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DESIGN-BUILD

Standard forms

Standard form agreements are usually the product of a great deal of effort and consultation with clients, contractors, design professionals and other industry groups. The forms are often updated to eliminate inconsistencies or accommodate changed circumstances. These forms are effective because they are based on current legal precedents and litigation. Because standard forms are fair, balanced and backed by industry and trade associations, clients often accept them.

On a national level, The American Institute of Architects (AIA), Engineers Joint Contract Documents Committee (EJCDC) and Associated General Contractors of America (AGC) produce standard contracts of various kinds for industry-wide use. (*Note: there is danger in taking clauses verbatim from one standard contract and inserting them in another.*)

It is fairly easy to make amendments to other construction contract documents, but the parties should be careful to use language that is consistent with the rest of the document.

Custom forms

When it is important to use custom agreements, due to the nature of the project or the client's wishes, the design professional may find it useful to check its usual terms against those of a standard contract.

There are some basic questions to ask when reviewing a contract, including:

- ✓ Why is this language 'better' than the standard form language?
- ✓ What problem is being solved?
- ✓ How does it affect the design professional's responsibilities?
- ✓ Will the language affect the relationship between the client and the design professional?
- ✓ Is the design professional assuming liabilities for which the design professional is not insured?

Review by counsel

For peace of mind, there is no substitute for contract review by a lawyer who is familiar with both the construction industry and the prevailing situation in your state. If and when disputes arise, the fact that an experienced law firm reviewed the contract on your behalf may well prove influential in resolving the matter. Insurance brokers and the CNA/Schinnerer program can also provide information on the exposures and risk management concerns intrinsic in a contract.

Rise of design-build

The rise of design-build as a project delivery method is significant enough to merit its own section in this guide. Design-build projects are a major source of claims, so any design professional considering such a project should consult the 'Design-build' section. For the purposes of this section, it is important to note that design-build combines designers' and builders' roles under a single point of responsibility.

Design-build contracts are often customized and advice should be sought from legal counsel before undertaking such a contract. There are many possible design-build contractual scenarios. The situation whereby the contractor acts as the design-builder, and retains the design professional, is quite common and does not require any special insurance or contractual arrangements by design professionals as they continue to provide services to their clients, even though it is the contractor rather than the client. The arrangement that involves a joint venture between the design professional and a contractor is more complex and professional liability insurance should be negotiated individually.

Types of damages—contractual, tort and statutory

Design professionals may become liable for three categories of damages:

- ✓ Direct damages, consisting of injury or death to a person, or damage to property
- ✓ Consequential damages, which are the indirect but reasonably foreseeable results of an action or failure to act
- ✓ Statutory damages, prescribed by the language in a statute—statutory damages can be awarded, even where there is no apparent injury or damage to property or persons

Asbestos/environmental concerns

Whether or not the design professional is aware of asbestos or other environmental hazards, responsibility for the abatement of those hazards should be the client's, since it is normally the client's land or property that contains the hazards in the first place.

Any time there is a situation where pollutants can lead to third party damage claims against the design professional, the client should be willing to consider one or more of the following solutions:

- ✓ Provide defense and protection of the design professional against claims arising from the release of any asbestos or other environmental pollutant or hazard
- ✓ Provide adequate compensation for the increased level of service and risk associated with such a project
- ✓ Allocate by contract much of the risk to the contractor, who is responsible for the removal of any environmental hazard, and who can manage the risk and usually be insured against such exposures