VERTICAL CONSTRUCTION

TEN CONTRACT CLAUSES ENGINEERS SHOULD KNOW

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THE FLOW DOWN CLAUSE

- The terms “flow down” to you from Owner or Prime..

AIA C141

- **§ 3.2** Engineer shall assume toward the Consultant all obligations and responsibilities that the Owner assumes toward the Engineer, and the Consultant shall assume toward the Engineer all obligations and responsibilities that the Engineer assumes toward the Owner. Insofar as applicable to a Service Agreement, the Engineer shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the Engineer, and the Consultant shall have the benefit of all rights, remedies and redress against the Engineer that the Engineer, under the Prime Agreement, has against the Owner. Where a provision of the Prime Agreement is inconsistent with a provision of the Service Agreement, the Service Agreement shall govern.

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FLOW DOWN CLAUSE

- AE accepts the contract terms of its prime.
- Often very little latitude for negotiation.
- Procedural framework of the relationship is set by others – notices, disputes, etc.

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FLOW DOW CLAUSE

- This is not “boilerplate.”
- You are bound to your prime’s documents - get a copy of every single one of them.
- Make sure the prime is aware of the limits of your coverages.

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FLOW DOWN CLAUSE

- Request in writing all document applicable to your contract.
- See that those provisions flow down to you that are “applicable to your scope of work”.
- Read the Prime Contract and other relevant documents before you negotiate.

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STANDARD OF CARE

AIA B101, Article 2.2:

The AE shall perform its services consistent with the professional skill and care ordinarily provided by AE practicing in the same or similar locality under the same or similar circumstances. The AE shall perform its services as expeditiously as is consistent with such skill and care and the orderly progress of the Project.

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STANDARD OF CARE

- Key language:
  - Professional skill and care, not “highest and best”
  - Ordinarily provided
  - Same locality
  - Similar circumstances
  - Same building type
  - Similar budget parameters

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STANDARD OF CARE

- This the performance standard of a professional.
- If you fail to meet this standard, you are negligent.
- Exactly what constitutes the negligence is established by expert testimony at trials where quality of performance is the issue.

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STANDARD OF CARE

- In the absence of the clause, applicable law supplies the definition.
- Do not allow contract language to modify the standard.
- Delete performance guarantees: “engineer warrants . . . insures . . . assures . . . guarantees.”
- Delete descriptions of services that set vague standards: “best efforts; “highest standard”; “first class”; “luxury”; “international quality”. Delete these.

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STANDARD OF CARE

Professional liability insurance will not cover an expanded standard of care.

The most effective tactic is to make it clear that professional liability insurance will not cover a standard of care broader than the norm. . . and you cannot purchase such coverage.

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INDEMNITY

- There is no “standard” indemnity clause.
- It is not likely that what is presented to you is equitable; quite possibly it will not be consistent with current law.
- It is a legislative/political/economic battleground in Minnesota right now, for AE’s and subcontractors.
- Don’t do this by yourself. Call your broker or counsel.

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INDEMNITY

- Indemnifying others for their own negligence. No. Delete "sole" in front of Owner's negligence.
- Indemnifying for "any and all injury": No. Limit exposure "to the extent of your negligence".
- Promising to defend others - is it within your coverage?
- Defense costs as a separate promise independent of your obligation to indemnify.

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INDEMNITY – THE STATUTES

- Minn. Stat. 337.01 to Minn. Stat. 331.10
  - A clause in a design contract requiring the AE to indemnify for someone else's negligence is unenforceable, unless
  - The AE can insure the obligation.

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INDEMNITY – NEWEST ISSUE

- Indemnity clause that splits the defense obligation from the liability:

"Vendor's obligations to defend Contractor from claims for damages , losses, and expenses are separate and distinct from its obligations to indemnify and hold harmless Contractor from such claims, damages, losses and expenses." (From local GC's contract)

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INDEMNITY

If you believe in “deal breakers”, this clause may be it.

- Do not agree to pay for someone else’s negligence.
- Make sure you are covered for the “defend” obligation.
- Do not sign the new split “indemnity”-”defense” language without review by your broker.

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INSURANCE

AIA B101 sets out typical requirements:

Article 2.5 The Engineer shall maintain the following insurance for the duration of this Agreement. If any of the requirements set forth below exceed the types and limits the Architect normally maintains, the Owner shall reimburse the Engineer for any additional cost:

.1 General Liability
.2 Automobile Liability
3. Workers' Compensation
.4 Professional Liability

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INSURANCE

- Professional Liability Coverage: see Standard of Care. Beware of uninsurable promises.
- E&O: understand your coverage: i.e.,
  - no additional insureds
  - "claims made" coverage
  - can you get pre-claim legal assistance coverage?
  - do you know how your deductible works?
  - do the underwriters want notice of high risk projects?
  - does coverage apply outside the US?

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INSURANCE

- General Liability
  - Additional insured requirement in contract.
  - What does the Umbrella apply to?
  - What is an “occurrence”, and when do “occurrences” occur?
  - Does it cover you internationally?
    - If you are working internationally, see your broker!

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INSURANCE –PROJECT POLICIES,ETC

- Project Policies: Owners want a rebate for reduced premium: impossible
- Owner may want you to procure a project policy. Know the difference – the price will shock them.
- If there is a "wrap" on a project, what is your coverage? Implications for your coverage?
- OPP: they usually come right through you first.

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DISPUTE RESOLUTION

- Article 8 of AIA B141
- Requires mediation as a condition precedent
- Offers the option of arbitration, litigation or other.
- AAA arbitration is built into the arbitration choice.

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DISPUTE RESOLUTION

- Check the “flow down” clause. The decision may already be made.
- Arbitration sounds appealing, but is not usually faster, cheaper or more fair that litigation.
- Arbitrators have the reputation for “splitting the baby”.

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DISPUTE RESOLUTION

- Mediate: you will be required to do so before you get into court anyway.
- Arbitration can be effective for claims of lesser amounts ($50,000, for instance), handled on a fast-track basis with limited discovery.
- The procedural latitude of courts is valuable. Arbitrators do not dismiss cases.
- For claims of any complexity, arbitration is not likely to be faster, cheaper or more fair.

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DISPUTE RESOLUTION

- If you are working internationally, you will have a different set of problems:
  - A foreign government is not going to submit to jurisdiction of a Minnesota court.
  - There are places in the world where you do not dare wind up in local courts.
  - International arbitration is prohibitively expensive
  - Necessitates a claims avoidance strategy not required of domestic work.

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LIMITATION OF LIABILITY

- The parties agree that the liability of the AE for negligence and breach of contract shall be limited to the amount of the fee, or to a specific dollar amount, or to the limits of the AE's professional liability coverage.
- Not in the AIA contracts.
- A regular feature of standard agreements among geotechnical professionals.

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LIMITATION OF LIABILITY

- Attractive, but hard to get.
- Know your Owner. To whom can you propose a limitation without counterproductive responses?
- Get it into your standard documents, so that it is on the table immediately.
- Know your owner: will they discuss a cap on error and omissions: i.e., 3% of construction value?

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DAMAGES - CONSEQUENTIAL

- Consequential Damages. AIA B101, Article 8.1.3. "The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of this or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided for in Section 9.7."

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DAMAGES

- This is a valuable clause. Your insurer will be grateful if this clause survives, since it lowers the risk profile of the work.
- It is a mutual waiver of the type of damage that turns modest claims into huge claims, like rents uncollected because of delay.
- Owners have a strong tendency to delete this clause.

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DAMAGES - LIQUIDATED

- AIA B101 Article 11.10.3: “The Owner shall not withhold amounts from the Engineer’s compensation to impose a penalty or liquidated damages on the Engineer, or to offset sums requested by or paid to contractors for the cost of changes in the Work unless the Engineer agrees or has been found liable for the amounts in a binding dispute resolution.”

DAMAGES

- AIA B101, Section 11.10.3 prohibits the imposition of liquidated damages or other penalty without a claim proceeding.

- If this should be deleted by the Owner, the liquidated damages issue is raised.

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DAMAGES

- Check the flow down clause!
- Adopt the position that liquidated damages are inappropriate for design services agreement.
- The last clause of Article 11.10.3 is very valuable, since it limits the imposition of penalties to cases that have been “tried”.

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SAFETY

- B101. Sec. 3.6.1.2. The Engineer shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, . . .

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SAFETY

- A201, Section 4.2.7. Submittals.

The Engineer's review shall not constitute approval of safety precautions or, unless otherwise specifically state by the Engineer, of any construction means, methods, techniques, sequences or procedures.

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SAFETY

1. Get something in the contract to make it clear that the Owner, through the contractor, is responsible for site safety.
2. If you spot and issue, create the correspondence (email) record that demonstrates that the issue was raised.
3. Life safety trumps all.

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TIME IS OF THE ESSENCE

- Not in the AIA documentation
- Has become so overused that it is difficult to gauge the importance of it.
- Appears in Owner agreements, such as in Article 6 of the ConsensusDocs contracts.

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TIME IS OF THE ESSENCE

- "Time is of the essence" can be used to turn any delay into a material breach of contract.
- At least theoretically it allows a presumption of injury from delay, without the strict requirement of proof of causation.
- A "time is of the essence" clause allows any delay to trigger liquidated damages or other penalties.

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TIME OF THE ESSENCE

- Do not accept liquidated damages or other time-related penalties.
- If you have such a clause, formal (written)requests for time extensions are critical.
- The Article 11.10.3 requirement of being found liable in a binding dispute resolution proceeding can be used to prevent imposition of penalties.

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Scope

- AIA B101, Article 3. Scope of Architect's Basic Services.
- AIA B101, Article 4. Additional Services.
- Incorporate additional documentation: a proprietary spec, proposals, correspondence, emails, etc.

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Scope

- Basic services: All contract forms are templates, and with increasing frequency, services do not fit the template.
- Assumptions as to what is a “standard” level of service.
- Additional services: failure to recognize additional services as they are being performed.

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SCOPE

- If using form contracts, delete what you do not need. (Obvious, but ignored as often as not.)
- Write out your scope in plain English and attach it as an exhibit.
- Attach the letters and emails which set the scope into the contract as exhibits.

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FEE

- AIA B101 Article 11 Compensation

- The contracts are flexible and can accommodate a fixed fee, percentage of cost of the work, or hourly, for both Basic Services and Additional Services.

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FEE

- The fee that fails to match the project is probably a more frequent root cause for loss than all other risk factors combined.
- Fee fails to match the scope; phases weighted wrong; unforeseen factors, sub-consultants fees inaccurately priced, or simply the wrong fee – put together by the wrong person.
- Do not look to the contract to solve this problem.

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FEE

- This is a project management issue.
- Experienced people performing the right task, for projects and building types they know.
- To know that you are working for low fees gives you at least a chance to manage the problem. To find out in mid-stream that the fee is wrong eliminates that chance.

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