

The Design Professional Roundtable

Bad Contracts = Bad Claims: How to Minimize Liability in a Litigious Environment

Presented by:
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Design Professional Roundtable
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Standard of Care

- The Consultant's services shall be performed in a manner consistent with ***that degree of skill and care ordinarily exercised by practicing design professionals performing similar services in the same locality, at the same site and under the same or similar circumstances and conditions.*** The Consultant makes no other warranties, express or implied, with respect to the services rendered hereunder.
 - Negligence-based standard of care.
 - Holds Consultant to standard which is consistent with insurance coverage.

Standard of Care, cont.

Unacceptable language:

- The Consultant's services shall be performed in a manner consistent with the ***highest*** degree of skill and care exercised by ***first class*** design professionals. The Consultant ***warrants*** that the design shall be complete and unambiguous and that the project, when completed in accordance with the design, shall be fit for its intended purpose.

Design Professional Indemnity

- To the fullest extent permitted by law, the Consultant agrees to ***indemnify and hold the Owner harmless*** from and against any liabilities, claims, damages and costs (including ***reasonable*** attorneys' fees) ***to the extent caused by the negligence*** of the Consultant in the performance of services under this Agreement.
 - No defense obligation
 - Negligence-based
 - Responsible only for your own negligence
 - Consistent with professional liability insurance coverage
 - Need to flow down to sub-consultants

Design Professional Indemnity, cont.

Unacceptable language:

- The Consultant agrees to ***defend***, indemnify and hold the Owner harmless from and against any liabilities, claims, damages and costs (including reasonable attorneys' fees) ***arising out of or resulting from*** the Project, except to the extent caused by the ***Owner's sole negligence***.

Waiver of Subrogation

The Consultant and Owner waive all rights against each other and against the contractors, consultants and employees of the other for damages to the extent that the damages sustained by either party are covered by insurance.

- Allocates risk to insurance to the extent available.
- Especially pertinent to property damage claims.
- Benefit tends to flow downstream.
- Rights are reciprocal.

Unacceptable language:

- The *Consultant* waives all rights against the Owner for damages to the extent that the damages sustained by the Consultant is covered by insurance.

Statute of Limitations

- Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of **Substantial Completion** for acts or failures to act occurring prior to Substantial Completion or the date of **issuance of the final Certificate for Payment** for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Consultant's services are substantially completed.
 - Places accrual of Owner claims at a fixed point in time (date of Substantial Completion or issuance of final Certificate for Payment).
 - Essentially converts statute of limitations into a statute of repose.

Statute of Limitations, cont.

Unacceptable language:

- Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run ***upon discovery of the harm complained of.***

Limitation of Liability

To the fullest extent permitted by law, *the total liability in the aggregate*, of Consultant and Consultant's officers, directors, employees, agents, and independent professional associates, and any of them, to Owner and any one claiming by, through or under Owner, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to Consultant's services, the project or this Agreement, from any cause or causes whatsoever, including but not limited to, the negligence, errors, omissions, strict liability, breach of contract, misrepresentation, or breach of warranty of Consultant or Consultant's officers, directors, employees, agents or independent professional associates, or any of them, shall not exceed the ***total compensation received by Consultant*** under this Agreement, or the total amount of \$_____, whichever is greater.

Limitation of Liability, cont.

- Very difficult to negotiate into Owner/ Consultant Agreement.
- Applies to any cause of action.
- Aggregate limit for all owner claims.
- Does not limit liability for claims by third parties.
- Is limitation amount sufficient? Limit to amount of fees?
Available insurance proceeds?
- Enforceability of provision

Ownership of Documents

- Drawings, specifications, and all other documents and information produced in connection with the project as instruments of service, regardless of form, shall remain the sole and exclusive **property of Consultant** whether the project for which they are made is executed or not. Owner shall not have or acquire any title to or ownership rights in any of the documents or information prepared by Consultant. **Upon payment in full hereunder**, Owner shall be permitted to retain printed copies of such documents or information for information and reference only in connection with Owner's use and occupancy of the project. **The documents and/or information shall not be used or reused by Owner on other projects, for additions to this project, for completion of this project by others, or for any other purpose for which the documents were not specifically prepared, provided Consultant is not in default under this Agreement, except with the express written consent of Consultant and with appropriate compensation to Consultant. Owner shall defend, indemnify and hold the Consultant harmless from and against any claims, losses, liabilities and damages arising out of or resulting from the unauthorized use of the documents.**

Ownership of Documents, cont.

- If Consultant terminated for convenience, Owner not entitled to use Documents.
- Do not permit use of documents on other projects or, absent default, use on this project by others.
- Protects Consultant from claims arising out of the unauthorized use or reuse of its documents.
- Alleviates concerns of risk due to use of documents without Consultant's involvement.

Ownership of Documents, cont.

Unacceptable language:

- Owner ***shall be entitled*** to use the documents ***for additions to this project or for completion of this project by others.***
- ***Nothing in the foregoing shall be deemed to relieve the Consultant from any liability for deficiencies in the documents other than deficiencies which may result from changes made to the documents by the Owner or its consultants without the review and approval of the Consultant.***

Evaluation of Budget

- Evaluations of the Owner's budget for the Project, the preliminary estimate of the Cost of the Work and the updated estimates of the Cost of the Work prepared by the Consultant represent the Consultant's judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Consultant nor the Owner 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, the Consultant ***cannot and does not warrant*** or represent that bids or negotiated prices will not vary from the Owner's budget for the Project, or from any estimate of the Cost of the Work evaluation prepared or agreed to by the Consultant.

Evaluation of Budget, cont.

- If Owner has option to request Consultant to redesign in case bids exceed budget, should limit Consultant's exposure to redesign effort. However, financial burden of redesign effort not likely covered by insurance.
- Highlights importance of cost estimating; consider outside consultants if necessary.
- Need flow-down provisions in sub-consultant agreements.

Unacceptable language:

- Any language warranting or affirmatively representing that project can be done for a certain sum.

Waiver of Consequential Damages

The Consultant and the Owner waive consequential damages, including but not limited to damages for loss of profits, loss of revenues and loss of business opportunities, for claims, disputes or other matters in question arising out of or relating to this Agreement.

- Mutual waiver.
- Types of damages include loss of use, loss of profits or anticipated profits, diminution in property value, etc.
- Appropriate for certain engagements such as studies, peer reviews, speculative ventures, projects where owner will heavily rely on stream of commerce (e.g., hotels, restaurants, casinos).

Unacceptable language:

- Non-mutual waivers.

Confidentiality

Consultant agrees it will not convey to others any proprietary non-public information, knowledge, data or property relating to the business or affairs of the Owner or of any of its affiliates, which is in any way obtained by Consultant during its association with the Owner. Consultant further agrees to use its best efforts to limit, to a “need to know” basis, access by its employees to all information referred to above. Any concepts, materials, or procedures of Consultant deemed by Consultant to be proprietary and so explained to Owner shall not be released by Owner or its employees to any other parties under any circumstances. ***This section shall not apply to information*** in whatever form that comes into the ***public domain***, nor shall it restrict the Consultant from giving notices ***required by law or complying with an order*** to provide information or data when such order is issued by a court, administrative agency or other authority with proper jurisdiction, ***or if it is reasonably necessary for the Consultant to defend itself from any suit or claim.***

Conclusion

Questions

Donovan Hatem LLP
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