

# BUILDING BLOCKS

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## WRITTEN CONTRACTS: ARE THEY *REALLY* NECESSARY?

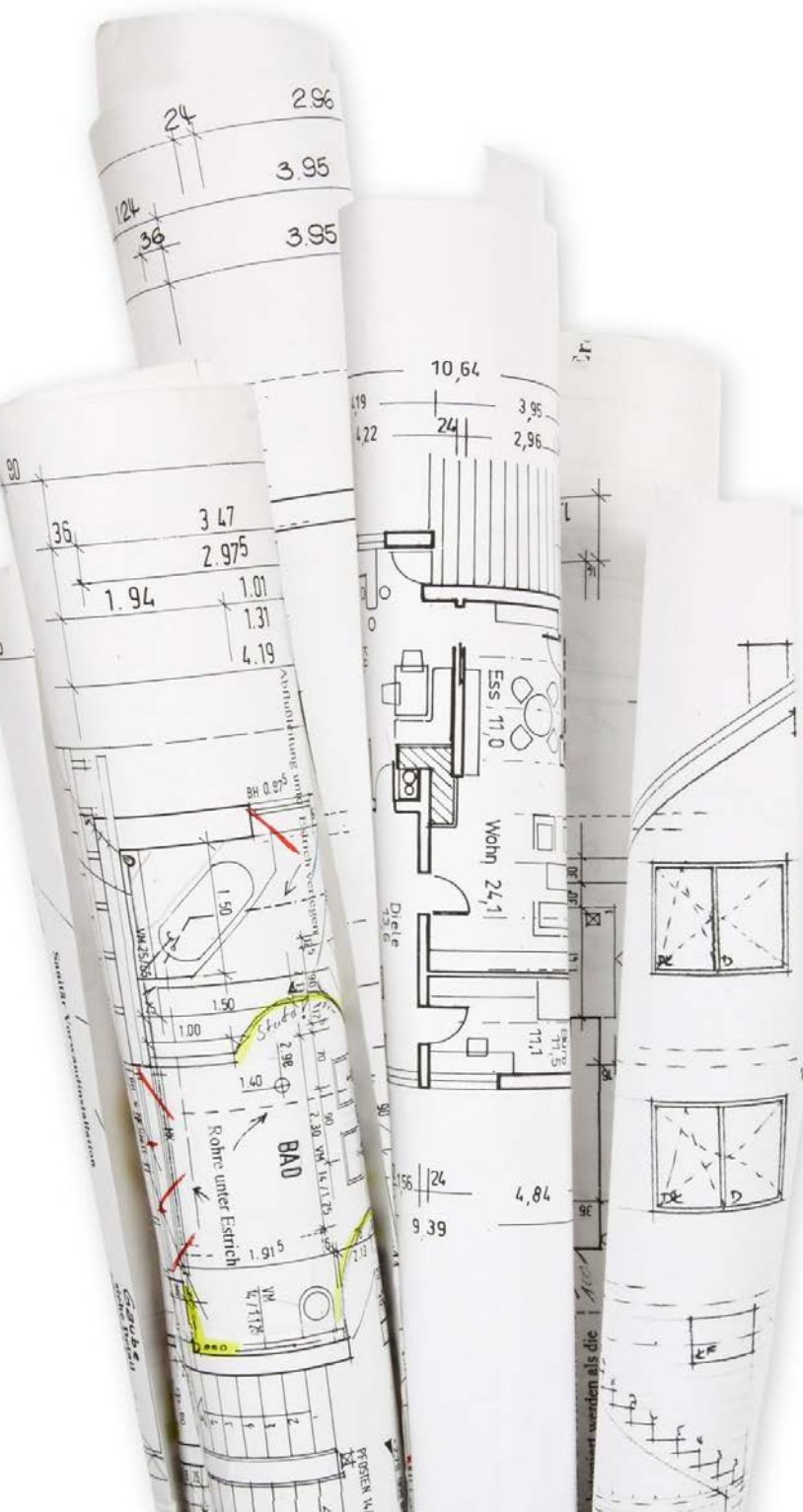
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### DO I REALLY NEED A WRITTEN CONTRACT TO PERFORM MY DESIGN PROFESSIONAL SERVICES?

Architect Alice sent her proposal to Client Clyde for a commercial project in the Land of Oz. Alice is a registered architect in the Land of Oz. Clyde liked the proposal, and sent a down payment (retainer) for Alice to get started immediately. Alice's proposal, which could have served as a contract, was never signed by Clyde. Alice proceeded to prepare contract documents and Clyde paid some of Alice's monthly invoices, but not all. The bids came in over the project's budget, and Clyde decided to terminate the project. None the less, Alice demanded to be paid for the outstanding invoices, and eventually sent the unpaid debt to a collection agency. Clyde sent the matter to his attorney, Alex. Alex knew the Administrative Code for the Land of Oz requires architects to have a written (and signed) contract before commencing services. Alex then demanded that all the money that Alice received to be sent back to Clyde, or he would report the matter of a written contract requirement to the Land of Oz's Board of Architects, and as a result, Alice would suffer probable a sanction by the Board. What was Alice to do?

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In different situations, as soon as there is a claim on a construction project, the attorneys and your insurance carrier get involved, and you will be asked for your contract. If you don't have a written and signed contract, well guess what, your position in the dispute will not play well with "he said/she said" in an arbitration or a court of law.

## THE REQUIREMENT

While the Ohio regulations for the practice of the design professions are fairly consistent, such as the requirement to abide by the standard of care, protect a client's confidential information, or not engage in plan stamping, one glaring difference is a written contract requirement. For architects, the Ohio Administrative Code (OAC) 4703-3-09 states:

(A) A registered architect or architectural firm is required to use a written contract when providing professional services. Such contract between the registered architect and the client shall be executed prior to the registered architect commencing work on any project. The written contract shall include, but not be limited to, all of the following items: (1) A description and location of the site. (2) A description of the services to be provided by the registered architect to the client. (3) A description of the basis of compensation applicable to the contract and the method of payment agreed upon by both parties. (4) The name and address of the registered architect or architectural firm and the client's name and address. (5) A description of the procedure to be used by the registered architect and client or design-builder to accommodate additional services. (6) A statement identifying the ownership of documents prepared by the registered architect and/or reuse of documents. (7) A description of the procedure to be used by either party to terminate the contract.

For Ohio landscape architects, professional engineers and surveyors, the Administrative Code<sup>1</sup> is silent on the topic. Therefore, Ohio design professionals are playing by different sets of rules. That being said, regardless of a written requirement for Ohio architects but not landscape architects, engineers and surveyors, best practices (and risk management) is to still have a written (and signed) agreement.

Of course, as soon as there is a rule, there always seems to be an exception. For architects, the Ohio administrative Code 4703-3-09 further states:

(B) This rule shall not apply to any of the following: (1) Professional services rendered by a registered architect for which no compensation will be paid to the registered architect. (2) Professional services rendered by a registered architect as a consultant to a professional engineer registered to practice engineering under Chapter 4733 of the Revised Code or to a landscape architect registered under Chapter 4703 of the Revised Code, when a written contract exists between the registered professional engineer or landscape architect and a client who is not the registered architect. (3) When the services are of the same general kind which the registered architect has previously rendered to and received payment from the same client.

The three exceptions seem to make sense, but from a risk management perspective, it is still a better practice to have a signed agreement.



## THE REALITY

Sticking to the rule is easier said than done. Whether it is a public law department that takes forever to process an agreement while the city wants the architect to get started immediately on their project, negotiations between the architect and their client are yet to be resolved yet the client wants the architect to get zoning approvals, or a project manager that is not so good on dotting the i's or crossing the t's, Ohio architectural firms are commonly put in a precarious position to be in noncompliance with the OAC 4703-3-09(A). Even a "letter of intent" to engage an architect without a signed written agreement may not be enough.

What is an architect to do? Should an architect insist that they cannot perform services without a signed agreement, at the risk of losing the client and project? Every situation is different, and there is no magic formula to resolve the problem. But let's at least try understand the logic behind the OAC 4703-3-09(A). It is a consumer protection position and theory. The reasoning goes as follows.

When an Ohio architect is proposing a scope of services, terms and conditions, the client may not know what an architect normally does, and client may have unreasonable expectations.

Ohio's rationale is to protect the innocent consumer of architectural services, and the best way to do that is to have a written agreement that spells out the basics of the client-architect relationship. OAC 4703-3-09(A) has 7 subparts that are so fundamental, that it is hard to not include all of them even in even the simplest contract (see above).

### OHIO ARCHITECTS ARE NOT ALONE

At least one other state requires that architects have a written contract before commencing services. See California's Business & Professions Code (BPC) 5536.22 which is similar to Ohio's requirement.



Architects must use written contracts when contracting to provide architectural services in California. [Business and Professions Code \(BPC\) section 5536.22](#) requires an architect to ensure that a written contract is in place prior to commencing any architectural work, unless the client authorizes the architect, in writing, to start work before the contract is executed. The law specifies minimum required items to be in the contract, including services to be provided, amount and method of payment, information on the architect and client, and procedures for additional services and termination of the contract. The legislation exempts certain types of work arrangements.

An architect must use a written contract when contracting to provide architectural services. The architect must provide the contract or use a written contract provided by the client (many public agencies and corporations use their own contracts).



[https://www.cab.ca.gov/licenses/written\\_contract\\_requirement.shtml](https://www.cab.ca.gov/licenses/written_contract_requirement.shtml)

### IN CONCLUSION

Stated simply, in the words of one English humorist: "Oral agreements aren't worth the paper they're not written on."<sup>2</sup> Certainly, the best course of action if you have any questions about the OAC 4703-3-09, its interpretation and enforcement, is to contact the combined Ohio Architects Board and Landscape Architects Board. <https://arc.ohio.gov/>

<sup>1</sup> The Constitution of Ohio is the foremost source of state law. Legislation is enacted by the Ohio General Assembly, published in the Laws of Ohio, and codified in the Ohio Revised Code. State agencies promulgate rules and regulations (sometimes called administrative law) in the Register of Ohio, which are in turn codified in the Ohio Administrative Code (OAC).

<sup>2</sup> Quotation from J. Norman Stark's August 11, 2017 article *Legally Speaking: Construction Contracts – Verbal Agreements*, ConstructConnect.

### **About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.*

*The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

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Cincinnati, OH  
Hilton Netherland Plaza  
September 20, 2019



### ***“Ethical Concerns That Your A/E Clients May Encounter”***

ae ProNet Fall Conference  
Chicago, IL  
October 4, 2019



### ***“Empowering Your Ethics in a Changing Construction Industry”***

Architects' Association of New Brunswick  
2019 Industry Forum  
Saint John Trade and Convention Center  
Saint John, NB, Canada  
November 26, 2019

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