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TOP TEN DESIGN CONTRACT CLAUSES

The Good, The Bad, and The Ugly

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SCOPE OF SERVICES (1)

- Define the Services
- WYSIWYG: What you see is what you get
- Avoid disputes
- Control expenditures
- Schedule
- Single description
- Process for change in scope

SCOPE OF SERVICES

- Phasing of work—design services
  - Study
  - Schematic
  - Concept Plan
  - Final design and specifications
  - Construction services
  - Post-construction review



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SCOPE OF SERVICES

- Establish quantities
  - Meetings
  - Inspections
  - Copies
  - Site visits
  - Presentations



- Define Deliverables and Deadlines
  - Owner review and approval
  - Notice to Proceed

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SCOPE OF SERVICES

- Outside Sign-offs
  - Permits and regulatory approvals
  - Acquisition of easements and rights of entry
- Compliance
  - Applicable laws
  - Grants
- Subconsultants
  - Extent
  - Coordination
  - Responsibility

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SCOPE OF SERVICES

- Owner Obligations
- Consultant will rely on Owner for
  - Surveys
  - Existing conditions
  - Testing
  - Environmental
  - Title information and restrictions
  - Financial services
- Access to property or facilities: Is it an operating facility?

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PRICING AND PAYMENT (2)

- Define how much you will pay
- Define when you will pay
- Define how you will pay





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PRICING AND PAYMENT

- Methods of Pricing
  - Lump Sum
  - Cost Plus Fixed Fee
  - Direct Cost
  - Percentage of Construction Cost
- Timing of Payment
  - "upon presentation of the Architect's statement of services" (AIA)
  - "for all Services performed in compliance"



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PRICING AND PAYMENT

- Reimbursable Expenses
  - Travel
  - Meals
  - Telephone/Telecopy
  - Reproduction
  - Postage
  - Messenger
  - Computer use
  - Obtaining bids, proposals, permits
  - Electronic messages (AIA)
  - Overtime (AIA)
  - Insurance (AIA)







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DOCUMENTS (3)

- Primary Purposes
  - Ownership
  - Access
  - Preservation and retention
  - Reuse



- Definitions
  - "Drawings, plans, specifications, photos, reports, information, observations, calculations, notes and any other reports documents, data or information, in any form…"
  - "Drawings, specifications and other documents"

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DOCUMENTS

- Ownership by the government agency, the consultant or jointly
  - "Upon payment of all amounts due Consultant . . . documents shall be and remain the property of Owner"
  - "…Engineer and client shall retain a joint ownership and property interest therein whether or not the project is completed."
  - "Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright."

DOCUMENTS

- Access and Use
  - Generally, government agency should seek broad use rights
  - Consultant usually seeks usage rights for promotional purposes at a minimum
  - "The Architect shall have the right to include representations of the design of the Projects, including photographs of the exterior and interior among the Architect's promotional and professional materials."

DOCUMENTS

- Access and Use
  - "Consultant shall have the right to retain copies of the Documents for its files and, at its sole risk, to use the retained copies of the Documents and the underlying works for other projects."
  - "Owner shall have the right to use the Documents for its own use and, at its sole risk, to use the Documents for other projects"
  - "…documents shall not be used by the Owner or others on the Project, for additions to this Project or for completion of this Project by others…"
  - "Architect shall have the right to retain copies of such drawings, specifications and other documents and reuse the standard or typical designs therein."

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DOCUMENTS AND CONFIDENTIAL INFORMATION (4)

- Use and Ownership
  - Use and ownership of documents will implicate intellectual property rights and proprietary or confidential information.
  - "Consultant's [promotional] materials shall not include Owner's confidential information."
  - "The Architect's [promotional] materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be confidential or proprietary."

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DOCUMENTS

- Document Retention
  - Reasonable period, generally for auditing purposes.
  - "three years after termination of this contract"
  - Notice period before destruction of documents.
  - Longevity, changes in technology
  - "These files are compatible only on Auto CAD release 15 or greater."
  - "Because data stored on electronic media can deteriorate undetected or be modified without the Architect's knowledge, the Owner agrees that the Architect cannot be held liable for the completeness or correctness of the electronic data after an acceptance period of 90 days from delivery of the electronic files."

DOCUMENTS

- Consultant will seek indemnification for improper use or reliance on documents
  - "Any reuse [of documents] by Client without written verification or adaptation by Engineer for specific purpose intended will be at Client's sole risk and without liability or legal exposure to Engineer…and client shall indemnify and hold harmless Engineer…from all claims, damages, losses and expenses including attorney fees…"

WARRANTY (5)

- WYSIWYG: What You See Is What You Get
- Standard of Care
  - "As expeditiously as is consistent with professional skill and care and the orderly progress of the project" (AIA)
  - "Highest standards of professional practice, care and diligence by recognized consulting firms performing services of a similar nature"
  - "Generally accepted and currently recognized standards of practice"
  - "Degree of care or skill ordinarily exercised, under similar circumstances by reputable members of its profession practicing in same or similar locality"

WARRANTY

- Free from defects and flaws in design
- Strictly conform to requirements of contract
- Professional standards
- Fit, sufficient and suitable for purposes intended
- Responsible for quality, technical accuracy, completeness, coordination
- Corrective services
- Sole risk of consultant

INSURANCE (6)

- Types of Coverage
  - Professional Liability/E&O
  - Owner's Professional Protective Indemnity (OPPI)
  - General Liability
  - Auto
  - Workers' Comp/Employer's Liability
  - Umbrella/Excess

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INSURANCE

- Minimum Limits
  - "such insurance as the Contracting Officer may require" (FAR)
  - "at least the minimum insurance coverages set forth"
- Contractor Insurance/Construction Phase
  - "Owner shall require all contractors to name the Architect as additional insured" (AIA)
  - "Owner shall include in the contracts of all contractors the requirement that . . ."

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INDEMNIFICATION (7)

- Government might not seek indemnification if it requires consultant to carry sufficient insurance
  - Consultant may not be able to obtain insurance if contract includes an indemnity that is too broad
  - State law may excuse further indemnity if Owner specifies insurance
- Government might seek indemnification for events except to the extent that it is due to sole negligence of government agency

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INDEMNIFICATION

- Common events triggering indemnification
  - Arising from Consultant's performance or failure to perform
  - Negligence of Consultant
  - Error or omission of Consultant
  - Arising from Consultant's failure to meet standard of care
  - Arising from government authorized deviations from Architect documents
  - Discovery, disturbance, etc. of hazardous substance
  - Government misuse of documents



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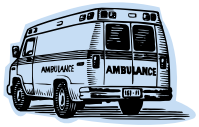
DELAY (8)

- Causes beyond Consultant's control
- Acts of God
- Acts of government
  - Client or non-client
- Acts of foreign enemy
- Acts of war
  - Declared
  - Undeclared
  - Civil
- Insurrection, rebellion, revolution



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DELAY

- Riots
- Terrorist activities
  - Foreign
  - Internal
- Vandalism
- Fires, floods, other casualty to property
- Unusually severe weather
- Epidemics, quarantines, illness
- Strikes, lockouts, labor disputes
- Inability to obtain material
- Accidents



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REMEDIES (9)

- Purposes
- Provide flexibility
- Create incentive to correct deficient work
- Protect Owner

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REMEDIES

- Withholding of payments
  - Pre-Declaration of Default
- Require correction of non-conforming work
- Reduce price and accept non-conforming work
- Terminate without liability for further payments
- Withhold and recover costs incurred by Owner in response
- Recover damages

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REMEDIES

- Terminations or Suspensions for Convenience
- Due to changed conditions
- Due to mistaken terminations for default

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DISPUTES (10)

- Circumvent forum shopping
- Elect most favorable forum
- Establish an agreed method for dispute resolution

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DISPUTES

- Types of Dispute Resolution
  - ADR
  - Internal Process
  - Mediation
  - Settlement Judge
  - Arbitration
  - Litigation



DISPUTES

- Establish an Internal Process
  - To avoid escalation of a dispute to litigation
  - Set a specific time limit for internal resolution
  - Useful for resolving less complex issues

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