



Checklist of Recommended Contractual Provisions for Design-Builders

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1. Nature of the relationship between the parties
2. Owner's criteria for and definition of scope of project.
3. List of Design-Builder's duties and responsibilities.
 - a. Design.
 - b. Construction.
 - c. Optional services.
4. List of Owner's duties and responsibilities.
5. Clear list of information for which Owner is responsible and on which Design-Builder may rely.
6. Responsibility for obtaining various permits.
7. Subcontracting and purchase of equipment/materials.
8. Scheduling and milestone dates.
 - a. Owner's approval of initial schedule implied from submittal.
 - b. Clear definition of completion milestones.
 - c. Consequences of early/late completion.
9. Change orders and claims procedures and entitlement.
 - a. Appropriate unforeseen conditions clause.
 - b. Force Majeure clause.
 - c. Consequences of owner's rejection of subcontract/subcontractor.
 - d. Time limits for owner decisions and approvals.
10. Standard of care for professional services.
 - a. Professional services performed in accordance with standard of care.
 - b. Limited responsibility for changes in codes or interpretations.
 - c. Limited responsibility for issues arising out of the Americans With Disabilities Act.
11. Construction and performance warranties.
 - a. Limitations based on owner-supplied information/equipment/feedstock.
 - b. Time limitations.
 - c. Limitation to performance test (if applicable).
12. Compensation.
 - a. Amount/formula for payment.
 - b. Progress Payment procedures.
 - c. Substantial/Final completion procedures and consequences.
13. Clauses to enforce payment.
 - a. Interest and attorney's fees.
 - b. Escrow of disputed sums.

- c. Limitation of right to audit to cost-plus/reimbursable items.
- 14. Limitation of liability clauses.
 - a. Limitation to fixed sum, percent of contract sum or formula.
 - b. Limitation of liability to corporate entity.
 - c. No liability for consequential damages.
 - d. Exclusivity of remedies clause.
 - e. Limitation of damages to insurance and waiver of subrogation.
 - f. Reimbursement for design modifications -- threshold or deductible (cost-plus contracts only).
- 15. No responsibility for pre-existing hazardous waste.
- 16. Indemnity provision and limiting obligation to insurable risks.
- 17. Ownership of plans.
 - a. Limitations on use.
 - b. Hard copy, not electronic medium, as official copy.
 - c. Warranty/indemnity against copyright/patent infringement.
- 18. Insurance provisions.
 - a. Design-Builder's insurance.
 - b. Builder's Risk insurance.
 - c. Waiver of subrogation.
- 19. Appropriate credit and publicity and use of project for promotional purposes.
- 20. Dispute resolution.
 - a. Step negotiations.
 - b. Mediation.
 - c. Arbitration.
- 21. Termination provisions.
 - a. By Design-Builder for cause.
 - b. By Owner for cause.
 - c. Premium for premature termination without cause.
 - d. Consequences of temporary suspension.
- 22. Legal boilerplate.
 - a. Governing law.
 - b. Integration clause.
 - c. No waiver/severability clause.

About the Author

Mark C. Friedlander is a partner in the Construction Law Group at the law firm of Schiff Hardin LLP. He obtained his B.A. from the University of Michigan in 1978 and his J.D. from Harvard Law School in 1981. He is currently an adjunct professor at the University of Illinois at Chicago School of Architecture and a lecturer at Northwestern University's Engineering School, and had lectured at the Illinois Institute of Technology School of Civil Engineering from 1987-89, at the Engineering School of the University of Wisconsin in 1988 and 1990, and the Architecture School of the Georgia Institute of Technology in 1997-98. Mr. Friedlander concentrates his practice in construction law and litigation with particular emphasis on design-build methods of project delivery.

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