BluePrint

For Design Professionals

Contracts as a Risk Management Tool

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Many organizations publish standard-form contracts that are commonly used by architects and engineers ("A/E") for construction projects. These include The American Institute of Architects ("AIA"), ConsensusDocs; and the Engineers Joint Contract Documents Committee ("EDCDC"). In addition, many owners have form agreements that they prefer to use.

Such agreements are helpful and a good place to start in preparing a contract for virtually any project. One must not, however, be under the illusion that these forms are adequate for all purposes. Indeed, some standard clauses can have the unintended effect of increasing one's obligations and liabilities.

This article addresses the following four provisions in contracts that require close attention:

- Scope of services
- Indemnity
- Insurance
- Relationship of the owner-A/E agreement to the A/E-consultant agreement

Scope of Services

It is extremely important that contracts clearly and accurately define the scope of services the A/E is obligated to perform. Failure to do so can create confusion and often results in disputes

In this Issue:

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over payment. It can also result in the A/E inadvertently increasing their risk of exposure to not only the owner, but third parties as well.

For example, if the scope of services is overly broad, the owner can claim that work the A/E did not intend to perform (and thus did not build into the price) falls under the contractual scope of services. If enforced, the A/E will be performing more work than contemplated, with no additional compensation.

An A/E's failure to clearly define their scope of work can also lead to liability for defects that are beyond their control. When design defect and/or construction defect claims arise, disputes over whether the defect being asserted was within the A/E's scope of work are commonplace. These claims can often be avoided at the contracting phase by clearly defining the A/E's scope of work, as well as what is not in the A/E's scope of work.

An A/E's scope of work can affect its liability for jobsite injuries as well. A/E's are usually responsible for the safety of their own employees on any jobsite. If the A/E's scope of work is broader, however, they can be held liable for the safety of others. As a result, an overly broad scope of work can create significant legal exposure if an employee is injured.

This type of confusion and the consequences that follow can be reduced by paying specific attention to the scope of services before signing the contract. Make sure you are only obligated to perform the work you intend to perform.

Indemnity

Owners routinely require A/Es to indemnify them in their agreements. Such provisions can have unintended consequences. For example, unless indemnity is limited to only those claims based upon negligence of the A/E, and then only to the extent that damages are caused by any such negligence, an A/E could be held liable for the negligence of third parties. As a result, indemnity agreements can greatly increase exposure in the event a construction worker is injured.

Moreover, most states have specific laws regarding when indemnification clauses are enforceable. For example, in Illinois, such clauses in construction contracts are generally non-enforceable. Specifically, 740 ILCS 35/0.01 provides in pertinent part:

> 35/1. Indemnification of person from person's own negligence – Effect – Enforcement
>
> §1. With respect to contracts or agreement, either public or private, for the construction alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

On the other hand, some states have enacted laws specifically addressing indemnification in favor of A/Es. For example, Texas Civil Practice & Remedies Code § 130.002 voids provisions

requiring a registered architect or licensed engineer to indemnify or hold harmless an owner from the owner's negligence or fault. All of this leads to one conclusion – pay attention to indemnity clauses in order to avoid unintended consequences and confusion in the future.

Insurance

Most A/Es (hopefully) have professional liability insurance and it is common for A/E insurance to be required by owners. The problem is that proposed contracts often require A/Es to furnish insurance that they may not have or that may not even be available. Examples of such insurance requirements are:

- Limits in excess of that held by the A/E;
- No deductibles;
- Strict requirements for notification to the owner by the insurer in the event of cancellation, reduction or other changes in coverage;
- Continuous coverage for a specified number of years; and
- Naming the owner as an additional insured on the professional liability policy.

Such provisions, if they are agreed to but not available to the A/E, can expose one to breach of contract claims. The same is true if such provisions are inadvertently agreed to and the insurance is not provided.

As a result, it is important that any contractual insurance provisions are consistent with actual, available coverage and the specified conditions of your insurer. Similarly, it is important to follow through and meet all insurance requirements imposed. Special attention needs to be paid in this regard, before the contract is signed.

Relationship of the Owner-A/E Agreement to the A/E-Consultant Agreement

Too often, A/Es, after negotiating an agreement with the owner, enter into separate, inconsistent agreements with sub-consultants. This oversight can be costly in the event the sub-consultant makes an error or fails to meet its expected obligations. Of major concern are the following areas:

- Scope of service
- Payment
- Dispute resolution
- Indemnity
- Insurance

Inconsistencies can create several problems. First, the Owner-A/E contract usually requires the sub-consultants to assume the same obligations as the A/E. Not following through and ensuring this is the case means the A/E will pay for any problems with respect to obligations that are outside the scope of the sub-consultant's more limited scope of services. Moreover, an owner often will only pursue a remedy against the A/E, even for the mistakes of a sub-consultant. If the contractual requirements are not the same, the A/E's remedy against the

culpable sub-consultant may be limited. To reduce these risks, it is critical that the owner-A/E agreement and the A/E-consultant agreement be consistent on all provisions.

In summary, standard form contracts are valuable tools. They do not and cannot, however, address all issues presented by each situation. Each contract should be considered separately with special attention towards the provisions discussed above. Attention to such matters at the outset will remove a great deal of uncertainty and, as best possible, avoid exposure to unintended risks.

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