### **Conclusion:**

#### **Reliance Upon Electronic Documentation**

Use of electronic documents, including Building Information Modeling (BIM), is becoming so prevalent that it may not be realistic to include a broad disclaimer on the use of such documentation. The AIA, EJCDC and the ConsensusDOCS have developed protocols for use of electronic documents.

The AIA E201-2007 Digital Data Protocol Exhibit is made a part of the agreement between the owner and architect pursuant to section 13.2 of AIA B101. It sets forth basic parameters for reliance upon electronic data. AIA Document E201 is not a stand-alone document, but is intended to be attached as an exhibit to an existing agreement for design services or construction. Its purpose is to establish the procedures the parties agree to follow with respect to the transmission or exchange of Digital Data for a specific project.

E201 does not create a license agreement for the use of Digital Data. If the Digital Data exchanged includes copyright-protected material, such as the Architect's Instruments of Service, the underlying agreement to which E201 is attached must contain provisions that specifically grant permission to use the copyrighted materials. AIA Documents B101™–2007, Standard Form of Agreement Between Owner and Architect; A201™–2007, General Conditions of the Contract for Construction; C101™–2007, Standard Form of Agreement Between Architect and Consultant; and other similar AIA

agreements for design services or construction, include those provisions. Parties not covered under such agreements should consider executing AIA Document C106™–2007, Digital Data Licensing Agreement.

EJCDC E-500 (2008), at §6.03, addresses the use of electronic documents as follows:

B. Either party to this Agreement may rely that data or information set forth on paper (also known as hard copies) that the party receives from the other party by mail, hand delivery, or facsimile, are the items that the other party intended to send. Files in electronic media format of text, data, graphics, or other types that are furnished by one party to the other are furnished only for convenience, not reliance by the receiving party. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern. If the parties agree to other electronic transmittal procedures, such are set forth in Exhibit J.

C. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files.

The AIA has also issued a protocol for reliance on Building Information Models. AIA document E202-2008 "Building Information Modeling Protocol Exhibit" sets forth Levels of Development to describe the level of completeness to which a Model Element is developed. Generally, the higher the level of development the greater reliance is allowed to be placed on it. This is explained as follows:



**Article 4 Model Elements.***§4.1 Reliance on Model Elements:*

§4.1.1 The Model Element Table at Section 4.3 identifies (1) the LOD required for each Model Element at the end of each Project phase, and (2) the Model Element Author responsible for developing the Model Element to the LOD identified. Each Model Element Author's content is intended to be shared with subsequent Model Element Authors and Model Users throughout the course of the Project.

§4.1.2 It is understood that while the content of a specific Model Element may include data that exceeds the required LOD identified in Section 4.3 for a particular phase, Model Users and subsequent Model Element Authors may rely on the accuracy and completeness of a Model Element consistent only with the content required for the LOD identified in Section 4.3.

§4.1.3 Any use of, or reliance on, a Model Element inconsistent with the LOD indicated in Section 4.3 by subsequent Model Element Authors or Model Users shall be at their sole risk and without liability to the Model Element Author. To the fullest extent permitted by law, subsequent Model Element Authors and Model Users shall indemnify and defend the Model Element Author from and against all claims arising from or related to the subsequent Model Element Author's or Model User's modification to, or unauthorized use of, the Model Element Author's content.

To the extent the model might be an Instrument of Service, the Owner's use would be governed by the license granted in B101. The purpose of Document E202-2008 is to establish the procedures and protocols the parties agree to follow with respect to the development and management of the Model throughout the course of the project. E202-2008 also defines the extent to which Model Users may rely on Model content, clarifies Model ownership, sets forth Model standards and file formats, and provides the scope of responsibility for Model management from the beginning to the end of the project.



## Environmental Conditions and Services

### Issue 1: Environmental Conditions

Waste materials, hazardous substances, and various contaminants (let's call it "Pollution" for ease of reference) can be a problem when discovered on a project where not anticipated. If you are providing design services for a renovation/remodeling job and encounter asbestos ceilings, pipes, and flooring tiles, how might you limit your liability? What about an underground petroleum storage tank or an electrical transformer containing PCBs? If you are designing a new facility or an addition to an existing facility in a commercial or industrial area, waste materials or hazardous substances might be discovered below ground, either during the design phase or when the Contractor begins excavating. Is there liability for the Design Professional? Who is responsible for evaluating the materials and determining what to do about them, as far as remediation, treatment, or disposal off-site? If the Design Professional takes responsibility for site conditions or wastes, you may be subject to strict liability under environmental laws, and subject to liability on other legal theories beyond which you are familiar and for which there is liability beyond the scope of your insurance coverage.

**Discussion:** If you are performing services at a site that has hazardous materials, pollutants, or other contaminants on or under the site that need to be treated or disposed of off-site, you might be held strictly liable, under various federal and state environmental laws, as an "operator of a hazardous waste facility," i.e., the project site where the waste is located or moved to. You could also be liable as an "arranger" for the transportation or disposal of hazardous wastes if you make independent decisions concerning the waste disposal and treatment. Several litigated cases have held the Design Professional and Contractor to be subject to strict liability under Superfund, merely for having advised the Owner on where to dispose of wastes, or for having moved wastes around on a project site.

In some recent environmental remediation contracts, Owners have attempted to shift all risk of environmental impairment onto the Design Professional or design/builder. An example of such adverse risk shifting is as follows:

*Design Professional shall dispose of all waste materials at a site and by the means designated at the sole discretion of*

*Design Professional and in compliance with all local, state, and federal laws governing the disposal of such waste material. In the event that either (i) the present means of disposal or (ii) the present disposal site utilized by Design Professional in disposing of such waste material becomes unavailable as a result of changes in laws or government regulations, Design Professional shall be responsible for ascertaining and undertaking other means or finding other sites for disposal and may seek from Owner an equitable adjustment in the fee or Reimbursable Expenses through the "Changes" clause of this Agreement.*

While the equitable adjustment language may be comforting at first, the transfer of waste disposal obligations to you can be an enormous liability that in all likelihood does not appropriately belong to you in light of the services provided and the fees charged. We have seen that some Owners, particularly Potentially Responsible Parties (PRPs), are attempting to pass off to the Design Professional or remediation contractors, all responsibility and risk for the wastes that are remediated and/or removed from the Owner's site.

**Conclusion:** Assuming that you are not specifically providing environmental remediation professional services, your contract should carefully limit the Scope of Services to exclude such services. The Changes clause and Changed Conditions clauses of the contract should bolster the position and specify what happens in the event hazardous wastes are discovered at the project site. You should protect yourself with language that allows you: (1) to terminate services if unexpected environmental conditions are uncovered; (2) to demand that the owner appropriately remediate the hazardous conditions or pollutants; (3) to receive compensation for any additional expenses you incur because of the Pollution; and (4) to be indemnified and defended by the owner for any and all liabilities and expenses arising from the Pollution. Coverage for environmental matters in a practice policy will depend, in part, on how your professional services are described in the policy and what exclusions are contained in the policy. Unless you are sure your policy has coverage for environmental matters, you should consult with your insurance professional before you become engaged in any environmental issues.

Moreover, if you know you are providing services on an environmental remediation project, you should discuss with your counsel language to make it clear that you are not responsible for permits, disposal decisions, signing of manifests, ownership of wastes and third party reliance on site assessment reports.

An example clause stating that the Design Professional is not responsible for hazardous substances is the following:

*Waste Materials and Hazardous Substances.* It is understood and agreed that Design Professional is not, and has no responsibility as a handler, generator, operator, treater, storer, transporter, or arranger for transport or disposal of hazardous or toxic substances found or identified at the site, and that Design Professional shall not be responsible to undertake or arrange for the handling, removal, treatment, storage, transportation, or disposal of hazardous substances or constituents found or identified at the site.

The AIA B101-2007, §10.6 explains that the architect does not have responsibility for discovering hazardous materials with the following clause:

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.

To eliminate any question concerning what, if any, responsibility the Design Professional will have for hazardous conditions that are discovered at the project, you might include a comprehensive clause similar to EJCDC Document E-500 (2008) at §6.09 which provides in part:

1.01 *Environmental Condition of Site*

- A. Owner has disclosed to Engineer in writing the existence of all known and suspected Asbestos, PCBs, Petroleum, Hazardous Waste, Radioactive Material, hazardous substances, and other Constituents of Concern located at or near the Site, including type, quantity, and location.
- B. Owner represents to Engineer that to the best of its knowledge no Constituents of Concern, other than those disclosed in writing to Engineer, exist at the Site.
- C. If Engineer encounters or learns of an undisclosed Constituent of Concern at the Site, then Engineer shall notify (1) Owner and (2) appropriate governmental officials if Engineer reasonably concludes that doing so is required by applicable Laws or Regulations.

D. It is acknowledged by both parties that Engineer's scope of services does not include any services related to Constituents of Concern. If Engineer or any other party encounters an undisclosed Constituent of Concern, or if investigative or remedial action, or other professional services, are necessary with respect to disclosed or undisclosed Constituents of Concern, then Engineer may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Project affected thereby until Owner: (1) retains appropriate specialist Design Professionals or contractors to identify and, as appropriate, abate, remediate, or remove the Constituents of Concern; and (2) warrants that the Site is in full compliance with applicable Laws and Regulations.

E. If the presence at the Site of undisclosed Constituents of Concern adversely affects the performance of Engineer's services under this Agreement, then the Engineer shall have the option of (1) accepting an equitable adjustment in its compensation or in the time of completion, or both; or (2) terminating this Agreement for cause on 30 days notice.

F. Owner acknowledges that Engineer is performing professional services for Owner and that Engineer is not and shall not be required to become an "owner," "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, which are or may be encountered at or near the Site in connection with Engineer's activities under this Agreement.

## **Issue 2: Environmental Impairment Indemnification**

As more fully discussed elsewhere in this manual, indemnity clauses shift risk between the parties to a contract. An Owner may demand that you indemnify it for damages related to environmental impairment or site conditions which is usually not appropriate or fair. Discuss the matter with your counsel. One test for fairness is to evaluate the relationship of the parties, who is best positioned to and reasonably should bear the burden of the environmental impairment in light of the relative roles, economic resources and economic benefits of the parties to the contract.

**Discussion:** Where you are performing services on a project that has potential environmental liability, such as environmental remediation, you

may consider using an indemnity clause that addresses environmental impairment separately from ordinary damages. Several large Owners have begun to include reasonable indemnity language in their standard form environmental remediation contracts, as to environmental damages arising out of pre-existing site conditions. A sample clause is as follows:

*Release and Indemnification for Environmental and Non-Environmental Damages.* With respect to “Environmental Impact Claims,” to the fullest extent permitted by law, Owner hereby releases and shall indemnify, defend and hold completely harmless Design Professional and its subcontractors, Design Professionals, agents, officers, directors, and employees from and against all claims, damages, losses and expenses, whether known or unknown, direct, indirect or consequential, including but not limited to fees and charges of attorneys and court and arbitration costs, arising out of or resulting from the services or work of Design Professional or any claims against Design Professional arising from the acts, omissions or work of others. To the fullest extent permitted by law, such indemnification shall apply regardless of the negligence or strict liability of Design Professional, provided, however, that said indemnification shall not apply to claims, damages, losses or expenses which are finally determined to result solely from the Design Professional’s negligence or willful misconduct.

“Environmental Impact Claim” means claims, suits, judgments, costs, losses, expenses whether known or unknown (including attorneys’ fees) which arise out of, are related to, or are based upon the actual or threatened dispersal, discharge, escape, release or saturation of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, gases or any other material, irritant, contaminant or pollutant in or into the atmosphere, or on, onto, upon, in or into the surface or subsurface (a) soils, (b) water or water course, (c) objects, or (d) any tangible or intangible matter, whether sudden or not.

**Conclusion:** Where there are pre-existing environmental conditions at a site on which the Design Professional will be providing services, it may be advisable to obtain indemnification from the Owner to indemnify you against claims arising out of a release of contaminants related to those pre-existing conditions. As indicated above, it is becoming increasingly common for large Owners to agree to this. Such a clause is as follows:

*Indemnification for Pre-existing Conditions.* Owner and Design Professional recognize and agree that Design Professional bears no responsibility whatsoever for the creation, existence, removal, or dispersal of infectious, hazardous, toxic or other dangerous substances (“Pre-existing Conditions”) existing at Owner’s work site. To the fullest extent permitted by law, Owner agrees to indemnify, defend and save harmless the Design Professional from and against any and all liabilities, demands, claims, penalties, damages, forfeitures, suits, and the costs and expenses arising from Pre-existing Conditions (including costs of defense, settlement and reasonable attorneys and expert fees and expenses), except to the extent the Pre-existing Conditions result from the sole negligence or willful misconduct of Design Professional.

EJCDC E-500 (2008), §6.10, addresses environmental indemnification as follows:

*C. Environmental Indemnification:* To the fullest extent permitted by law, Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Design Professionals from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals, and all court, arbitration, or other dispute resolution costs) caused by, arising out of, relating to, or resulting from a Constituent of Concern at, on, or under the Site, provided that (1) any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, and (2) nothing in this paragraph shall obligate Owner to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.

Assuming that you are not providing environmental remediation services for the Owner, you should have nothing to do with decisions affecting hazardous materials, pollutants, wastes or other contaminants found at or under the site. If hazardous materials, pollutants, wastes or other contaminants are found, it should be the Owner’s responsibility to have them removed by someone else. An example of a clause delineating that responsibility follows:



*Waste Responsibility.* It is understood and agreed that Design Professional is not, and has no responsibility as, a handler, generator, operator, treater, storer, transporter, or disposer of or arranger for the disposal of hazardous materials, pollutants, wastes or other contaminants found or identified at or under the site and Design Professional shall not be responsible to undertake or arrange for the handling, removal, treatment, storage, transportation, or disposal of hazardous or toxic substances or constituents found or identified at a site unless otherwise expressly provided in this Agreement.

The term “constituent of concern” is defined in the EJCDC contract. For purposes of this discussion, “constituent of concern” can be thought of as any hazardous material, contaminant or other pollutant that requires reporting or remediation of some sort.

Modifying the Scope of Services to address the environmental contamination at the site is one part of the analysis. In addition, the Owner should take responsibility for making the final decisions concerning waste handling and disposal. This should include having the Owner sign waste manifests. When Design Professionals are providing services on an environmental remediation project, they are generally advised by their risk managers and legal counsel not to select a facility for off-site disposal of wastes, but rather to offer the Owner several disposal site options to choose from. The theory is that the person who chooses the site is liable for any future release of its contaminants from that site. An example clause addressing this issue is as follows:

*Title to Waste.* For the purpose of this contract, Design Professional shall act as an advisor to Owner so that Owner can arrange and coordinate removal and transport or treatment of used petroleum storage tanks and associated contaminated materials or hazardous substances and constituents (“Waste”) by Contractors or Subcontractors experienced and licensed in such removal, transport, or treatment. At no time will Design Professional take title, constructive or express, to such Waste. Possession and title to such Waste shall remain with the Owner or shall pass directly from Owner to such Contractor or Subcontractor, or to the ultimate disposal facility.

Consider defining responsibilities in the contract as follows:

The Design Professional’s Scope of Services will be limited to obtaining publicly available information concerning disposal sites from reputable third party providers in the business of providing this information. This information will be presented by Design Professional to the Owner for the Owner’s decision in making a direct contract with the transporter and/or Treatment, Storage and Disposal (TSD) facility.

A statement can be included in the contract clearly explaining the intent of structuring the handling of the waste as described in (1) above.

Obtain agreement from the Owner to indemnify you in the event that you are later classified as a Potential Responsible Party (PRP) and a demand or claim is submitted against you by a third party or governmental agency associated with your alleged responsibility as a PRP.

Another issue that should be considered is who will be responsible for the disposal of soil or waste samples that are collected by the Design Professional. To the extent samples are used up during testing, this may not become an issue. If, however, there will be sample material remaining after any tests are completed, the contract should address how the material will be handled and who has responsibility for it. An example of such a clause is as follows:

*Disposal of Samples.*

a) Non-Hazardous Samples: At Owner's written request, Design Professional will retain preservable test specimens, or the residue therefrom, for thirty (30) days after submission of Design Professional's report, free of storage charges. Upon Owner's written request, Design Professional will use its best efforts to retain test specimens or samples for a longer period of time, but only for a mutually acceptable storage charge and period of time. After the expiration of the applicable retention period, Design Professional may dispose of all samples.

b) Hazardous or Potential Hazardous Samples: In the event that test samples contain toxic or hazardous constituents as defined by applicable law or regulations, upon completion of any testing and temporary storage by Design Professional, and per Owner's stated preference, Design Professional will either: (a) return such samples to Owner for disposal; or (b) use a manifest signed by Owner as generator and have such samples transported to a location selected by Owner for proper final disposal; or (c) dispose of such samples at a properly licensed disposal facility. Owner agrees to pay all costs, if any, associated with the storage, transport, and disposal of such samples. Owner recognizes and agrees that Design Professional is acting on behalf of Owner, and at no time does Design Professional assume title to said materials.

Environmental conditions may also constitute differing site conditions. In order to protect against performing uncompensated additional services, additional services for which you are not qualified or licensed, or assuming additional risk related to the performance of environmental remediation related services, you may include a clause such as the following in the contract:

*Discovery of Hazardous Substances (Non-Environmental Project).* Hazardous substances may exist at a site where there is no reason to believe they should or could be present. Design Professional and Owner agree that the discovery of unanticipated hazardous substances constitutes a changed condition and would require the renegotiation of the Scope of Services or termination of the Services. Design Professional and Owner also agree that the discovery of unanticipated hazardous substances may make it necessary to take immediate measures to protect health and safety. Design Professional agrees to notify Owner as soon as practicable should unanticipated hazardous substances or suspected hazardous substances be encountered. Owner encourages Design Professional to take any and all measures that, in Design Professional's opinion, are justified to preserve and protect the health and safety of Design Professional's personnel and the public. Owner agrees to compensate Design Professional for the additional cost of such protective measures. In addition, Owner waives any claim against Design Professional and agrees to defend, indemnify, and hold Design Professional harmless from any claim or injury or loss arising from Design Professional's discovery of unanticipated hazardous substances.

Another way to deal with this issue is along the lines presented by AIA Document B101-2007 at §10.6 which provides:

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.

The clause below permits changes within the general scope only and addresses what happens if contaminants are discovered.

*Changes:*

## 1. General.

Owner, within the general scope of the Agreement may, at any time, by written notice to Design Professional, issue additional instruction, require additional services, or direct the omission of services covered by this Agreement. In such event, there will be made an equitable adjustment in price and/or time of performance, but any claim for such an adjustment must be made within 30 days of the receipt of said written notice.

## 2. Environmental.

Owner and Design Professional agree that the discovery of unanticipated hazardous substances or conditions constitutes a changed condition, which may require a renegotiation of the Scope of Services or termination of services. Owner shall rely on Design Professional's judgment as to the continued adequacy of this Agreement in light of discoveries that were not anticipated or known. If Design Professional determines that renegotiation is necessary, Design Professional and Owner shall in good faith enter into renegotiation of this Agreement to permit Design Professional to continue to meet Owner's needs. If renegotiated terms cannot be agreed to, Owner agrees that Design Professional has the right to terminate this Agreement. If the Agreement is terminated, Owner shall pay Design Professional for all services performed and expenses incurred up to and including the date of termination, plus reasonable termination costs.

For concerns such as hazardous wastes or other contaminants or pollutants that might be discovered at the site, you should include in the changes clause, or under a Changed Conditions clause, a provision stating that you are not responsible for addressing environmental conditions and will not be required to increase your services to address contaminants that may be discovered at the site. Whether to increase your scope to include services needed to address wastes and contamination discovered at the project site should be your decision to make and should not be left solely to the Owner to decide.



## **Governing Law and Jurisdiction**

**Issue:** The interpretation, application, and enforceability of various contract clauses may depend upon the location of the project, or domicile of the Design Professional or the Owner. If the contract is silent about what law governs, the matter is generally decided based upon where the work is performed. Parties may also argue that the law of the state where one or more parties are domiciled should apply. If the contract is not specific about what law governs, the parties may end up spending a lot of time and money arguing this issue if a claim and litigation later ensue. The outcome of various issues can be directly related to which state's law controls. This is particularly true with regard to indemnification provisions and limitation of liability provisions, the permissibility of which are determined by the governing state law.

**Discussion:** Even if the contract specifies which state's law will govern, it is possible that the litigation can be filed in a jurisdiction different from the jurisdiction whose law will govern. Consider this hypothetical: The Design Professional is domiciled in New York. The contract was executed in New York and states that New York law applies. The design services are performed in a CADD facility in New Jersey for the Owner which is domiciled in New Jersey, and the construction project will be built in Pennsylvania. If the contract was silent about which state had jurisdiction over a dispute, the Owner could sue the Design Professional in New Jersey. That court would then be asked by the Design Professional to apply New York law as provided for under the contract. If the contract had been silent concerning which state's law would be applied, the New Jersey court would likely apply the law of its own state because it has the greatest connection with the project.

**Conclusion:** If the Design Professional wants a particular state's law applied, and wants disputes litigated in that state as well, it could use a clause such as the following:

This Agreement shall be governed by, and interpreted pursuant to, the laws of the State of \_\_\_\_\_ applicable to contracts made by parties domiciled in and to be wholly performed within the State of \_\_\_\_\_. Any action or proceeding arising from or pertaining to this Agreement shall be brought in a state or federal court in the State of \_\_\_\_\_, and the parties shall not challenge the law to be applied, the venue or jurisdiction.

Note that there are limitations to how this language can be used. There must be some reasonable connection with the state that is selected for governing law and jurisdiction. Otherwise, many courts will decline to accept jurisdiction, regardless of what the contract says. The court that takes jurisdiction over the matter may likewise decline to apply a foreign state's law if there is no adequate connection between the performance of the work under the contract and that state.

See “Choice of Law” section of this guide for additional discussion of this subject.

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## Green Design

**Issue:** Project owners such as hospitals, schools, large commercial enterprises, and government agencies are including clauses in their contracts that are adding sustainable design and construction requirements, including specific warranty language for the achievement of LEED certification.

In one contract involving a large and complex new medical center and hospital, the design contract stated that the design firm would design the facility so that LEED Gold certification would be achieved, and that “in the event that LEED certification is not granted, liquidated damages in the amount of \$2 million shall be assessed.”

What if the Design Professional that designs the project and warrants the LEED Gold certification in the above situation has only minimal construction phase responsibility? If its scope of service does not call for significant construction administration services, and some other firm, such as a construction management (CM) firm, is going to be performing that function instead, how can the design firm protect itself against decisions being made during construction and commissioning that are inconsistent with achieving Gold Certification?

**Discussion:** Unlike a supplier that gives an equipment warranty, a Design Professional does not have the same kind of control over the factors that affect a LEED certification warranty when the designer gives such a warranty. It is unreasonable for a project owner to demand such an uninsurable warranty from a Design Professional.

AIA B101-2007, §3.2.3 adds new requirements concerning green design responsibilities. Section 3.2.3 requires the architect to discuss with the owner environmentally responsible design approaches. It 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.

Two concepts in this paragraph are new: environmentally responsible design and the requirement to reach an understanding.

Although Section 3.2.3 does not bind an Owner to include environmentally responsible approaches in the design, it functions to raise owners' awareness of environmental issues.

The last sentence requires that the Architect and Owner reach "an understanding" regarding the Project requirements.

AIA B101-2007, §3.2.5.1 requires the Architect to consider environmental issues as part of its Basic Services for design. Section 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.

The requirements of this provision obligate the Architect to "consider environmentally responsible design alternatives," but the Owner is not obligated to select any such alternatives. Although the Architect is obligated to "consider" these issues, it is not obligated to select or employ a more environmentally responsible alternative. It will be important that the Architect document how it met this requirement.

The AIA published AIA Document D503™-2011, Guide for Sustainable Projects, in May 2011. The Guide discusses issues related to sustainable design and construction, and contains model language to amend A101, A201 and B101. It contains model language for an Architect's "Additional Services for Sustainable Projects." The Guide also contains model language addressing the issues discussed below with respect to no guarantees or warranties:

**Model Language**

§ 12.2 The Owner and Architect acknowledge that LEED® Certification is awarded by the Green Building Certification Institute (GBCI), an independent third party organization, and is dependent on factors beyond the Architect's control, such as the Owner's use and operation of the Project; the

Work provided by the Contractor or the work or services provided by the Owner's other contractors or consultants; or interpretation of credit requirements by GBCI. Accordingly, the Architect does not warrant or guarantee that the Project will be granted LEED® Certification by the GBCI.

§ 4.4.3.2 The Owner and Architect acknowledge that achieving the Sustainable Objective is dependent on many factors beyond the Architect's control, such as the Owner's use and operation of the Project; the Work provided by the Contractor or the work or services provided by the Owner's other contractors or consultants; or interpretation of credit requirements by a Certifying Authority. Accordingly, the Architect does not warrant or guarantee that the Project will achieve the Sustainable Objective.

A good example of a clause explaining that the Design Professional does not control third parties and cannot, therefore, 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.

An interesting example from a design build contract addresses the issue related to obtaining LEED certification as follows:

**Sustainable Building Practices (LEED)**

The Design/Builder and Owner acknowledge that the LEED Green Building Rating System, and other similar environmental guidelines (collectively “LEED”), utilize certain design and usability recommendations on a project in order to promote an environmental friendly and energy efficient facility. In addressing these guidelines, the Designer shall perform its services with that degree of skill and care ordinarily exercised by similarly situated members within its profession, involved in the design of similar projects in the same locale as the Project (the “Standard of Care”). The Design/Builder and Owner acknowledge and understand, however, that LEED is subject to various and possibly contradictory interpretations. Furthermore, compliance involves factors beyond the control of the Designer, including but not limited to the Design/Builder and Owner’s use and operation of the completed Project. The Designer will use reasonable care consistent with the foregoing Standard of Care in interpreting and designing to meet the intent of the LEED Green Building Rating Systems credit requirements, but does not warrant or represent that the project will actually achieve LEED certification. The Designer shall not be responsible for the Design/Builder and/or Contractor’s failure to adhere to the Contract Documents and any applicable laws, codes, and regulations incorporated therein, nor for any changes to the design made by the Owner without the direct participation and written approval of the Designer. *(cont’d)*

Likewise, the Designer shall not be responsible for any environmental or energy issues arising out of the Owner's use and operation of the completed Project.

The Design/Builder, Owner and Designer acknowledge that Project will pursue LEED-xx certification, and in doing so may include new or innovative products, technologies or methods in order to accomplish this objective.

The Design/Builder and Owner acknowledge that such innovative products, technologies and methods may lack a proven long-term history of successful application and, due to their innovative nature, it is therefore possible that they may not realize their intended objectives, or carry with them collateral consequences.

The Design/Builder and Owner agree that it has weighed the relative risks and rewards, and accepts the potential risks in order to incorporate such innovative products, technologies or methods as necessary to achieve desired level of LEED-xx certification.

Furthermore, Design/Builder and Owner acknowledge that if it chooses to complete and submit a LEED Certification Application for Existing Buildings, Operations and Maintenance Rating System ("Application") that Owner grants Architect the authority to sign the Application on Owner's behalf. Owner also acknowledges that by granting Architect the authority to sign the Application, Owner shall remain responsible and liable for any and all information provided and incorporated within the Application.

Owner acknowledges that in accordance with the Application, Owner shall be solely responsible for maintaining at the site of the Project for a period of not less than seven (7) years commencing on the date of award of LEED Certification all of the documentation provided for the Application.

Owner acknowledges that it, and not Architect, shall be solely responsible to achieve LEED Certification at least once every five (5) years from the date of the most recent award of LEED Certification.

**Mutual Waiver of Consequential Damages**

The standard AIA contract documents contain a mutual waiver of liability clause stating that both the project owner and design firm waive consequential damages that they might claim from each other. Such consequential damages may include lost profits, lost rents, lost tax incentives, lost financing terms, increased operation and maintenance costs, and other economic losses, such as loss or impairment of the building value due to failure to obtain a specified LEED certification.

This waiver of consequential damages may be an important tool to limit the architect's potential liability arising out of failure to achieve the intended sustainability objectives. Engineers and other Design Professionals should consider adding such a waiver to their contracts as well. A project owner might not be willing to grant a broad waiver clause, but it might accept such a clause if it is limited to consequential damages related to green design. It is worth pursuing this during contract negotiation. In drafting such a waiver of consequential damages clause specific to green design, consider delineating the consequential damages items listed in the preceding paragraph, plus any others you might think of, and state that the waiver applies, "but is not limited to," each of those items. The AIA D503™-2011, Guide for Sustainable Projects, includes model language to address these issues as follows:

**Model Language**

§ 8.1.3.1 The mutual waiver in this Section 8.1.3 expressly includes those consequential damages resulting from failure of the Project to achieve the Sustainable Objective or one or more Sustainable Measures including unachieved energy savings, unintended operational expenses, lost financial or tax incentives, or unachieved gains in worker productivity.

**Warranty of Green Design**

In addition to not agreeing to any warranties or guarantees concerning green design, it may also be advisable to add a clause affirmatively stating that the Design Professional is making no warranty and giving no guarantee concerning LEED certification because such certification is beyond its ability to control.

It may also be prudent to add a paragraph to the contract stating that any forms or representations that the Design Professional or contractor might provide to the project owner concerning LEED credit submittals do not constitute representations or warranties concerning the ultimate functionality

or high performance of the building, but instead are solely for the purpose of satisfying the LEED certification process documentation requirements.

In addition to exercising great caution with the language that goes into the contracts for design and construction, project parties must also give attention to the language of marketing materials, advertisements, websites, and proposals. Despite language in contracts that has carefully avoided over-promising the quality of the services to be provided or the results to be obtained, it is surprising to see the same company potentially create liability through its marketing materials, websites, and proposals. Among the first things that a plaintiff's counsel will review are the firm's marketing materials and website.

### **Proposal Language May Create Rules**

Proposals are often incorporated by reference or as an attachment to the Design Professional agreement. The representations contained in those proposals can, consequently, become an affirmative part of the contract. But even if not actually incorporated by reference, the content of the proposals might still be relied upon by a project owner in selecting a Design Professional, contractor, or vendor. Owners have successfully argued that they were expected and intended to rely upon those proposals when deciding whether or not to award a contract. Complaints have increasingly alleged fraud and negligent misrepresentation in the proposals and marketing materials, in addition to actual negligent performance of the services or work. Owners find these allegations particularly useful as a means to avoid liability limitations they may have agreed to in the contract. By arguing that they were "fraudulently induced" into the contract, the owners might be able to avoid a summary judgment in favor of the Design Professional to enforce a waiver of consequential damages clause or other limitation of liability clause in the contract.

The point is that it is not safe to think that proposals and marketing materials are merely "puffing" and do not create liability. Owners who are not satisfied with the result of services may latch onto those materials as one basis for their claim – and that one basis might be the thing that gets them past a motion to dismiss or summary judgment motion.

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## **Incorporation by Reference**

**Issue:** Some contracts contain a clause stating that another contract is incorporated by reference. For example, a design subconsultant's agreement might state that the terms and conditions of the prime architect's agreement with the project owner are incorporated by reference. In the context of a design-build project, a general contractor who is taking the lead role as the design-builder may flow down to its design firm subcontractor, by way of incorporation by reference, the terms and conditions of the owner/design-builder prime contract agreement. A typical clause might read as follows:

The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement.

Another example of incorporation by reference is as follows:

It is agreed that the terms and conditions of the contract between Owner and Client are hereby incorporated by reference into this agreement. All such terms and conditions are as fully binding upon the Design Professional as if set forth herein at length, to the same extent that Client is bound by the same to the Owner.

**Discussion:** You might see clauses like these if you are providing services as a Design Professional Subcontractor to a general contractor that is taking the lead on a design-build project. It is likely that terms and conditions of the prime contract will be inconsistent with your own Design Professional contract with the client. By agreeing that your contract with the client will consist not only of your professional services Agreement itself, but also the Prime Contract and any changes to that Prime Contract, you may inadvertently be agreeing to terms you do not know about in the prime contract. These terms might even supersede or override conflicting terms in your subconsulting agreement. It is possible, for example, that your client has agreed to a standard of care or indemnification requirement that is

contrary to your own risk management principles. It is further possible that if those terms flow down into your contract and are enforced against you, you will incur an uninsurable loss.

**Conclusion:** Do not agree to incorporate by reference the terms of another contract unless you have read that contract and understand those terms. You need to assure yourself that the incorporated terms and conditions do not impose risk and liability on you different from what you are otherwise agreeing to in your Agreement with your client.

The AIA Standard Form of Agreement between Architect and Consultant (AIA C401-2007, Section 1.1) provides the following incorporation by reference clause:

A copy of the Architect's agreement with the Owner, known as the Prime Agreement (from which compensation amounts may be deleted), is attached as Exhibit A and is made a part of this Agreement.

At least with the AIA language above, the prime agreement is to be attached to what you are executing so that you can review it.

As a subcontractor, if in reviewing the prime agreement language you find terms that conflict with the risk allocation provisions of your subcontract, you should seek to amend the above clause by adding an exception to incorporation for specific, identified articles of your subcontract.

To avoid confusion over the scope of services applicable to your subcontract that might arise from a general incorporation by reference of your client's prime contract, you may clarify your scope by specific reference and incorporation of the scope of service set forth in your own detailed proposal as follows:

The portion of the Project for which the Design Professional shall provide services is hereinafter called This Portion of the Project. Except as set forth herein, the Design Professional shall not have any duties or responsibilities for any other portion of the Project. This Portion of the Project consists of the following:

Refer to Design Professional's Proposal #PG11-0210 dated February 9, 2011 attached and incorporated herein as Exhibit A.

To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the Architect shall assume toward the Design Professional all obligations and responsibilities that the Owner assumes toward the Architect, and the Design Professional shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner. Insofar as applicable to this Agreement, the Architect shall have the benefit of all rights, remedies and redress against the Design Professional that the Owner, under the Prime Agreement, has against the Architect, and the Design Professional shall have the benefit of all rights, remedies and redress against the Design Professional that the Owner, under the Prime Agreement, has against the Architect, and the Design Professional shall have the benefit of all rights, remedies and redress against the Architect that the Architect, under the Prime Agreement, has against the Owner, Where a provision of the Prime Agreement is inconsistent with a provision of this Agreement, this Agreement shall govern.

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## Indemnification

### Issue 1: Uninsurable Indemnity Obligations

An indemnity clause allocates risk or shifts risk between the parties to the contract. The consequences of agreeing to a broad indemnity clause making you responsible for damages that are not caused by your own negligence can be devastating. If you sign an indemnity whereby you agree to indemnify your client for anything other than damages caused by your own negligent acts, errors, and omissions, you create a “contractual liability” and thereby assume liability that you would not have had but for the contractual obligation. Design Professionals' professional liability policies are intended to respond only to damages caused by the negligence of the insured Design Professional. Exclusions in the policy generally bar coverage for contractual liability in which the Design Professional has assumed liability for which it would not have been liable at common law. You could end up paying your client damages as required in your contract, but receive no insurance coverage to assist you.

There are often three parts to an indemnity clause. The indemnitor (the party granting the indemnification) agrees to (1) indemnify, (2) defend, and (3) hold harmless the Owner. By “indemnifying” the indemnitor agrees to reimburse the Owner for its losses, after those losses have been determined by litigation, arbitration, or settlement. By “defending” the Owner, the indemnitor agrees to pay for the Owner’s legal expenses as they are incurred by the Owner as it defends the claim brought by a third party. By “holding harmless” the Owner, the indemnitor agrees to protect the Owner against harm from suits by third parties or the indemnitor.

Signing an indemnity whereby you agree to indemnify the Owner for anything other than damages caused directly by your own negligent acts, errors, and omissions, creates a “contractual liability”. You are thereby assuming liability that you would not have had, except for the contractual obligation. Design Professionals’ professional liability policies are designed to respond only to damages caused by the negligence in the rendering of covered professional services by the insured Design Professional. Exclusions in the policy exclude coverage for contractual liability which the Design Professional has assumed in a contract for which it would not have been liable under the common law standard of negligence. In other words, you

could end up paying the Owner damages pursuant to your contract but receive no insurance coverage to assist you.

**Discussion:** An exceptionally broad indemnification clause may require the Design Professional to indemnify its client for all damages arising out of the project, including those caused by the client's own negligence — even in the absence of negligence by the Design Professional. An example of such a clause is as follows:

*Design Professional shall indemnify and save harmless the Client, and its officers, directors, employees and agents, from and against all liability, loss, cost or expense (including attorney's fees) by reason of liability imposed upon the Client, arising out of or related to Design Professional's services, whether caused by or contributed to by the Client or any other party indemnified herein, unless caused by the sole negligence of the Client.*

Under this clause the Owner intends for the indemnity to apply to all of a jointly caused loss. Thus if a \$1 million loss was determined to have resulted because the Owner was 90% at fault and the Design Professional was 10% at fault, the Design Professional would nevertheless have to indemnify the Owner for the entire \$1 million loss.

Beware of clauses containing the words “in whole or in part”. A clause may state that the Design Professional will indemnify the client for all damages caused “in whole or in part” by the Design Professional. Courts have interpreted this language to mean that if the Design Professional contributed even just a little bit to causing the damages, it will be required to indemnify the client for ALL of the damages, including those caused by the client's negligence. An example of such a clause is as follows:

*Design Professional shall indemnify, and hold harmless Client from any and all claims, demands, suits, actions, proceedings, loss, cost, and damages of every kind and description, including any reasonable attorneys' fees and/or litigation expenses, caused by, arising out of, or contributed to, **in whole or in part**, by reasons of any act, omission, professional error, fault, mistake, or negligence of the Design Professional, its employees, agents, representatives, or subcontractors, their employees, agents, or representatives in connection with or incidental to the performance of this Agreement.*

Another clause, shifting risk to the Design Professional for damages not caused by its own negligence provides as follows:

*Design Professional shall indemnify the Client for all claims, damages and expenses arising out of acts, omissions, errors or negligence of the Design Professional.*

This clause is dangerously clever in its subtlety and may more properly be called a “broad-form” indemnity. Note that by its terms you will indemnify your client for damages arising from your acts — regardless of whether those acts and omissions are negligent. By placing the word “negligence” after the other terms, it does not modify them but rather stands alone as a separate basis for indemnity. Refer to the discussion in this book on Standard of Care for an explanation concerning negligence based liability. You are not legally liable for every act, error, and omission. You are only liable for those acts, errors, or omissions that were negligent — that is, those acts that failed to meet the standard of care — unless you agree to another basis of liability pursuant to the terms of your contract.

Another problem with the indemnification clauses that are not limited to your negligence is that they conflict with the normal Standard of Care, as discussed later in this Manual. So even if you have negotiated an appropriate Standard of Care into your contract, you might be required to indemnify your client despite having complied with the specified standard. The indemnity clause may be applied by a court as standing on its own and creating a separate enforceable responsibility. State law will dictate the results, and the laws of the states vary widely concerning the interpretation and enforceability of indemnification clauses.

EJCDC E-500 (2008), §6.10.A addresses indemnification as follows:

*Indemnification by Engineer:* To the fullest extent permitted by law, Engineer shall indemnify and hold harmless Owner, and Owner’s officers, directors, members, partners, agents, Design Professionals, and employees from reasonable claims, costs, losses, and damages arising out of or relating to the Project, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, but only to the extent caused by any negligent act or omission of Engineer or Engineer’s officers, directors, members, partners, agents, employees, or Design

Professionals. This indemnification provision is subject to and limited by the provisions, if any, agreed to by Owner and Engineer in Exhibit I, “Limitations of Liability.”

6.10.B *Indemnification by Owner*: To the fullest extent permitted by law, Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Design Professionals from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court, arbitration, or other dispute resolution costs) arising out of or relating to the Project, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, but only to the extent caused by any negligent act or omission of Owner or Owner’s officers, directors, members, partners, agents, employees, Design Professionals, or others retained by or under contract to the Owner with respect to this Agreement or to the Project.

Note that these clauses require the Design Professional to indemnify the client only for damages resulting from the Design Professional's negligence. If multiple parties such as a client, contractor, and you, were all negligent and thereby contributed to the damages, you will only be required to indemnify the client for your proportionate share of the liability based on the “extent” of your negligence. In addition, the last clause above does not require the Design Professional to “defend” the client. The client's defense cost would, therefore, not become the responsibility of the Design Professional unless and until the client’s liability to the third party is finalized and it is determined that the liability resulted from the negligence of the Design Professional. The client could then look to the Design Professional for reimbursement of its damages, including legal defense costs.

One idea for obtaining a reasonable indemnification clause is to make the clause reciprocal so that both parties indemnify the other to the extent of damages caused by their negligence. An example of such a clause is the following:



The Consultant and the Client each agree to indemnify each other from liability for losses, damages, or expenses (including reasonable costs and attorney's fees) to the extent they are caused by each party's respective negligent acts, errors, or omissions relating to this Agreement. In the event the losses, damages, or expenses are caused by the joint or concurrent negligence of the Consultant and the Client, they shall be borne by each party in proportion to its own negligence. In no event shall the indemnification obligation extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by any applicable law.

**Conclusion:** Explain to your client that you do not have insurance for non-negligent acts, errors, and omissions. The reason for this is that insurance is intended to protect you in the event you breach the normal standard of care, i.e., you were negligent. Explain that broad form and intermediate form indemnities are contrary to the principles supporting the generally accepted standard of care for Design Professionals. It is not reasonable or appropriate for an Owner to hold you responsible for damages caused by someone else. Rather than forcing you to act as an insurance company for someone else, your client should purchase its own insurance, or obtain insurance from other appropriate parties, in order to obtain the protection it is apparently attempting to obtain from you without paying for it.

Try to negotiate an indemnity clause that allocates the risk to the parties in the best position to control and manage the risk and that reflects the appropriate standard of care. The sample clause below limits the Design Professional's exposure to bodily injury and property damage to the extent caused by a negligent act, error or omission in the performance of professional services by the Design Professional (or anyone else for whom the Design Professional is legally responsible) and makes Owner responsible for all liabilities caused by the Owner's negligence (or anyone else's negligence for whom the Owner is legally responsible). There are no defense obligations included in either party's indemnification obligation:

Design Professional agrees, to the fullest extent permitted by law, to indemnify and hold harmless Owner from and against any liabilities, damages, and costs (including reasonable attorneys' fees and cost of defense) arising out of the death or bodily injury to any person or the destruction or damage to any property, to the extent caused, during performance of professional services under this Agreement, by the negligent acts, errors, and omissions of the Design Professional or anyone for whom Design Professional is legally responsible, [subject to the limitations set forth in the Limitation of Liability article of this Agreement].

The Owner agrees, to the fullest extent permitted by law to indemnify and hold harmless the Design Professional from any liabilities, damages, and costs (including reasonable attorneys fees and cost of defense) to the extent caused by the negligent acts, errors or omissions of the Owner, Owner's contractors, Design Professionals or anyone for whom Owner is legally responsible.

Note that if there is a limitation of liability clause in your contract, it may be helpful to reference it in the indemnity clause in order to expressly limit the extent of your indemnification responsibility. Be aware, however, that it is possible under some circumstances and in some jurisdictions that a limitation of liability clause would not be enforced.

Note also that the Design Professional's indemnity is based only on damages arising out of bodily injury and property damage, whereas there is no such limitation on the indemnification to be provided to the Design Professional by the Owner.

Consider another clause:

*Design Professional Indemnification of Owner.* Design Professional agrees, to the fullest extent permitted by law, to indemnify and hold harmless Owner from and against any liabilities, damages, and costs (including reasonable attorneys' fees and cost of defense) to the extent caused by the negligent acts, errors, and omissions of the Design Professional.

Note that this clause requires the Design Professional to indemnify the Owner only for liability resulting from the Design Professional's negligence. If multiple parties such as the Owner, Contractor, and you, were all negligent and thereby contributed to the damages, you will only be required to indemnify the Owner for your proportionate share of the liability based on the "extent" of your negligence. In addition, this clause does not require the Design Professional to "defend" the Owner. The Owner's defense cost would, therefore, not become the responsibility of the Design Professional unless and until the Owner's liability to the third party is finalized and it is determined that the liability resulted from the negligence of the Design Professional. The Owner could then look to the Design Professional for reimbursement of its damages, including legal defense costs.

*Indemnification in California.* In California, on projects for public agencies, it is not enough to merely avoid including uninsurable "defend" language in the indemnification clause. What might otherwise be considered acceptable language (that only requires you to indemnify your client for damages to extent arising out of your own negligence) is not sufficient to avoid the duty the courts of California will impose on you to defend the indemnitee. In essence, the California Supreme Court has put us all on notice that if the contract contains an indemnification agreement, the agreement will be interpreted to impose an additional obligation for the indemnitor to defend the proposed indemnitee immediately upon the tendering of the defense. The only way around this, is for the parties to affirmatively state that there is NO duty to defend any claim that is subject to the indemnification provisions.

*Contractor Indemnity of the Design Professional.* Contractor indemnification of Design Professional should be required pursuant to the agreement between the Design Professional and its client. Such indemnification by the contractor of the Design Professional is typical of the industry standard form contracts but may be omitted in the owner drafted contracts. To the same extent that the owner is indemnified by the

construction contractor, the construction contract should name the Design Professional as an additional indemnitee.

### **Issue 2: Uninsurable Duty to Defend**

Design Professionals should not agree to defend their Clients. No common law duty requires a Design Professional to defend its client against third party actions. That duty can only arise as a result of a contractual liability created through the indemnification clause of the contract. Since this is a contractual liability, it is excluded from coverage pursuant to the contractual liability exclusion of the professional liability policy.

Courts that have interpreted indemnification provisions that included the duty to defend have explained that this means the Design Professional must defend its client (pay legal fees on behalf of its client) as the litigation is ongoing. The Design Professional cannot wait until the conclusion of the litigation to determine whether it is found to have negligently performed services and therefore owe a separate duty to indemnify. The courts see the duty to defend and the duty to indemnify as two separate and distinct duties. The insurance policy only covers damages to the extent they are caused by the Design Professional's negligence - and that determination can only be reached at the conclusion of the case or by a mutual settlement to which the insurance carrier agrees.

Although it is theoretically possible that the damages awarded by a court might include some attorneys fees if there is a statute which requires the same, attorneys fees are generally not awarded as part of a judgment in the American system of justice. Therefore, a clause stating that the Design Professional will defend (pay on behalf of) or will indemnify (pay attorneys fees after judgment is rendered) both may create uninsurable liability. Agreeing to defend on behalf of a client, however, is far worse since the Design Professional would be paying out of its own pocket its client's attorneys fees as they are incurred to defend against a third party claim that might not even ultimately be found to have been caused by the Design Professional's negligence.

Any duty to defend its client that the Design Professional may agree to under an indemnification clause, or other provision of the contract, is uninsurable pursuant to the contractual liability provision of the contract. Any duty to defend should be stricken from a contract, even if the contract states that the duty to defend and indemnify is limited to damages resulting from the negligent performance of professional services. This is because courts may interpret the duty to defend to be a broad separate duty from the duty to indemnify, causing the Design Professional to be required to defend a claim

on behalf of its client (paying attorneys fees as they are incurred) as soon as a claim is tendered by the client, even though no determination of negligence has been rendered.

The conservative way to look at the risk is that a contractually agreed upon duty to defend is triggered as soon as the claim is made because it is a separate duty from the duty to indemnify. At least one court has ruled that it is comparable to an insurance company providing you a defense against a claim. It doesn't wait to see if you are negligent before defending you. The carrier defends you in the hope of proving you are not negligent.

The clause below is not appropriate for a Design Professional to sign because courts may interpret the clause to mean that the indemnification requirement only applies to damages ultimately caused by negligence – but that the defense obligation is immediate and is not limited by the language of the clause concerning negligence.

*Indemnification (example of problem clause).*

*The Design Professional covenants to save, defend, hold harmless, and indemnify the County, and all of its elected and appointed officials, officers, employees, agents, departments, agencies, boards, and commissions (collectively the "County") from and against any and all claims, losses, damages, injuries, fines, penalties, costs (including court costs and attorney's fees), charges, liability, or exposure, however caused, resulting from, arising out of, or in any way connected with the Design Professional's negligent acts, errors, or omissions, recklessness or intentionally wrongful conduct of the Design Professional in performance or nonperformance of its work called for by the Contract Documents. This indemnification shall survive the termination of this Contract.*

See, for example, the recent California court decisions of *Crawford v. Weather Shield Manufacturing*, as well as *UDC Universal Development L.P v. CH2M Hill*, 181 Cal.App.4th 10, 103 Cal.Rptr.3d 684 (2010).

**Issue 3: Agreeing to Pay Reasonable Attorneys Fees as Part of Indemnification May Create Uninsurable Loss**

A question that is asked with increasing frequency is whether attorneys' fees incurred pursuant to an indemnity clause are insurable where they are not

incurred due to a duty to defend (i.e., paid on behalf of the indemnitee) but are instead paid after the litigation is complete and the indemnitor (e.g., engineer) is found liable for damages due to its negligence. The short answer is that unless the court would have awarded the attorneys' fees against the engineer in the absence of the contractual obligation to pay attorneys fees that were created by the indemnification provision, the attorneys' fees will not be covered by the professional liability policy. The contractual liability exclusion of the policy applies to such contractually created obligation to pay those attorneys' fees.

A typical indemnification clause that includes payment of attorneys' fees as part of the indemnification rather than as part of a duty to defend is the following:

*Indemnification. "The Design Professional shall indemnify and hold harmless Owner, its parent, affiliates and their respective directors, officers and employees ("Indemnitees") from and against any and all claims, suits, actions, judgments, demands, losses, costs, liability, damages, and expenses, of any kind (including reasonable attorneys fees) for injuries to persons (including but not limited to death) or damage to property to the extent any of the foregoing are caused by any negligent act, error, or omission of Design Professional, its officers, employees, agents, representatives, and persons for whom Design Professional is legally responsible in the performance of the Services."*

Although this clause may look innocuous in that the indemnification is limited to negligence, it may nevertheless create uninsurable loss by virtue of the attorneys' fees that are included in the indemnification. Under American Jurisprudence, the courts do not award attorneys' fees to the prevailing party unless the contract creates such a duty or unless there is some legal basis (such as a civil statute) that establishes the basis for the award of attorneys' fees.

What could happen if instead of including the reference to "reasonable attorney's fees" in the above quoted clause, the clause added the following sentence? "Design Professional shall not have an obligation to defend any person under this indemnity; however, Design Professional shall have liability for reasonable and necessary defense costs incurred by persons indemnified to the extent caused by Design Professional's negligence." The

answer is that some or all of the attorney's fees would be denied coverage pursuant to the contractual liability exclusion.

To avoid uninsurable legal fees under the above-quoted clause, one advisor recommended to a Design Professional that the final sentence be revised to read as follows: "Design Professional shall have liability for reasonable and necessary defense cost incurred by persons indemnified to the extent caused by Design Professional's negligence herein *and recoverable under applicable law on account of negligence.*"

This phrase that is shown in *italics* may be what is needed because unless the award is limited to the sum "recoverable under applicable law on account of negligence," the indemnity of legal costs is not fully insured. Specifically, an award of legal costs in favor of the indemnitee against the engineer that is based on the contractual indemnity alone is excluded from coverage by the contractual liability exclusion of the policy. The amount of the award that is made under applicable law respecting recovery of plaintiff's legal costs, apart from the contractual indemnity, could be covered under the policy depending upon terms and conditions of the policy.

In other words, if a state has a law for recovery of plaintiff's legal costs against the engineer, an award under that law may be covered under the professional liability policy. However, to the extent any award or part of an award is made to enforce the contractual indemnity of plaintiff's legal costs, it runs afoul of the contractual liability exclusion of the policy and would, therefore, not be covered.

As previously stated, the common law does not generally provide for an award of a party's legal costs. That is the genesis of contractual indemnity of legal costs. Contractual indemnity "fills in" what the law does not otherwise order. Likewise, that is the reason the engineer would limit the contractual indemnity to the sum that state law would award. The "fill in" to enforce the contractual indemnity is not a liability that would have attached to the "insured" in the absence of such contract, warranty, guaranty or promise, to quote from the contractual liability exclusion contained in one insurance carrier's policy. For the reasons explained above, a party that agrees to indemnify another should beware that agreeing to reimburse the indemnitee for attorneys' fees will likely create an uninsurable risk where those fees would not have otherwise been awarded by a court in the absence of the contractual obligation.





## Inspection

**Issue:** Design Professionals serving an Owner as an architect, engineer, or construction manager are sometimes asked to sign contract language describing one aspect of their services as “inspection.” The term “inspection” may imply a greater responsibility on the part of the Design Professional than what is usually intended by the Design Professional or can reasonably be provided for ordinary fees. The use of the word “inspection” may allow the Owner or a Court to think that you are committing to police the project and through your “inspection” ascertain all instances of the Contractor's personnel not complying with the detailed plans and specifications or other Contract Documents. Some Owners may even state in the contract that the purpose of the “inspection” is to ensure that problems are discovered and promptly reported to the Owner.

**Discussion:** Realistically, you cannot “inspect” or “ensure” all the work of a Contractor without having an “inspector” look over the shoulder of every laborer of the Contractor. Of course, you don't have all these inspectors overseeing the Contractor, you certainly are not going to be competitively priced if you are fully charging for the required amount of oversight and there will naturally be times when the Contractor's people fail to comply with the details of the Contract Documents without your knowledge. By applying the language requiring you to “inspect” the work, the Owner may allege that you breached your contractual duty. Compounding the liability potentially arising from an “inspection” term is the additional problem that the Contractor may also attempt to use the “inspection” language to affirmatively assert it is relieved of redoing work you or the Owner later reject — that you have previously “inspected” it and let it go. An example of a problematic clause is the following:

*Design Professional 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.*

*Design Professional 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.*

In the contract from which the above clause was borrowed, the Scope of Services clause was inconsistent with, and not as comprehensive as, the services the Design Professional would be required to perform in order to accomplish the inspection and reporting required by this clause. Other project Owners use language similar to that above and add the following:

*Design Professional shall make certain that the Project is completed in accordance with the Contract Documents and that construction costs and time delays are minimized to the fullest extent practicable, consistent with the Owner's criteria for function and quality. . . . Design Professional is responsible for maintaining adequate supervision over the design and also adequate observation or inspection of the construction work in order to guard the Owner against deficiencies in the design work and the work of the Contractors so that the Work is completed in compliance with the Contract Documents.*

**Conclusion:** It is not realistic to require you to “inspect” and discover all defects in the Contractor's work. Naturally, you will exercise reasonable care during your site visits to “observe” how the Contractor is performing, but that is all you can do. A sample clause is as follows:

*Construction Observation.* Design Professional shall, at reasonable intervals, provide an observer or representative to assist the Owner in evaluating whether the work being performed is in general conformance with the plans and specifications.

An example clause that provides reasonable protection for the Design Professional is the following:

The Architect's observations shall not constitute approval of the construction work nor shall they be construed to relieve the Construction Manager in any way of its obligations and responsibility. The Architect is not required to make continuous or exhaustive daily on-site observations of the quality or quantity of the construction work or to review construction means, methods, techniques, sequences and procedures. Accordingly, the Architect shall have no responsibility for construction means, methods, techniques, sequences or procedures or site safety and safety precautions and programs in connection with the construction work, all of which are solely the Construction Manager's responsibility. The Architect shall not have control over or charge of acts or omissions of the Construction Manager or subcontractors, or their agents or employees, or of any other persons performing portions of the construction work.

AIA Document B101-2007 at §3.6.2.1, addresses the issue squarely by explaining that the Design Professional will not be on site every day but make site visits as appropriate to how the work is progressing generally:

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.

Note that a major change from the B141-1997 document has been to delete the phrase, “to endeavor to guard the Owner against defects and deficiencies in the Work.”

By deleting the clause, the paragraph creates a more objective test: one which requires the Architect to advise the Owner of any problems actually observed, but which creates no obligations with regard to construction defects that are not detected. The insertion of the word “observed” into the paragraph limits the Architect’s determination of the Work actually visible for review.

Sometimes the word “inspection” is used in the Standard Form Contracts. This may be reasonable; however, it would be clearer if the term inspection were defined so as to avoid misunderstanding by the owner or a court. An example of using the term, but carefully defining it is found in AIA B101-2007, at §3.6.6 “Project Completion”, which provides as follows:

§3.6.6.1 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.

§3.6.6.2 The Architect’s inspections shall be conducted with the Owner to check conformance of the Work with the requirements of the Contract Documents and to verify the accuracy and completeness of the list submitted by the Contractor of Work to be completed or corrected.

In above quoted AIA language, it would have been preferable to have stated that the inspection is to determine that the work complies “generally” with the contract documents.

A similar provision is contained in EJCDC Document E-500 (2008) at Exhibit §A1.05.A.7:

*Construction Phase*

Upon successful completion of the Bidding and Negotiating Phase, and upon written authorization from Owner, Engineer shall:

7. *Visits to Site and Observation of Construction:* In connection with observations of Contractor's Work while it is in progress:

a. Make visits to the Site at intervals appropriate to the various stages of construction, as Engineer deems necessary, to observe as an experienced and qualified Design Professional the progress of Contractor's executed Work. Such visits and observations by Engineer, and the Resident Project Representative, if any, are not intended to be exhaustive or to extend to every aspect of Contractor's Work in progress or to involve detailed inspections of Contractor's Work in progress beyond the responsibilities specifically assigned to Engineer in this Agreement and the Contract Documents, but rather are to be limited to spot checking, selective sampling, and similar methods of general observation of the Work based on Engineer's exercise of professional judgment, as assisted by the Resident Project Representative, if any. Based on information obtained during such visits and observations, Engineer will determine in general if the Work is proceeding in accordance with the Contract Documents, and Engineer shall keep Owner informed of the progress of the Work.

b. The purpose of Engineer's visits to, and representation by the Resident Project Representative, if any, at the Site, will be to enable Engineer to better carry out the duties and responsibilities assigned to and undertaken by Engineer during the Construction Phase, and, in addition, by the exercise of Engineer's efforts as an experienced and qualified Design Professional, to provide for Owner a greater degree of confidence that the completed Work will conform in general to the Contract Documents and that Contractor has implemented and maintained the integrity of the design concept of the completed Project as a functioning whole as indicated in the Contract Documents. Engineer shall not, during such visits or as a result of such observations of Contractor's Work in progress, supervise, direct, or have control over Contractor's Work, nor shall Engineer have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by Contractor, for security or safety at the Site, for safety precautions and programs incident to Contractor's Work, nor for any failure of Contractor to comply

with Laws and Regulations applicable to Contractor's furnishing and performing the Work. Accordingly, Engineer neither guarantees the performance of any Contractor nor assumes responsibility for any Contractor's failure to furnish or perform the Work in accordance with the Contract Documents.

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## Insurance

**Issue:** Insurance coverage for the professional liability of a design firm is designed to provide coverage for negligent acts, errors and omissions of the policyholder. Some policies may be somewhat broader. For example, the insuring agreement of Zurich's ZPro Professional and Pollution Liability Policy provides the following:

The company will pay on behalf of an "insured" any "damages" and "claim expenses" the "insured" is legally obligated to pay because of a "claim" that is a result of:

1. An act, error or omission in the rendering of or failure to render "professional services" by the "insured" or any person or entity for whom the "insured" is legally liable; or
2. A "pollution event" resulting from "covered operations" or "completed operations" of the "covered operations" performed by the "insured" or any person or entity for whom the "insured" is legally liable;

The language does not expressly state that "negligence" is the trigger. Certain damages that a court awards pursuant to statutory law might be covered even if not negligent. Due to the contractual liability exclusion of the policy, however, there still is no coverage for claims and damages against the design firm that are only the result of contractual obligations rather than imposed by law. The exclusion states the policy does not apply to "claims", or "demands" arising out of "any contract, warranty, guarantee or promise, unless liability would have attached to the "insured" in the absence of such contract, warranty, guarantee or promise." Contractually created obligations such as agreeing to a "highest" standard of care or agreeing to a duty to defend or a duty to indemnify for damages not caused by the designers' negligence are excluded pursuant to the contractual liability exclusion of the policy. It is of critical importance that Design Professionals understand that their policies do not cover liability arising out of breach of warranty or from contractual liability (such as indemnification for damages not caused by the negligence in the Design Professional's rendering of covered professional services), except to the extent that the Design Professional would have been liable at common law based upon its negligence in the rendering of covered professional services.

Professional liability insurance companies expect their insureds to exercise prudent risk management, particularly with regard to the language they agree to in their contracts. Certain risks the Owner may ask you to agree to by contract are uninsurable. In other sections of this Guide, it is explained that if you incur liability to the Owner because you agreed to indemnify the Owner for damages caused by the Owner, some other party, or by your own acts and omissions which are not negligent, the insurance policy will not apply to the damages.

There is also an exclusion in most professional liability policies for express warranties and guarantees.

### **Issue 1: Limiting Contractual Obligations to What can be Covered by an E&O Policy**

Professional liability insurance is intended to cover you for your negligent acts, errors, and omissions. Breaches of warranty and contract are not covered except to the extent the breaches result from the negligent acts, errors, and omissions of the policy holder. Coverage for liability damages caused by anything other than your negligence is expressly excluded by the contractual liability exclusion.

**Discussion:** In one contract, the insurance Article stated that the Design Professional would “obtain professional liability insurance protecting it from claims resulting from errors and omissions, or negligent acts arising out of the performance of professional services and operations under this Agreement.”

**Conclusion:** The way the above paragraph is written, it appears to expect insurance to cover all errors and omissions regardless of whether they were negligent. The Design Professional should clarify to the owner that the professional liability policy, consistent with all such policies by all markets available today, limits coverage to damages caused by the Design Professional’s negligence. There may be somewhat broader coverage depending upon the actual Insurance Agreement of the policy, but the primary purpose of the policy remains to insure against damages caused by negligence.

### **Issue 2: Uninsurable Indemnity Provisions**

Be careful what you agree to by way of an indemnification clause. If you agree to indemnify the Owner for injuries and damages that are the result of anything other than your own negligence, there will likely be no coverage under your professional liability policy for your loss. You might prevail in



court by demonstrating that you complied with the standard of care and were not, therefore, negligent, but you could still have liability for those damages to the Owner which are based upon your contractual obligation.

**Discussion:** The contractual liability exclusion in a professional liability policy may state that there is no coverage for liability which you assume by contract that you would not have had at common law in the absence of the contract language. In other words, if you were negligent, your insurance covers you and the contractual liability is not an issue. If, however, you were not negligent, and the basis for the Owner's recovery against you is the contractual indemnification obligation, you have no coverage for that loss.

**Conclusion:** When you see provisions requiring uninsurable contractual liability for indemnification, or warranties and guarantees, you should immediately flag them as problem clauses. Some of these clauses are obvious. Others are subtle and harder to spot because they do not use language readily recognized as referring to warranties and guarantees. If, for example, you agree to the highest standard of care instead of the generally accepted standard, you may inadvertently "warrant" that your services will be the best, and will produce a perfect result. It may also be prudent to delete a reference in the indemnity clause that would require you to indemnify your client for breach of contract since this is not insurable absent negligence. In any event, your client has adequate legal recourse to sue for breach of contract without any need for a separate indemnity obligation. As clients are accustomed to receiving indemnities for breach of contract, it may not be easy to get this clause removed from the contract.

### **Issue 3: Obtaining Contractual Liability Coverage**

If your contract with your client requires you to obtain contractual liability coverage, you may find yourself in breach of the contract if your insurance carrier will not agree to the broad form contractual liability coverage the client intended.

One owner-generated contract required the Design Professional to procure a professional liability policy with contractual liability coverage for the project owner. The contract provided:

*"The Engineer's contractual liability coverage must, at a minimum, protect the Owner to the extent of the following hold harmless agreement...."*

**Discussion:** The language in the above-quoted Agreement went on to state that the Engineer will indemnify the owner for all expense *caused in whole or in part by any negligent act or omission of the Engineer.....* Courts typically apply such language to mean that the Engineer is responsible for 100% of the damages as long as even only 1% was caused by the negligence of the Engineer. The Design Professional policy, however, will only pay for the damages to the extent caused by the negligence of the Design Professional or others for whom the Design Professional is legally responsible.

Contractual liability for anything other than what the Design Professional would be liable for in the absence of the contract clause is excluded from coverage under the standard professional liability policy. Under these circumstances, the insurance company will not agree to provide contractual liability coverage for the liabilities the Design Professional agreed to in the contract.

**Conclusion:** The professional liability policy will only cover contractual liability to the extent that the Design Professional would have been liable for the damages in the absence of the contract language. This means, that the policy only covers damages arising out of the Design Professional's negligence. You will need to negotiate out of the contract any requirement for contractual liability coverage that exceeds what is typically insured under a professional liability policy. If necessary, you should obtain a letter/memorandum from your insurance broker and/or carrier to give to your client to help explain your position.

#### **Issue 4: Naming Owner as Additional Insured**

It seems that some Owners have been persuaded by individuals unfamiliar with professional liability insurance that they should be named as additional insureds under the professional liability policy. This is not done by insurance companies for professional liability policies. Additional insured status is, however, provided on some Commercial General Liability (CGL) policies. One rationale for the difference in the availability of additional insured status is that liability of the insured under CGL policies does not rest exclusively on negligence and it is possible for the Owner to have general liability resulting from the Contractor's actions.

**Discussion:** The professional liability carrier will almost never name an entity other than the Design Professional as an insured or additional insured under the professional liability section of the policy. Reasons for this include the fact that an Owner of a project is usually not a licensed Design Professional and is not likely to commit a negligent design error for which it

will need coverage under the professional liability policy. Moreover, the Owner is the party that is most likely to incur damages for which it desires to sue the Design Professional and recover under the Design Professional's professional liability policy. By being named as an additional insured, the Owner's ability to recover damages from the Design Professional under the policy may unintentionally be impaired due to "insured vs. insured" exclusions in the policy. Assuming that this could be resolved by removing such an exclusion, the Design Professional is placed in the position of losing part of its available insurance limits by sharing the proceeds of the policy with the Owner, particularly with respect to defense costs that the Owner might have in defending third-party claims.

Another challenge with having the Owner as an additional insured is that it creates potential remedies against the Design Professional that the Owner would not otherwise have. For example, consider a typical claim in which the Contractor alleges it is entitled to extra compensation as the result of changes it had to make in its work due to (1) differing site conditions, (2) failure of the Owner to coordinate the work between multiple Contractors, and (3) faulty plans and specifications. The Owner may very well tender the claim to you, and demand that you and your insurance company provide the Owner's defense to this Contractor claim. With Contractors submitting claims using the "kitchen sink" approach to allegations, it is likely that you, as the Design Professional, will be implicated frequently in being the cause, in whole or in part, for the Contractor's damages. You may end up defending the Owner against every claim filed by a Contractor. Imagine the conflict that this could cause between you and the Contractor if you are serving in the capacity of reviewing and approving change order requests. You might be inclined to deny otherwise bona fide change orders for fear that the Owner will look to you under the insurance policy for damages.

**Conclusion:** Just say no to the Owner's request to be named as an additional insured on a professional liability policy. In any event, you cannot accommodate an Owner with such a demand without the prior consent of your insurance company. If the insurance company is willing to do this at all, an extra premium will generally be required. In addition, a special endorsement and contract amendment will need to be drafted to clarify the meaning of "additional insured" and what (limited) rights the "additional insured" will have under the policy. It is important to limit the Owner's ability to recover under the policy to those damages caused by your actual negligence, and not merely alleged negligence. It is also important to clarify that the policy will not cover legal costs of the additional insured that are incurred in prosecuting a claim against the Design Professional. It may also

be appropriate to clarify that costs incurred by the Owner in defending against a claim will not be covered unless it is finally determined that the Design Professional was negligent. With these clarifications by way of endorsement and contract language, the Owner might be named as an “additional insured” by the insurance company without creating unmanageable new risks and liabilities for the Design Professional. Even with these changes, however, you are sharing your practice policy limits with an Owner and that may reduce the effectiveness of your insurance program in doing what you purchased it for, to protect you.

### **Issue 5: Uninsurable Warranties**

When you see a provision requiring a “warranty” or a “guarantee” you should immediately flag it as a potential problem clause. Spotting these clauses is not always easy, however, because they may be created by contract language that does not specifically refer to “warranties” and “guarantees.” For example, if you agree to be held to the “highest standard of care” instead of the “generally accepted standard,” you may have agreed to a hidden warranty that your services will be the best and will produce a perfect result.

**Discussion:** If you are sued by the Owner for a “defective design,” the insurance company will generally be required to present an expert witness in your defense to prove that you met the generally practiced standard of care. Assuming this is proved, you may be found to be not liable on the basis of negligence and yet liable for breach of your obligation to meet the “highest standard of care.” If this happens, you may incur an uninsurable loss for breach of contract.

Other clauses that may create warranties by their subtle (or not so subtle) language include clauses pertaining to “compliance with law.” It may not be realistic to expect you to identify, interpret, and apply every conceivable law, regulation and ordinance in precisely the manner that the governing agency or some other party believes it should be applied. In the event that the Owner incurs damages because of your incorrect interpretation and application of a law or regulation, you need to be able to defend yourself by presenting expert testimony to show that your interpretation was a reasonable one — even if it was incorrect. This, once again, is the normal negligence standard. If your interpretation was negligent, your professional policy may cover it. If, on the other hand, your interpretation was incorrect (but not negligent), and you have contractually obligated yourself to pay for the Owner’s damages, your policy may not cover your loss.

A clause addressing “cost estimates” is yet another that creates a potential warranty situation. You should be careful that you do not agree to incur

liability based solely on your cost estimate being incorrect. Agreeing to be responsible for damages resulting from a negligently prepared cost estimate is as far as you can safely go with this, if you hope to have the loss insured. Assuming it to be within the scope of “covered professional services” and not otherwise excluded, your insurance may cover you for a negligently prepared cost estimate that causes actual damages to your client. It will not cover you, however, for breaching a contractual commitment to give a perfect cost estimate — in the absence of a demonstration that your cost estimate was also negligent. Once again, you should agree only to exercise reasonable care in preparing the cost estimates.

Another clause that creates potentially uninsurable warranties is one that requires you to certify that the Contractor completed all the work in conformance with the plans and specifications. It is important that you not agree to such a certification. It can create a representation on which a third party might rely to its detriment and thereby have a cause of action against you. It might also constitute a warranty-type assurance to the Owner that the Contractor has completed the work in a satisfactory manner and this may create liability for you in the event that it is later determined that the Contractor did not perform in complete accordance with all the plans and specifications.

If you must give such a certification, state the facts and any qualifications or exceptions — noting in particular if you were not constantly on site for the entire period of construction.

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## Integrated Written Agreement

**Issue:** A written contract should be the final word concerning the intent of the parties to the contract. Unfortunately, even the most carefully drafted agreement will not expressly address every possible contingency. If there are “side letters” or oral agreements that supplement the written contract, or ambiguities in the contract, disputes may arise that require evidence outside of the contract document itself concerning the actual intent of the parties in view of the extra-contractual matters or the ambiguities. To determine which contract interpretation is correct, the court might permit what is called “parol evidence” to be introduced at trial. This could include oral testimony plus documentation other than the written contract.

**Discussion:** To avoid uncertainty and confusion concerning the rights and responsibilities of the parties under a contract, the contract itself should state all material representations, terms, conditions, and expectations as clearly as possible and ambiguities should be avoided. The intent of the parties should be discernible from looking within the “four corners” of the contract. There is no such thing as an artful ambiguity in a contract; ambiguities cause problems, period. Remember, if a dispute arises, a third party will be called upon to decide what the written contract says and the third party will first look at the words in the agreement to determine the intent of the parties. To eliminate the possibility of either party attempting to bring in some other document or evidence that may change or supplement the intent of the language of the contract, even without an ambiguity, in addition to careful drafting of the contract itself, a well-drafted contract usually contains an integration clause. Consider the following:

*Integrated Written Agreement.* This Agreement represents the entire and integrated agreement between the Owner and Design Professional and supersedes all prior communications, negotiations, representations, quotations, offers or agreements, either written or oral between the parties hereto, with respect to the subject matter hereof, and no agreement or understanding varying or extending this Agreement shall be binding upon either Party, other than by a written agreement signed by both the Owner and Design Professional.

**Conclusion:** You should anticipate that there will be purchase orders, work assignments, work orders, task orders and other types of written instruments directing work to be performed after a services contract has been negotiated and put into place. Some of those written instruments issued by the Owner may have terms and conditions differing from those agreed to in the basic contract. It may, therefore, be prudent to add an additional sentence to the Integrated Written Agreement clause stating that the terms and conditions of the Agreement control and govern over any subsequent form or document assigning work where the language contained therein is inconsistent with the Agreement. An example is as follows:

The parties agree that the provisions of the terms and conditions of this Agreement shall control over and govern as to any subsequent form or document signed by the Parties, such as Owner Purchase Orders, Work Orders, etc. and that such documents may be issued by Owner to Design Professional as a matter of convenience to the Parties without altering any of the terms or provisions hereof.

The two clauses discussed in this section should usually be employed together. If a subsequent transaction evidenced in a form or document does contain specific contract terms relevant to that transaction alone and the parties intend that provision shall only apply to that one transaction, the subsequent document should specifically state that it is intended to amend a specific portion of the original agreement and be acknowledged and signed by both parties as such. Amendments of a more general nature are better accomplished by a formal written amendment to the original contract.

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## **Limitation of Liability**

**Issue:** Through the use of a Limitation of Liability (LoL) clause, a Design Professional may reduce the extent of its potential liability to the Owner for damages arising out of negligence, breach of contract, or any other cause of action. Under the right circumstances and in the right jurisdiction, a properly drafted LoL clause will be enforced. Counsel must be consulted to make sure the LoL clause is correctly drafted and there are limitations on the effectiveness of any LoL clause. LoL clauses are different from waivers of claims or liabilities and indemnifications which are other risk management tools discussed elsewhere in this guide.

**Discussion:** An LoL clause is only effective among the parties to the contract. Accordingly, liability to other parties who are not parties to the contract cannot be addressed in an LoL clause. Nonetheless, an LoL clause can be an important consideration in contemporary contracting because Design Professionals are frequently called upon to design unique and technologically innovative projects which are responsive to diverse environments, technologies, and project locations. It is unrealistic to require Design Professionals to assume all the risk for innovative and unique designs or other high risk projects when the Owner is the primary beneficiary of the projects. It is, therefore, reasonable to ask the Owner to assume a larger percentage of the risk for a project, particularly because Design Professional fees are often small in comparison to an unlimited exposure to the Owner that the Design Professional might otherwise assume. Including LoL clauses in contracts allows some predictability with respect to the Design Professional's potential liability to the Owner. If the Design Professional is not permitted to contractually limit and quantify these risks as between parties to the contract, the cost of services, all other things being equal, should be increased because of uncertain exposure to claims.

**Conclusion:** Include a Limitation of Liability clause in your standard form contracts. If the Owner insists on the use of its form contract, seek to negotiate an LoL clause into the Owner's contract. Design Professionals who routinely seek an LoL clause in their contract are successful in obtaining them a large percentage of the time on commercial projects depending upon the type of project and client. Other Design Professionals appear to rarely, if ever, obtain LoL clauses. This may be because the Design Professional is embarrassed to ask for the LoL clause, or because the Design Professional assumes that an Owner would be offended to see such a clause included in

the Design Professional's standard form contract. Based on the success of many firms at getting these clauses into their contracts, and the further success in enforcing these in litigation, it is wrong to assume you should not ask for and expect this clause. If you are not embarrassed to ask, and steadfastly believe you are entitled to such an LoL, you increase your chances of successfully negotiating one into your contract.

A good example of an LoL clause is the following:

*Limitation of Liability:* To the fullest extent permitted by law, the total liability, in the aggregate, of Design Professional, Design Professional'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 Design Professional or \$50,000 whichever is greater.

A typical clause may look like the following from EJCDC Document E-500 (2008) at Exhibit I, 6.10.A.-1:

*Limitation of Engineer's Liability.* Engineer's Liability Limited to Amount of Engineer's Compensation: 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.

Notice the language specifically identifies the various legal causes of action that are included in the limitation and relates them to the project. There is a good reason for this formulation. Some cases have held that if the LoL states that it applies to damages arising out of “negligence” and does not mention “breach of contract” an Owner might sue for breach of contract and thereby avoid a significant benefit to the Design Professional of the LoL altogether. Therefore, when drafting an LoL clause with your counsel, it is advisable for risk management purposes to draft the clause so it is broad, specific and inclusive.

Another version of the above clause that is sometimes used will state that the LoL is either the “Design Professional’s compensation or a fixed dollar amount such as \$50,000, whichever is greater.” It is important if you choose such an “either/or” that you make the limitation whichever is “greater” and not “lesser.” It is particularly the case when performing a small fee job that you should not state that the limitation will be to a certain dollar amount or the contract fee, whichever is less. If the contract fee is too small in comparison to the amount of the risk at stake, a Court may refuse to enforce it.

The enforceability of LoL clauses depends upon state-law and local counsel and should be consulted about the best way to craft an LoL clause.

A few common themes for discussion with your counsel when considering an LoL clause include the following:

1. If the contract will also include an indemnity clause, keep it separate from the LoL clause. This will minimize the likelihood that a Court will void the LoL clause based upon the state's anti-indemnity statute, if any, or for public policy reasons. You might reference the limitation of liability clause, however, in the separate Indemnification clause. Review with your attorney what will and will not be enforceable in the jurisdiction.
2. Clearly identify the LoL clause and the liability limit and provide a limit that is reasonably proportionate to the risks. The liability limit should not be a *de minimis* sum. It could be linked to the liability insurance requirements of the contract, to the total fee earned by the Design Professional firm, or some other reasonable amount. (If you base it on insurance, do not refer to “insurance proceeds,” since this could expose your entire insurance program, which may be far in excess of the

insurance required by the contract. Be careful to base it on the amount of insurance required by the contract only.)

3. Do not bury the LoL clause in fine-print boilerplate language in the contract. It should be prominently featured—at least equal to the other terms and conditions of the contract. Refer to the LoL clause in subsequent task agreements or work orders or be sure that they specifically incorporate by reference all terms and conditions (including LoL) of the contract.
4. Provide an opportunity, either in the clause or in another part of the contract, for the Owner to negotiate a higher limit of liability, either for a predetermined sum or otherwise.
5. Provide a space for the Owner to initial the clause — demonstrating that it knew of the clause and negotiated it.
6. Identify types of claims to which the clause applies, including for example negligence, breach of contract, breach of warranty and indemnity.
7. Include a separate clause in the contract stating that the LoL was mutually negotiated and that, but for its inclusion, the fee would have been greater or that the Design Professional would not have entered into the contract.
8. Include a clause stating that the Design Professional's services are being provided only for the party in privity with the Design Professional, and that the services are not for the benefit of any third parties and to the extent that third party beneficiaries are found to exist by a Court, those parties are subject to the LoL.

Your counsel can advise you about whether it is necessary to do all or any of the above eight (8) items in order to have an enforceable LoL clause, but the list highlights some of the issues you may encounter. Find out from legal counsel what will work best in the specific jurisdiction.

An example of a reasonable clause that seeks to demonstrate that an arm's length negotiation occurred is the following:

*Professional Liability Limitation.* Design Professional's liability, and that of its officers, directors, employees, agents, and subcontractors, arising out of breach of contract, breach of warranty, negligence, indemnity, or any other cause of action, shall be limited to \$50,000 or Design Professional's fee, whichever is greater. In consideration of \$\_\_\_\_, Design Professional agrees, at Owner's request (which is hereby indicated by initialing the blank space in the margin beside this clause), to increase the limit of Design Professional's liability to \$\_\_\_\_. The additional charge for the higher liability limit is because of the greater risk assumed by Design Professional and is not a charge for additional professional liability insurance.

Beware of ConsensusDOCS 240, which has a prohibition upon certain LoL clauses in Design Professional contracts. Section 3.5 of that contract states that the Architect/Engineer is prohibited from entering into an agreement with a Design Professional that includes any limitation of liability, at least without the prior written approval of the Owner. It is perplexing why the authors of ConsensusDOCS should want to interfere in the relationship between the Design Professional and subconsultants. In any event, this clause should be stricken from the contract.

Paragraph 3.5 of ConsensusDOCS 240 also provides that the Owner "*shall be considered the intended beneficiary of the performance*" of the Design Professional's services, which could support a direct claim by the Owner against a Design Professional (§3.6.12). Conversely, the Agreement does not provide that the Design Professionals are intended beneficiaries of the Agreement between the Owner and Architect/Engineer. As the Design Professional, this would leave you in the unenviable position of not having your LoL enforceable against the Owner and also not enjoying the benefit of any LoL which the Architect/Engineer has in its contract with the Owner. This is another unreasonable provision in ConsensusDOCS that should be stricken from the form.

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## Notice Requirements

**Issue:** Contractually specified time periods by which a Design Professional is to notify the owner of occurrences, events, circumstances, or changes that may impact the schedule or cost of performance must be taken seriously. It is important that the prescribed time periods be realistic and that the Design Professional be aware of the time requirements and manage its services so as to meet them.

**Discussion:** When a contract states that the Design Professional must give notice of changes or requests for approval of additional services on prescribed forms to specific, named individuals on behalf of the owner, the Design Professional must be aware of that requirement and provide those notices on the correct forms, within the prescribed time limits, to the appropriate individuals who have the exclusive authority to grant changes.

In a number of litigated cases, courts have held that project owners are excused from paying a Design Professional for additional services where the Design Professional failed to provide notice to the individual specified in the contract, despite the fact that notice had been given to others within the owner entity. A number of cases have also held that where the specified deadline for submitting notice, including information, data, and costing have not been met, this may deprive the Design Professional of entitlement to payment for services.

In an apparent effort to expedite their projects and hold Design Professionals and contractors to strict schedules, some owners are arbitrarily establishing unrealistically short time periods in their contracts. An example is the following:

*Architect shall notify the Owner orally within forty-eight (48) hours after becoming aware of the occurrence of any event which will delay completion of the construction of the Project. Within five (5) days after providing oral notification, the Architect shall provide the Owner with a written confirmation, and such writing shall contain a detailed statement as to the event causing the delay, the exact length of the delay, and the steps the Owner should consider to minimize the impact of such event on the cost of construction and the time for completion of the Project.*

A problem with establishing specific time periods for providing initial notice and then the follow-up detailed information is that each situation will be different. It is not possible to guarantee that the time periods can be met with the exercise of reasonable care. It may take the Design Professional longer than anticipated to analyze a unique and unanticipated situation. It may also take longer than anticipated to subsequently analyze the length of the delay and the efforts and costs by the contractor and design firm that may be needed to overcome the delay.

**Conclusion:** The Design Professional should review all notice and time requirements of the proposed contract and negotiate out those time periods that are mandatory and unreasonably short. Some flexibility for meeting time periods should be built into the contract language to recognize that meeting the professional standard of care may reasonably require that additional time be taken to analyze and report on the matters required.

Once time periods are agreed upon and included in the Agreement, be sure that all project and contract managers responsible for the project are aware of the notice requirements and adhere to them faithfully.

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## Owner's Responsibilities

**Issue:** Some contracts go to great lengths concerning the Design Professional's responsibilities, but are silent concerning the corresponding responsibilities of the Owner. A contract between the Design Professional and the Owner should set forth not only the responsibilities of the Design Professional, but also the key responsibilities of the Owner as well. This will naturally include payment terms, termination notices, site access, rights of way, permits, provision of information, indemnification and other terms. Numerous other Owner responsibilities can also be included, particularly where environmental problems may be encountered and it is appropriate that the Owner assume responsibility for existing contamination, arranging treatment, transportation, and disposal of waste. It is important that you not overlook an item that needs to be assigned to the responsibility of the Owner.

**Discussion:** The various responsibilities can be set out in appropriate paragraphs and articles throughout the contract. Many of these have been presented as examples throughout this Risk Management Guide. In addition to establishing specific Owner responsibilities, the contract should require the Owner to promptly review Design Professional's submittals and to provide a decision-maker representative to address issues raised in the submittals. It may also be appropriate, particularly on environmental projects, to require the Owner to designate an individual to interface with the regulator or governmental agency involved in the project.

**Conclusion:** One useful way to help assure that key responsibilities will be identified with the Owner is to group them into one single clause titled Owner's Responsibilities. The clause should include a statement that the Design Professional is entitled to act in reasonable reliance upon the information provided by the client.

The AIA addresses Owner Responsibilities in AIA B101, article 5, with an extensive twelve paragraph description of duties assumed by the owner. Among the responsibilities of the Owner are to do the following:

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).

The AIA B101-2007 Document sets forth numerous Owner requirements, including, for example, the following:

§5.4 The Owner shall furnish surveys to describe physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

The EJCDC E-500 (2008), Exhibit B, addresses Owner Responsibilities as follows:

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.

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. The AIA B101-2007 document addresses this issue by providing the architect some level of protection at AIA B101, §3.1.4 as follows:

**Owner Decisions**

The Architect shall not be responsible for an Owner's directive or substitution made without the Architect's approval.

For a more detailed discussion concerning reliance upon documentation and information provided by others, see the section of the book below specifically addressing that subject.

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## Ownership of Documents

**Issue:** Documents such as plans, specifications, drawings, opinions, reports, calculations, etc. are all generally considered Instruments of Service created by the Design Professional for the purpose of carrying out professional design and other consulting services for the Owner. While it may seem an academic distinction, the professional services necessary to design a project concept are what you provide; the plans, specifications, drawings, opinions, reports, calculations etc. are merely expressions of the concept and the papers containing those expressions are the instruments or vehicles that communicate the services you provide.

Plans, specifications, drawings, opinions, reports, calculations etc. have historically been treated as the intellectual property of the Design Professional. Contracts such as the AIA Document B101 - 2007, and EJCDC Document E-500 (2008), make clear that these documents belong to the Design Professional that created them. However, Owners are more frequently demanding that the documents be deemed their property and be available for reuse by the Owner at will.

**Discussion:** In some regards the transfer of ownership demanded by Owners puts form over substance, but it has the very real result of giving away what, at law, is viewed primarily as your intellectual property. In addition to the liabilities that may flow from an unlimited transfer of ownership of the documents, protecting your property rights provide strong reasons for resisting these Owner demands. 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 Design Professionals 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...*

One of the problems with a clause like this is that you lose the ability to control the use of your work product and the project itself. Even if the Owner uses some other firm to complete the project, using your documents without changes or modifications, you are placed at greater risk, since you will not be on the project and will not be able to correct the inevitable design refinements that become necessary as construction work progresses. When you are on a project, you can interpret the drawings and specifications and work out with the Contractor and Owner how to resolve any refinements that are necessitated by work in the field. You lose this ability when the Owner utilizes your documents without your further input.

The situation is worse if the Owner uses only partially completed documents or takes your documents and modifies them for use on the project (or some other project) without your input and possibly without your knowledge. The liability exposure from such reuse is almost certainly too great to permit. If the reuse issue is one you intend to allow the Owner to have because of a business judgment on your part, consider specific disclaimers and release of liability on the reuse and be sure to include defense, indemnity and hold harmless covenants from the Owner relative to such reuse.

**Discussion:** State that the documents are the property of the Design Professionals and are not to be used without authorization. An example clause is as follows:

*Instruments of Service.* Drawings, specifications and other documents, prepared by the Design Professional and the Design Professional's Design Professionals are Instruments of Service for use solely with respect to this Project. This includes documents in electronic form. The Design Professional and the Design Professional's Design Professionals shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights.

The Instruments of Service shall not be used by the Owner for future additions or alterations to this Project or for other projects,

without the prior written agreement of the Design Professional. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Design Professional and the Design Professional's Design Professionals and the Owner agrees to defend, indemnify and hold harmless the Design Professional and the Design Professional's Design Professionals for all claims and liability resulting from such unauthorized use.

As more Owners are demanding ownership and exclusive use of the Design Professional's documents, it may be necessary to use a clause giving the Owner exclusive use and ownership of the Design Professional's documents, providing certain conditions are met that will provide some protection against unauthorized changes and inappropriate reuse, as in EJCDC Document E-500 (2008) at §6.03.E:

*General Considerations.* Owner may make and retain copies of Documents for information and reference in connection with use on the Project by Owner. Engineer grants Owner a limited license to use the Documents on the Project, extensions of the Project, and for related uses of the Owner, subject to receipt by Engineer of full payment for all services relating to preparation of the Documents and subject to the following limitations: (1) Owner acknowledges that such Documents are not intended or represented to be suitable for use on the Project unless completed by Engineer, or for use or reuse by Owner or others on extensions of the Project, on any other project, or for any other use or purpose, without written verification or adaptation by Engineer; (2) any such use or reuse, or any modification of the Documents, without written verification, completion, or adaptation by Engineer, as appropriate for the specific purpose intended, will be at Owner's sole risk and without liability or legal exposure to Engineer or to its officers, directors, members, partners, agents, employees, and Design Professionals; (3) Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Design Professionals from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from any use, reuse, or modification of the Documents without written verification, completion, or adaptation by Engineer; and (4) such limited license to Owner shall not create any rights in third parties.

A clause in the AIA Document B101-2007, at §7.2, addresses the ownership of documents issue as follows:

The Architect and the Architect's Consultant shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's Consultants.

§7.3 Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's Consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner's Consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

§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. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.



The provision at 7.3.1 provides both for release and indemnification. The indemnity is limited to claims by third parties against the owner.

EJCDC Document E-500 (2008) at §6.03.A provides as follows:

All Documents are instruments of service in respect to this Project, and Engineer shall retain an ownership and property interest therein (including the copyright and the right of reuse at the discretion of the Engineer) whether or not the Project is completed. Owner shall not rely in any way on any Document unless it is in printed form, signed or sealed by the Engineer or one of its Consultants.

### **Copyright of the Documents pursuant to ConsensusDOCS**

ConsensusDOCS 240 provides that the copyright interest in the Documents may be transferred to the Owner for an agreed price. In fact, it requires the parties to make a conscious decision about the ownership of the copyright by marking the box. If the parties fail to make that selection, the Agreement states that the Architect/Engineer will own the copyright interest. Subparagraph 10.1.1 provides:

The Parties agree that Owner \_\_\_\_ shall/ \_\_\_\_ shall not (indicate one) obtain ownership of the copyright of all Documents. The Owner's acquisition of the copyright for all Documents shall be subject to the making of payments as required by Paragraph 10.1 and the payment of the fee reflecting the agreed value of the copyright set forth below:

If the Parties have not made a selection to transfer copyright interests in the Documents, the copyright shall remain with the Architect/Engineer.

ConsensusDOCS 245, Short Form Agreement, does not provide a check-the-box approach to ownership of the copyright. Instead, the Architect/Engineer retains its copyright in the Documents (§14). The Owner receives property rights to the Documents upon payment in full, either at completion of the project or at the time of termination.

**Copyright of Electronic Documents**

AIA B101, §7.1 is a new provision without a predecessor in earlier versions of the AIA Owner-Architect Agreement. It consists of two separate topics and states:

The Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project. If the Owner and Architect intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

The first sentence is a warranty of the right to use any drawings or other documentation that one party transmits to the other. This applies not only to design and construction documents prepared by the design team but also to drawings, such as “as-builts” or preliminary sketches, or other information provided to the design team by the Owner. The second sentence requires the parties to agree on terms and conditions under which the Architect would provide its drawings or other documents in digital format. This is an increasingly important issue because the electronic nature of the medium may cause errors or other glitches to appear in the documentation that do not appear in the hard copy of the same documentation.

Design Professionals may seek to preserve the right to reuse individual elements of their design and also to protect their standard design details. An example of a clause addressing this issue is the following:

The Architect shall be permitted to reuse individual elements of the design of the Project on other projects; provided, however, that the Architect shall not substantially reproduce the design of the Project on any other project without the Owner’s prior written approval.

The Owner acknowledges that the Architect and the Architect’s Design Professionals may include in their design documents typical or standard design details, depictions, systems, instructions, and specifications regularly issued by the Architect and the Architect’s Design Professionals in the ordinary course of their practice (“Standard Details”). The Architect and the Architect’s Design Professionals shall retain all rights, title and interest,

including copyright and other statutory and reserved rights, to the Standard Details, subject to the Owner's right to use the Documents as provided in Section 8.4.

### **Treatment of Ownership of Documents by ConsensusDOCS**

#### ***Owner's License to Use the Documents***

ConsensusDOCS grants a license to the Owner, its Contractor, and its Design Professionals to use the Documents or Instruments of Service to construct the Project. ConsensusDOCS 240, §3.2.10 provides:

*Except as otherwise provided in this Agreement, the Architect/Engineer shall grant an appropriate license to use design documents prepared by the Architect/Engineer to those retained by the Owner or the Owner's Contractor to perform construction services for the Project.*

This license is somewhat problematic, however, because it is not tied to any performance obligations of the Owner, including payment to the Architect/Engineer for the Services rendered. Under AIA B101-2007, the license is clearly subject to the Owner substantially performing its obligations, including payment. Article 7.3 provides:

*Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner's consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.*

***Rights of the Owner after Completion of the Project***

Pursuant to Subparagraph 10.1.3 of ConsensusDOCS 240:

After completion of the Project, the Owner may reuse, reproduce, or make derivative works from the Documents solely for the purpose of maintaining, renovating, remodeling or expanding the Project at the Worksite. The Owner's use of the Documents without the Architect/Engineer's involvement or on other projects is at the Owner's sole risk, except for the Architect/Engineer's indemnification obligations pursuant to Paragraph 3.9, and the Owner shall indemnify and hold harmless the Architect/Engineer and its Design Professionals, and the agents, officers, directors and employees of each of them, from and against any and all claims, damages, losses, costs and expenses, including reasonable attorneys' fees and costs, arising out of or resulting from any such prohibited use.

This provision contains two significant prongs. First, after completion of the Project, the Owner is only authorized to reuse the Documents for “*the purpose of maintaining, renovating or expanding the Project at the Worksite.*” If the Owner reuses the Documents without the Architect/Engineer's involvement or on other projects, that use is at Owner's sole risk, except to the extent of the Architect/Engineer's indemnity obligations to the Owner. Second, the Owner must indemnify the Architect/Engineer if it reuses the Documents without the Design Professional's involvement.

***Architect/Engineer's Use of the Documents***

ConsensusDOCS 240, §10.1.4 limits the Architect/Engineer's reuse of the Documents as follows:

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.

Thus, after payment for and transfer of the copyright, the Architect/Engineer may only use the Documents “*in their constituent parts.*”

One way to address the issue of what extent the design professional can reuse the plans and specifications that it creates for one contract on a different project in the future for a different client, is to include a contract clause explaining that the plans cannot be reused for someone else in such a way that it would cause the projects to look alike. Consider how the following clause addresses that issue:

Instruments of Service may contain unique or distinctive architectural components that are valuable to Owner as “trade dress” and Owner’s license shall be exclusive as to such components. Neither the Design Professional nor its consultants shall use or reproduce or permit the use or reproduction of Instruments of Service, or the creation of derivative works based on Instruments of Service, for other projects that use or incorporate such unique or distinctive architectural components or which, taken independently or in combination, would produce a project with substantially similar and distinctive features. In the event Instruments of Service prepared by the Design Professional or its consultants are hopelessly commingled with Instruments of Service prepared by Owner or its separate design professionals or consultants, Owner shall hold and own the copyrights in such commingled Instruments of Service.



## Payment

**Issue:** Getting paid timely and in full is one of the primary keys to success. A surprising number of professional liability claims that are defended by insurance companies begin with the insured Design Professional filing suit against the Owner to recover the balance of its fee. Generally speaking, the Owner has some argument as to why it did not pay you and is quick to file a countersuit alleging that your negligence caused the project to go over budget or in some way to be otherwise unsatisfactory. Many disputes likely could be avoided if the Design Professional were more diligent in getting paid for services as the services are performed, and not allowing the project to be completed with significant fees still outstanding. You should also be wary of contracts that condition payment on a laundry list of conditions you must satisfy before you will be paid, including “pay when paid” clauses. The more “hoops,” the more likely that you will be required, as a practical matter, to compromise your billings because some condition or another has not been met to the Owner’s satisfaction.

**Discussion:** Some Owners seem to intentionally delay payment to the Design Professional as a way of saving themselves interest payments to their lender on money they would otherwise be drawing down from a construction loan or from bonds. Others have been known to stop paying close to the end of a project figuring the Design Professional will complete the services anyway and argue over payment later. Later is often too late because the Owner has already received the services it required, and you have no bargaining position to force payment without litigation. A contract clause such as the following could give you better bargaining clout:

*Payment.* Owner agrees to pay Design Professional'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. No deductions shall be made from the Design Professional's compensation on account of liquidated damages or on account of costs of changes in the Work, other than those for which the Design Professional has been finally determined to be liable. Design Professional may suspend services after five days prior written notice to Owner, where payment of any invoiced amount, not reasonably in dispute, is not received by Design Professional within 60 days of receipt of its invoice by Owner.

### **Withholding Payment for Cause**

Withholding of payment by the Owner on the basis that the Owner is dissatisfied with your services, or for any reason believes it should be able to charge back to you the extra costs or expenses paid to a Contractor on change orders, can be a major problem. The above clause helps reduce the problem by providing a strong disincentive for withholding payment, unless the Owner has already obtained a judgment against you for extra costs. Another challenge may be an Owner that desires to withhold payment if it doesn't receive the loan or grant funds it needs for the project or if the project is not constructed after it is designed. To avoid ambiguity concerning rights and responsibilities in this regard, some Design Professionals include a clause specifically addressing the issue, such as the following:

Payments on invoices submitted by Design Professional for services performed shall not be delayed, postponed or otherwise withheld pending completion or success of construction, or receipt of funding from lending institutions, government grants or other sources. Invoices for payment shall not be offset by any claims for withholding or deductions by Owner unless the Design Professional agrees or has been finally determined liable for such amounts.



A good payment clause that specifies time periods for payment is the following:

Payment to the Architect under this Agreement shall be made within thirty-five (35) days of the Owner's approval of the Architect's invoice. The Owner shall have ten (10) business days to approve each invoice. If the Owner objects to all or any part of an invoice, the Owner shall notify the Architect of any objection in writing and nevertheless shall pay any undisputed amounts to the Architect within the time set forth in this Section 5.1

Many jurisdictions provide for liens against the property on which the project is being built to secure a Design Professional's right to be paid for services rendered. Liens that are not paid and satisfied allow the Design Professional the right to foreclose on the property to obtain payment. These statutory and common law lien rights are specific to the jurisdiction where the project is being constructed. These procedures are highly technical and should be discussed with informed local counsel. Comforting as lien rights may be, availing yourself of them is not without challenges, aggravation and expense. Getting paid promptly should be a top priority and preserving your legitimate leverage points is an important tactic. This is, after all, how you make your living.

A Clause in 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.

This paragraph prohibits the Owner from withholding a portion of the Architect's fee to offset other losses or damages unless the Architect agrees or has been found to be liable for the sum withheld.

A clause in AIA B101-2007, at §9.1, addresses nonpayment and the right to suspend or terminate services. It provides the following:

If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

The EJCDC E-500 (2008), §6.05.D-2 addresses payment in the event of termination as follows:

*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.

The clause below prevents the design professional's client from arbitrarily withholding the fee. It provides that deductions in invoices may only be made by the client 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.

**Conclusion:** Require the Owner to pay you promptly throughout the project and give yourself significant contractual rights in the event of non-payment or late payment.

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## Permits and Licenses

**Issue:** Contracts generated by Owners may include a clause requiring the Design Professional to obtain all permits, licenses, and approvals necessary for the project. It is one thing for a Design Professional to maintain or obtain permits and licenses needed for it to be registered as a professional, or that are needed for it to legally perform the type of services anticipated by the contract. It is quite another, however, for the Design Professional to agree to obtain all the permits and approvals that the Owner or Contractor will need for doing the project. Some permits may simply be unobtainable for an ill conceived project. What then is your liability to the Owner?

**Discussion:** Knowing to what extent permits and approvals will be needed for the project and then going through the process of obtaining them is often best accomplished by the Owner. There are some permits and approvals that bear so much risk of non issuance or unforeseen expense (environmental permits, for example), that it is not appropriate for the Design Professional to undertake at its own risk to obtain such permits. There are other approvals that logically or legally can only be obtained in the name of the Owner. Beware of the Owner that acknowledges this, but then tells you to use a law firm to obtain permitting assistance and advice for the benefit of the Owner. The Owner should use its own resources and attorneys for this purpose. An example of a brief clause that may create extraordinary risk to the Design Professional is as follows:

*Design Professional shall obtain all required permits, licenses, agency approvals, and other necessary documentation in order to complete the project.*

If you have agreed to obtain all necessary permits and approvals, you may be at the mercy of some governmental agency that may delay issuing a required permit or approval well beyond your ability to control or even manage. If this in turn delays the project, you may be liable to the Owner for the impact of that delay if you have accepted responsibility for getting the permits. Ironically, this liability to the owner for delay damages is the exact inverse of what should happen in the event that an agency delays or even refuses to issue a permit. Under a proper model, the Design Professional should be compensated for the delay and its impact on the Design Professional's services.

**Conclusion:** Design Professionals should agree only to obtain those permits typically required to be obtained and maintained by Design Professionals. It is useful to specifically identify what, if any, these permits are in the contract documents. In some cases, you 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.* Design Professional 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.

Another example is the following:

Design Professional shall obtain only those permits and approvals typical to the performance of its services which are the following:  
\_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_.

If the Owner insists that you accept contractual responsibility for obtaining permits needed by you to perform your services, you could consider adding the following sentence to the above clause. What you specify below becomes important. If you cannot reasonably obtain the required permit promptly enough to maintain Owner's schedule expectations, you should carefully consider why you are taking responsibility for it.

If the services will be on a project that involves environmental contamination or remediation, you might clarify that the Owner is solely responsible for environmental permits and approvals by adding a clause to the above language as follows:

*Owner Responsibility for Permits.* Design Professional shall obtain only those permits and approvals typical to the performance of Design Professionals services which are the following: \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_. The Owner will be responsible for obtaining all environmental health and safety permits and approvals that may be necessary for the timely completion of the Scope of Services under this Agreement, including but not limited to, hazardous waste permits under RCRA, toxic substances permits under the Toxic Substances Control Act, air emission permits under the Clean Air Act, waste water discharge permits (NPDES) under the Clean Water Act, and any other permits that may be required under environmental laws and regulations.

Another way to handle the issue is to specifically require that the Owner provide the needed reviews, approvals, and permits that appear to be within its area or responsibility. Consider EJCDC Document E- 500 (2008) at Exhibit B2.01.H:

Owner shall at its expense . . .

H. Provide reviews, approvals, and permits from all governmental authorities having jurisdiction to approve all phases of the Project designed or specified by Engineer and such reviews, approvals, and consents from others as may be necessary for completion of each phase of the Project.

Perhaps what the Owner is looking for is the assurance that you, as the Design Professional, are properly licensed. You might offer a clause covering just that issue:

#### Licensing

Design Professional represents and warrants that, to the extent necessary or required by law, Design Professional and all of Design Professional's employees are currently certified and licensed in compliance with all applicable federal, state, and other governmental and quasigovernmental requirements, and will maintain such certification and licensing throughout the performance of Services.

Note, however, that the above warranty is likely not insurable under a typical professional liability policy because express warranties are usually excluded by professional liability insurance policies. Nonetheless, most Design Professionals may be required to provide this or a substantially similar warranty and should be able to do so without too much liability concern if the warranty is limited to facts within the Design Professional's control and about which the Design Professional can be comfortable after an appropriate internal review. An alternative approach would be to either delete the words "and warrants" or to delete the words "represents and warrants" and replace with "agrees". In any event, local counsel should be consulted periodically about any new or special licensing requirements that may apply to your practice in a specific jurisdiction.

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## Redesign Obligations

**Issue:** Design Professionals are increasingly being required to redesign projects due to construction costs exceeding the owner's budget. Since the Design Professional has no control over material escalation costs or the bids submitted by potential contractors, it is not possible to guarantee that the bids received will not exceed the budget, or that as a result of normal change orders during construction, the payment budget will not be exceeded. If the Design Professional agrees to Contract language requiring it to redesign, without compensation, to decrease the cost of the project, it may incur substantial risk of an uninsurable loss. This is especially risky in times like these where there is evidence of impending inflationary markets. The impact of the requirement to redesign the project at no cost to the client can be reduced by making that requirement conditional upon a determination that the cost overrun was caused by the negligence of the design professional.

**Discussion:** ConsensusDOCS 245, §6.1.2 takes a similar approach to constructability issues:

Architect/Engineer must promptly revise without compensation those documents which have not been approved by the Owner and to which the Owner has reasonable objections or which present constructability [sic] problems.

Sometimes the problem of free design arises out of a clause that is fairly subtle such as the following:

*Revisions. Without limiting any other provisions of this Agreement or the Owner's other rights and remedies, the Architect agrees that any and all revisions required to be made to the drawings, specifications and other documents prepared by or on behalf of the Architect for any of the following reasons shall be included as part of Basic Services and shall be performed at the Architect's sole cost and expense:*

*(a) Drafting errors, conflicts, inconsistencies and other errors or omissions;*

*(b) Any failure of the Architect or any of the Architect's Design Professional's to follow any written instructions or approvals given by the Owner;*

*(c) The fault or negligence of the Architect or any of the Architect's Design Professionals;*

*(d) A Failure by the Architect or any of the Architect's Design Professionals to perform in accordance with the terms of this Agreement; and*

*(e) A failure by the Architect or any of the Architect's Design Professionals to design within the budget then established by the Owner as provided in Section 3.2*

Note that subparagraph (a) of the above clause requires the Design Professional to revise the documents for all “drafting errors, conflicts, inconsistencies...” at no charge to the client regardless of whether there was negligence or the Design Professional satisfied the standard of care when drafting the plans and specifications. In other words, the Design Professional is required by this clause to draft perfect plans and specifications.

Pursuant to AIA B101, §6.6, if the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services is exceeded by the lowest bona fide bid or negotiated proposal, the Owner can choose several courses of action, including:

- .1 Give written approval of an increase in the budget for the Cost of the Work;
- .2 Authorize rebidding or renegotiating of the Project within a reasonable time;
- .3 Terminate in accordance with Section 9.5;
- .4 In consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or
- .5 Implement any other mutually acceptable alternative.

AIA B101, §6.7 states:

If the Owner chooses to proceed under Section 6.6.4, the Architect, without additional compensation, shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. The Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6.

Note that under the AIA document, the architect can be required to redesign the project for no additional fee, even if the cost overrun was not within its contract or responsibility. Performing these services for free, however, is the full extent of the architect's loss.

Under ConsensusDOCS 240, §3.1.2, the Architect/Engineer must “*promptly revise . . . without compensation*” those documents:

- “which have not been previously approved by the Owner and to which the Owner has reasonable objections.”
- “identified by Contractor and accepted by the Owner as presenting constructability problems.”
- “needing revisions to reflect clarifications and assumptions and allowances on which a guaranteed maximum price is based.”

This establishes a duty to revise the Documents without additional compensation, but none of the scenarios are tied to a violation of the standard of care. In addition, if the Contractor claims a constructability problem and the Owner accepts the Contractor's position, the Architect/Engineer must redesign the Documents without compensation. There is no requirement that the Contractor's position be reasonable or correct. Why should an Architect/Engineer be expected to work for free when it has complied with the standard of care?

**Conclusion:** Revise the redesign clauses of contracts to state that unless the budget was exceeded due to the negligent performance of services by the Design Professional, any additional services for redesign will be compensated.

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## Rejection of Work

**Issue:** Until the 2007 edition of the AIA design professional agreement, it was generally thought that when the Design Professional has the authority by contract to reject work of the Contractor for reasons such as non-conformance with the Contract Documents, additional liability is likely undertaken. For example, the Owner or the Contractor might successfully argue that because of the Design Professional's authority to reject work, the Design Professional was responsible for catching and then directing the correction of mistakes or poor workmanship by the Contractor. In addition, the Owner or the Contractor might even argue that given the Design Professional's authority to reject work, it had a responsibility to reject work not only because the work did not conform to the specifications, but also when the work is being performed in an unsafe manner.

**Discussion:** Contractor's employees who are injured on the job sometimes seek to recover workers compensation from their employer and then sue the Design Professional and the project Owner. The theory of liability in these action-over claims is that the Design Professional had authority to reject work and/or expressly or impliedly had authority to stop work at the project. The agreement is that the Design Professional knew or should have known of the unsafe condition, and had responsibility for assuring the worker's safety or, in the alternative, that the Design Professional designed an unsafe project to construct. In evaluating whether the Design Professional had such responsibility, the Courts consider a number of factors, including what the contract language says about the matter and what actions the Design Professional's personnel took in the field that might demonstrate that they exercised control over the Contractor's work on the project.

**Conclusion:** Make it clear in contract documents that you are not undertaking safety responsibility. Perhaps add a clause that acknowledges you may reject the Contractor's work, but you do not have a duty to do so. In addition, you may consider language to eliminate unilateral authority to reject work and instead create only the authority to recommend to the Owner the rejection of work that in your opinion is nonconforming. By acting as an advisor to the Owner, it is more difficult for someone to argue that you had some independent duty to stop the work (although the Owner will have rights against you if your advice was not up to the standard of care). Note, however, that the AIA contract document now specifically gives the Architect the ability to reject the work. Most of the reported decisions from

litigation have shown that courts generally recognize that the responsibility of the architect is for the benefit of its client and not for the benefit of third parties (there are certainly exceptions to that rule however).

AIA B101 at §3.6.2.2 addresses rejection of work and clearly establishes that the Architect owes no duty to the Contractor or its employee as follows:

The Architect has the authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect shall have the authority to require inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons or entities performing portions of the Work.

If you accept authority to reject the work instead of merely “recommending” to the Owner that the work be rejected, you might consider a clause similar to the following:

The Design Professional shall have the authority, but not the duty, to reject Work which, in the professional opinion of the Design Professional, does not generally conform to the Contract Documents. Neither this authority, nor the decision to exercise or not exercise such authority, shall give rise to a duty or responsibility of the Design Professional for site safety, construction means, methods or techniques, create an express or implied duty or responsibility to the Contractor, Subcontractors, or material and equipment suppliers or their employees.

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## Reliance on Information Provided by Others

**Issue:** Information needed for the performance of the Design Professional's services is often provided by others, including the project Owner, geotechnical engineers, and other Design Professionals retained by the Owner. It may include information from as-built drawings of the building or facility on which you are providing services. It is generally not possible for you to perform your own investigation or second guess the information provided to you. Nor does the Owner expect to pay you to do so. It is important, however, that the Owner give you all the information within its possession (or ability to obtain), so that you may perform your services most effectively. It is also important that you be able to rely on the information.

**Discussion:** Some Owners fail to provide all the information they have or, if they provide it, they state that it is for your general information only and that you are not entitled to rely upon it. By agreeing to language disclaiming the reliability of site information and other information provided by the Owner, you may be forfeiting your right to recover costs or damages resulting from your use of such information if it turns out to be incomplete or incorrect. An example of language from an environmental remediation services contract demonstrates the extremes to which some Owners will go to put the burden on the Design Professional for all site conditions and to disavow the reliability of any data or information provided by the Owner.

*Design Professional represents and warrants that it is familiar with the geological and environmental conditions at the Site and off-Site property, and has been granted the right to conduct, and has conducted, all investigations it deems appropriate to determine that it can fulfill the requirements of this Agreement. Notwithstanding any other provision of this Agreement, Design Professional assumes the risk of all conditions, as specified in this Contract, that may affect Design Professional's ability to perform the Services and will, regardless of such conditions, or the expense or difficulty of performing the Services or the negligence, if any, of Owner, with respect to same, fully complete the Services for the stated contract price without further recourse to Owner or Beneficiaries. Information on the Site and local conditions at the Site and off-Site property furnished by Owner or Beneficiaries is not guaranteed by*

*Owner or Beneficiaries to be accurate, and is furnished only for the convenience of Design Professional.*

In most cases, this transfer of liability from Owner to Design Professional is not appropriate because the Owner has actually retained others to investigate the site and provide the information before retaining the Design Professional. By the above clause, the Design Professional appears to have created an unconditional warranty. Even if the data and information given to it by the Owner is incorrect, the Design Professional appears to have no recourse. The Owner expressly disavowed reliance upon that data. Design Professional has warranted that it knows all about the site conditions and will assume any risk associated with whatever conditions actually arise. This leaves no room for a change order request based on the discovery of differing site conditions.

**Conclusion:** Include a clause in the contract that requires the Owner to provide you with all the information and data it has or can reasonably obtain concerning the site, the project, the existing buildings on the site and any needs they have for what you are designing on the site. Include a statement in the clause that, as the Owner obtains any additional information during your performance of services, it will promptly provide the information to you. Finally, include a statement that the Owner intends for you to rely upon the information.

The following clause incorporates responsibilities of the Owner to provide information and specifically entitles the Design Professional to rely upon that information:

*Site Information Provided by Owner.* Owner shall furnish and update as necessary an accurate legal description and a certified land survey of the site; accurate locations, dimensions and complete data pertaining to existing buildings and other improvements; and full information concerning available service and utility lines both public and private, above and below grade, including inverts and depths.

Owner shall be responsible for determining the existence of, handling, removal, and disposition of all hazardous and toxic materials such as, but not limited to, PCBs and asbestos, which may be encountered in the Project, and shall make known to Design Professional any known potential or possible health or safety hazards existing on or near the project site upon which services are to be performed.



AIA B101-2007 at §5.4 addresses the issue as follows:

The Owner shall furnish surveys to describe physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§5.5 The Owner shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

If the contract is for the performance of environmental remediation services or if the property may have environmental issues, you may also want to consider a specific, affirmative representation by the Owner that it has given you all the information available. An example is as follows:

Owner warrants and covenants that it has provided and will continue to provide Design Professional all environmental information, studies, or lab analyses which may be pertinent to the services to be performed under this Agreement.

EJCDC E-500 (2008), §B2.01 addresses the issue of what information is to be provided by the Owner by providing an extensive listing of documentation required, including the following:

In addition to other responsibilities of Owner as set forth in this Agreement, Owner shall at its expense:

C. Following Engineer's assessment of initially-available Project information and data and upon Engineer's request, furnish or otherwise make available such additional Project related information and data as is reasonably required to enable Engineer to complete its Basic and Additional Services. Such additional information or data would generally include the following:

1. Property descriptions.
2. Zoning, deed, and other land use restrictions.
3. Property, boundary, easement, right-of-way, and other special surveys or data, including establishing relevant reference points.
4. Explorations and tests of subsurface conditions at or contiguous to the Site, drawings of physical conditions relating to existing surface or subsurface structures at the Site, or hydrographic surveys, with appropriate professional interpretation thereof.
5. Environmental assessments, audits, investigations, and impact statements, and other relevant environmental or cultural studies as to the Project, the Site, and adjacent areas.
6. Data or consultations as required for the Project but not otherwise identified in the Agreement or the Exhibits thereto.

Give prompt written notice to Engineer whenever Owner observes or otherwise becomes aware of the presence at the Site of any Constituent of Concern, or of any other development that affects the scope or time of performance of Engineer's services, or any defect or nonconformance in Engineer's services, the Work, or in the performance of any Contractor.

AIA B101-2007, at §3.1.2 provides some reasonable basis for reliance as follows:

The Architect shall coordinate its services with those services provided by the Owner and the Owner's Consultants. The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and the Owner's Consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information.

EJCDC E-500 (2008), §6.01.D likewise provides for reasonable reliance as follows:

*Reliance on Others:* Subject to the standard of care set forth in Paragraph 6.01.A, Engineer and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.

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## Responsibility for the Services of Others

**Issue:** a Design Professional is responsible for the services it provides and is also responsible for the services provided by its subconsultants. This includes coordination of the services of the Design Professional and its subconsultants with the owner. It does not include, however, coordinating services of others with whom it has no contractual relationship or legal authority to control. Some contracts are imposing a greater duty to coordinate services than can reasonably be accepted by the Design Professional.

**Discussion:** AIA B101, §5.6, provides that the Owner is responsible for coordinating its Consultants services with those of the architect. It provides the following:

The Owner shall coordinate the services of its own Consultants with those services provided by the Architect. Upon the Architect's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's Consultants. The Owner shall not furnish the services of Design Professionals other than those designated in this Agreement, or authorize the Architect to furnish them as an Additional Service, when the Architect requests such services and demonstrates that they are reasonably required by the scope of the Project. The Owner shall require that its Consultants maintain professional liability insurance as appropriate to the services provided.

Several concepts in this paragraph are new. It is the Owner who is responsible for coordinating its Consultant's services with those of the Architect. The "scope of service" portion of the Consultant's contract must be furnished to the Architect. The Architect must "demonstrate" the need for the Owner to hire the Consultants other than those designated in the Agreement. The Owner may authorize the Architect to hire those Consultants directly. And the Consultants are required to maintain the same kinds of insurance as the Architect.

In contrast to the above described approach, the ConsensusDOCS make the A/E responsible for coordinating the Owner's other Consultants.

Under Subparagraph 3.2.6 of ConsensusDOCS 240, the Architect/Engineer must coordinate the services "*of all design consultants for the Project, including those retained by the Owner.*" The parties must designate those consultants or attach a separate exhibit listing the names and/or disciplines of the Owner's design consultants. This duty to coordinate also appears in ConsensusDOCS 245, Short Form Agreement. Under the wording of ConsensusDOCS, if the Owner's Design Professionals do not properly perform, the Owner could claim that the Consultants contributed to the problem by failing to properly coordinate the services of Owner's Consultants. Thus, the Design Professional should carefully consider the implications of this clause and negotiate revisions to it.

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## **Right of Entry**

**Issue:** Before you can perform services at a site you must have authorization to be on the site. If the Owner holds title to the property in question, this is generally not an issue. If, however, the Owner is retaining your services to investigate a property the Owner is considering purchasing, the Owner, at least, has a buy/sell agreement with the current owner of the property. Someone must take responsibility for obtaining permission from the property owner or tenant for you to be on the site and it should reasonably be the Owner. This is also important if you are performing services on the Owner's property and you need access to cross over or investigate neighboring property in order to satisfy your Scope of Services.

Some Owner-generated contracts contain clauses putting the entire burden for obtaining access rights, rights of way or easements, on the Design Professional. An example of such an unfortunate clause is as follows:

"Design Professional shall obtain all necessary easements, rights of way, rights of entry, permits and licenses to enter the proposed site for the purpose of performing services under this Agreement, including to conduct tests and collect data."

**Discussion:** If you agree to this clause and there is a delay (or impossibility) in being granted access to the site to allow timely completion of the services, it appears that you may be liable to the Owner for the delay and impact costs. The irony with such a result is that the Owner is in a better position than you are to negotiate and obtain the right of entry and is, therefore, the appropriate party to bear the risk of loss because of being denied entry. It would, therefore, be more reasonable for the Owner to retain the liability and to compensate you for the additional costs occasioned by the delay, than for you to compensate the Owner.

**Conclusion:** Instead of agreeing to take responsibility for obtaining the right of entry, explain to the Owner that since the Owner has a better opportunity to negotiate for, and obtain the right of entry than do you, the Owner should accept that responsibility in the contract. The contract clause might then provide:

*Permits and Rights of Entry.* Design Professional shall assist the Owner to obtain all necessary permits and licenses directly related to services required to be performed by Design Professional under this Agreement. . . . Owner shall provide a reasonable right of entry and any easements and all authorizations needed to enter upon property to perform services required under this Agreement.

You may also want to establish that the Owner owes you a duty to obtain necessary rights of entry by including a clause such as the following:

Owner will arrange for right-of-entry and access to the property for the purpose of performing studies, tests and evaluations required to perform the agreed services. Owner represents that it possesses necessary permits and licenses required for all of its activities at the site.

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## Schedule (Timeliness of Performance)

### Issue 1: Time for Performance of Your Services

It is possible that the performance of a Design Professional's services may be delayed for reasons beyond its control, such as inability to obtain information, or the need to obtain additional analytical or investigative work. There may also be delays caused by the Owner, a governmental agency, or even a construction Contractor over whom the Design Professional has no control. Some Owners not only fail to see why they should pay the Design Professional additional compensation for the delay — they actually desire to seek costs and damages from the Design Professional for such delays.

It seems that with the advent of design/build contracting, more project Owners are seeking to treat Design Professionals like general Contractors—regardless of the professional nature of the services being rendered. Even on standard design contracts, we are seeing more evidence of Owners attempting to treat the Design Professional like a construction Contractor.

A “time is of the essence” clause can impose undue risk on the Design Professional. Such a clause jeopardizes the Design Professional's duty to perform within the standard of care and may result in a liability for delay without fault.

**Discussion:** Avoid, to the extent possible, contract provisions holding you to a strict time deadline. Delete language such as “time is of the essence.” It is appropriate only to agree to complete your services in a timely manner consistent with the exercise of due care. The common law would not impose liability on the design professional for delay if the schedule could not be met consistent with meeting the standard of care. If the Design Professional agrees to “time of the essence” clauses, it commits to something that the common law does not require. This then is an uninsurable promise or guarantee. If the Owner insists on making “time is of the essence” and holding you to a strict time deadline, consider including a Suspension, Timeliness of Performance, Force Majeure or other clause that will excuse untimely performance that arises from circumstances beyond your control. An example of a typical “time of the essence” clause is the following:

*Time of the Essence. Time is of the essence in performance of the Services described in this Agreement. Unless extended by mutual written agreement of the Parties, Design Professional's obligation to perform the Services to be provided under the terms of this Agreement shall commence on the Effective Date and be completed on or before the scheduled termination date.*

This clause fails to allow for unforeseen circumstances or for situations where the exercise of an appropriate standard of care may require additional time for performance.

Some Design Professionals address delays in a separate clause such as the following:

If Design Professional is delayed at any time in the progress of the services by any reason beyond the Design Professional's control, including any act or omission of the Owner, by any act or omission of a Contractor, or by adverse weather or other conditions not reasonably anticipated, the time for completion of the Services shall be extended for a time equal to the time of such delay and an equitable adjustment in Design Professional's fee shall be made as may be reasonable under the circumstances.

Another way the delays issue may be handled is to include a clause stating that the Design Professional will exercise diligence to complete its services on the schedule established for the project, as may be consistent with the standard of care required for the services. An example is as follows:

Design Professional agrees to exercise diligence in the performance of its services consistent with the agreed upon project schedule, subject to the exercise of the generally accepted standard of care for performance of such services.

AIA B101-2007, at §2.2, addresses time for performance 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.

\* \* \*

In practical terms, this means that the Design Professional is committed to performing its services on the agreed upon schedule as far as can consistently be done within the generally accepted standard of care for performance of such services. Under the terms of this clause, if you fail to meet the schedule you will not automatically be liable to your client for damages on a warranty type basis. If the untimely performance results from owner interference or changes, for example, rather than from your negligence, that untimeliness may be an excusable delay if you have included appropriate contract language.

Another provision of AIA B101-2007 applicable to time for performance is §3.1.3 as follows:

As soon as practicable after the date of this Agreement, the Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services. The schedule initially shall include anticipated dates for the commencement of construction and for Substantial Completion of the Work as set forth in the Initial Information. The schedule shall include allowances for periods of time required for the Owner's review, for the performance of the Owner's Design Professionals, and for approval of submissions by authorities having jurisdiction over the Project. Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner's approval, the Architect shall adjust the schedule, if necessary as the Project proceeds until the commencement of construction.

When delays occur in the performance of your services for reasons other than your negligence, you should not be held responsible for those delays. There

should be a way for you to be excused for not completing the services by the scheduled completion date if the delay is caused by others. In some cases, you should be paid additional compensation for the delay, especially when that delay is caused by the owner or the construction contractor over whom you have no responsibility. Some clients, however, seek to make the Design Professional responsible for all delays and assess costs against the Design Professional for all delays.

### **Issue 2: Responsibility for Contractor's Schedule**

Some contracts attempt to shift responsibility to the Design Professional for assuring that the contractor performs its work on schedule. Consider the following clause:

*In the event the Construction Contractor fails to substantially complete the Project on or before the substantial completion date specified in its agreement with Owner, and the failure to substantially complete is caused in whole or in part by a negligent act, error or omission of the Design Professional, then Design Professional shall pay to Owner its proportional share of any claim or damages to Contractor arising out of the delay.*

The clause goes on to establish liquidated damages for delays in construction that go beyond milestones for different phases of the work. As a result, the Design Professional may be required to pay the liquidated damages that the contractor would otherwise have to pay, in the event that the delay is to any degree attributed to the Design Professional's negligence.

**Discussion:** In another contract, a clause went even further with its assignment of responsibility for the project schedule to the Architect. It provided:

*In addition to preparing the Project Schedule, Architect shall assist the Contractor to prepare a Critical Path Method (CPM) or other approved Project construction schedule for the construction Project which shall integrate the Architect's services with the Contractor's Work and with the Owner's occupancy requirements for the Project.*

It would appear from this clause that the Architect is assuming responsibility for creating the project schedule and the CPM schedule that the contractor will use. This gives the Architect too much scheduling responsibility and may so insinuate the Architect into the contractor's scheduling responsibility

that it will give the contractor a legal excuse for missing deadlines. This may entitle the contractor to additional time and cost for eventual changes to the schedule for which the contractor alone should have been responsible.

**Conclusion:** At a minimum, the clause should be revised to state that the contractor is solely responsible for his schedule, including his means, methods, and procedures for achieving that schedule.

### **Issue 3: Time Limitations on Design Professional's Response to Contractor RFI**

Some contracts establish specific time frames for the Design Professional to review contractor Requests For Information (RFIs), shop drawings, and change order requests. One contract, for example, reads, "Architect shall respond to Contractor's request for information within 48 hours after receipt of a request or such earlier time as is necessary to maintain the Construction Schedule."

**Discussion:** This short time frame may create an impossibility. Despite diligent efforts by the Design Professional, it may be impossible to analyze the situation and respond within such a short time frame. This could turn into a situation where the contractor knows of its need for information but procrastinates on its request to the point of creating a critical path delay, possibly to establish its own right to time and/or cost increase. Additionally, the Contractor could create the same result by submitting a large number of such requests at the same time.

**Conclusion:** At a minimum, when a time frame is specified, an exception should be added to the time requirement to permit additional time as necessary for the Architect to review the matter and act in a manner consistent with the Standard of Care. Delete language such as "time is of the essence". Agree only to complete your services in a timely manner consistent with the exercise of due care. If the client insists on subjecting you to a time is of the essence clause, and holding you to a strict time deadline, consider including a clause for Suspension, Timeliness of Performance, or Force Majeure that will excuse untimely performance that was caused by delays beyond your control.

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## Scope of Services

**Issue:** One of the biggest causes for contention between parties to a contract is disagreement over what was intended to be included in the Design Professional's Scope of Services. It is of utmost importance in any contract to carefully define the services that are included under the contract. The description of the services to be provided and what will be paid for them are the essence of the business deal between the Design Professional and the Owner. The description of services is generally set forth in the "Scope of Work" or "Scope of Services" section of the contract or a corresponding schedule to the contract. This part of the contract details the specific services to be performed. Quite often a clause that is brief in words will create ambiguous or exceptionally broad Design Professional responsibility.

Agreeing to "provide all services and permits necessary to complete the project," for example, can have significant liability consequences. A Design Professional may be tempted at the beginning of a project, when everyone is anxious to get going, to agree to such a clause, thinking that it is not that important. That thinking is not consistent with good risk management.

**Discussion:** The description of services in the contract should describe the specific services ("Basic Services") that will be provided by the Design Professional to meet the Owner's project needs. Think about and draft the language to clearly reflect, in detail, your assumptions and what you are actually being paid to do. Remember a third party who does not know your shorthand or industry parlance may be asked to judge how well you have performed. Therefore, if certain things are being assumed or taken for granted by you and you might be wrong about them, spell out your assumptions. It may provide a liability inoculation if the failure of those assumptions turn out not to be what you thought.

Are there tasks that are beyond your skill set or comfort zone and should someone else be subcontracted to perform a subspecialty? It is best to write an objective, detailed description of the scope and to quantify the services where possible—particularly if you are working around potential remediation services where the quantities and contaminants may easily vary from what was initially anticipated by the parties.

Services that might reasonably be provided for the project which are to be excluded from your Basic Services are usually addressed as "Additional

Services” or “Changes in Services.” These are to be paid for by the Owner separately as provided for in the contract, if they are later, in fact, rendered by the Design Professional. This bifurcation of Basic Services and Additional Services helps avoid confusion over what is included in the services and helps resolve how services will be billed if they are later requested. If there are certain services that you would not provide under any circumstances, these should be listed in the contract as “Excluded Services.” This might include certain environmental remediation design services, for example, that might be required if contaminants are discovered at the project site.

A sample clause for scope of services is as follows, but the more detail you can provide in your contract (here the Appendix), the better off you may be and, as with all contract terms, your counsel should be engaged to help you structure scope of services clauses and appendices:

#### Scope of Services

1. Basic Services. Design Professional shall furnish the labor, material, equipment and services ("Services") set forth in Appendix \_\_\_\_ of this Agreement. The scope of services (and related plans and specifications) may not be modified or amended, unless the changes are first agreed to in writing by Owner and Design Professional. The parties shall adjust compensation to Design Professional to reflect such changes in the Services.
2. Additional Services. The general category "Additional Services," referred to in Article \_\_\_\_ may include services generally similar to the Basic Services and arising due to changes in the scope of the Project, including, but not limited to, changes in size, complexity, schedule or character of the work, and also may include revisions to studies, reports, design documents, drawings or specifications which have previously been approved by the Owner, or when such revisions are due to causes beyond the control of the Design Professional. All changes in scope and revisions shall require the written authorization of the Owner, and shall be agreed to by Design Professional, prior to commencement of work, as provided in Article \_\_\_\_ of the Agreement.
3. Excluded Services. Without attempting to be a complete list or description of all services or potential services that will be excluded from this Agreement and which will not be performed by the Design Professional, the following services are specifically excluded from this Agreement: [list here]. In addition, the Design



Professional shall have no responsibility for discovering, handling, removing or disposing of any hazardous materials, pollutants, contaminants or wastes.

**Conclusion:** Beware of the “Changes” clause of the contract, particularly as it applies to additional services. The “Changes” clause should authorize the Owner to seek only such changes as are within the general scope of the services expressly contemplated by the contract. If the “Changes” clause gives the Owner exceptionally broad authority, the Scope of Services clause may be rendered meaningless or significantly less valuable. The Design Professional should be very careful to avoid clauses that permit the Owner or Client to make unilateral changes to the Scope of Services, as such unilateral changes may require extension of prices that may not have been loss generators at the time of contract inception but are at the time of the expansion of the Scope of Services. Similarly, with such a clause, the Owner or Client might attempt to extend the Scope of Services to include services that the Design Professional considers ill advised from a professional standards perspective or which the Design Professional is not properly trained or licensed to perform.

The Scope of Services should also carefully describe the location of the project, taking care to state any part of the Owner's property that will not be included as part of the project site. The exclusion of certain parts of a location may have particular importance if environmental assessment services are part of the project.

In addition to geographic limitations, it can be useful to describe any specific areas of service that, although necessary for the overall project, are not included in the Design Professional's contract. For example, an HVAC Design Professional might clarify that it is not responsible for designing or installing pipes or conduit beyond the walls of the building. An environmental Design Professional that is providing services for the removal and replacement of underground storage tanks can clarify that it is not responsible for other environmental matters at the Owner's facility such as PCBs, lead paint or asbestos that might be found at the location.

Assumptions concerning site conditions can also be set forth. This may be in a different clause of the contract or even a separate table or attachment entitled Schedule of Assumptions. Assumptions can be used to clarify the Scope of Services. Some contracts place the risk of changed conditions on the Design Professional. It could be interpreted as requiring you to keep

revising and adding to your services (or staffing) as necessary to cope with the actual field site conditions. If the field conditions differ from what was anticipated, this may have significant impact on the services the Design Professional must perform or may prevent the Design Professional from fully performing the contract or from being paid the extra costs incurred in addressing the changed conditions.

An example of specifically excluding certain services is the following:

#### EXCLUDED SERVICES

Services to be performed are set forth in the Scope of Services section of this agreement. Services excluded from performance include, but are not limited to:

1. Geo-technical or soils testing;
2. Environmental assessment;
3. Investigating or performing any archeological study; and
4. Designing any lighting plan.

Although these services will not be provided by us, they may still be necessary for the project. It is your responsibility to make that determination and to procure any such services from an appropriate and qualified Design Professional. When you do, you agree to provide their findings or plans to us so that we can evaluate their potential impact upon the services we have agreed to provide.

We are not responsible for addressing within our design or fees, any environmental conditions you might encounter or find, including but not limited to garbage, dumping sites, petroleum tanks or radioactive waste, nor are we responsible for noncompliance with any permit requirements associated with the above, or for any other requirement not included within our Scope of Services.

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## Severability

**Issue:** If a contract contains a particular provision or clause that violates law or public policy, a Court may find the clause to be unenforceable or, in some jurisdictions, might even find that the offending clause causes the entire contract to become void. Both parties to a contract usually prefer that the balance of the contract terms and conditions will remain in full force and effect, despite the unenforceability of one clause. However, in certain circumstances, a party may decide that if one term is eliminated, they would like the entire contract to become void. The following discussion focuses on circumstances where the parties decide they would like the balance of the contract to remain in force when one or more terms are deemed unenforceable.

**Discussion:** Rather than losing the benefit of the entire contract, parties may include a clause known as the “severability” clause, which specifies the intent of the parties to preserve the enforceable provisions of the contract and for the Court to limit the non-enforcement of the contract to the offending provision by “severing” the offending provision from the contract. An example of such a clause is as follows:

*Severability. If any of the terms or conditions of this Agreement are determined to be invalid or unenforceable, in whole or in part, the remaining provisions hereof shall remain in full force and effect, and be binding upon the parties hereto.*

**Conclusion:** Although this clause serves the purpose of maintaining the enforceability of the balance of the contract, it does not do anything to address the intent that the parties had when they negotiated the contract or to revise and make enforceable the offending clause. One way to handle this issue might be to add a sentence to the end of the preceding language stating that the voided clause will be revised to get as close as possible to the original intent without violating the law. This of course asks a Judge or someone else to become a drafter after the fact and is potentially problematic. It cannot be known if the Judge will accede to the request or, if so, whether the Judge will get it “right” in the eyes of the parties. An example of such a clause is the following:

EJCDC E-500 (2008), §6.11.C. *Severability*: Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Engineer, which agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

Similar protection from losing the benefit of an entire provision can also be included directly in certain clauses that receive close judicial scrutiny (like indemnity clauses and limitation of liability clauses). For example, indemnity clauses and limitation of liability clauses often begin with the phrase, “to the fullest extent permitted by law. . . .”

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## Shop Drawings

**Issue:** Confusion surrounding the Design Professional's review of shop drawings created by Contractors has been an ongoing cause of frustration to Design Professionals and Contractors and has led to many claims and much litigation. Contractors have sometimes successfully argued that a Design Professional's review and approval of a shop drawing constitutes acceptance of whatever was contained in that shop drawing.

**Discussion:** Contractors will sometimes submit drawings containing changes to the design details set forth in the Contract Documents, with the hope that the Design Professional will approve them, and thereby agree to what is, in essence, a change order. If the system or design details contained in the shop drawings that are approved by the Design Professional fail to work as required by the Contract Documents, the Contractor may then attempt to argue that it is excused from responsibility because the Design Professional "approved" the changes contained in the shop drawings and is responsible for any failure. Some Contractors may even assert that they relied upon the Design Professional's expertise in approving the details contained in the shop drawings. In response to this, Design Professionals have made a serious effort to reduce the risk of reviewing a shop drawing. Many shop drawing review stamps avoid the use of the word "approved." The closest thing to an approval in stamp language might be "reviewed — no exceptions noted."

Whether or not avoiding the word "approved" is the key, what is vital is that the role and purpose of the Design Professional performing the review and providing "approval" is clearly defined in the contract. Some contracts put the Design Professional in a bad position by using unfortunate language such as:

"Design Professional shall review and approve shop drawings. Design Professional's review and approval shall include a determination of whether the work complies with all applicable laws, statutes, ordinances and codes, and a determination of whether the work, when completed, will be in accordance with requirements of the Contract Documents."

**Conclusion:** The above language goes too far in what it requires the Design Professional to do and invites a broad reading of the Design Professional's responsibility. For reasons discussed elsewhere in this Risk Management Guide, the Design Professional's role is not to warrant and guarantee that

every aspect of the Contractor's work complies with all laws and regulations. Moreover, it is not always possible at the shop drawing review stage to determine that the Contractor's work, when complete, will meet the requirements of the Contract Documents.

Common practice is to include a contract clause explaining your limited role and responsibility with regard to the review of shop drawings. Moreover, the shop drawing stamp you use should parallel the limited responsibility defined in the contract and notations on the drawing should set forth who created the drawing, what it purports to show and what it does not show in your opinion. An example of a clause that sets forth the scope of the review in a manner consistent with allocating responsibility to the appropriate parties is the following:

#### *Submittals*

Design Professional shall receive submittals of others, including shop drawings, product data and samples from Contractor, and shall promptly review and take other appropriate action on them, but only shall review same for general conformity with the design concept of the Project and the general intent of the Contract Documents. Shop drawings, samples, and other submission reviews by Design Professional shall not include checking of specifics, dimensions or openings for potential conflict. Design Professional, Owner, and Contractor shall develop a list of the number and kind of anticipated submissions prior to the start of construction. Design Professional's review of a specific item shall not indicate approval of an assembly of which the item is a component.

AIA Document B101 – 2007 at §3.6.4.1 uses the word “approved” but spells out the limited purpose of the review as follows:

...[T]he Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques,

sequences, or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

EJCDC E-500 (2008), §A1.05.A addresses shop drawing as follows:

*Construction Phase.* Upon successful completion of the Bidding and Negotiating Phase, and upon written authorization from Owner, Engineer shall:

11. *Shop Drawings and Samples:* Review and approve or take other appropriate action in respect to Shop Drawings and Samples and other data which Contractor is required to submit, but only for conformance with the information given in the Contract Documents and compatibility with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. Such reviews and approvals or other action will not extend to means, methods, techniques, sequences, or procedures of construction or to safety precautions and programs incident thereto. Engineer shall meet any Contractor's submittal schedule that Engineer has accepted.

### Shop Drawings Review Stamp

A shop drawing review stamp might read as follows:

Review and approval of the within drawing are only for conformance with the general design concept of the Project as generally expressed in the Contract Documents. Review and approval of the within drawing are not conducted for the purpose of determining the accuracy and completeness of details, like dimensions or quantities, or for substantiating instructions for the installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Design Professional's review and approval shall not constitute approval of any construction means, methods, techniques, sequences, or any safety precautions or procedures, and approval of a specific item shall not indicate approval of any assembly of which the item is a component.

A good example addressing the Design Professional's responsibility for detecting deviations in the submittals by the contractor is the following:

**When Contractor Provides Professional Services**

The question arises as to what is the extent of the Design Professional's responsibilities when the construction contractor is providing design details as part of its own risk and is submitting those designs for review as part of the shop drawing review process. AIA B101-2007, §3.6.4.3 addresses the issue as follows:

The Architect shall not be responsible for any deviations from the Construction Documents that are not highlighted and brought to the attention of the Architect in writing by the Construction Manager. The Architect's review of a specific item shall not indicate approval of an assembly of which the item is a component. When professional certification of performance characteristics of materials, systems or equipment is required by the Construction Documents, the Architect shall be entitled to rely upon such certification to establish that the materials, systems or equipment will meet the performance criteria required by the Contract Documents and/or Construction Documents.

If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review Shop Drawings and other submittals related to the Work designed or certified by the design professional retained by the Contractor that bear such professional's seal and signature when submitted to the Architect. The Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals.



**Responding to RFIs**

An issue that may cause risks to the Design Professional similar to those arising from reviewing shop drawings, is the response to contractor requests for information (RFIs). AIA B101-2007, §3.6.4.4 addresses this as follows:

Subject to the provisions of Section 4.3, the Architect shall review and respond to requests for information about the Contract Documents. The Architect shall set forth in the Contract Documents the requirements for requests for information. Requests for information shall include, at a minimum, a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested. The Architect's response to such requests shall be made in writing within any time limits agreed upon, or otherwise with reasonable promptness. If appropriate, the Architect shall prepare and issue supplemental Drawings and Specifications in response to requests for information.

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## Site Safety

**Issue:** Safety is a concern on any construction project. Construction sites continue to be one of the most dangerous worksites. Responsibility for overall site safety, however, generally belongs to the General Contractor on the site, because that Contractor has direct responsibility for the work at the site and Owners typically require Contractors to assume that risk by contract. In addition to the safety program that the Contractor should have, each Subcontractor should be required to maintain a safety program for its own employees as well. In recent years, construction workers have increasingly sought recovery for their injuries from Design Professionals who have provided services at the project site. Two alternative theories of Design Professional liability are usually presented: the design itself created the hazard leading to injury or, more commonly it seems, the Design Professional's construction administration services were such that the Design Professional owed a duty to the injured party to protect the injured party from unsafe site condition(s).

A Contractor's (or subcontractor's) injured workers often obtain whatever worker's compensation is available through their own employer, and then seek to recover the balance of their alleged damages from the Design Professional, arguing that the Design Professional is responsible for the injury due to its design or its contract, or due to the actions of its agents and employees in the field.

In the “damned if you do, damned if you don't” category we must put the arguments of injured workers which allege that, regardless of contract language to the contrary, the Design Professional knew of dangerous site conditions and undertook various actions to correct the condition — such as communicating observations or recommendations to the General Contractor — and that this activity by the Design Professional demonstrates that it had the authority to control or actually did control the work and safety at the jobsite. The case law in this area varies from state to state, and it can be confusing. The specific circumstances, contract language and in-field behaviors are the facts that will be carefully parsed to determine what, if any, liability applies.

**Discussion:** Your contract with the Owner should expressly state the limitations upon your role concerning jobsite safety responsibility, but your in-field activities must mirror whatever limitations are contained in the

contract. Site safety is one place you want to zealously avoid “scope creep.” The contract might include a provision stating that you are responsible for maintaining a safety program solely for your employees, and the Contractor is responsible for overall site safety, including the safety of its employees and all others on the site. The contract might also affirmatively state that you are not responsible for the safety program and procedures of the Contractor or of the project site, and that to the extent you *observe* Contractor's work, it is for the purpose of confirming general conformity with the Contract Documents and specifically not for the purpose of reviewing the site's safety procedures, monitoring site safety or correcting deficiencies in the Contractor's means, methods, or procedures for handling site safety. You may also consider requiring the Owner to include a provision in its contract with the Contractor that provides for indemnification of you by the Contractor for any claim arising out of injuries or death of an employee of the Contractor. An example clause is the following:

*Site Safety for Design Professional's Employees*

Design Professional will maintain a safety program solely for its employees and Design Professional's subconsultant's employees. Design Professional specifically disclaims any authority or responsibility for general jobsite safety and for the safety of persons who are not the employees of Design Professional or Design Professional's subconsultant(s). It is understood and agreed that the Design Professional will not be responsible for the job safety or site safety of the project, and shall not be responsible for compliance with safety programs and related OSHA regulations required to be followed by the Contractor or its employees, Subcontractors, and agents. Jobsite safety shall be the sole responsibility of [Owner or] Contractor.

Because of the formulation of the last sentence, the above clause should be coordinated with other contract language so that the Owner assigns the Contractor responsibility for overall site safety.

Another example is the following:

*Site Safety.* Owner agrees that, in accordance with generally accepted construction practices, each Contractor or Subcontractor not retained by Design Professional shall be solely and completely responsible for working conditions on the job site, including safety of all persons and property during the performance of their work. This obligation shall include providing any and all safety equipment or articles necessary for employee personal protection and compliance with OSHA regulations. These requirements will apply continuously on the job site and will not be limited to normal working hours. Any monitoring of the Contractor's or Subcontractor's procedures conducted by Design Professional in this role is not intended to include review of the adequacy of the Contractor's or Subcontractor's safety measures in, on, adjacent to, or near the construction site.

EJCDC E-500, Exhibit A, §A1.05.C addresses the issue as follows:

*Limitation of Responsibilities:* Engineer shall not be responsible for the acts or omissions of any Contractor, Subcontractor or Supplier, or other individuals or entities performing or furnishing any of the Work, for safety or security at the Site, or for safety precautions and programs incident to Contractor's Work, during the Construction Phase or otherwise. Engineer shall not be responsible for the failure of any Contractor to perform or furnish the Work in accordance with the Contract Documents.

ConsensusDOCS 240 includes the following sentence in its description of the Design Professional's responsibility:

*If the Architect/Engineer has actual knowledge of safety violations, the Architect/Engineer shall give prompt written notice to the Owner (§3.2.8.4).*

This ConsensusDOCS provision is troublesome. Although the Design Professional may be required to provide notice to its client, or take other action, when it has actual knowledge of Safety violations, not every state requires it to do so. The contract language would appear to impose upon the Design Professional a strict standard similar to what New Jersey adopted in the 1995 case of *Carvalho vs. Toll Brothers*. It is advisable that this clause

be stricken from the contract so as not to create responsibility beyond your normal scope of services or beyond what the court would impose on you at common law.

The extent to which Design Professionals have responsibility and liability for job site safety continues to be debated in courts around the country, with widely divergent results. This makes it difficult to provide uniform advice or counsel to Design Professionals. Risk management Design Professionals and attorneys are generally quick to advise Design Professionals to obtain legal advice specific to the law of their individual state, rather than rely upon general educational information that may be provided in risk management workshops and nationally distributed books such as this one.

**Conclusion:** Affirmatively state in the contract that you are not responsible for the safety program and procedures of the general contractor or of the project site. State also that to the extent you observe and review contractor's work it is only for the purpose of confirming the contractor's general conformance with the contract documents and not for the purpose of reviewing its safety procedures. Require your client to include a provision in its construction contract requiring the contractor to indemnify you for any claim arising out of injuries or death of an employee of the contractor. Consider this example:

The Design Professional will be responsible only for its activity and that of its employees and subconsultants at the job site. Neither the professional activities of the Design Professional, nor the presence of the Design Professional or its employees and sub-Design Professionals at a work site, shall relieve the Client or its contractor(s) of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending and coordinating the Work in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. The Design Professional and its personnel have no authority to exercise any control over any construction contractor or its employees in connection with their work or any health or safety programs or procedures; however, the Design Professional reserves the right to report to the Client any unsafe condition observed at the site without altering the foregoing. The Client agrees that the General Contractor shall be solely responsible for job site safety, and warrants that this intent shall be carried out in the Client's contracts with the General Contractor by which the Design Professional and sub-Design Professionals shall

be indemnified by the General Contractor and shall be made additional insureds under the General Contractor's policies of general liability insurance.

Another example is as follows:

The Design Professional will be responsible only for its activity and that of its employees and subcontractors at the job site. Neither the professional activities of the Design Professional, nor the presence of the Design Professional or its employees or sub-Design Professionals at a work site, shall relieve the Client or its contractor(s) of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence techniques or procedures necessary for performing, superintending and coordinating the contractor's work in accordance with its applicable contract documents and any health and safety requirements of the Client and regulatory agencies. The Design Professional and its personnel have no authority to exercise any control over the Client, its contractor(s) or their employees or subcontractors in connection with their work or any health and safety programs or procedures; however, the Design Professional reserves the right (but not the obligation) to report to the Client any unsafe condition observed at the site without altering the foregoing.

Beware that despite the contract language, the courts in some states may impose liability upon the Design Professional that has actual knowledge of dangerous conditions and does nothing to prevent injury to workers.

EJCDC E-500 (2008), Article 6.01.H, provides:

Engineer shall not at any time supervise, direct, or have control over any contractor's work, nor shall Engineer have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor or the safety precautions and programs incident thereto, for security or safety at the Site, for safety precautions and programs incident to the Contractor's work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work.

Exhibit D1.01.F.5 of EJCDC E-500 (2008) further provides:

Resident Project Representative shall not: Advise on, issue directions, or assume control over safety practices, precautions, and programs in connection with the activities or operations of Owner or Contractor.

**Conclusion:** In some jurisdictions, a Design Professional contract stating that the Design Professional has no responsibility for site safety will provide a legal defense against most suits by non-employees alleging that the Design Professional has site safety responsibility. But in many jurisdictions, courts have looked beyond the terms of the contract to scrutinize the Design Professional's actions to determine whether the Design Professional assumed responsibility and exercised authority for site safety that was not expressly given to it by contract. For this reason, it is important that the Design Professional exercise caution in its communications with the contractor with regard to safety concerns or other matters impacting the means, methods, and procedures of the work. The written and oral communication should clearly maintain that the Design Professional does not have independent authority to make decisions concerning safety, and that only the contractor and the project owner can make such decisions.

As a practical matter, the Design Professional's contract should expressly state the limitations upon its authority concerning jobsite safety responsibility and any authority to stop work. This should include a provision stating that the Design Professional is not responsible for the safety program and procedures of the general contractor or of the project site. It may be advisable to have the owner include a provision in its contract with the general contractor acknowledging that the Design Professional has no responsibility for site safety; that site safety is the general contractor's sole responsibility; and requiring the contractor to indemnify the Design



Professional for any claim arising out of injuries or death of an employee of the contractor.

The factors which would appear to be relevant in any case where an attempt is made to expand the [engineer's] liability beyond the specific provisions of the employment contract are set forth [as follows]:

- (1) actual supervision and control of the work;
- (2) retention of the right to supervise and control;
- (3) constant participation in ongoing activities at the construction site;
- (4) supervision and coordination of subcontractors;
- (5) assumption of responsibility for safety practices;
- (6) authority to issue change orders; and
- (7) the right to stop the work.

This list of factors provides a tool with which a Design Professional may evaluate whether it is assuming responsibilities for site safety either by contract language or by actions in the field.

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## Standard of Care

**Issue:** The common law standard of care for performance of professional services is generally defined as the ordinary and reasonable care usually exercised by one in that profession, on the same type of project, at the same time and in the same place, under similar circumstances and conditions. Perfect performance is not required by the common law. As explained by one court: “As a general rule, [a]n architect's efficiency in preparing plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one of that profession... [I]n the absence of a special agreement he does not imply or guarantee a perfect plan or satisfactory result. Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance.” This normal standard establishes the base line. Services that fail to conform to the standard, and thereby cause the Owner or the Client to sustain damages, may be deemed negligent.

**Discussion:** It is possible that you will make a mistake or error in your plans and specifications that causes the Contractor to incur increased time and cost in revising or even removing and re-performing part of its work. This may entitle the Contractor to a change order from the Owner. But unless the mistake resulted from your “negligence” you will not be legally responsible to the Owner for the increased costs it paid to the Contractor. You may, of course, as a matter of business judgment, decide it best to share in some of the Owner's increased costs or perform additional services at no charge to the Owner in order to help rectify the situation and protect your business relationship. Providing such a remedy should be at your sole discretion, however, and not be forced upon you by ill-advised contract terms and conditions.

To determine whether your act, error, or omission was negligent, the Owner will generally have to present an expert witness to give expert testimony to establish the applicable standard of care, and show how you failed to conform to it. In your defense, the insurance company will generally present an expert witness to establish what standard of care, in the expert's opinion, should have been applied, and how you complied with that standard. Absent a contractual undertaking by you to a standard of care greater than the

ordinary standard of care, the Owner may not prevail against you unless the jury (or judge in the event there is no jury) decides, based on the expert testimony, that you were negligent.

Owners are sometimes including language in their contracts requiring the Design Professional to perform to a standard greater than the generally accepted standard. For example, one such clause states:

*Design Professional 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.*

Several concerns with this clause are readily apparent, including:

(1) The “highest standard” is an unknown. Unlike the normal standard of care which can be determined from reference to code books, customs in the practice, and your peers in the area for similar projects, you may not know the “highest standard” until you get to court and a Design Professional from across the country testifies to the greatest and best, cutting edge technology and state of the art being used by one design firm 2,000 miles away for similar services. The “highest standard” is, therefore, an undefined term which presents undefined risks that cannot easily be understood or adhered to.

(2) The Owner who demands this standard of care probably does not expect you to actually practice any higher standard, since that might entail an over-designed (and a more expensive) project — resulting in additional costs for design and construction. In fact, the Owners that most often insist on this standard are also the tightest on the budget and the most demanding and difficult to get along with on a project when things do not go exactly as they had hoped. They expect the best possible service for the lowest possible price.

(3) By agreeing to this “highest standard” you may subject yourself to liability for breach of contract even though there was no negligence on your part. If, for example, the Owner has sued you for mistakes and your expert witness shows that you were not negligent, you could prevail on the part of the Complaint that alleges negligence. However, you could very well lose on the part of the Complaint that is based on breach of contract. If you prevail on the negligence count and lose on the breach of contract count, your professional liability policy may not cover your loss because the loss may be

excluded by the “contractual liability” exclusion of the policy or by the “warranty” exclusion of the policy.

(4) Agreeing to the “highest standard” may also be viewed by some Owners and courts as constituting an express warranty or guarantee regarding the results to be achieved by your services. Again, if viewed this way, the loss may be specifically excluded from coverage by the “warranty” exclusion of your professional liability policy.

It is not in the Owner’s best interest to require anything other than the ordinary standard of care. Most Owners understand that Design Professionals do not have substantial business assets, and that if there are damages to be recovered, the Owner must look to an insurance company rather than the Design Professional. Since the language of this clause most likely creates an uninsurable contractual liability, the Owner has arguably gained nothing of substance by insisting on it. In fact, it might even so skew the legal basis for the Owner’s suit that the insurance company would have no responsibility at all under the policy.

Additionally, there is substantial case law addressing the issue of the standard of care. In deciding liability based on that standard, parties to the contract are probably better served by relying on the precedents that have been established in those reported cases.

For the first time the AIA B101 Owner-Architect Agreement explicitly states the standard of care to which the architect must perform. 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.

The first sentence, which describes the standard of care, is the formulation most commonly applied by the courts. Even though it has not previously appeared as an explicit term in AIA Owner-Architect contract forms, it nevertheless would be considered an implied term in any contract for professional design services, unless the contract provides otherwise.

You might also add at the end of the standard of care clause a brief statement that the contract is not intended to create any guarantees or warranties on the part of the Design Professional. An example is as follows:

No warranty or guarantee, either express or implied, is made or intended by this Agreement.

In instances where the Owner has refused to delete the “highest standard” language after having been engaged in the above discussion, some Owners have agreed to add a sentence to the end of their “highest standard” clause stating:

The performance standard is not intended to create a warranty, guarantee or a strict liability standard, and it is expressly agreed that Design Professional is agreeing only that its services will not be performed negligently or with willful or reckless misconduct.

EJCDC E-500, §6.01.A addresses Standard of Care as follows:

*Standard of Care:* 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.

If the contracts presented to you by an Owner seem to have numerous different clauses scattered throughout them that contain requirements exceeding the generally accepted Standard of Care that create warranties and guarantees, the following clause might be helpful to clarify the Standard of Care and disavow any inadvertent warranties hidden in the contract:

“Standard of Care.” Notwithstanding any clause in this Agreement to the contrary, Design Professional expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Design Professional performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances. Nothing in this Agreement shall be construed to establish a fiduciary relationship between the parties.

Standard of care may also be an issue when providing cost estimates, recommendations, opinions, and decisions which, as a practical matter, are all made on the basis of the Design Professional’s experience, qualifications and professional judgment. Avoid language suggesting higher standards of care or warranties and guarantees that may be alleged to establish the standard of care for the already tricky area of cost estimates, because a higher standard of care may significantly alter your legal liability to the Owner and create uninsurable risks.

#### **Treatment in ConsensusDOCS**

ConsensusDOCS 240 does not define the standard of care. Instead, Paragraph 2.2 defines the relationship of the Owner and Architect/Engineer:

*The Architect/Engineer accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and exercise the Architect/Engineer’s skill and judgment in furthering the interests of the Owner. The Architect/Engineer represents that it possesses the requisite skill, expertise, and licensing to perform the required services. The Owner and Architect/Engineer agree to work together on the basis of mutual trust, good faith and fair dealing, and shall take actions reasonably necessary to enable each other to perform this Agreement in a timely, efficient and economical manner. The Owner and Architect/Engineer shall endeavor to promote harmony and cooperation among all Project participants.*

The terms “*trust and confidence*” might imply a fiduciary relationship and thus a heightened standard of care, which could be uninsurable under the typical Professional Liability policy. Note that the above quoted clause is from the original 2007 version of this document. ConsensusDOCS has revised the clause since then to delete some of the fiduciary language. If using a ConsensusDOCS form, however, you will not be able to assume that you know the precise language it contains without actually reading it to see whether it is a revised version, since they are apparently revising the documents on no specific time schedule.

The ConsensusDOCS 240 also increases the standard of care by requiring more complete construction drawings from those generally provided. Contractors and Design Professionals frequently debate whether disputed Work is reasonably inferable from the Construction Documents. ConsensusDOCS 240 requires these Documents to “completely describe all work necessary to bid and construct the Project.” The stipulation in the ConsensusDOCS that the designer must “completely describe all work necessary to bid and construct the Project” will undoubtedly aid the Contractor in a dispute over the quality of the Documents.

Please note that the ConsensusDOCS are subject to frequent revision. It is possible that by the date of publication of the Contract Guide, the current version of the ConsensusDOCS 240 may be different from what is quoted here.

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## Survival

**Issue:** After the completion of work under your contract, or after termination of your contract with the Owner, it is usually important that certain risk allocation aspects of the contract survive and continue to be enforceable even though the contract itself has terminated. This may be generally understood by the parties and Courts, but by stating it clearly in writing it is possible to avoid any uncertainty or ambiguity concerning the intent of the parties.

**Discussion:** Include a survival clause in the contract identifying what aspects of the contract will survive. Such a clause is as follows:

*Survival.* The conditions of this Agreement concerning indemnification, limitations of liability, record keeping and reporting, disposal of material, and any other provisions allocating responsibility or liability between the parties to this Agreement, shall survive the completion of the services under this Agreement and any termination of this Agreement.

EJCDC E-500, §6.11.B, addresses it as follows:

*Survival:* All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason.

The following is an example of a survival clause that specifies specific articles of the contract that will survive the termination of completion of the contract:

“The Parties agree that the provisions of Articles 1, 2.7, 2.8, 10, 11, 12 and 13 as well as those provisions set forth in all Appendices, and Contract Documents that have been incorporated into this Agreement by reference and that by their nature require survival, shall survive the termination, cancellation or expiration of this Agreement.”



## Suspension of Services

**Issue:** If a Design Professional's services on a project are suspended by the Owner or the Design Professional for reasons beyond the control of either the Owner or the Design Professional or if a Design Professional exercises its rights to suspend services because of nonperformance by the Owner, and services are resumed at a later date, the Design Professional generally should be compensated for the additional costs the Design Professional incurred during or as a result of the delay. If the suspension is very lengthy, as it can be if a governmental agency is slow in issuing a necessary permit or if a citizen's group succeeds in having a court temporarily stop the project, the additional costs for the Design Professional could be substantial. It is possible, for example, that the pay grades of key personnel for the project will have increased by the time the services resume. These are merely examples of some of the types of additional costs that should be borne by the Owner. Unfortunately, many contracts fail to specifically address this situation and how the Design Professional will be paid. Some contracts turn the issue on its head and call for the Design Professional to make payments to the Owner on account of the delay.

**Discussion:** Consider a clause that sets forth the responsibility of the Owner to pay you the additional compensation incurred because of delays in the performance of your services that are not within your control. AIA B101-2007 Article 9 addresses the issue as follows:

§9.1 If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

§9.2 If the Owner suspends the Project, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

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## Termination

**Issue:** One of the more important provisions of a contract may be the provision addressing how the contract is terminated and what rights and responsibilities flow from a decision to terminate the contract. Typically when termination becomes an issue, the parties may not be getting along. Relying on good will to bring about a fair result may be misguided. Contracts typically contain a provision permitting the Owner to terminate the Design Professional's services for (i) cause, and (ii) for any other reason at the Owner's convenience. Some of these provisions do not provide any requirement that the Owner give the Design Professional prior notice of a perceived defect in the services or an opportunity to cure the defect within a specified number of days prior to termination. Both termination for cause and termination for convenience clauses often fail to provide for recovery of appropriate termination costs by the terminated Design Professional. Although the clauses state that Design Professional will be paid for the services rendered prior to the termination, they fail to provide for the extra costs the Design Professional may incur in closing down the services on the project and terminating any of its subconsultants.

**Discussion:** Termination provisions should be equitable and should be applied equally by both parties to the contract. Just as the Owner should be entitled to terminate a Design Professional for cause, a Design Professional should likewise be able to terminate the contract for cause — such as the failure of the Owner to make timely payment of the Design Professional's invoices.

Some Design Professionals seek to include language permitting both the Owner and the Design Professional to terminate the contract for convenience, upon some specified period of prior notice — such as seven to ten days. This is deemed unacceptable to many Owners because it could leave them stranded half way through a project and it could be quite difficult and expensive for an Owner to obtain follow-on services after their Design Professional departs. For this reason, it may be more commercially reasonable to provide a clause permitting the Owner to terminate you for cause or for convenience, but allowing you to terminate the contract only for cause. An example clause providing for such rights is as follows:

*Termination for Cause.* This Agreement may be terminated by Owner for cause after seven (7) days written notice by Owner, based on any of the following reasons: (i) Design Professional's negligence or misconduct that would make its continued association with the Owner prejudicial to the best interests of the Owner; (ii) the filing of a petition in bankruptcy by, against, or on behalf of the Design Professional; (iii) Design Professional's uncured breach of any material term or condition of this Agreement.

This Agreement may be terminated for cause by Design Professional if, after seven (7) days written notice by Design Professional, Owner has not paid the amount due Design Professional after thirty (30) days have elapsed since the original payment date established in this Agreement.

*Termination for Owner's Convenience.* Owner may terminate this Agreement for its convenience without cause, upon fifteen (15) days prior written notice to the Design Professional. In the event of termination for Owner's convenience, Owner will incur no liability to Design Professional by reason of such termination, except that Design Professional shall be compensated for all Services performed prior to the termination date, together with reimbursable expenses then due or incurred and for all Termination Expenses as defined below.

\* \* \*

"Termination Expenses" shall mean compensation in addition to compensation for Basic and Additional Services and shall include those expenses that are attributable to termination of this Agreement for which Design Professional is not otherwise compensated, including reasonable cancellation charges of subconsultants.

You might want to consider adding greater detail to the requirements for termination expenses in the final subparagraph above in order to avoid any potential ambiguity.

### Termination Expenses

If the contract is terminated for the convenience of the client, the Design Professional should be reimbursed the expenses it reasonably incurs to terminate its services. A more detailed example clause for termination expenses is as follows:

In the event of termination for convenience by the Owner the Design Professional shall be entitled to: (1) recover all reasonable costs and expenses incurred up to the date of termination, plus all costs incurred to assemble and close project files and documents; (2) unavoidable down time in the reassignment of project staff; (3) termination penalties/expenses related to third parties retained by Design Professional in regard to its obligations under this contract; plus (4) a termination amount of 15 percent of the remaining portion of the total compensation (or estimated compensation) agreed to herein or by separate authorization to cover lost profits, damages, and lost opportunity costs which cannot otherwise be accurately calculated.

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.

EJCDC E-500, §6.05.D-2 addresses termination expenses as follows:

*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 Design Professionals, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.





## **Third-Party Beneficiaries**

**Issue:** Claims by individuals or corporations against Design Professionals with whom they have no contract are becoming more common. Construction Contractors, for example, sue project architects and engineers, alleging that their design errors, delays in reviewing shop drawings, rejection of equipment, interference with construction progress, and other issues have caused them to suffer damages from delay or impact. Many states limit these suits based on a theory called the “economic loss doctrine.” The doctrine usually applies so that a party (such as a Contractor) who has no contract with a Design Professional has no standing to sue for money damages. The suit must instead be filed by the Contractor against its own Client, the Owner, who is legally responsible for its agent's (the Design Professional's) acts and omissions.

Other parties that have been filing suits against Design Professionals include lending institutions that have loaned construction money to a project Owner in reliance upon a Design Professional's report (or certification) concerning site conditions, the completion of construction and the like. Property buyers who purchase property in reliance upon site assessment reports (such as mechanical equipment reports, roof reports, home inspection reports, and environmental site assessment reports) also have been suing the professionals who prepared the reports for some other party, such as the property seller or some previous buyer from whom the current purchaser/owner bought the property.

**Discussion:** The risk management issue here is that under various legal theories, the Design Professional may be found to have liability to the individuals or entities that were not parties to the contract between the Design Professional and the Owner. These “third-party” claims have become more than a nuisance. In some cases they have resulted in significant damages being awarded against a Design Professional. Usually the Design Professional has received no additional fees to compensate it for the increased risk associated with another party benefiting from the Design Professional's services.

**Conclusion:** Try to allocate the risk of third party claims to the party who introduces the third party to fact pattern. Subjecting yourself to third-party liability that you did not, and reasonably should not have, originally contemplated is not, generally speaking, in your or the Owner's best interest.

In some jurisdictions you may be shielded from such liability, but good risk management calls for a proactive approach to limiting your exposure. Because of the greater risk for you, higher fees are justified for your services to compensate you for the increased risk. Even though the Owner does not want to pay you higher fees to compensate you for the increased risk, the Owner may want or need its lender to rely upon your report. It may also intend for some future property purchaser to be able to review your instruments of service. If so, the Owner should be presented with your need to include risk transfer language to limit your liability to third parties before your work is shared with them.

If there are to be no intended third party beneficiaries, language such as the following may be used:

*No Third-Party Rights.* Nothing in this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than Owner and Design Professional, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Design Professional, and not for the benefit of any other party. Owner agrees that it shall not disclose to any third party any data, reports or other information furnished by Design Professional under this Agreement without the prior written consent of the Design Professional and subject to such reasonable conditions as the Design Professional may require. In the absence of such consent, Design Professional shall have no liability to Owner or anyone else for claims arising from such unauthorized disclosure.

AIA B101-2007, §10.5 addresses third party reliance as follows:

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.

### **Third Party Reliance Letters**

Some firms require a letter to be executed by any third party that will have access to the firm's work product for any purpose. By doing this, they obtain the consent of the third party to be bound by risk allocation and limitation clauses. An example of such a letter is the following:

Third Party Report Letter

Re: Report \_\_\_\_\_

Dear \_\_\_\_\_,

Our Client, \_\_\_\_\_, has asked our firm to deliver to you a copy of the subject report. Prior to delivering a copy to you, we must receive from you a signed original of this letter agreement, and our fee of \$\_\_\_\_\_.

In consideration of our providing you with a copy of the report prepared for our Client, you acknowledge and agree to the following:

- 1) The report was produced pursuant to an Agreement with our Client which contained certain scope descriptions and risk allocation clauses, including indemnification, limitation of liability, and time bars to litigation, all of which were mutually determined and agreed upon in the Agreement;
- 2) Your access to the report is conditioned upon your acknowledgment of, and your specific agreement to be separately bound by the same scope descriptions and risk allocation clauses contained in the Agreement between us and our Client (copies attached);
- 3) The report is limited to the facts and laws existing at the time of our services, and our firm is not responsible for changes in facts or law since the date the services were performed;
- 4) The report was intended for our Client's exclusive reliance and internal use, and is not for general distribution or publication;
- 5) The services provided by us to our Client have been performed for our Client and our report may or may not be suitable for your purposes; and
- 6) Any further distribution of the report without our prior written consent and subject to such restrictions as we may reasonably require or any unauthorized use of the report shall be at your and such recipient's sole risk and without liability to us.

If you desire the report to be updated, or for further services concerning the subject matter of the report to be provided, we will entertain discussions for a further agreement with you subject to our Client's consent to such an arrangement.

Please execute this letter in the place indicated and return an original to us.

Agreed and accepted:

\_\_\_\_\_

An even more comprehensive reliance letter might include a limitation of liability clause as between the receiving party and the Design Professional, such as the following:

You further agree to limit our liability to you arising from any cause of action whatsoever including but not limited to negligent professional acts, errors, and omissions, breach of contract or breach of warranty to an amount equal to our fee for providing you a copy of the report. This limitation shall not apply to the extent prohibited by law.

Agreed and Accepted:

\_\_\_\_\_

Some firms also consider placing a “no third-party beneficiary” disclaimer statement at the top of every report where a concern related to third party reliance exists.

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## **Time Limitations to Legal Action**

**Issue:** Litigation against a Design Professional generally must be filed within the period of time specified in statutes of limitations or statutes of repose. If the actions are filed outside of those periods, the Design Professional has a defense against those actions. However, because the statute of repose and the statute of limitations are both in the nature of a defense, they do not preclude the filing of the claim by the plaintiff in the first place.

Where an action is based on breach of contract, for example, a statute of limitations may require that it be filed within a specified period such as two, four, or six years of the breach — depending upon the applicable law. Where the action is based upon negligence, it may have to be filed within a shorter period, such as two years from the date of an injury resulting from the negligent act, error, or omission. That period may be extended significantly, however, because the time period might not begin to run until years later, when the injured party learns (or reasonably should have learned) of the loss or injury. The time limit applicable to filing an action may become further clouded when the claims mix some combination of breach of contract, negligence and other torts. Moreover, in cases where fraud or misrepresentation are alleged, there may be a dispute over whether the time period for filing suit runs from the date of the misrepresentation or from the date of the discovery of the misrepresentation or if the statute of limitations defense is available at all.

**Discussion:** Many states also have a statute of repose limiting the time in which a party may file suit against a Design Professional that provided services for a construction project. The period generally begins to run from a specified point in time, such as “substantial completion.” The statute of repose may run for a specified number of years, regardless of when a party first learns of its loss or injury. The time bar to claims under statutes of repose is generally longer (say eight or nine years in some jurisdictions) than statutes of limitations (say two or four years) in the same jurisdiction. Statutes of repose may provide greater certainty. Each jurisdiction, however, has its own time period for filing suit and the time period may vary or may not be available depending upon the nature of the claim.

**Conclusion:** 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. You could agree to a mutual time frame barring either you or the Owner from bringing claims beyond a certain time. The downside of a contractual provision is that it only applies to the parties to the contract and not third parties. However, it is probably the case that most of a Design Professional's exposure is to the project owner, so a time bar to litigation in your contract may go a long way in reducing your most significant liabilities. An example of a clause limiting the time by which the Owner can sue the Design Professional 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 Design Professional's services.

Another example 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.

This provision does not establish when the statute of limitations will begin to run but, instead, contractually establishes a 10-year statute of repose commencing at Substantial Completion. The effect of this language is to establish contractually an absolute 10-year period of repose beginning with Substantial Completion while carefully not superseding any applicable state or other law that may set forth other restrictions, including a shorter repose period.

## Underground Utilities

**Issue:** Contractors are typically expected to locate underground utilities before commencing their work. This expectation holds true even when the contractor has been provided basic information and drawings from the Design Professional or Owner concerning the known or expected locations of utilities.

Additionally, many jurisdictions have “one call” laws that require a contractor to call before digging to have underground utilities marked out by the utilities' owners. Nonetheless, in part because damages flowing from disruption of utilities are so great, Owners occasionally include a clause in the Design Professional's contract concerning underground utilities that is based on language typical of the Contractor's contract. Such language may require the Design Professional to assume all responsibility for locating underground utilities and any damages resulting from its failure to locate them all correctly. The liability transfers in the clauses often appear to apply regardless of whether the Design Professional exercised the appropriate standard of care to locate the utilities. An example of an unfortunate owner generated underground utility clause follows.

*“Design Professional 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.”*

Damages resulting from hitting an underground utility or other subsurface condition can be significant. Not only may there be the direct damage of repairing or replacing the utility, but there may be consequential, indirect damages such as loss of an Owner's (or even major population center's) electricity or telephone service. Businesses could close down and lose revenues for one or more days.

**Discussion:** Unless you are directly involved in performing or supervising the performance of intrusive field operations, your contract rationally should not suggest that you have any responsibility for underground utilities. On the contrary, the Owner should be required to provide all information in its

possession concerning underground utilities to you and you should be expressly entitled to rely on that information. Primary responsibility for locating underground utilities should ordinarily be assigned to the Contractor doing the intrusive field operations. Even if you will be actively involved in such intrusive field operations, the contract should clearly state that you will be liable only for your negligence. The contract should provide only that you exercise reasonable care with regard to the underground utilities, including compliance with state “one call” laws. The contract should not impose any strict liability on you in this regard. An example clause is as follows:

**Underground Utilities.** Owner shall advise and provide Design Professional with all information and data in its possession concerning the type and location of all underground utilities, both public and private. Design Professional 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 Design Professional 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.

***Special considerations-contaminated sites:*** If you are providing professional services regarding a site that may be the subject of remediation activities or institutional controls, consider addressing the fact that there may be conditions at the site that may be damaged or altered as a result of your services, despite the fact that you met the reasonable standard of care. To limit contractual liability for damage to underground facilities, Environmental Professionals might consider a clause such as:

Design Professional shall not be liable for services performed that result in injury or damage to, or interference with, any underground structures or facilities which are not expressly called to Design Professional’s attention in writing and correctly shown on the plans furnished by Owner in connection with the Work. Owner recognizes that the use of excavation, exploration and test equipment may unavoidably affect, alter, or damage the terrain and affect subsurface, vegetation, buildings, structures and equipment in, at, or upon the site, and Design Professional shall not be responsible for the same, except to the extent such damage or loss results from Design Professional’s negligence.



## Waiver of Subrogation

**Issue:** Insurance companies vary in how they treat a waiver of subrogation. The typical policy states something like the following:

*Subrogation.* In the event of any payment under this policy, the Company shall be subrogated to all the “insured’s” rights of recovery against any person or organization and the “insured” shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The “insured” shall do nothing to prejudice such rights.

**Discussion:** Some policies, however, add an exception to this prohibition against waiving subrogation — stating that if you are required by your contract to waive subrogation, the carrier will agree to that. Such an exception is provided by the following language:

The Company shall not exercise any such rights against any persons, firms or corporations included in the definition of “insured” or against the “insured’s” clients if, prior to the claim, the “insured” contractually entered into a legally enforceable waiver of subrogation.

**Conclusion:** Review your policy to determine what is required of you with regard to waiver of subrogation. If your carrier does not permit it, you should advise your client that the waiver is not available. In the alternative, if your policy does not automatically include the waiver of subrogation when it is required by your contracts, you may be able to obtain an endorsement to the policy on a client-by-client or project-by-project basis.

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## Waiver of Terms and Conditions

**Issue:** If a party to a contract chooses to ignore its terms and acquiesces to the other party doing something contrary to the stated terms and conditions, it could be argued that the acquiescing party has, by virtue of their acquiescence, agreed to alter the terms of the contract, and is barred from subsequently enforcing such terms and conditions.

**Discussion:** If we assume that the parties cared enough to formally enter into a written contract for design services, and to carefully negotiate the various terms and conditions of that contract, it is also safe to assume that they desire, and have a right to expect, to have those terms and conditions complied with, unless and until they execute an amendment to the contrary. Nevertheless, Courts have sometimes come to the opposite conclusion. To avoid the possibility of having a court rule that you have inadvertently given up the right to enforce some contract terms, consider adding a clause stating that your failure to enforce a clause on one occasion does not bar you from enforcing that clause on future occasions. Owners sometimes include these clauses in their agreements so that their waiver or failure to enforce certain provisions will not be considered a general waiver or a waiver of future breaches. They often fail to make such clauses reciprocal, which suggests that a waiver or failure to strictly enforce all terms of the agreement could be viewed as a broader waiver. There is absolutely no reason why such a clause should not be reciprocal. An example of such a reciprocal clause is as follows:

*No Waiver.* The failure of the Owner or the Design Professional to, in any one instance or more, insist upon performance of any one or more of the provisions or conditions of this Agreement, or to exercise any right or privilege conferred in this Agreement, shall not be construed as thereafter waiving any such provisions, conditions, rights or privileges, but the same shall continue and remain in full force and effect. No provision of this Agreement shall be deemed to have been waived unless such waiver shall be in writing signed by the party against whom such waiver is being sought.

**Conclusion:** It is better to be safe than sorry and to include a clause like the one above which affirmatively states the intent of the parties that a waiver of

a breach of the contract terms by the either party will not be deemed a waiver of the same or other provisions in the future. Note that the above clause is reciprocal and also includes a formal mechanism for establishing actual waivers.

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## Warranties and Guarantees

**Issue:** A Design Professional has a duty to perform its professional services in a manner consistent with the standard of care that other Design Professionals would exercise on similar projects, in the same location and time, under similar circumstances. 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. Professional liability insurance is intended to cover only those damages that arise out of your negligent performance. It does not cover express warranties and guarantees.

**Discussion:** Some clients are including clauses in their form contracts treating Design Professionals more like construction contractors than Design Professionals. 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. But no one is perfect. There will be some errors and omissions on any project. As explained in other sections of this book, the owner is expected to pay for such matters in the absence of negligence on the part of the Architect. That is standard industry practice.

In an owner-generated contract for engineering services, the engineer was to agree not only to the “highest” standard of care but also that the services would be “fit for the purposes intended” by the client. The clause provided the following:

*Warranty. Engineer warrants that the Services shall be performed in accordance with the terms of this Contract and all applicable federal, state and local laws, ordinances and government rules and regulations; and the highest standards of professional engineers performing similar services; and that the product of the Services shall be fit for the purposes*

*intended by Client. If, during performance of the Services or within one (1) year after completion of the Services or termination of this Contract or the applicable Request for Services, any portion of the Services or its performance fails above, Engineer shall promptly correct, at Engineer's own expense, such a nonconformance after receipt of a written notice from Client which shall be given within thirty (30) days. With respect to such corrections, the requirements of the first sentence of this article shall continue for an additional one (1) year period.*

Another contract contained a clause that would create Uniform Commercial Code (UCC) type warranties of the professional services. It provides as follows:

*Design Professional warrants that its Services shall result in a design that will allow for the successful operation of the Facility, including the suitability of the Project for the use for which the Project is intended.*

This creates a warranty of fitness for intended purpose, much like a UCC warranty. This is very dangerous.

Another significant problem with giving such a warranty is that it has the potential to extend the statute of limitations period by which the owner may sue the Design Professional to be the breach of the contract Statute of Limitations period instead of the Negligence Statute of Limitations period.

A tort action based in negligence must typically be filed within two years (varies by state) whereas a breach of contract (e.g. warranty) may typically be filed for up to six years. For this reason, even when the warranty language does not directly impact the extent of the liability, it is still good risk management practice to eliminate such language from contracts.

When you see a provision requiring a “warranty” or a “guarantee” you should immediately flag it as a potential problem clause. Spotting these clauses is not always easy, however, because they may be created by contract language that does not specifically refer to “warranties” and “guarantees.” For example, if you agree to be held to the “highest standard of care” instead of the “generally accepted standard” you may have agreed to a hidden warranty that your services will be the best and will produce a perfect result. If you are sued by the Owner for a “defective design,” the insurance company will generally be required to present an expert witness in your

defense to prove that you achieved the generally practiced standard of care. Assuming this is proven through expert testimony, you may be found to be not liable on the basis of negligence and yet liable for breach of your obligation to meet the “highest standard of care.” If this happens, you may incur an uninsurable loss from the breach of contract.

Other clauses that may create warranties by their subtle (or not so subtle) language include clauses pertaining to compliance with law. It may not be realistic to expect you to identify, interpret, and apply every conceivable law, regulation and ordinance in precisely the manner that the governing agency or some other party believes it should be applied. In the event that the Owner incurs damages because of your incorrect interpretation and application of a law or regulation, you need to be able to defend yourself by presenting expert testimony to show that your interpretation was a reasonable one — even if it turned out to be incorrect. This, once again, is the normal negligence standard. If your interpretation was negligent, your professional policy may cover it. If, on the other hand, your interpretation was wrong, but not negligent, and you have contractually obligated yourself to pay for the Owner’s damages resulting from any noncompliance, your policy may not cover your loss.

A clause addressing cost estimates is yet another that creates a potential warranty situation. You should be careful that you do not agree to incur liability based solely on your cost estimate being incorrect. Agreeing to be responsible for damages resulting from a negligently prepared cost estimate is as far as you can safely go with this, if you hope to have the loss insured. Assuming it to be within the scope of “covered professional services” and not otherwise excluded, your insurance can cover you for a negligently prepared cost estimate. It will not cover you, however, for breaching a contractual commitment to give a perfect cost estimate—in the absence of a demonstration that your cost estimate was also negligent. Once again, you should agree only to exercise reasonable care in preparing any cost estimates.

Another clause that creates potentially uninsurable warranties is one that requires you to certify that the Contractor completed all the work in conformance with the plans and specifications. It is important that you do not agree to such a certification. It can create a representation on which a third party might rely to its detriment and thereby have a cause of action against you. It might also constitute a warranty-type assurance to the Owner that the Contractor has completed every aspect of the work in a satisfactory manner. This may create liability for you in the event that it is later determined that

the Contractor did not perform in complete accordance with all the plans and specifications.

If you must give such a certification, state the facts and any qualifications or exceptions—noting in particular your limited scope or work and if you were not on site for the entire period of construction.

A good example of a clause that explains Standard of Care and eliminates warranties is the following:

*Standard of Care.* Notwithstanding any clause in this Agreement to the contrary, Design Professional expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Design Professional performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances. Nothing in this Agreement shall be construed to establish a fiduciary relationship between the parties.

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. Having warranties in your contract might so confuse the question of liability that it could adversely impact the insurance company's ability to defend a claim and analyze whether any coverage for negligence might be applicable to the matter. With that in mind, a project owner may want to reconsider the wisdom of including warranties and guarantees in its Design Professional



contracts since it may be the clause which causes the insurance company to deny coverage.

### **Performance Guarantees**

On projects such as power generation facilities, it is not uncommon to find contract language requiring performance guarantees concerning how much energy will be generated from the plant and how efficiently it will operate. For wastewater treatment facilities, it is not uncommon to see performance guarantees concerning how efficiently effluent will be handled and what percentage of water will remain in the sludge that exits the plant. These performance guarantees are often coupled with liquidated damage provisions. To protect against potentially unlimited liability for these types of guarantees, the Design Professional should negotiate a reasonable limitation of liability provision that caps any liquidated damages that might be assessed. Performance efficacy insurance products may not be available to you and if they are, they may be too costly.

### **Warranties that may not be as significant**

Some clauses contain warranty language that concern issues which are not insurable in any event, and therefore, may not be of such grave concern as what has been discussed above. An example of such a warranty is the following:

The Architect represents and warrants that (a) it is experienced in the design and renovation of facilities similar to the Project, (b) it is and will remain properly licensed to perform all services required of it under this Agreement and (c) it is financially solvent and able to pay its debts as they mature.

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## **Sample of Supplemental Terms and Conditions**

The following Supplemental Terms and Conditions are offered for your consideration and use as appropriate. I have found them useful on occasion when confronted with a particularly long, oppressive or redundant and confusing Owner contract form. In those instances, it may be more practical (and maybe more acceptable to the Owner) to simply attach these Supplemental Terms and Conditions to the Owner contract form, rather than to go through the entire document line by line striking entire clauses and pages of text. This is especially true where, for instance, there are indemnification obligations or standard of care provisions scattered in a number of place throughout the document. It is also valuable when the Owner contract form was clearly drafted for construction services as opposed to professional design services, or where a generic purchase order (which was created for the purchase of widgets) is utilized by the Owner. The intent of these supplemental terms is not to cover every provision addressed in this Guide, but rather to provide a quick and simple solution to fix a few of the most critical risk transfer clauses. Please note the critical importance of the second sentence of the first paragraph below, stating that in the event of any inconsistency between the terms in the underlying contract document and this supplement, these clauses will take precedence.

### **Addendum to the Agreement Supplemental Terms and Conditions**

The clauses contained in this supplement shall be included in the contract to which it is attached. Where there are differences or inconsistencies between the language in the base contract and this supplement, these clauses shall take precedence.

**Limitation of Liability**

To the fullest extent permitted by law, the total liability, in the aggregate, of Design Professional, Design Professional'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 Design Professional or \$50,000 whichever is greater.

**Waiver of Consequential Damages**

Notwithstanding anything in this Agreement to the Contrary, it is agreed that Design Professional 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 of any system, or other property, or any other indirect, special or consequential damage, whether arising in contract, tort (including negligence), warranty or strict liability.

**Standard of Care**

Notwithstanding any clause in this Agreement to the contrary, Design Professional expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Design Professional performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances. Nothing in this Agreement shall be construed to establish a fiduciary relationship between the parties.

**Indemnification**

Notwithstanding any clause or provision in this Agreement or any other applicable Agreement to the contrary, Design Professional's only obligation with regard to indemnification shall be to indemnify and hold harmless (but not defend) the Client, its officer, directors, employees and agents from and against those damages and costs (including reasonable attorneys fees and cost of defense) that Client is legally obligated to pay as a result of the death or bodily injury to any person or the destruction or damage to any property, to the extent caused by the negligent act, error or omission of the Design Professional or anyone for whom the Design Professional is legally responsible, subject to any limitations of liability contained in this Agreement.

**Time for Performance**

Design Professional recognizes the importance of meeting the schedule that is applicable to its services, and shall perform its services to meet the schedule as expeditiously as is consistent with the exercise of professional skill and care and the orderly progress of the Project. If Design Professional is delayed at any time in the progress of the services by any reason beyond the Design Professional's control, including any act or omission of the Owner, by any act or omission of a Contractor, or by adverse weather or other conditions not reasonably anticipated, the time for completion of the Services shall be extended for a time equal to the time of such delay.

**Ownership and Copyright of Documents**

(1) Client expressly acknowledges and agrees that the documents and data to be provided by Design Professional under the Agreement may contain certain design details, features and concepts from Design Professional'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 Design Professional. Nothing herein shall be construed as a limitation on Design Professional's right to re-use such component design details, features and concepts on other projects, in other contexts or for other clients.

(2) The client acknowledges Design Professional's work product, including electronic files, as instruments of professional service. If the client reuses or makes any modification to Design Professional's designs, documents or work product without the prior written authorization of Design Professional, or uses the documents without retaining Design Professional, the client agrees, to the fullest extent permitted by law, to release Design Professional, its officers, directors, employees and subconsultants from all claims and causes of action arising from such uses, and shall indemnify and hold them harmless from all costs and expenses, including the cost of defense, related to claims and causes of action to the extent such costs and expenses arise from the Client's modification or reuse of the documents.

**Responsibility for Services Related to Cost Estimates being Exceeded**

(1) It is recognized that neither the Design Professional nor its client has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, Design Professional cannot and does not warrant or represent that bids or negotiated prices to construct the part of the project for which it has provided services will not vary from the Owner's budget for the Project or from an estimate of the Cost of the Work or evaluation prepared or agreed to by Design Professional.

(2) Notwithstanding any other term of this Agreement, if Design Professional has any duty to design the Project within a Construction Budget, its duty shall be limited to responsibilities that are reasonably within its direct control, thereby excluding matters that are beyond the control of Design Professional including, but not limited to, unanticipated rises in the cost of labor, materials or equipment, changes in market or negotiating conditions, and errors or omissions in cost estimates prepared by others. Therefore, any such redesign effort required of Design Professional necessary to maintain the project within the Construction Budget that is not due specifically to the negligent act, error, omission, or willful misconduct on the part of Design Professional shall require an increase to the compensation of Design Professional.

### **Compliance with Laws**

Design Professional shall exercise the reasonable standard of care to comply with requirements of all applicable codes, regulations, and current written interpretation thereof published and in effect during the Design Professional's services. In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Design Professional and which result in a substantive change to the construction documents, the Design Professional shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes. The client acknowledges that the requirements of federal, state, and local laws, rules, codes, ordinances, and regulations, including the Americans with Disabilities Act, are subject to various and possible contradictory interpretations. The Design Professional will use reasonable professional efforts and judgment to correctly interpret and apply such requirements. Design Professional, however, cannot and does not warrant or guarantee that the work will comply with the interpretation of such requirements by others.

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## **Use of Copyrighted Contract Documents**

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## Continuing Education Courses

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This book, with the three quizzes set forth below, has been registered with the American Institute of Architects (AIA), Continuing Education System (CES), for continuing education. Each course covers approximately one-third of the book – with a little overlap of the most critical risk allocation clauses.

Zurich North America Insurance is a registered provider with the AIA of continuing education. Individuals employed by design firms that are insured by Zurich Insurance may take these courses, free of charge – complements of Zurich. Please follow the instructions for each course as to the pages of the book to be read for each of the quizzes.

If you have questions concerning the Guide or any of the courses, please send an e-mail with your inquiry to [construction@zurichna.com](mailto:construction@zurichna.com).

### Instructions for Taking Courses

To take one of the courses, just make a photocopy of the pages of the applicable quiz, circle your answers, sign the course certification, and email a PDF copy to the above email address.

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**Course 1 (3 Learning Units)**

- 1) Advertising: The clause in AIA B101 - 2007 that addresses the issue of the design professional's use of photographic or artistic representations of the design of the project in its promotional materials is:  
a) §4.1                      b) §6.1.2                      c) §10.7                      d) §13.5
- 2) Americans with Disabilities Act: Since it is expected that design professionals will design in accordance with applicable laws, insurance will cover claims against design professionals based on any failure to meet a covenant to comply with laws and regulations so long as not due to willful misconduct.  
a) True                      b) False
- 3) As-Built Drawings: A term more accurately reflecting the nature of what so called "as-built" drawings actually are is "record drawings".  
a) True                      b) False
- 4) Certifications: The following contract clauses from the AIA B101 document and the EJCDC E-500 document prohibit the design professional from having to sign a certificate requiring knowledge it doesn't have based on the scope of its services.  
a) B101-2007, §10.4 and EJCDC, E-500, §6.20  
b) B101-2007, §12.5 and EJCDC, E-500, §3.5  
c) B101-2007, §14.3 and EJCDC, E-500, §6.01  
d) B101-2007, §10.4 and EJCDC, E-500, §6.01
- 5) Certifications: When issuing a certificate, which of the following is most insurable?  
a) "Certifies that the Contractor has completed the work in conformance with the plans, specifications, contract documents and applicable laws..."  
b) "Certifies that to the best of the Design Professional's knowledge, intention and belief, the work has progressed to the point indicated..."
- 6) Changes: The Design Professional contract should make clear in the Scope of Services or elsewhere in the Agreement for Professional Services that the Design Professional will be compensated for extra services related to differing site conditions or will have the right to terminate the contract.  
a) True                      b) False

- 7) Changes in Design Professional Services: The contract guide suggests that the following clause concerning changes in professional services is unacceptable and should be rejected by the Design Professional.

Changes and claims: Owner may, at any time, by written notice, make changes in the Services to be provided, including changes in specifications and/or drawings, omit or add work, changes in the schedule, etc. Should the changes made increase or decrease the cost of the Agreement, an equitable adjustment shall be made in accordance with the time and material proposal, including a detailed cost breakdown.

- a) True                      b) False
- 8) Change Orders in Construction: An agreement by the Design Professional to pay construction change order costs exceeding 10% of the budget may create an uninsurable loss for the Design Professional.
- a) True                      b) False
- 9) Choice of Law: Which state's law will be applied to a dispute between parties to a contract?
- a) The law of the state where the project is located.
- b) The law of the state where the contract was signed.
- c) The law of the state where the Design Professional is incorporated.
- d) It depends on several factors, especially including what is specified in the contract.
- 10) Compliance with Laws: When agreeing to comply with laws, which of the following provisions is the most reasonable for a Design Professional to agree to?
- a) Regardless of where services are to be performed, Design Professional warrants that it shall at all times comply with any and all applicable foreign, federal, state, and local government laws, ordinances, statutes, standards, rules, regulations, and guidance, including but not limited to those relating to working hours, working conditions, health and safety, and the environment.
- b) The Design Professional shall indemnify and hold harmless the owner against any claims, damages and losses of any kind caused by, arising out of, or related to failure to comply with any laws, ordinances or regulations.
- c) Design Professional and Owner will use reasonable care to comply with applicable laws in effect at the time the services are performed hereunder, which to the best of their knowledge,

information and belief, apply to their respective obligations under this Agreement.

- 11) Compliance with Law: Since a Design Professional should be expected to conform and design to the requirements of laws and regulations, there is no harm in a Design Professional signing a contract covenanting that it will comply with all laws and regulations.  
a) True                      b) False
- 12) Confidentiality: What article in AIA B101-2007 addresses confidentiality of information?  
a) §1.2.3.4                      b) §1.4.3.2                      c) §2.3.2.1                      d) None of the above
- 13) Confidentiality: There is no harm in a Design Professional agreeing to a confidentiality clause that prevents it from disclosing anything it discovers at a project, including pollution events, since a project owner would never expect a Design Professional to withhold reporting such information when required to do so by law or regulation.  
a) True                      b) False
- 14) Cost Estimates: The following budget estimate clause would result in the Design Professional having to provide free design services to redesign a project even though the reason the budget was being exceeded had nothing to do with negligence of the Design Professional.

The Design Professional shall provide Owner with a Project Budget estimate. . . . If agreement on any of the Project budget estimates cannot be reached between Design Professional and Owner, Design Professional, with the assistance of Owner, shall redesign the Project as necessary to meet the Owner's Project budget requirements at no additional cost to Owner.

- a) True                      b) False
- 15) Cost Estimates: Under AIA B101-2007, §6.7, what is the extent of the architect's responsibility/liability in the event the project must be redesigned due to cost estimates or budget being exceeded?  
a) The Architect's modification of the design will be the extent of its responsibility.  
b) There is no limit to the architect's responsibility.  
c) The Architect's responsibility is limited to actual direct damages incurred by the project Owner as a result of having to redesign the project.  
d) All of the above.

- 16) Damages: Which of these contract documents provides for mutual waiver of consequential damages?
- a) AIA-B101
  - b) EJCDC E-500
  - c) ConsensusDOCS 240
  - d) All of the above
- 17) Dispute Resolution: Arbitration is preferable to litigation because it is faster, less expensive, less adversarial, and produces better results.
- a) True
  - b) False
- 18) Dispute Resolution: Under AIA B101, unless the parties specifically choose litigation as the mechanism for resolving disputes, their disputes will be resolved by arbitration.
- a) True
  - b) False
- 19) Electronic Media: To determine whether errors alleged by an Owner were in the original Contract Documents or only in the retrieved electronic data (possibly including unauthorized changes by the Owner or others) it is important that you maintain a set of final Contract Documents by which you can benchmark the electronic media to determine whether the data contained in that media are the same as in the final work product you provided to the Owner.
- a) True
  - b) False
- 20) Electronic Media: Under the AIA E2002-2008, BIM model users may rely on the accuracy and completeness of a model element consistent only with the content required for a Level of Development (LoD) identified in the model element table.
- a) True
  - b) False
- 21) Electronic Media: What is the AIA BIM protocol exhibit?
- a) E201-2007
  - b) E202-2008
  - c) E301-2008
  - d) None of the above
- 22) Environmental Conditions: You should protect yourself with language that allows you to:
- a) Terminate services if unexpected environmental conditions are uncovered.
  - b) Demand that the owner appropriately remediate the hazardous conditions or pollutants.
  - c) Receive compensation for any additional expenses you incur because of the Pollution.
  - d) All of the above



- 23) Environmental Conditions: Which clauses of the AIA B101 and the EJCDC, E-500 address hazardous materials?
- a) AIA B101, §10.6 and EJCDC §6.09 through 1.01
  - b) AIA B101, §3.4 and EJCDC §4.5
  - c) AIA B101, §6.9 and EJCDC §7.4
  - d) None of the above
- 24) Environmental Conditions: Where there are pre-existing environmental conditions at a site on which the Design Professional will be providing services, it may be advisable to obtain indemnification from the Owner to indemnify you against claims arising out of a release of contaminants related to those pre-existing conditions.
- a) True
  - b) False
- 25) Environmental Conditions: Under the AIA document B101-2007 at §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.
- a) True
  - b) False
- 26) Green Design: Which two AIA B101 clauses address green design issues?
- a) §3.2.3 and §4.2.5
  - b) §3.2.3 and §3.2.5.1
  - c) §3.8 and §5.2
  - d) §6.7 and §9.8
- 27) Green Design: The standard AIA contract documents contain a mutual waiver of liability clause stating that both the project owner and design firm waive consequential damages that they might claim from each other.
- a) True
  - b) False
- 28) Green Design: Design professional liability insurance will cover damages of a design arising out of breach of a contractual guarantee that the design will achieve LEED silver status?
- a) True
  - b) False
- 29) Standard of Care: Which of the following is true concerning agreeing to a contract clause such as the following: "The Design Professional represents that

its services will be performed in a manner consistent with the highest standard of care, diligence and skill exercised by nationally recognized consulting firms”

- a) It may subject the DP to liability for breach of contract even though there was no negligence;
- b) It could potentially create a loss that is excluded from insurance coverage due to the “contractual liability” exclusion of the policy;
- c) It could potentially create a loss that is excluded from insurance coverage due to the express warranty exclusion of the policy;
- d) All of the above.

30) Standard of Care: What clause of the AIA B 101-2007 contract and the EJCDC E-500 (2008) contract document address the standard of care as that which is “ordinarily used” by other design professionals?

- a) AIA B 101 – 2007, section 2.2. and EJCDC E-500, section 6.01.A.
- b) AIA B 101 – 2007, section 5.1. and EJCDC E-500, section 7.05.A.
- c) AIA B 101 – 2007, section 4.2. and EJCDC E-500, section 5.05.B.
- d) AIA B 101 – 2007, section 7.3. and EJCDC E-500, section 9.03.C.

**Continuing Education Certification:** I hereby certify that I have read the sections of the Contract Guide referenced in each quiz question, and that I have personally read and answered each of the questions contained in this Course.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Individual Name printed: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Physical Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP: \_\_\_\_\_

Email Address: \_\_\_\_\_

Phone: \_\_\_\_\_

AIA Member Number (if applicable): \_\_\_\_\_

**Course 2 (3 Learning Units)**

- 1) Indemnification: A problem with the broad form and intermediate form indemnities is that they conflict with the normal Standard of Care, as discussed later in this Manual. So even if you negotiated an appropriate Standard of Care into your contract, you might be required to indemnify your client despite having complied with the specific standard.  
a) True                      b) False
- 2) Indemnification: If an indemnification clause requires a design firm to defend its client against litigation, the duty to defend begins:  
a) When the claim is made by a third party against the indemnified party (example: the client of the design firm makes the claim).  
b) Only if the designer was negligent.  
c) Only after the litigation has been completed and judgment rendered against the design firm.  
d) None of the above.
- 3) Indemnification: No common law duty requires a consultant to defend its client against third party actions. That duty can only arise as a result of a contractual liability created through the indemnification clause of the contract. Since this is a contractual liability, it is excluded from coverage pursuant to the contractual liability exclusion of the errors and omissions policy.  
a) True                      b) False
- 4) Indemnification: A clause stating that the consultant will defend (pay on behalf of) or will indemnify (pay attorneys fees after judgment is rendered) both may create uninsurable liability.  
a) True                      b) False
- 5) Indemnification: Which of the following indemnification provisions is most likely to have damages that may be resolved under a professional liability policy?  
a) "Indemnify, defend and hold harmless the Client for all damages arising out of Design Professional's services."  
b) "Indemnify and hold harmless the Client for all damages to the extent caused by the Design Professional's negligent performance of professional services."  
c) "Indemnify and hold harmless the Client for all damages caused by the design firms acts, errors or negligence."

- 6) Indemnification: Note that if there is a Limitation of Liability clause in your contract, it is helpful to reference it in this Indemnity clause in order to expressly limit the extent of your indemnification responsibility.  
a) True                      b) False
- 7) Indemnification: Contractor indemnification of Design Professional should be required pursuant to the agreement between the Design Professional and its client. Such indemnification by the contractor of the Design Professional is typical of the industry standard form contracts but may be omitted in the owner drafted contracts. To the same extent that the owner is indemnified by the construction contractor, the construction contract should name the Design Professional as an additional indemnitee.  
a) True                      b) False
- 8) Inspection: What phase was dropped from the AIA B141-1997 document when it was revised and replaced by the AIA B101-2007, §3.6.2.1?  
a) "Visit the site at intervals appropriate to the stage of construction."  
b) "To endeavor to guard the Owner against defects and deficiencies in the work."  
c) "Keep the Owner reasonably informed."
- 9) Insurance: Contractual liability for anything other than damages the design professional would have incurred in the absence of language contained in a contract clause is not covered by a professional liability policy.  
a) True                      b) False
- 10) Insurance: What parties are often named as additional insureds on a design professional's professional liability policy?  
a) Contractors                      b) Project owners  
c) Subcontractors                      d) No one
- 11) Insurance: Professional liability insurance provides coverage for the following:  
a) Negligence  
b) Warranties  
c) Contractual liability for a duty to defend that is included in an indemnification clause of a contract.
- 12) Insurance: Which of the following may be excluded from professional liability coverage as a result of the warranties exclusion?  
a) Covenant to comply with all laws and regulations;  
b) Agreement to perform redesign services necessary to get a project back on budget;  
c) Agreement to perform services consistent with the "highest" standard of care exercised by a nationally recognized firm;  
d) All of the above.

- 13) Limitation of Liability: A well drafted limitation of liability (LoL) clause should do which of the following?
- a) Indemnify against third party claims;
  - b) Limit liability to the amount of insurance proceeds available to the design professional;
  - c) Limit liability only to the extent that damages are not caused by the design firm's negligence;
  - d) Limit liability for damages arising out of all causes of action including negligence, breach of contract, warranties and strict liability.
- 14) Limitation of Liability: It is a good idea to draft a single contract clause to address both limitation of liability and indemnification.
- a) True
  - b) False
- 15) Limitation of Liability: If you are doing a contract for a small fee, it may be wise to make the LoL the amount of the fee or a specified dollar amount, whichever is *greater*.
- a) True
  - b) False
- 16) Notice Requirements: If time periods are established in the contract for providing notice to an owner of a change or a claim, the failure of the design professional to provide written notice by the specified time will generally be excused by a court if the project owner cannot demonstrate that it was harmed by the lack of notice or late notice.
- a) True
  - b) False
- 17) Owner Responsibilities: What section of the AIA B 101-2007 document sets forth numerous owner requirements?
- a) 3.2
  - b) 5.4
  - c) 6.7
  - d) 9.6
- 18) Ownership of Documents: Under ConsensusDOCS 240, who owns the instruments of service in the event that the parties do not check the box indicating who will own them?
- a) Project owner
  - b) Contractor
  - c) Design Professional
- 19) Ownership of Documents: What clause in AIA B101-2007 requires the project owner to indemnify the architect against damages arising out of the owner's re-use of the documents on a different project without the participation of the architect?
- a) There is no such clause
  - b) 7.1
  - c) 7.2
  - d) 7.3.1

- 20) Payment: How long does a project owner have to pay the design professional's invoice?
- a) 10 days
  - b) 30 days
  - c) 60 days
  - d) Whatever the contract says
- 21) Payment: Under AIA B101-2007, if the owner fails to make timely payment to the architect, this may be deemed a basis for the architect to terminate the contract or otherwise suspend its services until paid.
- a) True
  - b) False
- 22) Permits: Why should the design professional (DP) be wary of promising to obtain all permits necessary for a project to be designed and constructed?
- a) The DP may not be in the best position to obtain certain permits that are typically obtained by the project owner or the contractor.
  - b) The could potentially create uninsurable risks since delays caused by government in issuing permits that are not due to design professional negligence are not insurable.
  - c) Obtaining certain environmental approvals and permits might potentially subject the DP to environmental liability if a pollution event later occurs.
  - d) All of the above.
- 23) The following clause allocates reasonable and appropriate risk to the design professional.
- “Design Professional shall obtain all necessary easements, rights of way, rights of entry, permits, licenses, and environmental approvals needed for design and construction of the project.”
- a) Reasonable
  - b) Unreasonable
- 24) Standard of Care: Which of the following is true concerning agreeing to a contract clause such as the following: “The Design Professional represents that its services will be performed in a manner consistent with the highest standard of care, diligence and skill exercised by nationally recognized consulting firms”
- a) It may subject the DP to liability for breach of contract even though there was no negligence;
  - b) It could potentially create a loss that is excluded from insurance coverage due to the “contractual liability” exclusion of the policy;
  - c) It could potentially create a loss that is excluded from insurance coverage due to the express warranty exclusion of the policy.
  - d) All of the above.

- 25) Standard of Care: What clause of the AIA B 101-2007 contract and the EJCDC E-500 (2008) contract document address the standard of care as that which is “ordinarily used” by other design professionals?
- a) AIA B 101 – 2007, section 2.2. and EJCDC E-500, section 6.01.A.
  - b) AIA B 101 – 2007, section 5.1. and EJCDC E-500, section 7.05.A.
  - c) AIA B 101 – 2007, section 4.2. and EJCDC E-500, section 5.05.B.
  - d) AIA B 101 – 2007, section 7.3. and EJCDC E-500, section 9.03.C.

**Continuing Education Certification:** I hereby certify that I have read the sections of the Contract Guide referenced in each quiz question, and that I have personally read and answered each of the questions contained in this Course.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Individual Name printed: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Physical Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP: \_\_\_\_\_

Email Address: \_\_\_\_\_

Phone: \_\_\_\_\_

AIA Member Number (if applicable): \_\_\_\_\_





**Course 3 (3 Learning Units)**

- 1) Redesign Obligations: Under AIA B101-2007, the architect can be required to redesign a project at no additional fee to the owner if the original design would result in the cost exceeding the owner's budget.  
a) True                      b) False
- 2) Redesign Obligations: Under both AIA B101 and ConsensusDOCS 240, the design professional can only be required to redesign a project due to cost overruns if it violated the standard of care, i.e., the overrun occurred due to the negligence of the design professional.  
a) True                      b) False
- 3) Rejection of Work: Under AIA B101 - 2007, the architect has authority only to recommend that the contractor's work be rejected. It does not have authority itself to reject non-conforming work.  
a) True                      b) False
- 4) Reliance on Information Provided by Others: According to AIA B101, section 3.1.2, which of the following is true concerning the architect's right to rely upon information provided by its client?  
a) Architect is entitled to rely on the information.  
b) Architect is not entitled to rely on the information.  
c) This clause does not address the question of reliance.
- 5) Schedule: Which Article in the AIA B 101 – 2007 states that the architect shall perform its services as expeditiously as is consistent with the professional skill and care?  
a) 10.3                      b) 3.6.4.1                      c) 3.1.2                      d) 2.2.
- 6) Schedule: Which of the following is the reasonable and appropriate amount of time for a design firm to respond to a contractor's request for information (RFI)?  
a) 1 day                      b) 2 days                      c) 10 days  
d) No specific number of days is the appropriate amount of time for every RFI. It will all depend upon the facts and circumstances.
- 7) Scope of Services: One extremely important point for managing the risk in a contract is to draft a "scope of services" clause that is very broad and open enough to allow it to be interpreted so as to permit the amount of work to be assigned to the design professional to increase without need of a change order or the issuance of an additional services document.  
a) True                      b) False

- 8) Severability: What clause of a contract may be useful for providing that in the event one provision of the contract is deemed by a court to be void or unenforceable, the balance of the contract will still remain in effect?
  - a) Choice of law
  - b) Scope of Services
  - c) Severability
  - d) Indemnification
- 9) Shop Drawings: Pursuant to AIA B 101-2007, section 3.6.4.2., the architect may both review and “approve” a contractor’s shop drawings.”
  - a) True
  - b) False
- 10) Shop Drawings: What clause of AIA B101- 2007 addresses the design professional’s responsibility with regard to reviewing shop drawings when the contractor is providing design work as part of its own scope of services?
  - a) 3.6.4.3
  - b) 3.6.4.4
  - c) 4.2.5
  - d) 6.2.
- 11) Site Safety. Overall Site safety is primarily the responsibility of which of the following:
  - a) Contractor
  - b) Design Professional
  - c) Project Owner
- 12) Site Safety. The Contract Guide recommends that if ConsensusDOCS 240 is used for the project, the Design Professional should strike from the contract the clause that states that if the A/E has knowledge of safety violations it “shall give prompt written notice to the Owner.”
  - a) True
  - b) False
- 13) Standard of Care. Which of the following is true concerning agreeing to a contract clause such as the following: “The Design Professional represents that its services will be performed in a manner consistent with the highest standard of care, diligence and skill exercised by nationally recognized consulting firms”
  - a) It may subject the DP to liability for breach of contract even though there was no negligence;
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  - c) AIA B 101 – 2007, section 4.2. and EJCDC E-500, section 5.05.B.
  - d) AIA B 101 – 2007, section 7.3 and EJCDC E-500, section 9.03.C.
- 15) Survival. The purpose of a “survival” clause in the contract is to identify aspects of a contract that will survive the completion of the services, such as express representations, indemnification, and limitation of liability.
- a) True
  - b) False
- 16) Suspension of Services. What article of AIA B 101 – 2007 addresses the right of the architect to suspend its services in the event that the client fails to make timely payments?
- a) 5.4
  - b) 6.3
  - c) 8.1
  - d) 9.1
- 17) Termination. When a client terminates a design professional for convenience the design professional will always be automatically entitled to “termination expenses” in addition to any compensation that is due, regardless of whether this issue is addressed in the contract.
- a) True
  - b) False
- 18) Third Party Beneficiaries.
- If the parties to a contract do not intend there to be any third party beneficiary rights, it may be prudent to include a clause expressly disavowing third party beneficiary rights, such as the clause at Article 10.5 of the AIA B 101 – 2007.
- a) True
  - b) False
- 19) Time Limitations on Actions. What is a key difference between a “statute of repose” and a “statute of limitations”?
- a) The statute of repose typically establishes a specific number of years following project completion after which a suit may not be filed, whereas a statute of limitations may permit a longer period of time for filing suit depending upon when a plaintiff discovers its injury.
  - b) The statute of limitations will always result in a shorter period of time for filing suit than would otherwise be permitted by the statute of limitations.
  - c) The statute of repose is more rigidly enforced by courts than is the statute of limitations
  - d) There is no difference between the two statutes.

- 20) Underground utilities. Design professionals have no risk and responsibility with regard to underground utilities.  
a) True                      b) False
- 21) Warranties. Any and all warranties contained in design professional contract should be negotiated out of the contract.  
a) True                      b) False
- 22) Warranties. By agreeing to performance guarantees or warranties that professional services will achieve specified results, the Design Professional may incur liability for damages that are not the result of negligence, and therefore have an uninsurable loss.  
a) True                      b) False

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Physical Address: \_\_\_\_\_

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Email Address: \_\_\_\_\_

Phone: \_\_\_\_\_

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