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Architects, Engineers and Construction Managers

Top Design Professional Contract Clauses

Top 10 Most Valuable Contract Clauses for a Design Professional

Understandably, a design professional's primary focus may be simply getting the job. However, it is equally important to proactively safeguard yourself against unintended and potentially costly pitfalls resulting from a poorly worded contract in the projects you do get. Without a strong written contract, you risk significant liability issues that can quickly erode any profits you may earn, alienate your client, and, even worse, put your entire firm in jeopardy. When negotiating your next big project, keep the following key contract provisions and strategies in mind:

1. Scope of work.

This is a clearly written description of the professional scope of services you intend to provide to your client and even informs others of the boundaries of the contract.

The description should include:

1. services you agree to provide to your client;

2. services you will not provide; and

3. additional services you are willing to provide for an additional fee, if any.

The scope of services should clearly and completely describe which services are included in your primary fee and which services are additional and outside of your primary fee.

Avoid clauses that hinge on the client's discretion. For example, a clause that requires you to certify that the scope of services will be "adequate to meet project needs" or to provide "all services necessary to complete the project" can put you on the hook for services well outside of your initial intent, costing your firm time and money. Look for scope of services lists through professional associations such as the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC®) to help ensure you have included all important items which should or should not be in scope for your project.

2. Limitation of liability.

A limitation of liability clause limits the total damages you will be obligated to pay in the event your client sues you. The liability amount will be dependent on the project size and cost, as well as your total fees. Although the enforceability of these types of clauses may vary by state, best practice is to limit your liability to either your professional fees, a limit less than or equal to the limit of liability found on your professional liability insurance policy, or somewhere in between. It is not always easy to agree on the inclusion of a limitation of liability clause in your contract, particularly with government clients, but a limitation of liability clause should always be a default in your standard professional contract.

3. Consequential and punitive damages.

Many prospective clients attempt to include consequential or punitive damages into their contracts, which can significantly increase the total damages claimed well beyond your fee or the cost to repair actual damages. You can remove those damages from the agreement by including a Waiver of Consequential or Punitive Damages clause in your contract. Note that a limitation of liability clause is not a substitute for a waiver of consequential or punitive damages clause, and best practice is to include both types of clauses. If your contract remains silent on consequential and punitive damages, your client may still be able to seek recovery for them.

4. Alternative dispute resolution.

Most professional services contracts provide options for various types of dispute resolution, such as mediation, arbitration, or civil court. It is a discussion worth having with your client and an important decision to be made, as efficiency, time, and money may be at stake. When in doubt, mediation is your best option. This form of conflict resolution gets the parties to the table quickly, is less expensive than arbitration or civil litigation, and often successfully resolves the claim in an effective manner. In contrast, the arbitration system in many states can be inefficient and costly, and the most expensive option—civil litigation—can include multiple parties, span the course of several years, and entail large amounts of legal fees.

5. Limits of insurance.

Construction contracts typically include a requirement that design professionals and subcontractors maintain various limits of insurance for the duration of the project. You should review this provision with your client to ensure that the amount of insurance they are requiring is relevant to the project at hand, particularly if the amount is different than the limits of your and/or your subcontractors' or consultants' policies. If a client demands you increase your insurance limits, talk to your insurance agent prior to entering into the agreement and use the additional cost for that coverage as a leverage point to increase your fees. Your client may concede the insurance requirement if they realize you will be passing the cost back to them.

6. Additional insureds.

Many contracts require the design professional to add the client (and others) as an additional insured, or to defend and indemnify the client for your negligent acts as a design professional. However, the typical professional liability insurance policy does not automatically provide for that coverage and, in fact, excludes indemnity agreements from coverage altogether. The solution? A simple endorsement may be added to your insurance policy for a modest premium to add the client as an "additional insured." This endorsement limits the coverage to "your" negligent acts, so you are not insuring the negligent acts of the client or anyone else. If you choose not to amend your policy, you may be in breach of your contract requirement to defend and indemnify which, unfortunately, means you would likely have to provide such defense and indemnity out of your own pocket.

Architects often take on other design services, such as mechanical, electrical, plumbing, or structural and civil engineering. Always make sure your contract requires those disciplines to add you as an additional insured to their professional liability policies as well, to protect yourself from their negligence.

7. Attorneys' fees.

In most states, you are only entitled to reimbursement of attorneys' fees in a lawsuit if allowed by statute, you are successful in a claim against another party for fraud, or it is provided by your contract. If a client fails to pay for your services, you will probably have to sue to collect the money. This, of course, means you will incur attorneys' fees. Your best chance at recovering both professional and attorneys' fees is to include a provision in your contract that simply states the prevailing party to an action that arises from the terms of your agreement is entitled to the recovery of its reasonable attorneys' fees.

8. Billing and payment.

A professional services contract should always specify when payment for services is due, the penalties for a late payment (such as interest and the cost of collections), and the rights of the professional in the event the client refuses to pay the fees due. Potential recourses in the event of non-payment may include the termination of services and/or withholding the submission of the client's documents for permit approval until the contract is fully paid. You should avoid contract language that allows your client to withhold payment of disputed invoices or in any way waives your rights to recovery.

9. Warrantees and certifications of service.

Your contract should never be a guarantee of complete compliance or accuracy of any aspect of a project (for example, a subcontractor's installation of a storm water drainage system) or a warranty of compliance with a specific government standard or regulation (such as ADA compliance or LEED Gold certification). By warranting an aspect of the construction project, you are assuming a standard of care that may be well beyond what is legally required of a design professional. Professional liability insurance is intended to cover negligence based upon a design professional's recognized standard of care and is not intended to cover a breach of warranty.

Be on the lookout out for certifications, guarantees, and warranties in the fine print of a client's purchase orders (all the more reason to use a professional contract). Additionally, avoid using terms in contract language that provide a guarantee, often signaled by words such as "ensure," "assure," "state," "declare," or "certify."

10. Jobsite safety and construction means and methods.

Design professionals often take on and charge for the additional service of construction observation. However, unless you are a design build firm and are clearly charging for additional construction services, you should make clear that you are not responsible for site safety or construction means and methods. While you cannot ignore your duty as a licensed professional to report imminent threats to life or safety, the responsibilities for jobsite safety and the repercussions if you are negligent will far exceed the fees you will typically collect for your professional services. Avoid language that calls for your "supervision" or "management" of a jobsite and strike contract clauses that give you control or responsibility for directing a contractor, including the authority to stop work.

When all else fails…

We know there are a variety of contract formats in the marketplace and for many design firms, selecting the right contract language can be overwhelming. When in doubt, talk to your attorney or consider tapping into a professional association's expertise before implementing any contract in your practice. The AIA contract database is an excellent starting point, as such form documents have been tested in many state and federal courts and are consistently reviewed and updated by a team of volunteer lawyers and risk management professionals. Additionally, Hiscox provides policyholders with a no-cost consultation from an attorney to assist in the review of your professional contract to ensure you are keeping these important risk management concepts in mind.

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