



Risk Control Guidelines | Design Professional Series

Contract Clauses for the
Design Professional

Risk management and avoidance should be the concern of every design professional. Each project presents a varying degree of risk that threatens the design professional's successful performance of services. A key to minimizing and controlling risk is the design professional's contract. A con-

tract, while no guarantee that claims will be avoided, can greatly control and reduce the design professional's liability exposure. Therefore, careful attention and consideration should be afforded a contract. Following are a few contract clauses that may warrant special consideration.

Standard of Care

ANALYSIS AND COMMENTS

The standard of care to which a Design Professional will be held in the performance of services will vary from project to project and locale to locale. The services a professional provides will be measured against the services other Design Professionals would provide in the same locale under similar circumstances. Since there is no definitive measure, Design Professionals will often agree to accept a higher standard of care that would not normally exist, or they cannot meet. Similarly, if the Design Professional guarantees that its services will meet even a minimum standard of care, the Design Professional is creating potential actions of breach of contract and warranty in addition to negligence claims. A design professional must also be aware that industry standards or owner requirements may exceed the standard of care, thereby necessitating contract language that minimizes risk exposure. Limit liability exposure by not agreeing to a specific standard of care, or guaranteeing to meet the base standard of care.

CONTRACT CLAUSES TO CONSIDER

- "Design Professional will *endeavor* to provide services in a manner consistent with the level of care and skill ordinarily exercised by other Design Professionals in the same locale."
- "Design Professional will *strive* to perform its services in accord with a manner consistent with the level of care and skill ordinarily exercised by other Design Professionals in the same locale."

CONTRACT CLAUSES TO AVOID

- "Design Professional *warrants* it will provide its services in accord with a manner consistent with the level of care and skill ordinarily exercised by other Design Professionals in the same locale."
- "Design Professional's services *will be provided* in a manner consistent with the level of care and skill ordinarily exercised by other Design Professionals in the same locale."
- "Design Professional *warrants* that it has the skills and knowledge necessary to design this complex, expensive and complicated project."
- "Design Professional *will perform* its services in the highest standard of care."



Observation of Work

ANALYSIS AND COMMENTS

Whether providing periodic or full-time construction administration services, a Design Professional's liability will be dependent upon the contract language governing the performance of those services. A provision that contains "observation" as the standard of care does not create an obligation upon the Design Professional to conduct detailed reviews of projects to ferret out defects or deficiencies with work. To the contrary, contract provisions that call for "inspection of work," may be legally interpreted as an obligation of the Design Professional to perform in-depth reviews of the project work, and "certifying" the work as being properly performed. Failure to find a defect could have disastrous claim implications for the Design Professional. Similarly, a Design Professional that is willing to "ensure" that the work is being performed in accord with the plans and specifications is not only assuming a responsibility of the Contractor but also increasing its liability exposure.

CONTRACT CLAUSES TO CONSIDER

- "Design Professional *will periodically* visit the site at intervals the Design Professional deems appropriate *to become generally familiar* with the progress or to keep the Owner advised of work."
- "Design Professional *will observe* the work of the Contractor to endeavor *to determine if* the work is in conformance with the project documents and to guard against defects and deficiencies in the work."

CONTRACT CLAUSES TO AVOID

- "Design Professional *will inspect* the work for defects, deficiencies and conformance with the plans and specifications."
- "Design Professional *will observe* the work to ensure that it is being performed in accord with the project plans and specifications."

Project Budget Estimate

ANALYSIS AND COMMENTS

Owners often view the project budget set by the Design Professional as being the guaranteed maximum price of the project. Owners do not realize that the Design Professional does not have control over the costs of material and equipment, as well as Contractors' bids. When bids begin to exceed the budget, the Design Professional is looked at as having erred. Contractual recognition and clear communication of the purpose of the budget is necessary to control risk.

CONTRACT CLAUSES TO CONSIDER

- "*Based upon information and project criteria provided by the Owner*, and in cooperation with the Owner, the Design Professional will endeavor to develop an estimated budget of contract costs which is recognized as an attempt to define the cost of the project and does not represent the actual amount of bids that may be submitted."
- "The construction budget developed by the Design Professional represents the *Design Professional's best judgment* of the project costs and the Owner recognizes that costs of material and equipment and the means by which Contractors develop their bids may affect same."

CONTRACT CLAUSES TO AVOID

- "Design Professional *warrants that the costs* of the project are set forth in the final project budget developed by the Design Professional."
- "The construction budget prepared by the Design Professional represents *the project's guaranteed maximum price*."

Plans and Specifications

ANALYSIS AND COMMENTS

Regardless of the skill of the Design Professional, or the thoroughness of the Design Professional's review of the design documents before bidding, conflicts, discrepancies and omissions will be discovered during construction. To minimize and control risk exposure, the Design Professional cannot warrant the completeness or accuracy of its design documents. Additionally, the Design Professional should seek to transfer some of the inherent risks of design to the Contractor by having clauses such as the "Contract Clauses to Consider," at right, incorporated into the Contractor's contract. The intent of each design document should be clearly communicated by the design professional to avoid inappropriate acts from being undertaken such as the bidding or issuance of a notice to proceed when design documents have not been finalized.

CONTRACT CLAUSES TO CONSIDER

- "The *more specific* detail will prevail."
- "In *case of conflict* between plans and specifications, the specifications will govern."
- Include in Contractor's contract — "*Contractor warrants* it has reviewed the plans and specifications prior to bid and contracting and has notified the Design Professional of any conflicts in the documents."
- "Design Professional *does not warrant*, and Owner acknowledges, that despite the completeness of the design documents, changes and additions may be required that may increase the cost of the project."
- "Construction work *cannot commence* until plans and specifications are released for construction by design professional."

CONTRACT CLAUSES TO AVOID

- "*Design Professional warrants* the accuracy of its design documents."
- "*Owner and Contractor may rely on* the design documents as a complete representation of the project and work to be performed."

Arbitration/Litigation/Mediation

ANALYSIS AND COMMENTS

Arbitration v. Litigation. Design Professionals need to carefully consider the pros and cons of both procedures. More importantly, the Design Professional should seek to establish some alternative dispute resolution procedure, which can be implemented before having to undertake an adversarial role. This might take the form of on-site mediation or mediation/arbitration process. On-site resolution will avoid adversarial entrenchment, and will permit the project to be completed more harmoniously and as a team. If the Design Professional can be brought into an action between the Owner and Contractor, separate proceedings in separate forums regarding the same issue can be avoided. However, a contract that allows Design Professionals to be included in other legal actions also eliminates a distinct disincentive to start a separate action against the Design Professional.

CONTRACT CLAUSES TO CONSIDER

- "Any and all claims between the Owner and Design Professional shall be submitted to binding arbitration after the dispute is submitted to mediation."
- "Design Professional shall not be joined in any proceeding as a necessary party involving the Contractor."

CONTRACT CLAUSES TO AVOID

- "Disputes shall be settled by a dispute committee established by the Owner."
- "Design Professional shall be joined as a necessary party in any action involving the Contractor."

Defective Contract Documents

ANALYSIS AND COMMENTS

It is the rare project that does not realize defects in the design documents. Errors or omissions are discovered in most contract design documents. Accordingly, the Design Professional should not be penalized for not being perfect. Since defective contract documents may entitle the Contractor to compensatory damages for the delays, extras, changes, and possibly relieve the Contractor from performance, clauses controlling the Contractor's recovery should be included in the Contractor's contract. Owners should be willing to insert same since the Owner may be considered to have materially breached an implied warranty that the contract documents were suitable for construction. The Owner must be aware that its obligation to furnish a Contractor non-defective contract documents often exceeds the responsibility of the Design Professional to provide similarly accurate documents to it. Within its contract with the Owner, the Design Professional should avoid clauses that make it responsible for change order costs that exceed a percentage of the budget for change orders that the Owner determines are caused by errors and omissions. If the Owner insists on such a provision, a clear process to challenge the owner's determination should be included.

CONTRACT CLAUSES TO CONSIDER

- "Contractor shall review the contract documents for accuracy and conformity and notify Owner of any defects."
- "Contractor shall review the documents for conformity with applicable laws and notify Owner of any violation of same."
- "Design Professional shall not be responsible for any costs arising from change orders issued on the project."
- "Design Professional *shall not be responsible for any costs arising from change orders* issued on the project, but will perform reasonable redesign work at no cost if change arises from an error or omission."

CONTRACT CLAUSES TO AVOID

- "Design Professional shall pay to Owner the cost of any change orders when the aggregate sum of the change orders caused by errors or omissions exceeds ___% of the value of the contractor's contract."
- "Design Professional shall redesign the project at no cost when the redesign is required due to errors or omissions."
- "Owner shall retain ___% of Design Professional's fee to pay for change orders arising from design errors or omissions."

Limited Liability

ANALYSIS AND COMMENTS

Limited liability clauses are accepted by most States so long as the limitation is not too low or unreasonable. A clause that attempts to limit a Design Professional's liability to a sum that is not reflective of the project cost or risk will be deemed unenforceable on public policy violation grounds. However, a reasonable limitation will generally be upheld. To determine what is reasonable, counsel from the State in which the project is located should review the provision.

CONTRACT CLAUSES TO CONSIDER

- "Owner recognizes that there are inherent risks in construction projects and thereby *agrees to limit* the Design Professional's liability on this project to \$_____ for claims and damages related to the negligent acts of the Design Professional."
- "Design Professional's liability for claims arising from this Agreement related to the negligent acts of the Design Professional *shall be limited to its design fee.*"

CONTRACT CLAUSES TO AVOID

- "Design Professional *shall be liable for any and all claims* arising from this Agreement."
- "Design Professional's liability *shall not be limited to* the fee paid to Design Professional and/or its insurance coverage."

Ownership of Documents

ANALYSIS AND COMMENTS

Ownership of design documents traditionally rests with the Design Professional. Not only is it recognition of the Design Professional's intellectual property, but also a control over the unauthorized use of the drawings by the Owner or other parties. If ownership rights are transferred to the Owner, the Design Professional should retain rights to control the Owner's use of the design documents. The Owner should also offer indemnification to the Design Professional for the Owner's use of the design documents.

CONTRACT CLAUSES TO CONSIDER

- "Design Professional shall retain ownership in the design documents produced."
- "Owner shall not use the design documents for any purpose except the construction of the project without the written consent of the Design Professional."

CONTRACT CLAUSES TO AVOID

- "Owner may use the design documents as it sees fit after Design Professional is paid in full for the production of the design documents."
- "Design Professional waives any right to claim ownership of the design documents in a default situation."

Termination and Right to Cure

ANALYSIS AND COMMENTS

"Termination for Convenience" and "Termination for Default" clauses are totally different. The convenience clause permits the Owner to discontinue work without the Design Professional being in default. The Termination for Convenience clause should specify the procedures by which the contract may be terminated as well as the compensation that will be paid to the Design Professional. Loss of profit and overhead should be included as a payable cost in addition to design fees owed. Although the termination for convenience clause suggests it can be exercised with impunity by the Owner, court decisions have indicated it must be exercised in good faith. The Termination for Default provision should specify (1) the reasons a default can be alleged; (2) the procedure for implementing terminations; and (3) the scope of any cure or corrective procedure that is permitted. A cure period should exist to allow the Design Professional to commence to cure the default and control its potential damage exposure.

CONTRACT CLAUSES TO CONSIDER

- "Owner shall have the right to terminate the Design Professional for failure to . . . after the Design Professional has been provided with seven (7) days to begin to correct the failure identified by the Owner"
- "Owner may terminate Design Professional for its convenience but shall pay the Design Professional for . . ."

CONTRACT CLAUSES TO AVOID

- "Owner shall have the right to terminate Design Professional for failure to . . . upon written notice to Design Professional."
- "Owner shall have the right to terminate Design Professional for Owner's convenience."

Control of Work

ANALYSIS AND COMMENTS

It can be argued that the design documents set forth the means, methods and techniques for performing the work. In order to avoid the liability created by this view of the design documents, the Design Professional's contract, as well as the Contractor's, should clearly state that the Contractor is responsible for establishing means and methods. Similarly, the Design Professional's risk exposure will be controlled if the coordination and scheduling of work rests with the Contractor. If the Owner insists on the Design Professional preparing and maintaining the project schedule, the clause establishing the duty should be qualified by stating that the schedule and updates developed by the Design Professional shall be based upon scheduling information provided by the Contractor.

CONTRACT CLAUSES TO CONSIDER

- "Design Professional shall not be responsible for Contractor's means and methods for the performance of work, and if specific means and methods for the performance of work are set forth in the design documents, Contractor shall be responsible to review the means and methods and determine if the performance of same is feasible, appropriate and complete."
- "Design Professional is not responsible for directing, coordinating or scheduling the work of the Contractor."

CONTRACT CLAUSES TO AVOID

- "Design Professional shall direct, coordinate and schedule the work of the Contractor."
- "The Contractor shall perform the work in accord with the means, methods, techniques and sequences set forth in the contract documents."

Safety

ANALYSIS AND COMMENTS

Safety is a major concern of any project, and a major liability risk. The responsibility for site safety should be delegated to the party that has the greatest ability to control safety, the Contractor. The Design Professional must be careful not to directly assume that responsibility, or a portion thereof, by agreeing contractually to review or approve a safety plan as a project submittal. The plan should be simply received as project correspondence. It must be noted, however, that even without direct contract responsibility, State law often will create a duty of the Design Professional. Consultation with counsel from the State in which a project is located should occur to determine the statutory duty owed.

CONTRACT CLAUSES TO CONSIDER

- "Design Professional is not responsible for site safety."
- "Design Professional's presence on site shall not give rise to any responsibility for identifying safety concerns or give rise to any responsibility for safety."

CONTRACT CLAUSES TO AVOID

- "Design Professional shall review for appropriateness the safety plan prepared by the Contractor."
- "Design Professional will advise the Contractor of safety concerns as part of the project safety teams."

Legal Fees

ANALYSIS AND COMMENTS

Traditionally, legal fees are a non-recoverable cost unless the contract or a statute specifically provides for recovery. Owner should consider the inclusion of such a provision (the right to recover legal fees) in the contract. The potential for having to pay another party's legal fees, if you are proven to be wrong or having acted in bad faith, will typically promote the settlement process. At the time a contract is executed neither party is planning a dispute, and will therefore normally include a "never to be used legal fees" clause.

CONTRACT CLAUSES TO CONSIDER

- "All legal fees shall be paid by. . . the prevailing party in a dispute situation."
- "Reasonable legal fees may be recovered by the Design Professional if it prevails in a dispute situation."

CONTRACT CLAUSES TO AVOID

- "Reasonable legal fees may be recovered by the Owner if it prevails in a dispute situation."
- "Design Professional waives its rights to collect legal fees and cost of litigation against the Owner."

Changed Site Conditions

ANALYSIS AND

COMMENTS

A "Changed Conditions" claim is not an automatic right that the Contractor possesses. The Contractor's contract must expressly provide for the claim. The Design Professional, in order to control its risks, must impress upon the Owner to include clauses that transfer risk to the Contractor and control the Contractor's potential recovery. In addition to clauses in the Contractor's contract, the Design Professional should ensure control of its risk.

CONTRACT CLAUSES TO CONSIDER

- Expressed Recognition of Claim placed in Contractor's contract - "Contract sum will be equitably adjusted for conditions which are (1) at variance or differ materially from those indicated on the plans, or (2) differ materially from those generally encountered."
- Include in Contractor's contract - "Contractor warrants it has visited the site prior to entering this contract."
- Include in Contractor's contract - "Owner/Design Professional does not warrant or guarantee the accuracy of any information concerning subsurface conditions."
- Include in Contractor's contract - "Contractor agrees to verify site conditions and not to use any information provided by Owner without verification or to make a claim arising from the variance of same with the actual conditions."
- "Design Professional does not warrant to Owner the accuracy of any information concerning subsurface or other physical conditions of the site."

CONTRACT CLAUSES TO AVOID

- "Design Professional warrants and guarantees the accuracy of any information contained in its design documents."
- "Owner and/or Contractor can rely on the information contained in the design documents as being accurate and reflective of the actual conditions at site."

Indemnification and Hold Harmless

ANALYSIS AND COMMENTS

Indemnification and hold harmless provisions are arguably the most complex contract provisions to understand. Since they transfer legal and financial responsibility to the Design Professional from the project Owner, they are also argued to be the most important. The scope of the legal and financial exposure transferred to the Design Professional by an indemnification and hold harmless provision is dependent upon the language of the provision. Most State statutes hold the Design Professional responsible for its negligent acts. The contract language should, therefore, limit the scope of the Design Professional's indemnification of the Owner to negligent acts. Language, which does not refer to or contain the limitation of "negligence," will increase the scope of the Design Professional's liability.

CONTRACT CLAUSES TO CONSIDER

- "Design Professional will defend and indemnify the Owner, its representatives, employees and agents to *the extent of* the Design Professional's negligent acts."
- "Design Professional will indemnify, hold harmless and defend Owner against any claims directly arising from the Design Professional's negligent acts."

CONTRACT CLAUSES TO AVOID

- "Design Professional will defend and indemnify the Owner, its representatives, employees and agents *arising from* the Design Professional's negligent acts."
- "Design Professional will defend and indemnify the Owner, its representatives, employees and agents from claims arising from the Design Professional's performance of services."
- "Design Professional will defend and indemnify the Owner, its representatives, employees and agents from claims arising from the Design Professional's performance of services related to this highly complex project."

Waiver of Consequential Damages

ANALYSIS AND COMMENTS

Consequential damages do not flow directly from the actions of an offending party. These damages are usually unforeseen and can be substantial. For example, a design error requires additional work to be performed by the Contractor. In addition to the actual additional construction costs represented by the error, a loss of business claim is filed by nearby businesses because the Contractor had to keep an adjacent street closed longer than anticipated. Depending upon the duration and the businesses affected, the consequential damages could be substantially more than the construction cost extra. Avoid contracts without a waiver provision or a waiver running solely back to the Owner.

CONTRACT CLAUSES TO CONSIDER

- "Owner and Design Professional mutually agree to waive all claims of consequential damages arising from disputes, claims, or other matters relating to this agreement."

CONTRACT CLAUSES TO AVOID

- "Design Professional agrees to waive consequential damages from the Owner for claims arising from this agreement."
- "Owner and Design Professional do not waive any or all claims of consequential damages."

NOTES: _____





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