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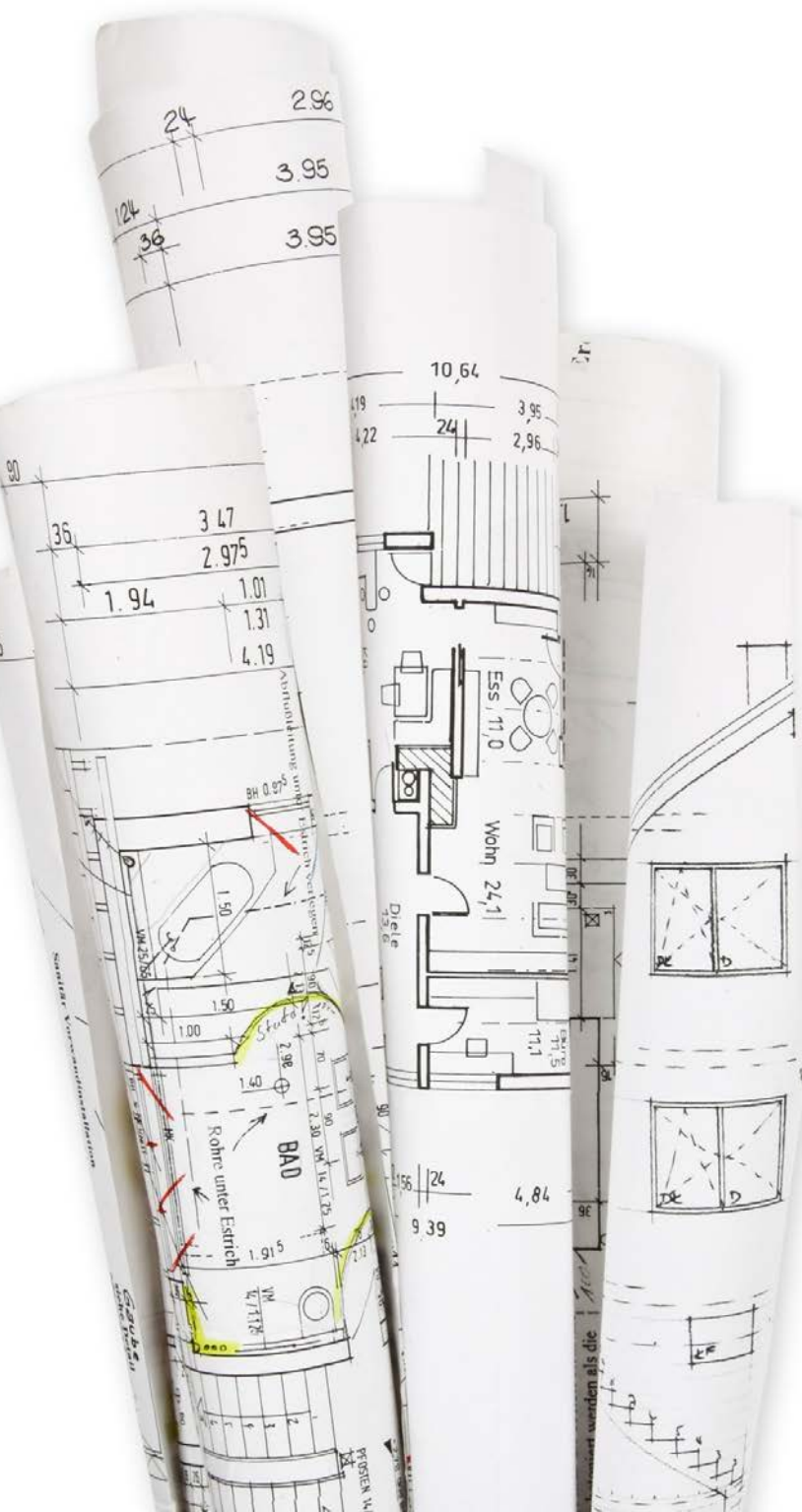
CONTRACTS & OWNERSHIP OF THE FIRM'S DOCUMENTS – #5 OF THE TOP 10 RISK MANAGEMENT PRINCIPLES

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In the October 2019 issue of Building Blocks we outlined the top 10 risk management principles regarding design professionals for the next 10 months, one principle at a time, focusing on one each month.¹ Consequently, in the fifth of the top 10 principles, the March, 2020 issue of Building Blocks is focusing on “Contracts & Ownership of the Firm’s Documents.” The top 10 principles are based, in part, upon the Council of American Structural Engineers’ (CASE) “Ten Foundations for Risk Management,” and the National Council of Architectural Boards’ (NCARB) two of the six educational modules titled “Practice Management” (PcM) and “Project Management” (PjM) of the Architectural Registration Examination (ARE). The first five risk management principles relate to practice management, and last five risk management principles relate to project management.

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DESIGN PROFESSIONALS' CONTRACTS WITH THEIR CLIENTS

After securing a new commission, the next step is to negotiate a contract between your design professional firm and your client. There are basically six types of contracts between an architect or engineer and their client. They are:

- 1.) *Professional association model agreements (which can be modified and negotiated);*
- 2.) *A firm's custom in-house agreements (which can be developed over time based upon past project experience);*
- 3.) *Letter agreements created by the design professional firm (likewise, which can be developed over time based upon past project experience, and can include standard terms & conditions for each proposed project);*
- 4.) *The design professional firm's client's agreement (can be a standard form or project specific);*
- 5.) *Purchase orders prepared by the design professional firm's client (usually a company or corporation standard form); and*
- 6.) *Master agreements developed by the design professional or its client (for repetitive projects).*

Contracts Prepared By the Design Professional Firm

If the contract is proposed by the architect or engineer to their client, the wisdom is to have the form used reviewed periodically for risk management purposes. Enlist your professional liability insurance agent, your professional liability insurance carrier and/or your legal counsel to understand how the practice of architecture and engineering is constantly evolving. As an example of how the building industry is changing, the standard of care and the practice of the professions changes over time with technology, recognizing ethics relating to harassment and discrimination in the work place, and sustainable design. The American Institute of Architects Code of Ethics and Professional Conduct promulgated the 2018 Rule of Conduct 6.501, which speaks to the environment that did not exist in the 2017 Code of Ethics, as follows:

Members shall consider with their clients the environmental effects of their project decisions.

When negotiating an architect or engineer contract, consider negotiating and include the following basic terms as a starting point with your client:

- 1.) *A "betterment" clause that provides that the cost of any items unintentionally omitted from the contract documents still must be paid for the project owner, and not the design professional;*
- 2.) *A "limitation of liability" clause appropriate for the scope and fee of your contract;*
- 3.) *A "mediation" clause for dispute resolution; and*
- 4.) *A "waiver of consequential damages" clause.*

Contracts Prepared By the Design Professional Firm's Client

Known as client-driven contracts, the wisdom is to particularly identify unclear, ambiguous, and onerous contract language. A well-written, fair, complete and signed contract can minimize the design professional's firm exposures and risks. A good contract will recognize that professional services are being provided – not a product – and therefore perfection cannot be warranted by the service provider.

Lastly, ensure that the terms of the contract are insurable under your firm's professional liability insurance policy. For example, most insurance policies do not provide for the defense of an indemnitee, even though that term is often found in indemnity clause. However, a separate insurance policy can be purchased for providing defense – see DesignPro Insurance Group's September 2018 newsletter titled "Contractual Defense Protection – a New Solution for the Old Duty to Defend Problem." And make sure that an indemnification clause suggested by your client is tied to your negligence only, and not any other legal theories such as breach of contract or breach of warranty.

OWNERSHIP OF THE FIRM'S DOCUMENTS

Drawings, specifications, reports, and other documents produced by design professionals are instruments of their professional service, not products. By analogy, a dentist's dental tools do not become the patient's property after his or her last examination - they are the dentist's instruments of service. Sometimes a design professional's client may insist on owning or having an unlimited license to use the documents. If the design professional can identify the client's specific needs for the instruments of service (e.g., construction, occupancy or maintenance), a limited license can be granted by the architect or engineer to satisfy their specific needs.

If you client insists on owning or having an unlimited license, and the design professional is willing to acquiesce to this demand, the client should be required to hold harmless and indemnify the design professional for all liability, cost, and expenses, including attorneys fee and defense expenses incurred, as a result of any modification or use of the instruments of service (such as on another project) without the architect's or engineer's written authorization.

Sample Ownership of Documents Provision

The standard and non-standard portions of the project-specific construction documents prepared or furnished by the A/E and the A/E's consultants related to this Project, pursuant to this Agreement, are instruments of the A/E's and the A/E's consultants' professional services (the "Construction Documents"). The A/E's and A/E's Consultant's standard details, specifications and designs shall remain the property of the A/E. However, the Construction Documents shall become the property of the Owner upon payment in full of all fees and expenses incurred by the A/E under this Agreement, and any modifications to this Agreement.

Furthermore, the Owner may use the Construction Documents only for construction, occupying, maintenance or additions to this Project only, and the Owner may not make any modifications to or use the Construction Documents for any other project, and shall be at the Owner's sole risk, without the written permission of the A/E. The transfer of ownership of the Construction Documents to the Owner is not to be construed to be a sale by the A/E or the A/E's consultants. Furthermore, the A/E and the A/E's consultants make no guarantees, certifications or warranties, either expressed or implied warranty of merchantability and fitness for any particular use of the Construction Documents. This transfer of ownership of the Construction Documents is not a waiver of the A/E's and the A/E's consultant's other rights under law and this Agreement.

Lastly, the Owner agrees, to the fullest extent permitted by law, to indemnify, hold harmless and defend the A/E, its officers, directors, employees, representatives, agents and the A/E's consultants from and against any claims, allegations, losses, damages, liabilities or costs, including attorneys' fees, expert witness fees and costs, and any other defense costs, arising from or allegedly arising from in any way related to the unauthorized reuse or modification of the Construction Documents by the Owner, including any other person that uses the Construction Documents from or acting through the Owner.

IN CONCLUSION

Negotiate your contracts and the ownership provisions in your agreements that fit your situation, and do not be surprised if your client expects you to accept their client-driven contract, and to own your documents. Design professionals must understand their own risk tolerance when negotiating their contracts, and must also protect their best interests by controlling their exposures and risks associated with the misuse of the project construction documents. Also do not be surprised if you are a Consultant to the Prime Professional on a project, where the Prime Professional has already signed an onerous contract including have given up ownership of their documents without the safeguards suggested above. That Prime Professional will expect you as a Consultant to also relinquish your documents without such risk management measures in place.

1 The above risk management principles have been adapted, in part, from an article that originally appeared in the June 2012 issue of STRUCTURE magazine, published by the National Council of Structural Engineers Associations (NCSEA), and is reprinted with permission. The top 10 principles of risk management for design professional are 1) A Firm's Culture & Ethical Practices, 2) Mentoring And Education, 3) Communication Skills, 4) Go/No Go" Policy, 5) "Contracts & Ownership Of The Firm's Documents," 6) Develop A Scope Of Services With Appropriate Compensation, 7) Produce Quality Contract Documents, 8) Construction Phase Services, 9) Utilize A Certificate Of Substantial Completion, and 10) Dispute And Claim Handling.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for the last 15 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.

Disclaimer: *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

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Postponed



“Project Management (PJM), Architecture Registration Examination (ARE 5.0)”

Postponed



“Ethically Looking Outward – Architecture/Interior Design Perspectives”

The Alberta Association of Architects

Banff, Alberta, Canada

May 9, 2020 - 10:30 a.m. – 12:00 p.m.

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