



Tips on Drafting Better Contracts

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Design professionals often find themselves involved in disputes arising out of services they performed at a project. In such instances, the existence of a properly prepared and executed contract may mean the difference between remaining a party to such a dispute or being relieved of liability for such claims. The days of the handshake deal are far gone and it is imperative that the design professional be armed with a written agreement that clearly delineates the nature and extent of each party's roles, rights and responsibilities. Below are several important tips on drafting a well versed agreement:

- **BE CLEAR AS TO THE SCOPE OF YOUR SERVICES.** The contract should clearly state the nature and extent of each service being performed by the design professional during both the design and construction phases of the project. Further, if the contract provides that the design professional will perform additional services over and above basic services, the agreement should clearly state that any such services will only be provided if requested and expressly agreed to in writing.
- **IDENTIFY SPECIFIC EXCLUSIONS.** Services that the parties agree will not be performed by the design professional should be specifically delineated in the contract. An example is that the design professional will not be responsible for the contractor's means, methods, techniques or sequencing of construction, or for site safety.
- **IF APPROPRIATE, INDICATE THAT THERE ARE NO THIRD PARTY BENEFICIARIES TO THE CONTRACT.** If it is agreed between the parties that the services being performed by the design professional are to benefit someone who is not a party to the agreement, make certain the contract clearly identifies that party. If not, make sure the agreement provides that no relationship, contractual or otherwise, is being created between the architect and any third party.
- **INCLUDE A COPYRIGHT PROTECTION PROVISION.** Unless agreed otherwise, the contract should include language that provides that the design professional retains all copyright protection and ownership to the plans and drawings. It should also be stated that the design professional is granting the owner a nonexclusive license to the plans and drawings solely for construction and use with respect to the subject project.
- **BE CAUTIOUS WITH INDEMNIFICATION LANGUAGE.** Many owners request design professionals sign agreements which

contain indemnification language which requires the design professional to defend, indemnify and/or hold harmless the owner in the event of a claim. Be careful when agreeing to any contracts with such language, as such provisions often result in significant legal ramifications.

- **INCLUDE PAYMENT LANGUAGE.** Clearly state the precise amounts the design professional is to be paid and when payment is to be made.
- **ADD TERMINATION LANGUAGE.** Include a provision that clearly states when and how the parties may terminate the contract.
- **INCLUDE LIMITATION OF LIABILITY LANGUAGE.** In certain circumstances, the Courts of the State of New York have enforced limitation of liability clauses. Therefore, consider adding language limiting the amount of damages for which the design professional will be responsible.
- **CONSIDER ALTERNATIVE DISPUTE RESOLUTION.** In anticipation of a dispute between the parties, consider including a provision setting forth a mechanism (i.e., arbitration or mediation) for resolving such a dispute. Such language can be helpful to stave off full blown litigation should a conflict between the parties arise.
- **GET A FULLY SIGNED AND DATED CONTRACT.** It is difficult, and sometimes impossible, to enforce a contract that is not dated and signed by all parties.

While having an appropriate contract is no guarantee against a claim, the absence of one certainly impedes the design professional's ability to extricate themselves from such claims. The paramount rule is to be cautious when entering into professional service agreements. The design professional must be careful to review and understand all of the terms and conditions of the agreement, which set forth the rights and responsibilities of the parties, prior to executing the agreement. In this regard, the design professional should strongly consider consulting with an attorney qualified to assist in drafting an agreement which will fully protect the design professional's interests.

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