Berkley Design Professional
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Better By Design®

Contract Review Checklist

Risk management begins with your contract. In a perfect world, you would always use your firm's standard professional services agreement or an industry-standard professional association form. However, design professional firms are frequently presented with a client-drafted agreement that may be unbalanced and unfairly seek to shift inordinate risk to the design firm. Such contracts can also be unclear about the scope of services and the responsibilities for the project participants: owner/client, design professional and contractor.

Berkley Design Professional offers a comprehensive Contract Review Guide to help you draft, review and negotiate contracts that equitably apportion risk. This handy checklist identifies the "Top 10" areas for your initial review and risk assessment.

1 Project Description

Your contract should reflect as much relevant information as possible known to you and your client at the time of execution. A solid understanding of the scope and intent of the project—by both parties—is essential for clear communication at the outset and throughout the life of the project. Your agreement should contain a clear description of:

- ☐ Functional program
- ☐ Technical and other owner project requirements
- ☐ Project team members
- ☐ Construction delivery method
- ☐ Budget
- ☐ Schedule

2 Standard of Care

As a professional, you operate under a Standard of Care. You are providing a service, not a product. Perfection is not on the table. We recommend including an affirmative Standard of Care clause in your agreements—and that you use it as an opportunity to educate your clients. This may help you negotiate the deletion of any warranties or guarantees elsewhere in the contract, and it helps set realistic client expectations from the outset. Important areas to include in such a clause:

- ☐ Services are consistent with the professional skill and care usually provided by others practicing in your locale and under similar circumstances
- ☐ There are no other express or implied warranties with respect to your services

3 Scope of Services

A clear scope of services is the key to a successful and profitable project. Your scope of services should address both deliverables and schedules. In short, your scope should identify:

- ☐ What services you will perform for the negotiated fee (basic services)
- ☐ What services you can perform for an additional fee (additional services)
- ☐ What services you will not perform (e.g., something specifically excluded)
- ☐ What services should be performed by others (e.g., the geotechnical services will be performed by a separate firm and contracted directly with the owner)

4 Construction Phase Responsibilities

During the construction process, your design becomes reality—and this is where many claims surface. Risks can be managed with appropriately contracted and provided construction phase services.

- ☐ Define the frequency and/or quantity of site observations
- ☐ Define a reasonable turnaround time for submittals and RFIs
- ☐ Disclaim responsibility for means, methods, sequences of construction—and for jobsite safety
- ☐ Include a self-executing hold-harmless clause in the event that the client later cuts your construction phase services

5 Owner's Responsibilities

Agreements generated by owners are usually very specific about the design professional's responsibilities and can be notoriously silent on their own responsibilities. The project—and the successful performance of your scope—is dependent upon the client's actions. Your contract should state that the client is responsible for:

- ☐ Providing project information (program, objectives, schedule, budget, contingencies etc.)
- ☐ Identifying a project representative who is authorized to make decisions on the client's behalf
- ☐ Making decisions and approvals in a timely manner
- ☐ Furnishing services of consultants contracted directly by the client, such as geotechnical engineers (and that you have the right to rely on the information provided)

6 Indemnification

An indemnity clause is a common tactic for client's to shift risk, sometimes unfairly, to you. Your professional liability insurance policy covers you for damages related to your professional errors and omissions—and is not designed to cover additional risk that you may assume by contract. In some states, such as California, the duty to provide a defense may be implied in connection with an indemnity clause. Our first recommendation is to delete the clause entirely. If your client insists upon an indemnification from you, here are some strategies you can use to mitigate your exposure:

- ☐ Narrowly define the parties you are indemnifying—the client, its officers and employees (strike language referring to its "agents" or other parties)
- ☐ Make sure the indemnification is specifically tied to your negligence and is proportionate to the extent caused by your negligence
- ☐ Remove the word "defend" from the clause—and specifically disclaim the duty to provide a defense for the client
- ☐ Provide for reasonable attorneys' fees/expenses but only if recoverable by law in your jurisdiction

7 Document Ownership, Copyright & License

Drawings, specifications, reports and other documents you produce, as well as your digital files, are instruments of professional service—not products. Clients sometimes insist on ownership or an unlimited license to use these instruments of service. We recommend that you retain ownership and provide your client with a limited license to meet a specific need, such as construction or maintenance. If you transfer ownership to a client, you may not be able to freely use the design or even parts of it on future projects without giving rise to a copyright infringement claim by your client. If you do agree to transfer ownership to your client:

- ☐ Grant only upon full payment for your services
- ☐ Carve out your firm's standard details, schedules and specifications from the ownership transfer so that you will be able to continue to use those standards
- ☐ Include an indemnification from the client for its future use of the instruments of service

8 Dispute Resolution

Problems, issues and disputes can and will arise on your project. It is critical that you negotiate with your client and memorialize in your agreement how you will handle them. Having a dispute resolution strategy can help you promptly address issues and mitigate potential claims. If not addressed in your contract, your default dispute resolution method is litigation. Rather than leaving it to the courts to decide, we recommend that you include proactive processes in your agreement:

- ☐ Include a "Meet-and-Confer" session as the first step. This session includes decision makers from both parties in an attempt to resolve an issue in its early stages.
- ☐ If the "Meet-and-Confer" session is not successful, your contract should specify that the parties will enter into formal mediation. Mediation is often successful, can save legal costs and results in a voluntary settlement.
- ☐ If the mediation process is not successful, the next step in your contract should allow the parties to move into binding dispute resolution such as litigation.

9 Suspension of Services & Termination

You should have the right to suspend services in the case of non-payment of fees or other material failure of the client to perform its contractual duties (such as the failure to make a critical decision). This decision should not be made lightly; project delays caused by the design professional carry significant risk exposure.

- ☐ Clearly define a notification period and process in the contract
- ☐ Require rectification of failure (e.g., payment for services rendered)
- ☐ Disclaim liability for delays and include an equitable adjustment to schedule and fees upon resumption of services
- ☐ In the event of termination, address the clients rights and restrictions related to your instruments of service (see item 7)

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Limitation of Liability

Limitation of Liability (LoL) clauses can be used to help balance the risks and rewards of a project. The client is the primary beneficiary of the completed project—and accordingly has a greater share of the rewards. Strive for an LoL clause on every contract, and insist on one for limited services (studies, reports, inspections, master planning, conceptual design). While LoL clauses are enforceable in most jurisdictions, here are some best practices:

- ☐ Be explicit in the contract—in some jurisdictions, it is necessary to use font treatments such as all capitals and or bold text to highlight LoL clauses
- ☐ Consider requiring initials next to the clause to demonstrate that the clause was fairly negotiated and agreed to
- ☐ You can set the limit as a lump sum—a fixed amount or your fee, typically whichever is greater
- ☐ You can set the limit to the available insurance required by your contract, which may be less than your policy limits and takes into account any erosion of your policy limits due to expenses or other claims

BONUS

Waiver of Consequential Damages

"Direct" damages, such as the cost to complete unfinished work, may be very small compared to the "consequential" damages, such as the loss of operating revenue a client might claim as a result of the delay. Similar to the philosophy with LoL clauses, because consequential damages can be so out of proportion with the rewards (i.e., your fees) of a typical design contract, they should be waived or limited.

- ☐ Make the clause mutual—you and your client each waive the right to claim consequential damages against the other
- ☐ Have it be applicable to any claims or disputes arising out of the contract regardless of which legal theory is applied (contract, warranty, tort, negligence, strict liability, etc.)
- ☐ If you cannot negotiate this waiver, be prepared to invest resources to carefully document all causes of delay during construction to avoid becoming a scapegoat

About Berkley Design Professional

Berkley Design Professional was started in 2013 by a team of people with deep roots in underwriting, loss prevention and claims handling for the Design Professional community. The genesis of Berkley DP was the combination of our team's passion for bringing fresh ideas to the products and services Design Professionals need together with W. R. Berkley Corporation's desire to commit its superior financial strength and A+ rated paper to this industry segment. Berkley DP's motto is: "Better by Design." By this we mean that our policyholders are better businesses because we've designed comprehensive coverage and current risk management solutions that make their practice less susceptible to loss.

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