“Everything” You Need to Know About Design Professional Agreements

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Learning Objectives

- Key elements and requirements of design professional service agreements
- Alternate versions of contract analysis and management
- The scope of work, work around
- IROPE management of contract evaluation, negotiation, drafting, and management
Discussion Question Number One

What type of contract do you execute most often?

- Standard AIA, AGC, or similar agreement
- Client Generated Agreement
- Short Form Agreement Incorporating Another Agreement
- Letter Proposal/Agreement
- Notice to Proceed
- Handshake & Hope

Agenda

- Contracting Basics
- Analyzing the Contract – Three Paths
- The Sixteen and the Six – “Pareto Pared”
- The Scope of Work as a “Work Around”
- The IROPE Model of Contract Evaluation & Management
- The Prime-Subconsultant Relationship
- And the “Others” . . .
Key Contract Principles

Elements:
1- Offer
2- Acceptance
3- “Consideration”

An agreement is to reflect “a meeting of the minds”

Parole Evidence Rule: Absent ambiguity, if it isn’t in the agreement, it doesn’t exist.

Principles of Contractual Risk Evaluation

The party with the ability to control a risk, should bear that risk.

Challenges:
- Open-ended Obligations
- Third-party Reliance
- Outside Factors
- Risk Disproportionate to Reward
California Statutory Required Elements
Arch: 5536.22   Eng: 6749

(1) Description of services;
(2) Basis of compensation & method of payment;
(3) Client & A/E: name, address, and license number;
(4) Procedure for additional services; and
(5) Termination procedures for either party.

Permitted Exceptions to Contract Requirement

- No compensation expected;
- Compensation and manner of services implied by prior services to and payment from the same client;
- Client knowingly states in writing after full disclosure of this section that a writing which complies with the requirements of this section is not required;
- Services rendered to another licensed professional.
- Engineers Only: Public Agency or Specified Industries
The Five Rs of Design Agreements

- Relationships
- Responsibilities
- Rights
- Rewards
- Risks

Discussion Question No. Two

In drafting and negotiating your service agreement, which of the “Five Rs” is most important to you?

- Relationships
- Responsibilities
- Rights
- Rewards
- Risks
Common Contract Structure

- Most design professional Agreements are organized by:
  - Chronology
  - Compartments
- Both formats typically leave a miscellaneous “grab bag” at the end.
- To correlate all the terms, functionality may be the best organization for analysis.

Dominant Functions in Contract Clauses

- Relationship
- Scope of Responsibility
- Performance Standards
- Procedures
- Financial Rights & Responsibilities
Sixteen Clauses You Need to Know

Sixteen Clause Checklist

- Parties
- Scope of Work
- Additional Services
- Owner Rights/Duties
- Standard of Care
- Ownership of Docs
- Payment Terms
- Warranty/Guarantee
- Assignability
- Third Party Rights
- Communications
- Limitations of Liability
- Indemnity
- Insurance
- Dispute Resolution
- Consistency with Other Agreements
### Sixteen Clauses By Function

#### Relationships
- Parties
- Assignability
- Third-Party Rights
- Electronic Communications

#### Responsibilities
- Scope of Work
- Additional Services
- Owner Responsibility

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### Sixteen Clauses By Function

#### Rights
- Ownership of Documents
- Other Contracts & Parties
- Rewards
- Payment Terms
- Termination

#### Risks
- Warranty/Guarantee
- Limitation of Liability
- Indemnity
- Insurance
- Dispute Resolution
Focal Points for Evaluation

Subject Matter
- The Project
- The Client
- The Team

Risk Allocation
- Between Contracting Parties
- Third-Party Responsibilities

The Go-No Go Evaluation

- Each Project, Client, and Team should be evaluated prior to committing to a project.
- The key evaluation is whether each can and should succeed. If not, stop!
- Likely or critical failure points should be identified with a corresponding and proactive plan for identification and response. If not, stop!
A Contract Evaluation Matrix - Perfection Denied - Improvement Pursued

<table>
<thead>
<tr>
<th>Clause</th>
<th>Open-Ended</th>
<th>Third-Party Issues</th>
<th>External Factors</th>
<th>Risk Exceeds Reward</th>
<th>Other</th>
<th>Response</th>
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<tbody>
<tr>
<td>Scope of Work</td>
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The Pragmatic Priorities (The Pareto Principle)

80% of the liability claims against design professionals are based on or made worse by 20% of the typical contract provisions; or

Focus on 20% of the typical design professional contract provisions can successfully avoid or limit 80% of claims.
Six Core Issues
(The Key 20%)

1. Standard of Care
2. Scope of Work
3. Warranty & Guarantee
4. Third Party Relationships & Rights
5. Indemnity & Defense

Discussion Question No. Three

Of the six core concerns, what is your greatest contractual concern and focus:
1. Standard of Care
2. Scope of Work
3. Warranty & Guarantee
4. Third Party Relationships & Rights
5. Indemnity & Defense
The Scope of Work as a “Work Around”

Elements for a Contract/Risk Management Scope of Work:
- Intended Beneficiaries & Uses
- Standard of Care
- Assumptions & Additional Services
- Closure & Inclusion

The Scope of Work as a “Work Around” - Parties & Uses

Consultant’s services are intended for the Client’s sole use and benefit and solely for the Client’s use on the Project and shall not create any third party rights. Except as agreed to in writing, Consultant’s services and work product shall not be used or relied on by any other person or entity, or for any purpose following substantial completion of the Project.
The Scope of Work as a “Work Around” - Standard of Care

Consultant’s services shall be provided consistent with and limited to the standard of care applicable to such services, which is that Consultant shall provide its services consistent with the professional skill and care ordinarily provided by consultants practicing in the same or similar locality under the same or similar circumstances.

The Scope of Work as a “Work Around” - Close & Include

Consultant’s services shall be limited to those expressly set forth above, and Consultant shall have no other obligations or responsibilities for the Project except as agreed to in writing or as provided in this Agreement.

All of Consultant’s services in any way related to the Project shall be subject to the terms of this Agreement.
The Scope of Work as a “Work Around” - Stated Assumptions

Via “excluded” or “additional” services or via “assumptions”

*Consultant’s services are based on the following assumptions. In the event of any ultimate facts or events differ from such assumptions, Consultant’s services, schedule, and compensation shall be adjusted accordingly.*

IROPE

- Issue
- Risks
- Options
- Plan
- Execute
**IROPE Issue**

- Client & Project Selection
- Sixteen Contract Clauses (and others) or the Core Six
- Four-plus Elements of Evaluation
  - Open-ended Obligations
  - Third-party Reliance
  - Outside Factors
  - Risk vs. Reward

**IROPE Risks**

Identify the Risks:
- Internal
- External
  - Client
  - Contractors
  - “Project”
  - Others

Weigh the Risks for:
- Probability
- Severity
IROPE
Options

List options applicable to risks.

Coordinate and combine where possible.

IROPE
Plan

- Develop a strategic and proactive plan from the options.
- Focus first and foremost on risks with the greatest combined probability and severity.
- Identify the specific steps, tools, and procedures to implement the plan.
- Monitor the issues and risks over time on a regular schedule.
**IROPE Execute**

- Although it seems so simple, a partially completed or ignored project delivery plan is the greatest risk of all.

- Adjust the plan as necessary as the project proceeds.

**Discussion Question No. Four**

What contract clause or issue warrants your most time and attention for drafting & negotiation:

- Scope of Work
- Indemnity
- Dispute Resolution
- Limitations of Liability
- Standard of Care
Five Ways to Limit Liability

- By Dollar Amount
- By Available Insurance
- No Personal Liability
- By Category of Damages
- By Time

Limitation of Liability

Client agrees that Consultant’s total liability to Client and all third Parties for any or all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to the Project or this Agreement from any cause or causes including, but not limited to, the Consultant’s negligence, errors, omissions, breach of contract or breach of warranty shall not exceed:
Limitation of Damages

The Parties expressly waive any and all claims for consequential damages for the Project including, but not limited to, loss of use, profits, business, reputation, financing, rental expenses, loss of income, and overhead.

Limitation of Time

Any claim in litigation between these Parties must be filed not later than the earlier of the expiration of the applicable statute of limitation or four (4) years from either substantial completion or Consultant’s last services on the Project.
Primes & Subconsultants: Traditional Laments

- For Primes:
  - Vicarious Liability

- For Subconsultants:
  - Flow down of prime agreements without an opportunity to “negotiate” or “participate”
  - Joint & Several Liability

- The Traditional Response:
  - Resignation to the Result
  - Negative Relationships from Outset

Traditional Prime/Sub Drivers

- Vicarious Liability vs. Joint/Several Liability
- Prime Contract Flow Down & Resistance
- “Coordination”
- Indemnity, Insurance, and Payment
Joint & Several Liability
Vicarious Liability

**Joint & Several Liability** allows an injured party to recover 100% of its damages from anyone who contributed to their indivisible harm.

**Vicarious Liability** imposes responsibility on one person for the failure of another with whom they have a special relationship – usually a contract.

“Other” Consultants & Subconsultants Not the Same

Generally a prime consultant will be vicariously liable to a client (and possibly others) for the actions of subconsultants, regardless of its own fault.

Generally there will be shared liability with “other consultants” (and contractors) only if at fault and assumed by contract or conduct. *Therefore, it can be controlled!*
Joint & Several Liability
Vicarious Liability

- Joint & Several
  - Contractor
  - A/E
  - Others
  - Client

- Vicarious
  - Client
  - Prime
  - Sub

Managing Prime-Subconsultant Pitfalls

The Precarious Pitfalls
- Scope Gaps (real or imagined)
  - Or even overlaps
- Additional Services
- Payment of Fees
- Claim Response/Support
Right to Rely

Consultant shall be entitled to rely on the adequacy and accuracy of information provided by Client or Client’s consultants. Consultant shall coordinate such information solely for interface with its services and shall notify Client of any errors actually identified in such information. Consultant shall not be responsible for the acts or omissions of the Client, Owner, Contractors, other consultants and their respective agents or employees, or any other persons or entities performing work on the Project who are not under the direct control or authority of Consultant.

Seven Key Prime-Subconsultant Contract Clauses

- Incorporation of (or Divergence) from Prime
- Scope
- Additional Services
- Coordination
- Indemnity
- Insurance
- Payment Provisions
## Incorporation

**Incorporation is the baseline, not the goal or end game**

- All provisions of the Prime Agreement should be shared with and passed on to subconsultants.
- Incorporation of the Prime Agreement is the best way to accomplish this.
- Review the Prime Agreement to assure that all required pass-through provisions are passed through.
- Exercise care as to priority of Agreements.
- Require specific identification of exceptions.

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**Prime Agreement is part of this Subconsultant Agreement. Subconsultant shall be responsible to Owner and Consultant to the same extent and subject to the same terms as Consultant is obligated to Owner under the Prime Agreement.**

*In the event of any conflict in the terms or obligations, the more stringent obligation shall apply, except to the extent expressly provided to the contrary.*
The Prime/Subconsultant Scope Debate

- **Prime:**
  - All services within the subconsultant’s capacity and expertise necessary to complete the project

- **Subconsultants:**
  - Detailed:
    - Qualitatively
    - Quantitatively
  - Limited
    - Generically
    - By exclusions & additional services

Subconsultant Scope Definition

*Subconsultant’s Scope of Work and Project Responsibility shall be as set forth below as well as all other services reasonably necessary to complete the obligations of the Prime Agreement within Subconsultant’s expertise and qualifications except as set forth below or expressly to be provided by others.*
Additional Services

- Common commitment based on Prime Agreement.
- For “team external” issues, provide that it will be compensated only if compensated by client and agree to joint, good faith pursuit of payment.
- For “internal” issues, provide specific provisions for compensation such as “to the extent insured” or beyond a minimum percentage contingency.
- Provide that in the case of dispute, services will be provided and later resolved.

Subconsultant Coordination

- Require all consultants to coordinate their own work.
- Establish (enforce & facilitate) sequence of coordination.
- Require written confirmation of coordination and Code compliance at critical milestones.
- Consider Enhancement of Matrix Allocations
  - Primary, Secondary, Sole, None
Coordination with Accountability

- Require each consultant to be solely responsible for coordination of its work.
- Require coordination at each stage of the project.
- Require written confirmation of coordination.
- Make consultant responsible for errors in coordination.

Indemnity & Defense

- Distinguish internal team obligations from client obligations in Prime Agreement.
- Distinguish indemnity and defense obligations.
- Pursue internal collaboration (and consider mutuality).
- Pursue insurability.
Indemnity & Defense

Subconsultant shall indemnify and defend Owner solely to the extent expressly required by the Prime Agreement.
Consultant and Subconsultant shall each defend to the extent covered by applicable insurance and indemnify the other for third party claims, litigation, liabilities, and losses to the extent actually caused by such party’s negligent errors or omissions or breach of this Agreement.

Claim Response/Cooperation

In the event of any claim, allegation, or demand by Client, Owner, Contractor, or any other third party involving the scope of work or responsibilities of either Party, such Party shall promptly assume responsibility for the investigation, defense, and response to such issues for the benefit of both Parties.
Insurance

- Contractually require adequate insurance for all “team” members and related “others” and to Prime contract minimums.
- Require continuity of insurance:
  - Occurrence policies during project
  - Claims-made policies during project + 10 years
- Update and monitor insurance information annually and on collective/mutual basis.

Categories of Core Insurance

- Professional Liability
- Commercial General Liability
- Excess Liability / Umbrella Liability
- Commercial Auto
- Workers’ Compensation / Employer’s Liability
### Subconsultant Payment Issues & Financial Obligations

- Client obligated payments linked/contingent on client payment.
  - Conditioned on mutual and prompt pursuit of payment.
- Non-client based payment subject and limited to specific criteria for additional services.
- Provide for proportionate or linked set off for charges or non-payment by Client.

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### Subconsultant Payment Issues & Financial Obligations

Subconsultant’s fees and expenses for amounts approved by Prime shall be due within thirty (30) days of receipt of such invoice by Prime, but shall not be considered late and no interest shall accrue until thirty (30) days after Prime’s receipt of payment for such services from Client so long as Consultant and Subconsultant jointly pursue payment promptly and in good faith.
# The Master Service Conundrum: Continuous Services vis-à-vis Professional Liability Exposure

**Sean O’Kane A.I.A. Architect, P.C. v. Puljic, - Connecticut**
- A continuous service contract does not toll the statute of limitations for a breach of contract claim by the architect for unpaid fees.

**Regency Club at Wallkill, LLC v. Appel Design Group, - Pennsylvania**
- Application of the “continuous treatment” doctrine did not toll the statute of limitations for negligence. Architect was in a “continuous service” relationship with owner.

## Fees:
- Stay current with invoicing and receivables;
- Be aware of expiring lien rights if fees are owed

## Services:
- Segregate work such to establish a clear beginning and end to authorizations or phases;
- Final invoices and confirming correspondence;
- Master Service Agreements: Separate Authorizations, Tracking Numbers, Invoicing, and Closure
Additional Resources Available

- 16 Contract Clauses You Need to Know
- Skating on Thin Ice: Surviving and Succeeding on Projects with Precarious Contract Terms
- Making the Grade: Testing Design Professional Indemnity Obligations
- Limitations Done Five Ways

Questions & Answers
Thank You!

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