

ACEC
Business Insurance Trust
Engineered for Peace of Mind

GREYLING
INSURANCE BROKERAGE | RISK CONSULTING
A DIVISION OF EPIC



FUNDAMENTAL CONTRACT CONSIDERATIONS FOR ENGINEERS

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ENGINEERING CONTRACT FUNDAMENTALS

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OBJECTIVE

Provide a General Overview of Fundamental Contract Terms and Provisions

Develop a Working Knowledge of These Fundamental Contract Clauses

Illustrate How Contracts Risk Management Benefits Engineers and Their Firms

ESSENTIAL PROVISIONS IN AN ENGINEER'S CONTRACT

Scope of Services – *Clear, limited, finite*

Standard of Care - *“Reasonable Person” standard; No warranty*

Schedule – *Time is NOT of the essence*

Compensation – *Timely, not contingent*

Additional Services

Owner's Responsibilities – *Your right to rely*

Risk Transfer

Insurance

Indemnity

Waiver of Subrogation

Limitation of Liability

Consequential Damages

Termination and Suspension of Services – *Beware!*

Ownership of Documents – *Instruments of Service;*

License

SCOPE OF SERVICES

Clearly Defined

Finite

Limited

Set out the nature and items of work that Engineer will perform

A Scope of Services that is too broad may result in an unlimited obligation or expectation

“Engineer’s services shall include but not be limited to”

Too broad. Virtually anything could fall within this scope

“Engineer’s services shall consist of the following”

Limited and Finite

Establishes Clear Expectations

Anything beyond this Scope triggers Additional Services

STANDARD OF CARE (SOC)

Establishes the quality and level of performance that Engineer must achieve on the project

Common law = “Reasonable person standard” / Negligence based

What would a reasonably prudent engineer have done under the same or similar circumstances?

Contract language can establish any higher standard to which the Engineer agrees

Anything beyond this Scope triggers Additional Services

SOC should be negligence-based and grounded in the Reasonably Prudent Person standard

A/E Professional Liability Insurance coverage is written on this basis

Heightened SOC can jeopardize coverage

Heightened SOC can amount to a warranty for which engineers are not insured

Not perfection

Highest, Best, Most, Utmost, Ultimate, Cutting Edge

INDEMNIFICATION

Indemnify (verb): To reimburse; compensate for loss or injury; give back; pay back; recompense for past loss; remunerate; repay; restore; return money paid out

- *Legal Thesaurus*, Second Edition. William C. Burton

Defend?

Protect?

Indemnity is an agreement (a contract or a provision in a larger contract) by which one engages to save another from the legal consequence of the conduct of one of the parties, or of some other person

Common Law Typically Requires Complete Absence of Fault On The Part Of A Party Seeking To Be Indemnified

Parties Can Agree In a Contract, However, To Anything They're Willing To Sign

Even If It's Unfair

Anti-Indemnity Statutes Play A Role

INDEMNIFICATION

▼ Broad-Form Indemnity

▼ Requires Engineer to indemnify Client for any losses arising out of the project for virtually any reason or due to the Client's or other parties' conduct, even if Engineer is completely free from fault

▼ " . . . connected with or arising out of the Project/your Services . . . "

▼ Insurability problems

▼ Intermediate-Form Indemnity

▼ Requires Engineer to indemnify Client for any losses arising out of the project so long as Engineer has the slightest degree of fault

▼ " . . . caused in whole or in part by the fault of the Engineer . . . "

▼ Insurability problems

▼ Limited-Form Indemnity

▼ Requires Engineer to indemnify Client only for those losses that are actually caused by the professional negligence of the Engineer or its subconsultants

▼ " . . . to the extent caused by the Engineer's negligent acts, errors, and omissions . . . "

▼ Insured for this!

INDEMNIFICATION

Why Should Engineers Be United on Indemnity?

Engineers will continue to see unfair indemnity provisions until we speak as one

Clients hear conflicting messages from us on indemnity, and don't believe us

When Engineers are willing to "sign anything", clients have no incentive to change
"Everyone else has signed this. What's your problem?"

A united front insisting on fair, insurable indemnity is good for our profession

- Realistic, fair fees

- Keeps insurance premiums manageable

- Reduces disputes between Engineers, Clients, and Contractors

Clients do not benefit from forcing uninsured liability onto underfunded Engineers

Engineers don't *really* gain a competitive advantage by being more risky

- Every project becomes a "bet the firm" project

- You may be one bad project away from bankruptcy or having to sell your firm

- Hope is not a strategy!

SCHEDULE

Similar to SOC, should be based on reasonably prudent person standard

Reasonable demands

Realistic expectations

~~Time is of the essence~~

Five simple words – May seem innocuous

Tied to schedule and not Engineer's SOC

Inappropriate/Aggressive schedule can conflict with Engineer's professional & ethical responsibilities

“Hold paramount the safety, health, and welfare of the public” (NSPE Fundamental Canon 1)

“In order to safeguard health, life, safety, welfare, and property, the practice of engineering in this state is a learned profession to be practiced and regulated as such . . .” (Ala.Code (1975) § 34-11-2)

Simple fix: ***“Subject to the applicable Standard of Care, time is of the essence.”***

COMPENSATION

Timing, Triggers

Invoice

When Client Receives Payment/Funding (“Pay-When-Paid”)

If Client Receives Payment Funding (“Pay-If-Paid”)

Method, Manner of Getting Paid

Check

Wire

ACH

Additional Services

Is Scope of Services Limited & Finite Such That Additional Services/Compensation Are Clearly Understood?

Addenda, Amendments That Modify Compensation Must Be Incorporated Into the Contract or Constitute a New Agreement

Parties’ Unwritten Pattern and Practice Can Serve To Modify Contract, Relationship

OWNER'S, CLIENT'S RESPONSIBILITIES

Access To Site

Safety Plan

Hazardous Materials – Discovery, Disclosure, Notification

Permits

- Building Permits

- Construction Permits

- Environmental Permits

Surveys

- Boundary Suveys

- Topographical Maps, Surveys

- Utilities, Subterranean Assets

- Geotechnical Reports, Soil Borings

- FONSIs, ESIs, EAs, Archeological Findings

Engineer's Right to Rely on the Completeness & Accuracy – Release of Claims

LIMITATION OF LIABILITY

Only Limits Engineer's Liability to Those Identified In The Contract

Cannot Limit Liability To Third Parties By Contract

Car Accident Plaintiffs

Personal Injury, Property Damage Plaintiffs

Direct Claims Brought By Contractors

Engineer's Contractual Liability to Client Can Outweigh Engineer's Ability To Control Risk

Compensation Is Certainly Limited

Agreed-Upon Limitation

Engineer's Compensation

Some Multiple of Compensation (e.g., 3x Fee)

Limits of Insurance Required By Contract

Limits of Insurance in Engineer's Practice Policies

WAIVER OF CONSEQUENTIAL DAMAGES

Should be Mutual

Insulates Parties From Liability For Indirect Damages

Lost Profits

Lost Business Opportunities

Increased Overhead

Loss of Goodwill/Business Reputation

cf. Direct Damages Like Medical Bills, Repair Costs, Compensatory Damages

Speculative Damages

Consequential Damages Do Not Naturally Flow From Breach of Contract, Negligence, or Other Wrong

DISCLAIMER OF THIRD-PARTY BENEFICIARIES

First Parties = Signatories to the Contract

Third Parties = Strangers to the Contract

Third Parties Can Sometimes Be Deemed To Have Rights Under The Contract

Unless Parties Cut Off Those Rights In The Contract

Explicit Intent To Disclaim Any Rights That Strangers To The Contract Might Otherwise Enjoy

e.g., The Contractor

JOBSITE SAFETY

Not suitable for Engineers

Responsibility of the Contractor or Whoever Owns/Has Control of the Site

Subordinate to Client's, Owner's, Contractor's Site Safety Plan

Little, No Control Over Others Who Will Have Profound Direct Impact

Contractors

Owner

Governmental Agencies

The Public, Third Parties

A/E Professional Liability Insurance

Engineers typically do not serve as safety consultants

***Pro Tip: Avoid the Assumption of a Duty Not Otherwise Owed by Contract From Your Conduct In The Field
Ex: Engineer/CEI tells Contractor's Employee To Stop What He's Doing, Come Down, Put On His Harness, and Tie Off Before Resuming His Task. Contract Does Not Call For This, But Engineer Just Assumed a Duty For Safety Through Her Conduct.***

SITE VISITS / CONTRACT ADMINISTRATION

Major Scope-Creep Potential

Disadvantageous Site Visit Provision Can Negate a Well-Craft Standard of Care

The Applicable SOC may call for only x number of site visits per time period

Contract's Site Visit Provision May Substantially Enhance The Number Of Site Visits Or The Scope of Site Visits

Does Compensation Account For This?

LIQUIDATED DAMAGES

Inappropriate for Professional Engineers

Money Damages Agree-Upon In Advance of an Anticipated Loss That Is Within The Control of the Breaching Party

Automatically Triggered By Some Arbitrary Event; *cf.* Professionally Negligent Act by Engineer

Factors Often Outside of Engineer's Control

Timely Performance By Contractor

Proper Performance By Contractor

Conduct of Owners, Others

LDs are not Damages the Engineer Becomes Legally Obligated To Pay Because of a Professionally Negligent Act, Error, or Omission

Any Damages Suffered by the Client or Owner Because of Engineer's Professional Negligence Are Simply Damages

Covered by the Engineer's Indemnity Obligations

A/E Professional Liability Insurance

Distinguish A Particular Dollar Amount Chargeable Per Day Under Contract Because of An Arbitrary Event or Deadline

INCORPORATION-BY-REFERENCE

Parole Evidence Rule

“The Four Corners of the Contract”

Incorporation-by-Reference Clauses Make Documents That Are Outside of the Contract Legally Binding As If They Were Written Into The Contract

Standard Specifications

Other Parties’ Contracts (Flow-Down Implications)

Safety Plans

Your Proposal And Marketing Materials

Cybersecurity, Technological, Software Requirements

Bound By These Obligations Even If Engineer Never Sees Them Or Reads Them

Trending: Electronically Stored Documents Hosted On Websites Accessible by Hyperlinks & http:// Addresses

Always Request and Review Upstream Contracts and Documents That Are Being Incorporated Into Your Contracts
i.e., Design-Build

RE-USE & OWNERSHIP OF DOCUMENTS

Instruments of Service

Works For Hire

Protection Under the Copyright Act (17 U.S.C. §§ 101, et seq.) From Use of Instruments of Service by Another Without Express Written Consent

Professional Liability Exposure Caused by Future Use

Not a Paid Fee For Future Use

No Way to Control or Tailor Design to Future Project, Future Use of Design

Limited-Use License

Perpetual

Royalty-Free

Paid-In-Full

CONTRACTOR SUBMITTALS

Contractors Must Provide Submittals – Most Common Are Shop Drawings

Key Word to Avoid If You Can is “Approve”

“Approval” of Shop Drawings Has Been Held To Be The Assumption Of The Legal Liability When That Component Of The Project Fails, Injures Someone, Or Causes Damages

AIA A201 § 4.2.7 – “for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents”

EJCDC C-700—2018 § 7.16.C

Review

General Conformance

Design Concepts, Information Given

Review Does Not Relieve Contractor of Obligations and Responsibilities

Approved


CONTRACT REQUIREMENTS: INSURANCE COVERAGE NEEDS

DENISE SPRUMONT
SENIOR UNDERWRITER
THE HARTFORD



CERTIFICATE OF INSURANCE

- ✓ Disclaimer
- ✓ Carrier & Policy Limits
- ✓ Additional Insured
- ✓ Special Wording



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	CONTACT NAME	
	PHONE (A/C, No. Ext):	FAX (A/C, No.):
	EMAIL ADDRESS:	
	ADDRESS:	
	INSURER(S) AFFORDING COVERAGE	NAIC #
INSURED	INSURER A:	
	INSURER B:	
	INSURER C:	
	INSURER D:	
	INSURER E:	
	INSURER F:	

COVERAGES

CERTIFICATE NUMBER:

REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSURER	TYPE OF INSURANCE	ADDITIONAL INSURED	POLICY NUMBER	POLICY EFF. DATE (MM/DD/YYYY)	POLICY EXP. DATE (MM/DD/YYYY)	LIMITS
	COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO. SUBJECT <input type="checkbox"/> LOC <input type="checkbox"/> OTHER					EACH OCCURRENCE \$ (DAMAGE TO RENTED PREMISES (Per occurrence)) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ PRODUCTS • COMPIOP AGG \$
	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> OWNED AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS ONLY <input type="checkbox"/> NON-OWNED AUTOS ONLY					COMBINED SINGLE LIMIT (Per accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
	UMBRELLA LIAB <input type="checkbox"/> OCCUR EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED. \$ <input type="checkbox"/> RETENTION \$					EACH OCCURRENCE \$ AGGREGATE \$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N	N/A			<input type="checkbox"/> PER STATUTE <input type="checkbox"/> OTHER E.L. EACH ACCIDENT \$ E.L. DISEASE • EA EMPLOYEE \$ E.L. DISEASE • POLICY LIMIT \$
DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)						

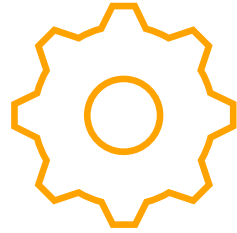
CERTIFICATE HOLDER

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

ADDITIONAL INSURED STATUS ON A COMMERCIAL POLICY



What Does it Do?



Who Needs It?



What Happens in the Event of a Claim?

ADDITIONAL INSURED: SPECIFIC & BLANKET OPTIONS

SPECIFIC

Used for a certificate holder who wants to see themselves scheduled on the policy. May be needed for a specific coverage type for example:

- Ongoing operations (CG 20 10)
- Products and completed operations (CG 20 37)
- Lessors of property (building or equipment)
- Municipalities
- Side-track agreements
- Vendors
- Line of business (auto, general liability, property, and workers' comp)

BLANKET

Provides coverage when required by written contract. Lessens the burden on the policy owner to request endorsements each time.

COMMON ENDORSEMENTS FOR ENGINEERS

WAIVERS OF SUBROGATION



Often required as part of a written contract. An agreement where the carrier agrees not to subrogate against a party, even if there is an opportunity to do so.

HOLD HARMLESS



An agreement where through a written agreement, the policyholder agrees not to hold a party harmless in the event they may have responsibility in relation to a loss situation.

PRIMARY & NON-CONTRIBUTORY ENDORSEMENTS



Often requested as part of a written contract. The policy holder agrees that their policy will be primary, and will not contribute to loss dollars in the event of a loss.

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THANK YOU

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