

CONTRACTUAL CLAIMS DEFENSES



Copyright Materials

This presentation is protected by US and International Copyright laws. Reproduction, distribution, display and use of the presentation without written permission of the speaker is prohibited.

© Promark Assoc. Agencies, Inc.

Course Description

Custom contracts may be filled with undesirable provisions that put a design firm in difficult and possibly uninsured positions. In this course, we discuss regularly encountered contract issues that may lead to claim troubles and how to protect yourself.



Learning Objectives

Review of contract types - standard forms of agreement, client drafted, firm's standard terms and conditions, letter, and verbal;

Review commonly seen unfavorable provisions;

Discussion of problematic language in each provision- what to be on the look out for and why it matters when defending against a claim;

Review against standard forms of agreement and negotiating for a fair outcome.

Contract Types

Standard
Forms of
Agreement

Firm Drafted

Client
Drafted

Verbal

Document Ownership & Control

The Issues

- Reuse
- Liability

The Bad

- *“Client shall be the sole and exclusive owner of all plans, specifications, drawings, elevations, calculations, data, and all other documents (in all cases whether preliminary or final) prepared by Consultant, or at Consultant’s direction, or supplied by consultant or Client. Client shall be free to utilize all such material and the contents thereof in any other development or project. Consultant may, at its election, retain one copy of such documents for reference purposes only.”*



Document Ownership & Control

Recommendations

- Maintain copyright giving the Owner limited license to use the documents for the project.
- If you choose to transfer ownership rights:
 - Seek indemnity
 - Protect your rights
 - Require payment prior to transfer

Confidentiality

The Issues

- Practicality
- Responsibility – Legal, Ethical

The Bad

- *“The Consultant agrees that all knowledge and information not already considered within the public domain which the Consultant may acquire from the Owner by virtue of performing services hereunder, will be regarded as strictly confidential and held in confidence and shall not be disclosed to anyone without the Owner’s prior written consent to such disclosure.”*



Confidentiality

Recommendations

- Allow for disclosure in order to complete services
- Allow for disclosure as required by law or ethical obligation

Redesign Obligations

The Issues

- Perfection
- Financial Burden

The Bad

- *“The Consultant agrees that any and all revisions required to be made to the drawings, specifications and other documents prepared by or on behalf of the Consultant due to errors, conflicts, inconsistencies and other errors or omissions shall be included as part of Basic Services and shall be performed at the Consultant’s sole cost and expense.”*

Redesign Obligations

Recommendation

- Narrow redesign obligations to negligence in the performance of professional services

Compliance with Laws

The Issues

- Conflicts
- Unintended Expansion of Liability
- Uninsurable Warranty Statements

The Bad

- *“Consultant shall cause all drawings, specifications, documents and other Work required to be performed by Consultant to be prepared in accordance with all federal, state, and local statutes and regulations governing the Project and the Work, it being specifically understood that Consultant shall be responsible for interpreting applicable regulations so that all aspects of the facility may be utilized for the purposes intended.”*



Compliance with Laws

Recommendations

- Tie compliance with all laws to the standard of care to avoid a potentially impossible warranty obligation that may also be uninsurable

Schedule

The Issues

- Delays
- Insurability

The Bad

- *“Time is of the essence in performance of the Services described in this Agreement. Consultant’s obligation to perform the Services to be provided under the terms of this Agreement shall commence on the Effective Date and be completed on or before the scheduled termination date.”*



Schedule

Recommendations

- Time is always a consideration, but services should be performed in a manner consistent with the standard of care.
- Don't be held responsible for forces beyond your control.



Force Majeure

Force Majeure provisions and why they are important... maybe now more than ever.

Defined: An event or effect that cannot be reasonably anticipated or controlled.

“Neither party shall be held responsible for delays due to circumstances beyond the control of the parties such as war, strike, riot, crime, or an event described by the legal term act of God.”

Inconsistent Dispute Resolution

The Issues

- Gap in Resolutions

The Bad

- Often a problem when Owner/Contractor and/or Design Professional/Consultant contracts are inconsistent.



Inconsistent Dispute Resolution

Recommendation

- All parties bound to mediate, if unsuccessful, all parties either litigate or arbitrate in the same proceeding.

Limitations of Liability

The Issues

- Limiting Exposure
- Potential Insurance Credit
- Potential Flow-Down Concern

The Bad

- *“The obligations under this Article shall not be limited in any way by the amount or type of insurance required to be provided to or for the benefit of an Indemnatee as described in Insurance Requirements of the agreement.”*
- ***The answer is always No if you never ask!***



Limitations of Liability

Recommendations

- Ask for it. Include it in your standard requests. It can be limited to:
 - *available* insurance proceeds
 - a specific dollar amount
 - your fee

Waiver of Consequential Damages

The Issues

- Limiting Exposure

The Bad

- *No Waiver*
- ***The answer is always No if you never ask!***



Waiver of Consequential Damages

Recommendations

- Ask for it. Include it in your standard requests.
- *Sample Provision:*
 - *“The Design Professional and Owner waive any and all special, incidental, indirect or consequential damages, including but not limited to loss of use, loss of profits or revenue, for claims, disputes or other matters in question arising out of or relating to this Agreement or the underlying Project, whether caused by negligence, errors, omissions, strict liability, breach of contract, breach of warranty or other cause...”*



Agreeing to Provide Direction, Control & Supervision

The Issues

- Expanded Liability
- Outside Insurance Coverage
- Outside Your Control

The Bad

- “Contractor shall give attention and supervision to the Work to help General Contractor obtain the most efficient and highest quality methods, systems and end product for the Work.”
- Any provision that does not clearly exempt you from responsibility and provisions that allude to responsibility for OSHA, Labor Law, etc.

Agreeing to Provide Direction, Control & Supervision

Recommendations

- **Affirmatively stated – Even if otherwise silent.**
 - *“The Design Professional shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Design Professional be responsible for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents...”*

Agreeing to an Elevated Standard of Care

The Issues

- Expanded Liability
- Outside Insurance Coverage

The Bad

- *“Consultant agrees to perform its services in the best and most sound way and in an expeditious and economical manner consistent with the best interests of the Owner.”*
- *Upon completion of the Project in accordance with the drawings and specifications, Consultant represents that the Project will be a fully functional and integrated facility within the parameters of the Owner’s budget for Owner’s intended use.”*



Agreeing to an Elevated Standard of Care

Recommendations

- *“The Design Professional shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Design Professional shall perform its services as expeditiously as is consistent with such professional skill and care. Design Professional makes no warranties, express or implied, under this Agreement or otherwise, in connection with its services.”*

Agreeing to a Broad Indemnity

The Issues

- Expanded Liability
- Outside Insurance Coverage

The Bad

- *“Design Professional agrees to indemnify and defend Owner and Owner’s Agents from and against all claims, loss, damages, including attorney’s fees, arising out of or in connection with services performed under this contract caused by errors, omissions or acts of the Design Professional whether caused in whole or in part by any party indemnified herein.”*

Agreeing to a Broad Indemnity

Recommendations

- *“The Design Professional shall indemnify the Owner for damages to the extent caused by the negligent performance of services of the Design Professional or those for whom the Design Professional is responsible.”*



Incorporating a Prime Agreement Without Review

The Issues

- Little in Subconsultant Agreement May Apply
- Potential for Expanded Liability
- Potential to be Uninsurable
- Difficulty for Prime to find Subs willing to sign

The Bad (maybe)

- *“Subconsultant agrees to incorporate and be bound by the terms of the Prime in the same manner and to the same extent as the Consultant. In the event of an inconsistency between the terms of this agreement and the Prime agreement, the Prime (or the more stringent) applies.”*

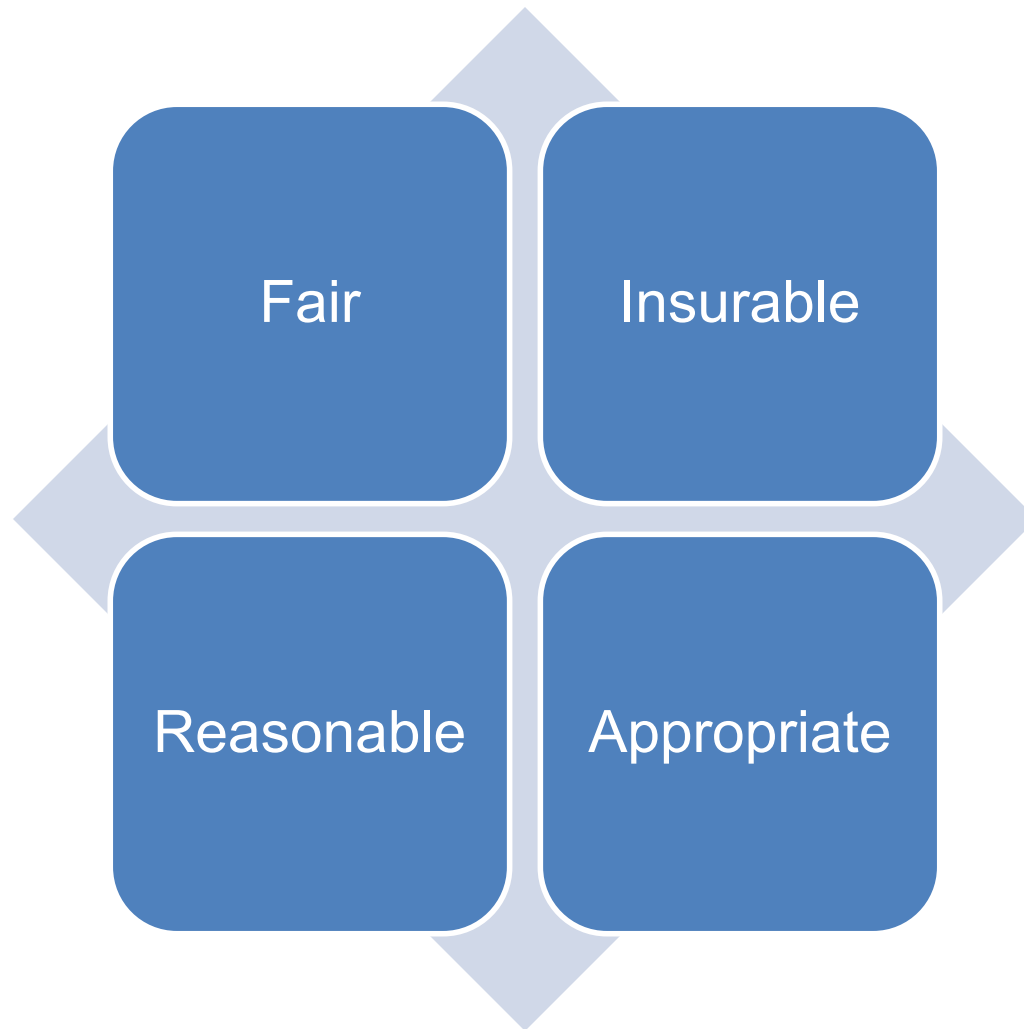
Incorporating a Prime Agreement Without Review

Recommendations

- **Get the Prime, Read the Prime**
- Understand what/who you are responsible for/to
- Subs – make sure the terms of your agreement govern
- Primes – due diligence in contract negotiations top to bottom



Negotiating



Questions??

This concludes The American Institute of Architects
Continuing Education Systems Program

Quizzes will be sent out via email – certificates of
completion will be provided for each returned quiz.



Thank You!

Brian Sutter

Jennifer Costanzo

Eric Alderson

Contact Info:

bsutter@sugarmanlaw.com

jenn@promarkinsurance.com

eric@promarkinsurance.com

www.sugarmanlaw.com

www.promarkinsurance.com



Sugarman
LAW FIRM^{LLP} 