



A View from the Courtroom: Three Provisions Every Design Contract Should Include
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Contracts are not written because the parties expect the transaction to go off without a hitch. Contracts are written in anticipation of problems arising. In the 4,000 years since the first known contracts were written, specifying the names of the seller, buyer, item/service, and cost terms, the scope of contractual provisions have expanded to address the rights and responsibilities of the parties when things do not go as expected. Despite the impossibility of anticipating every way in which a project might go sideways, decades of experience representing design professionals in litigation review inform certain basic contract provisions a prudent design professional should consider including within their form proposals or inserting into contracts prepared by others.

Reliance on Owner-Provided Information

The project owner often supplies information concerning a site, a project design, or an existing building, providing the design professional with a starting point in performing their work. As the project moves through the stages of design from conceptual, schematic, development, construction documents, bidding and administration, modifications to the information provided by the owner or the owner's other consultants may change.

Defining the design professional's right to rely on owner-provided information serves two critical functions: First, should the information change such that the design professional has to undertake additional effort, a provision addressing the design professional's right to rely on owner-provided information can avoid disputes over costs; Second, in a worst-case scenario where discrepancies between the owner-supplied information and actual conditions are not discovered until construction is underway, a provision addressing the design professional's right to rely on owner-provided information can provide a compelling defense. Put another way, a contract provision stating the design professional is entitled to rely upon the accuracy of all information supplied by the owner or other professionals hired by the owner, and that the design professional will be compensated by the owner for any costs incurred to make corrections or revisions to owner-supplied information, will provide a layer of protection to the design professional who relies in good faith upon work performed and provided by others at the owner's behest.

Waiver of Consequential Damages

Design professionals recognize that owners may pursue claims related to cost overruns related to errors or omissions in the design. But when a project opening is delayed, owners often seek to recover lost profits and other business costs from the design professional, claiming that "but for" the designer's errors or omissions, the business would have been open and the owner collecting rent or generating revenue as per the contract schedule. Such consequential damages or indirect losses can include anything the owner seeks to connect to the design issue, claiming it was foreseeable that if the project did not open on time (for example), owner would suffer lost business



opportunities, loss of use of the project, loss of goodwill, damage to owner's reputation, increased financing costs and other categories of damages which the design professional was unlikely to have considered at the time of contracting, but which the project owner is now connecting to the time spent to address and correct a design issue.

While such claims may seem speculative and may not actually be recoverable, the cost of a claim for consequential damages can often outstrip the cost of correcting the design error or omission itself. Many owners use the threat of litigation over millions of dollars of consequential damages to squeeze a design professional to pay a greater sum to resolve design disputes far in excess of the thousands of dollars which may be attributable to an error or omission. To minimize the risk of such claims, the prudent design professional will include a waiver of consequential damages within their form proposal or terms and conditions incorporated within a contract to define the limits of the damages an owner may seek to recover.

Limitation of Liability

While risk cannot be avoided, the potential exposure accompanying risk can be limited by contract. Every design contract carries the risk that claims tied to design issues may outstrip the fees generated on the project. Even low five figure design contracts for limited services on a project can provide an owner with the opportunity to assert a six or seven figure claim for damages arising from design-related issues. While those circumstances do not exist on every project, when offering their proposal and executing their contract, the prudent design professional will seek to limit their liability exposure to fees paid (if the owner will accept such a limitation) or the policy limits of available insurance (if the owner balks at the lower amount) as a means to protect themselves and their business.

It is a basic tenet of the law that freedom of contract among sophisticated parties, such as project owners and construction professionals, allows for the allocation of risks, including who is responsible for what information; what types of damages may be claimed; and the amount of damages which may be recoverable. Prudent design professionals will leverage their bargaining position when submitting bids and negotiating contracts to protect themselves from owners looking to shift project construction risks to the design team.



Conclusion

The contractual provisions discussed herein are examples of means by which designers can protect themselves at the contract stage from claims, and minimize the risk of spending time with lawyers in a courtroom litigating over disputes.

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