

AIA Took Kit Series Contract Review

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Presented: 11/9/2010

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- “Raise Your Hand”

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To cancel a request to speak:

On the Participants panel, click **Lower Hand**.



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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 form 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