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PROSURANCE
REDEKER GROUP LTD.

Protecting Your Practice – Contracts for Building Inspection Engineers

RLI Design Professionals Learning Event 239

February 15, 2013

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Course Description

This morning, we'll focus on the importance of **written contracts** between building inspection engineers and other design professionals, contractors, owners, and others. We'll discuss **key provisions** to consider when either using a **standard contract** or negotiating a **non-standard contract**.

Learning Objectives

Participants will:

- learn **why contracts are important** in the practice of building inspection engineering.
- gain an understanding of the **key standard provisions** of a contract, such as: standard of care, changes or delays/ unknown conditions, dispute resolution, limitation of liability, and billing and payment.
- explore some of the **risk issues unique to building inspection engineering**, such as: right of entry, certifications, hazardous materials, reliance on client-furnished information, and prescriptive versus performance standards of providing services.
- review basic techniques for **successful contract negotiation**.

DISCLAIMER

NOTHING PRESENTED HEREIN IS A SUBSTITUTE FOR ACTUAL LEGAL ADVICE THAT CAN ONLY BE PROVIDED IN THE EVENT THAT AN ATTORNEY CLIENT RELATIONSHIP IS FORMED AND AGREED TO BY BOTH THE ATTORNEY AND THE CLIENT. FURTHERMORE, THE PRESENTATION INVOLVES HYPOTHETICAL FACTS AND IS NO SUBSTITUTE FOR LEGAL ADVICE BASED ON THE ACTUAL FACTS AND CIRCUMSTANCES OF A PARTICULAR SITUATION.

PS – THE LAWYER MADE ME DO THIS…

Preparing for the Contracting Process

It’s not ALL about liability and risk

Preparing for the Contracting Process

Preparing for the Contracting Process

Meets some legal requirements

Communication

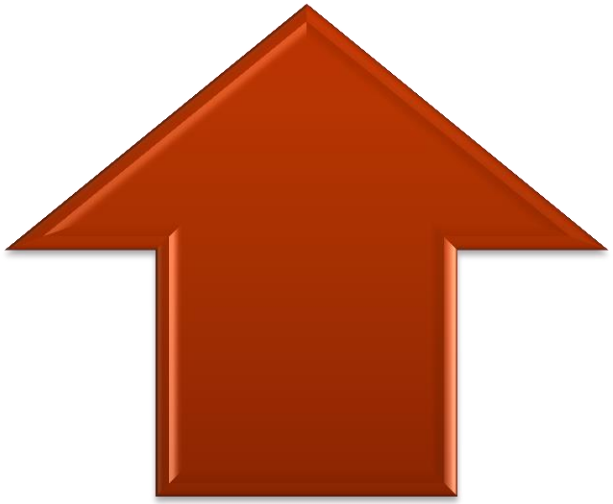
Evidence of agreement

Fee collection

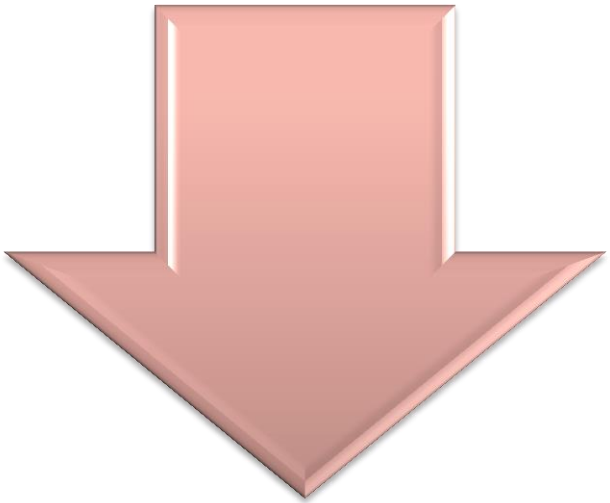
Documentation

Preservation of the record

Preparing for the Contracting Process



Written Contract



Verbal Contract

Components of a Contract

The Scope of Services

The Schedule

Payment Terms

General Terms & Conditions

Scope of Services Defined

- Included Services
- Excluded Services
- Additional Services

Types of Written Agreements

Standard Forms of Agreement – e.g., AIA; EJCDC

Your Firm's Terms & Conditions

Owner/Client Drafted Contracts

Purchase Orders

Letter Agreements

Examples of Standard Agreements

AIA

DBIA
DESIGN-BUILD

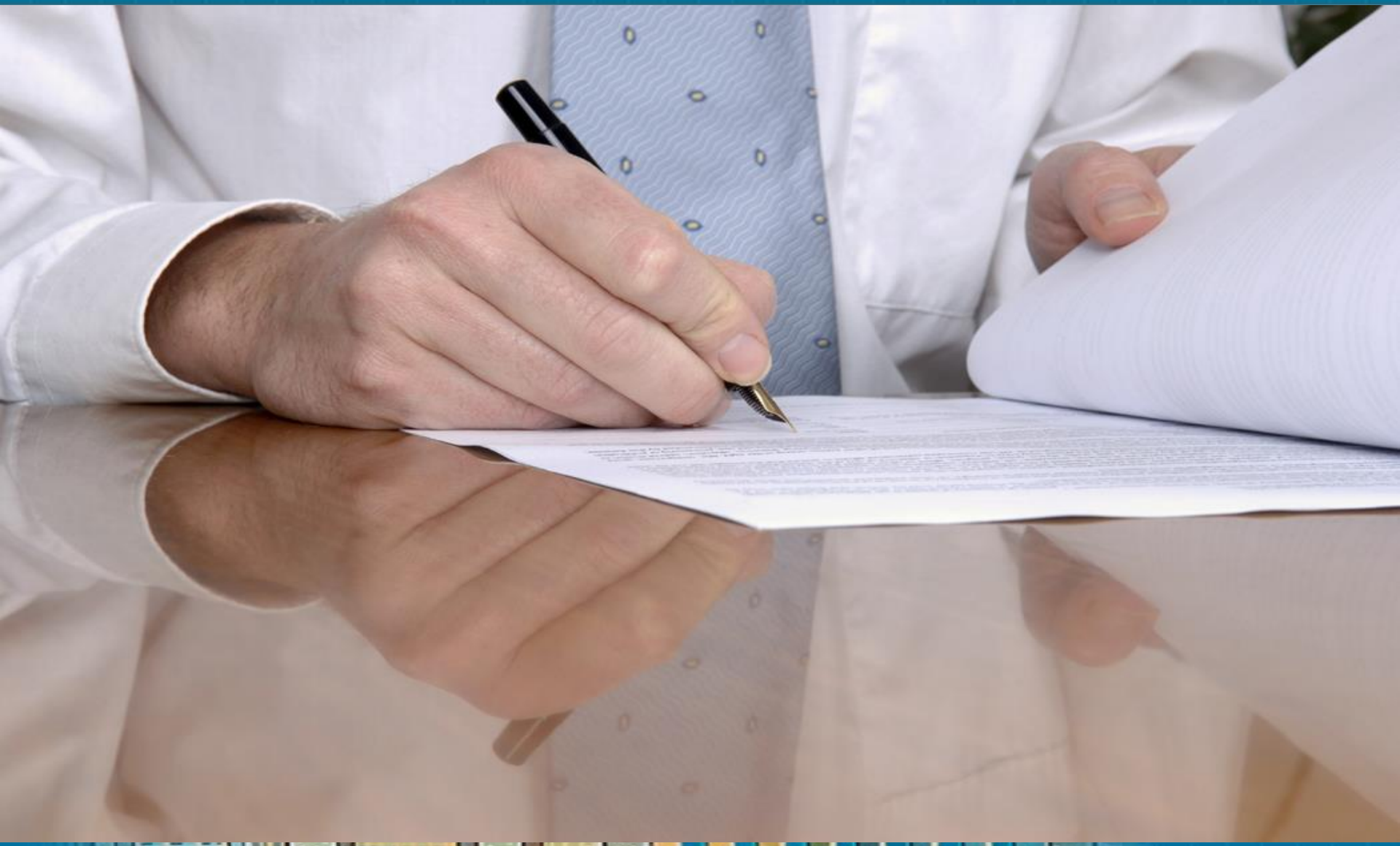
EJCDC®
ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

ConsensusDOCS®
Construction Contracts Built By Consensus

Standard Forms of Agreement–Benefits

- Case law
- Documents are coordinated
- Modifications to one are easy to make to others

Terms and Conditions/Master Service Agreements



Sample Terms and Conditions for Discussion

Entire Agreement	Suspension/ Termination	Certifications
Right of Entry	Changes or Delays	Third Parties
Standard of Care	Governing Law	Consequential Damages
Hazardous Materials	Dispute Resolution	Ownership of Documents
Approvals	Limitation of Liability	Billing and Payment
	Reliance	

Entire Agreement–Precedence

These Contract Provisions and the accompanying Proposal constitute the **full and complete Agreement** between the parties and may be **changed**, **amended**, **added to**, **superseded**, or **waived** only if both parties specifically **agree in writing** to such amendment of the Agreement. In the event of any **inconsistency** between these Contract Provisions and any proposal, contract, purchase order, requisition, notice to proceed, or like document, **these Contract Provisions shall govern**.

Right of Entry

When entry to property is required for the CONSULTANT to perform its services, the **Client** agrees **to obtain legal right-of-entry** on the property.

Standard of Care

CONSULTANT and its employees, subsidiaries, independent professional associates, subconsultants, and subcontractors will exercise **that degree of care and skill ordinarily practiced at the same point in time and under similar circumstances by professionals providing similar services**. Client agrees that services provided will be rendered **without any warranty**, express or implied.

Hazardous Materials

The scope of CONSULTANT's services for this Agreement does not include any responsibility for **detection**, **remediation**, **accidental release**, or services relating to **waste**, **oil**, **asbestos**, **lead**, or other **hazardous materials**, as defined by Federal, State, and local laws or regulations.

Approvals

Client acknowledges that the **approval process** necessary to estimate or maintain a project **timeline** is both **unpredictable** and **outside of the Professional's control**. Professional does not guarantee reviews or approvals by any governing authority or outside agency, nor the ability to achieve or maintain any project timeline.

Suspension/Termination

The **Client** may, at any time, by written notice, **suspend** further work by CONSULTANT. The Client shall **remain liable for**, and shall promptly **pay CONSULTANT** for all services rendered to the date of suspension of services, **plus suspension charges**, which shall include the cost of assembling documents, personnel and equipment, rescheduling or reassignment, and commitments made to others on Client's behalf.

Client shall pay CONSULTANT pursuant to the rates and charges set forth in the Proposal. CONSULTANT will submit monthly invoices to Client for services rendered and expenses incurred. If **Client does not pay invoices within thirty (30) days** of submission of invoice, **CONSULTANT may**, upon written notice to the Client, **suspend further work until payments are brought current**. The **Client** agrees to **indemnify and hold CONSULTANT harmless from any claim or liability resulting from such suspension**.

Changes or Delays

Unless the accompanying Proposal provides otherwise, the proposed fees constitute CONSULTANT's estimate to perform the services required to complete the Project. **Required services often are not fully definable in the initial planning**; accordingly, **developments may dictate a change** in the scope of services to be performed. Where this occurs, changes in the Agreement shall be negotiated and an equitable adjustment shall be made.

Costs and schedule commitments shall be subject to **renegotiation** for unreasonable delays caused by the **client's failure to provide specified facilities, direction, or information**, or if CONSULTANT's failure to perform is due to any **act of God, labor trouble, fire, inclement weather, act of governmental authority, failure of transportation, accident, power failure, or interruption or any other cause beyond the reasonable control of CONSULTANT**. Temporary work stoppage caused by any of the above may result in additional cost beyond that outlined in the accompanying Proposal.

Governing Law

The laws of the state in which the **CONSULTANT office executing this Agreement** is located shall govern the validity and interpretation of the Agreement.

Dispute Resolution

The Client and CONSULTANT agree to submit all claims and disputes arising out of this Agreement to **non-binding mediation** prior to the initiation of legal proceedings. This provision shall survive completion or termination of this Agreement; however, **neither party shall seek mediation** of any claim or dispute arising out of this Agreement **beyond the period of time that would bar** the initiation of legal proceedings to litigate such claim or dispute under the applicable law.

Limitation of Liability

To the fullest extent permitted by law, the **total liability**, in the aggregate, of **CONSULTANT** and CONSULTANT's **officers, directors, employees, agents, and subconsultants** to **Client** and **anyone claiming by, through or under Client**, for any and all **injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to CONSULTANT's services**, the Project or this Agreement, from any cause or causes whatsoever, **including but not limited to, negligence, strict liability, breach of contract, or breach of warranty** shall not exceed the **total compensation** under this Agreement.

Reliance on Information Provided by Others

CONSULTANT shall be **entitled to rely**, without liability, on the **accuracy and completeness of any and all information provided by Client**, Client's consultants and contractors, and information from public records, without the need for independent verification.

Certifications

CONSULTANT shall **not be required to sign any documents**, no matter by whom requested, that would result in **CONSULTANT's having to certify, guaranty, or warrant the existence of conditions** that CONSULTANT cannot ascertain.

Third Parties

Nothing contained in this Agreement shall create a **contractual relationship** with, or a **cause of action in favor of**, a **third party against either the Client or CONSULTANT**. CONSULTANT's services hereunder are being performed **solely for the benefit of the Client**, and no other entity shall have any claim against CONSULTANT because of this Agreement or CONSULTANT's performance of services hereunder.

Consequential Damages Waiver

Neither the Client nor the CONSULTANT shall be liable to the other or shall make any **claim for any incidental, indirect or consequential damages** arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to **loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value** and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.

Ownership of Documents

All reports, notes, drawings, specifications, data, calculations, and other documents, including those in electronic form prepared by CONSULTANT are **instruments of CONSULTANT's service that shall remain CONSULTANT's PROPERTY**. The **Client agrees not to use CONSULTANT-generated documents** for marketing purposes, **for projects other than the project for which the documents were prepared by CONSULTANT**, or for future modifications to this project, without CONSULTANT's express written permission.

Any **reuse or distribution to third parties without such express written permission or project-specific adaptation by CONSULTANT will be at the Client's sole risk and without liability to CONSULTANT** or its employees, subsidiaries, independent professional associates, subconsultants, and subcontractors. Client shall, to the fullest extent permitted by law, **defend, indemnify, and hold harmless CONSULTANT** from and against any and all costs, expenses, fees, losses, claims, demands, liabilities, suits, actions, and damages whatsoever arising out of or resulting from such unauthorized reuse or distribution.

Billing and Payment

Client shall **pay** CONSULTANT pursuant to the **rates and charges set forth in the Proposal**. CONSULTANT will submit monthly invoices to Client for services rendered and expenses incurred. If Client does not pay invoices within thirty (30) days of submission of invoice, CONSULTANT may, upon written notice to the Client, **withhold deliverables and/or suspend further work** until **payments are brought current**. The Client agrees to **indemnify** and **hold CONSULTANT harmless** from any claim or liability resulting from such suspension.

Bad Language

INDEMNITY - DEFINED

in-dem-ni-ty

1. a. security against loss or damage.

   b. exemption from incurred or future penalties or liabilities.

2. Old English – what the right hand giveth, the left hand taketh away!

INDEMNITY CLAUSE - BAD LANGUAGE

To the fullest extent permitted by law, Consultant shall defend, indemnify and hold harmless Developer…against any and all claims… including the reasonable fees of attorneys, arising out of or in any way connected with any act or omission of Consultant…whether such claims, liens, demands, damages, losses or expenses are based upon…any other legal…theory whatsoever, and regardless of whether or not such claim…is caused in part by a party indemnified hereunder, including the partial negligence of any such party.

INDEMNITY CLAUSE - BAD LANGUAGE

To the fullest extent permitted by law, Consultant shall defend, indemnify and hold harmless Developer…against any and all claims… including the reasonable fees of attorneys, arising out of or in any way connected with any act or omission of Consultant…whether such claims, liens, demands, damages, losses or expenses are based upon…any other legal…theory whatsoever, and regardless of whether or not such claim…is caused in part by a party indemnified hereunder, including the partial negligence of any such party.

Denial of Coverage!

We have received a demand from the law firm of Fortune Esq. dated February 1, 2013 that Your Firm ("YOU") pay for the legal expenses incurred by Nashville Developers ("ND"). This demand is based upon the indemnification clause from your contract with ND, in which YOU agreed:

> *To the fullest extent permitted by law, YOU will assume sole responsibility for and agree to indemnify and save harmless ND from any and all loss, expense (including counsel fees)…on account of damage to property arising out of or in consequence of the performance of the work under this agreement.*

We wish to advise you that we will be unable to pay a settlement, judgment or award obligating you to indemnify another party for their counsel fees or for other damages not predicated on your negligence, as this is specifically excluded under your policy. You are at your liberty to associate your own personal counsel at your expense in defending this suit.

SAMPLE INDEMNITY CLAUSE – PRIVATE ENTITY

"Consultant agrees to indemnify Owner, but **shall not be responsible for the cost of their defense**, from liability for damages arising out of the performance of Consultant's services on this project **unless and only to the extent that such liability is actually determined to have been caused by the negligent acts, errors or omissions of Consultant**, its principals, employees or sub consultants."

SAMPLE INDEMNITY AGREEMENT–FURTHER LANGUAGE

Appended to the end of an indemnity clause:

"Notwithstanding the foregoing, for any claim alleging Consultant's negligent performance of professional services, Consultant's obligations regarding any indemnitee's defense under this paragraph **shall be limited solely to the reimbursement of such indemnitee's reasonable defense costs incurred to the extent of Consultant's actual indemnity obligations** hereunder."

SAMPLE INDEMNITY AGREEMENT – FURTHER LANGUAGE TO MAKE CLEAR THAT A CONTRARY INTENT CONTROLS…

Thank you for your time!

QUESTIONS??

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