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


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 Surveys
- 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
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CERTIFICATE OF INSURANCE

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

USED FOR A CERTIFICATE HOLDER WHO WANTS TO SEE THEMSELVES SCHEDULED ON THE POLICY. MAY BE NEEDED FOR A SPECIFIC COVERAGE TYPE FOR EXAMPLE:

SPECIFIC

- 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.
THANK YOU

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