GREAT AMERICAN INSURANCE GROUP | Professional Liability

The Great American Dozen

Contract Check List

While Great American's Risk Management Team is committed to assisting you and your risk management needs, we have compiled a quick guide with key contract provisions that should be taken into consideration when reviewing your next contract.

1. <u>Defense and Indemnification:</u> You've heard it. You've seen it: "Design Professional will defend, indemnify and hold harmless the Client, the Contractor and all officers, directors, subsidiaries, parent companies, employees and agents from all losses and damages associated with this Project." This provision is frequently used by Owners and should be reviewed and revised to protect a design professional's interests.

Indemnification clauses are meant to shift the responsibility for certain potential risks from one project participant to another. However, it is important to know for what risks you are taking responsibility. As a design professional, you are only legally liable to indemnify another party for your own negligence. Nothing more, nothing less, which includes defense obligations (baring certain jurisdictions). Typically, professional liability policies do not cover defense costs of another party.

It is important to note that some contracts require the defense/indemnification of the Client for the Client's own negligence. Such contract provisions are enforceable in some jurisdictions. However, the language must be "clear and unequivocal." Despite the fact that this language would present coverage issues under the professional liability policy, the design professional can still be liable under the contract.

- ✓ Remember:
  - Limit the definition of "indemnitee" to only the party with whom you are contracting (example: terms such as "agent," "parent company," "subsidiaries" should be stricken from the contract).
  - Delete any defense obligations.
  - Indemnification obligation should be negligence-based only.

A sample of an insurable indemnity provision:

> *To the fullest extent permitted by law, the Design Professional shall indemnify and hold harmless the Client from and against damages, losses, costs and expenses (including reasonable attorneys' and experts' fees, interest and court costs) to the extent such damages result from the negligent act, error or omission of the Design Professional, its employees, subconsultants or anyone for whose actions the Design Professional is legally responsible.*

2. <u>Standard of Care</u>: The standard of care is the standard by which a design professional's performance is judged. The industry standard is one of reasonableness and practicality. Remember, a design professional is providing a service, not a product, and the standard is not "perfection."

✓ Remember

- Words such as “above average,” “highest,” “best” and “first-class” delineate a higher standard of care and should not be the standard by which design professionals are judged. If you see these terms in your contract, it is best to remove them.
- Your professional liability insurance policy provides coverage for the industry standard. If your contract promises anything more, than that may present insurability issues.

A sample of an insurable standard of care provision is as follows:

> *The services that a Design Professional provides will be performed in a manner consistent with that degree of care as ordinarily exercised by similarly situated Design Professional currently practicing under similar circumstances. No warranty or guarantee is included or intended in this Agreement or instruments of its services.*

3. <u>Time is of the essence</u>: Delete this provision if possible. This provision may invite potential delay claims later in the project. If any “milestone” dates are missed or any time provision in the contract is not carried out exactly, the other party has both the recourse of terminating the agreement and of bringing a claim for delay damages. Additionally, some courts have construed such a phrase as the establishment of an express warranty. It is our recommendation that this language be deleted from your contract.

4. <u>Scope of Services</u>: Be sure that your scope of services is specifically delineated in your contract. This means that the services you are providing *and not providing* should be defined in the contract. In addition, it is recommended that services being provided by other design professionals also be noted in this provision.

5. <u>Incorporation by Reference</u>: This is a biggie and is often overlooked. Essentially, this phrase is doing exactly what it says: it includes the terms and obligations of the underlying contract into the design professional’s contract simply by mention. It is very common for consultant agreements to incorporate a prime agreement by reference. This language can present insurability/risk management issues as the prime agreement may contain inappropriate language for the consultant.

✓ Remember:

- If you see this provision, you should request a copy of the Prime agreement for review.

Sample language to include in your contract is as follows:

In the event of any discrepancy between the terms and conditions of the Consultant agreement and Prime agreement, the Consultant agreement will control.

6. <u>Limitation of Liability</u>: It is recommended that a Limitation of Liability provision be included in your contract. This provision, if found to be enforceable, can cap the potential damages that can be incurred[1].

✓ Remember:

- In order to enhance enforceability of such a clause, the design professional should draw the client's attention to the clause.
- Engage in negotiation with the client concerning the clause.
- Maintain documentation and evidence of that negotiation process.

Sample Language that can be used:

Notwithstanding any other provision of this agreement and to the fullest extent permitted by law, the Client agrees that the total liability, in the aggregate, of the Design Professional and the Design Professional's officers, directors, partners, employees, agents and consultants, to the Client and their respective officers, directors, employees, agents and anyone claiming by, through or under the Client for any and all injuries, claims, losses, expenses, damages whatsoever arising out of, resulting from or in any way relating to the Design Professional's services, this Agreement or any Addenda, from any cause or causes, shall be limited to [the proceeds of the Design Professional's available insurance coverage or the total amount of compensation received by the Design Professional, whichever is greater.

DID YOU KNOW?

If your firm implements a limitation of liability of $250,000 or less in your contract, you may qualify for up to 15 percent reduction in premium with Great American Insurance Group.

7. <u>Alternative Dispute Resolution (ADR)</u>: It is helpful to include an ADR provision in your contract, provided that this is negotiated with your client. At times, all that is needed is a meeting with your client to determine if the issue can be resolved in its initial stages. If this

[1] Limitation of liability clauses should be drafted by legal counsel in the design professional's jurisdiction with experience in this area. The phraseology of such clauses may be critical not only to their effectiveness and scope, but also to the enforceability of the clause itself, depending on wording and jurisdiction.

is not effective, “Mediation as a Condition Precedent” can be the next step. This essentially mandates the parties engage in mediation, with a neutral third party, to determine whether the issue can be resolved before any party can commence litigation.

A sample mediation clause to consider:

> *Design Professional and Client agree to submit all claims and disputes arising out of this Agreement to non-binding mediation before the initiation of legal proceedings. This provision shall survive the completion or termination of this Agreement; however, neither party shall seek mediation of any claim or dispute arising out of this Agreement beyond the period of time that would bar the initiation of legal proceedings to litigate such claim or dispute under the applicable law*.

In addition, you may often see an arbitration clause in your contract. It is highly recommended that these arbitration provisions are removed and replaced with a mediation clause. Arbitration lives up to its name and oftentimes the decision rendered is ‘arbitrary.’ In addition, arbitration is arguably more costly than litigation and the decisions are unappealable. Rather, mediation is the preferred method of resolution whereby a neutral party is retained to hear both sides of the conflict and the decision is non-binding. A mediation is a great avenue to explore a settlement before engaging in litigation and incurring legal fees.

8. <u>Ownership of Documents</u>: Some contracts contain ownership clauses wherein the Client assumes ownership of the Design Professional’s designs/specifications. While it is not recommended the ownership is transferred to the Client, there are ways to protect yourself if this becomes a ‘deal-breaker.’

✓ Remember:

- All fees owed to the design professional must be paid in full before providing documents to the client.
- Ensure that an indemnification provision is included if the design professional is handing over their work product.

Sample Language is as follows:

> *Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Design Professional and their respective officers, employees, agents and representatives, from any claim, damage, liability or cost (including reasonable attorney fees), caused by arising or allegedly arising out of any unauthorized reuse or modification of the construction documents by the Client or any person or entity that acquires or obtains the plans and specification from or through the Client without the written authorization of the Design Professional*.

9. **Know Your Role and Avoid Express Warranties or Guarantees**: The role of a Design Professional is often confused with that of a Contractor. The industry's standard of care for a design professional's performance is reasonableness and practicality, not perfection. Design Professionals provide a service, not a product. When referenced in a contract, your role should be defined as "Design Professional," "Architect," "Engineer," or "Consultant." If a client refers to you as a "Contractor" or "Subcontractor," it may indicate that the contract is more suited for a contractor doing work rather than a design professional providing services. A Design Professional cannot guarantee a perfect result, and it is recommended that any language referring to warranties or guarantees be removed.

- ✓ Watch for buzz words like "work," "warrants," "guarantees," "ensures," or "certifies" in your contract.

10. **Jobsite Safety**: Jobsite Safety has been and generally continues to be the responsibility of a Project's general contractor, unless stated otherwise. While this is a known obligation since the general contractor has control of the project site and those on-site, it is recommended that a Design Professional specifically exclude the any jobsite safety responsibilities in their contract.

We recommend adding the following language:

> The Design Professional shall not supervise, direct, or have control over Contractor's work. The Design Professional shall not have authority over or responsibility for the construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the work of the Contractor. The Design Professional does not guarantee the performance of the construction contract by the Contractor and does not assume responsibility for the Contractor's failure to furnish and perform its work in accordance with the Contract Documents.

11. **Right to Rely on Owner-Furnished Information:** Modern design practice depends heavily on existing information that the design professional did not create—site surveys, geotechnical investigations, environmental assessments, utility locations, as-built drawings, and prior feasibility studies. These materials form the foundation for design services, yet they are prepared outside the design professional's scope of work. Establishing a clear contractual right to rely on this information is essential for fair risk allocation.

It is neither feasible nor economically viable for design professionals to verify or duplicate owner-furnished baseline investigations. Without explicit language establishing the right to

rely, design professionals may face liability for defects in information they did not create and could not reasonably confirm.

Recommended provisions:

- The Design Professional shall be entitled to rely upon information provided by the Owner, including the technical sufficiency and timely delivery of documents and services furnished by the Owner's other consultants.
- The Design Professional shall not be required to review or verify any information provided by the Owner or the designs or computations of the Owner's other consultants for compliance with applicable laws, statutes, ordinances, building codes, and regulations.
- The Design Professional shall have no responsibility for any services provided by the Owner's other consultants.
- The Owner shall indemnify and hold the Design Professional harmless from and against claims, damages, losses, and expenses arising out of services performed by the Owner's other consultants.

Sample clause:

The Design Professional shall be entitled to rely upon the accuracy, completeness, and technical sufficiency of all information furnished by the Owner, including, without limitation, surveys, reports, studies, and services performed by the Owner's other consultants. The Design Professional shall not be required to investigate, review, or verify such information or the designs, computations, or services prepared by the Owner's other consultants for compliance with applicable laws, statutes, ordinances, building codes, rules, or regulations. The Owner shall indemnify and hold the Design Professional harmless from and against claims, damages, losses, and expenses arising out of the services performed by the Owner or the Owner's other consultants.

12**. <u>Mutual Waiver of Subrogation</u>:** Subrogation is a legal right that allows insurers, after paying a claim, to pursue recovery from third parties they believe caused the loss. While common in the insurance industry, subrogation can create significant unfairness for design professionals. Even when all parties agree that insurance will be the exclusive source of recovery for certain property damage, the design professional may still be drawn into costly and time-consuming litigation.

A mutual waiver of subrogation addresses this issue directly. By agreeing that, to the extent property insurance covers a loss, neither the Owner nor the Design Professional (nor their contractors, consultants, etc.) will pursue claims against one another, the contract ensures

that losses are resolved through insurance—not litigation. This keeps the focus on project completion, reduces disputes, and aligns with the fundamental purpose of risk transfer: insurance should bear the risk, not the design professional's balance sheet.

Without a waiver, property insurers routinely include architects, engineers, and consultants in lawsuits to recoup payments for fire, water intrusion, or similar damages. These claims can last years and generate substantial legal costs—even when the design professional had no role in the loss. A mutual waiver of subrogation eliminates this exposure by ensuring that covered property losses are resolved solely through insurance.

Key advantages:

- **Reduces litigation:** Prevents unnecessary lawsuits and defense expenses.
- **Clarifies risk allocation:** Keeps responsibility with the insurance purchased to address it.
- **Supports industry standards:** Consistent with AIA B101 and A201 agreements.
- **Protects project focus:** Keeps parties aligned on completion and recovery—not blame.

Sample clauses:

To the extent damages are covered by property insurance, the Owner and Design Professional waive all rights against each other and against the contractors, consultants, agents, and employees of the other, except to insurance proceeds. Each party shall require similar waivers from their contractors and consultants. This waiver applies only to insured losses; if coverage is denied or the insurer is insolvent, rights are preserved. Nothing herein limits the Design Professional's rights against subconsultants for their own negligence.

Or:

The Owner and the Architect waive all rights against each other and against the contractors, subcontractors, consultants, agents, and employees of the other for damages caused by fire or other causes of loss to the extent covered by property insurance applicable to the Work or the Architect's Instruments of Service. This waiver shall be effective regardless of whether the party suffering the loss has obtained such insurance. The waiver shall apply to the extent that such insurance is applicable to the damages and shall survive completion of the Project and termination of this Agreement. The Owner and Architect shall require similar waivers from their respective contractors, consultants, and insurers.