AIA Took Kit Series
Contract Review

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Objectives

• Explain the role of contract review in the design process.
• Discuss limitations on the review process.
• Identify problematic words/phrases found in contracts.
• Provide alternatives for those problematic words/phrases.
• Demonstrate examples of wording that can create uninsured exposures to the insured.
What to watch for in reviewing contracts.

- Words/Phrases that raise the standard of care.
- Words/Phrases that broaden the scope of services beyond what was understood to be the scope.
- Words/Phrases that create coverage issues or coverage gaps.
- Rely on actions of third party. (Example: Green/Sustainable Design)
Contractor, Materialmen, Suppliers

• With the rise of Design/Build projects
• Many contracts are contractor-based contracts given to designers.
• Hooks designer into many issues
  – Guarantees/Warranties
  – Jobsite safety and maintenance
  – Construction Defects
  – Is there insurance affected?
Contractor/Materialmen/Suppliers (2)

- First option: Recommend not using the contractor-based for and use AIA, EJCDC or designer’s basic form.
- Have an addendum changing “contractor” to “consultant.”
- Delete all references to Materialmen/Suppliers/Tools/Equipment
Standard of Care

- The Standard of Care is the minimum degree of care a reasonable person would do on a like project in the same area with comparable resources.

- Therefore, statements like “to the client’s satisfaction could raise the standard of care and be a liability assumed under contract, creating a coverage gap.”
Absolute Words

- **All**
  - Delete or add *applicable*

- **Any**
  - Delete or add *applicable*

- **Best**
  - *Generally accepted*

- **Complete/Completely**
  - *In accordance with Prof Stds*

- **Entire**
  - *In accordance with Prof Stds*

- **Every**
  - *In accordance with Prof Stds*

- **Full/Fully**
  - *In accordance*
Special Mention: Code Compliance

• Should be required to comply with applicable codes
• Disclaimer relative to changes or differences in interpretation of codes
• ADA
Owner Deviations

• Owners don’t always follow the plans, specifications, advices of architects.
• You should be getting indemnified for owner deviations from your work
Absolute Phrases

• But not limited to  Delete
• In any manner whatsoever  Delete
• Minimize/Maximize  Delete
• Without limitation  Delete

Note: In many cases, there are more pressing contract issues to be addressed; therefore, if these have to be conceded to get favorable wording in other areas, we recommend that to the designer.
Control Words

• Approve *Take appropriate action*
• Certify *Statement of professional opinion*
• Control *Observe*
• Direct *Observe*
• Ensure *Endeavor to*
• Inspect *Observe*
Defend: A four-letter word

• Coverage Issue: Liability assumed under contract. *May not be covered.*
• There are only certain conditions under which plaintiff entitled to fees.
• Only issues within exclusive control of designer should require a defense.
• (Example: Copyright/Conflict of Interest)
Defend (and Coverage)

• The obligation to defend is a liability assumed under contract.
• There legally only certain allegations that can give rise to paying plaintiff fees. (Ex: allegations of fraud or violation of the Fair Trade Practices Act of some state.
• Liabilities assumed under contract are excluded from coverage.
• See also: Assume all risk, protect, pay for
Defend (and Coverage)

• Two options relative to this word or like words:
  1) Delete and allow only for “indemnify.”
  2) Note that the defense obligation only applies to General, Auto Liability and umbrella.

• Defend may be disguised as: Assume all risk, protect, save, pay for…
Arising out of, resulting from, or as a consequence of

- Normally found in indemnification agreements.
- Carries the same impact to the insured as “defend”
- Multiple events may cause problem. Your only exposure should be “to the extent caused by the performance of your professional services.”
Electronic Media

- Agreement for printed documents
- Acknowledge untraceable change potential on electronic media
- Owner releases Architect from deviations that occur from conversion of design from printed to electronic form
Submittal Review

• Contractor must conform to pre-approved schedule and deadlines
• Review of product and material substitution is an additional service
Design Coordination
Design Build

• Provide Architectural background for MEP/FP subcontractors use.
• Adjust Architectural backgrounds is needed
• There is no directing of MEP/FP subcontractors, nor responsibility for their work.
Guarantees/Warranties/Certifications

- These are directly excluded under PL policies.
- Should be replaced with “representations”
- If not choice but to certify, the do so “to the best of our knowledge, belief and ability.”
- Must be something completely within your knowledge or control. Ex: corporate status.
- Only contractor responsible for construction warranties.
- Architect is relying on manufacturer, supplier, installer relative to the performance of new equipment, materials or products.
Construction Warranties

- Contractor responsible for warranties relative to:
  - Construction of entire project
  - Quality of construction
Owner reserves right to withhold fees if dispute pending

- This needs to be addressed in one of three ways:
  - Deleted in its entirety
  - Modified to indicate the fees will be held in escrow until the dispute is resolved.
  - Until insurance money is paid.
  - Note: Carriers consider these fees withheld as waived fees, which do not fall within the definition of “damages.”
Prevailing Party Fees

• This is where the party who prevails in a dispute gets their fees paid.

• Problems
  – Is “prevailing” defined?
  – It is a liability assumed under contract.
  – Liabilities assumed under contract are excluded from coverage.

• While the phrase could favor architect, there are some coverage concerns.
Liquidated Damages

- **Liquidated Damages**: Amounts designer is asked to pay under contract for delays. Normally, expressed in dollars per day.
- Normally, only applicable to construction contracts.
- **Coverage Applications**: These may be precluded from or only partially covered under the PL policy.
- **Actual vs. Contractual Damages**: Actual will be covered, while contractual will not be.
Liquidated Damages

• “Other damages that may be awarded as a result of a breach of contract.
• Normally, not defined in the contract.
• They may or may not be covered depending on what they are.
Other Delay Issues

• Time is of the Essence
• Force Majeure
Jobsite Safety/Means & Methods

• The designer should not be involved in either issue. This is a contractor issue.
• Normally, in Illinois, there are legal protections for the design professional.
• State protections can be waived by contract.
• Even ambiguous language can be dangerous in court.
Addressing Bodily Injury Claims

• It should be the contractor’s obligation to insure for bodily injury claims.
• Get an indemnity from contractor in the construction contract for these types of claims.
Site Visit Duty

• The gist of the designer’s role on a jobsite is to determine if the work being done on the site is in **general conformance** with the contract documents.

• There is no duty to ensure the work is **strict conformance** when completed.

• The designer is under no obligations to make measurements or make exhaustive inspections.
Faulty Workmanship/Construction Defect

• Designers should not be committing to anything in this area.
• This goes beyond the standard of care for the design profession in the construction phase.
• These references should be deleted.
• You will also see “Decennial Damages” in international contracts, which is the same issue.
Indemnification Clause

- We have already discussed Defend and “arising out of”
- However, is it fair?
- Is it two-way? Does owner have to indemnify for its own problems?
- Recommend adding a second paragraph to the indemnification clause using owner’s contract and changing places of client and designer.
- Exclude indemnity for indemnitee’s own fault.
Ownership of Documents

• First recommend that the ownership rests with the designer who provides client with a License to Use
  •   - Exclusive
    – Non-Exclusive: There can be a condition that the designer does not use the same designs in the geographical area as the client’s project.
• BIM law developing
Ownership of Documents
Indemnification & Defense

- There has to be an indemnification and defense agreement in favor of the designer for use other than for the project for which they were created.
- Note: The defense agreement is only as effective as the client’s ability to pay for the defense.
- Simply releasing the designer has no significance with 3rd party claims.
Ownership of Documents
Marketing/ Notes on Drawings

• Designer may ask for permission to use images for marketing and advertising.

• Notes on the contract documents:
  – Documents created for the specific project
  – Specifically suited for the project in its location
  – Modifications/alterations to the contracts may be required to adapt the designs for any other application.
Third Party Beneficiaries

- There should be no third party beneficiary
- No right to maintain action in contract or tort directly against Architect.
Site Evaluation and Rehab Projects

• Contracts require “complete understanding of the site” as an entre to no change orders

• Rehab projects and hidden conditions
Acceptance of Contract by Owner

- Signing Contract
- Giving authorization to proceed
- Making payment