TOP TEN CONTRACT PROVISIONS TO AVOID AT YOUR PERIL

Risk management begins with a clear, well written, legally enforceable contract. The following is a check-off list of key clauses to consider. It is not a substitute for your attorney’s review of the contract as a whole.

- **Billing and Payment**
  - When payment is due
  - Interest and collection costs for late payment (incl. atty fees)
  - Right to suspend or terminate services in event of non-payment
  - Don’t allow client to withhold payment of disputed invoices

- **Warranties and Guarantees**
  - Don’t do it. Goes beyond your standard of care and is not insurable.
  - Avoid terms as “all,” “every,” “insure,” “ensure,” “assure,” “state” or “declare.”
  - Check P.O.s for conflicting terms – always there.

- **Consequential Damages**
  - Include mutual waiver of consequential damages, i.e. indirect expenses, lost profit, etc.
  - Can be much greater than your fee or the cost of repairing damage.

- **Jobsite Safety**
  - Not your job.
  - Avoid supervision of a jobsite, or “assure strict compliance” with plans and specs, control of contractor.
  - What you say on the jobsite can affect the terms of your contract – reliance
  - Do not ignore imminent threats to life or safety you see. Its your duty as a licensed professional.

- **Limitation of Liability**
  - Include the maximum liability you will accept under the contract
  - Not to exceed your total fee, or the limits of your insurance.
  - Public projects almost never accept such limits
  - Bankruptcy is the option – not good for anyone

- **Mediation**
  - Voluntary agreement to resolve a dispute
  - Not arbitration, often a prerequisite to arbitration or litigation
Remarkably effective – 85% settle the day of mediation with proper preparation

- **Scope of Services**
  - Detailed list of those services that are covered by your basic fee – precise and complete
  - Everything else is additional services
  - Avoid general statements as “scope will be adequate to meet project needs”, or “all services necessary for completion of project”.
  - AIA and EJCDC forms have good scope of services lists

- **Standard of Care**
  - The standard of care for design professionals requires only that you perform your services with the degree of skill and care ordinarily exercised by other members of your profession under similar circumstances, at the same time and in the same or a similar locale.
  - Set out in Indiana case law – professional negligence standard.
  - This is your insurable standard. Anything more is not covered: “perform to the highest standard of practice”, “all appropriate or necessary services”, “to the satisfaction of the Client”.
  - You’re not perfect. Things happen.

- **Termination**
  - Define when either party may terminate and why.
  - Non-payment of fees; client’s breach of any material condition; inability to reach agreement on additional services; changes in the parties or substantially changed conditions.
  - Suspend services until client cures breach.
  - Retain ownership of documents.

- **Third Party Beneficiaries**
  - If others could reasonably and foreseeably be damaged by your negligence, you may be liable to them, even if they are not a party to your contract.
  - Under Indiana law, if your contract specifically disclaims any reliance by third parties on your contract, this threat can be cut off.
  - Consult your attorney, or the AIA and EJCDC form language.

N.B. The duty to defend your client is now against public policy and void in all contracts entered into by a design professional on or after July 1, 2019. Included in Indemnification provisions typically. To be safe, best to delete “defend” from the obligation to defend, indemnify and hold harmless Client for negligent acts or omissions.