

CONTRACT REVIEW 101 FOR ENGINEERS

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Ryan Lewis Experience

Civil Engineering Undergraduate Degree from U of Idaho

CE Masters Degree from U of Idaho

Licensed Professional Engineer since 2016

FOPP Graduate – Bachner Communications, Inc.

10 Years of Engineering and CMT experience at STRATA

Reviewed over 100 Contracts (STRATA's included)

No Law Degree

Disclaimer

I did not attend law school. I am not a lawyer. Laws vary from state to state. This presentation does not offer any legal advice. Consult with your attorney for legal advice. The information included in this presentation does not necessarily reflect the opinions of STRATA or our insurance provider(s). Rather, this presentation simply includes my opinions based on my experiences. You are entitled to disagree with anything included in this presentation.

Agenda

Defining a Contract

General Terms and Conditions

Contract Negotiations

Contract Elements/Clauses

Best practices





What is a Contract?

“A legally enforceable agreement between two or more parties, setting forth the obligations of each party to the other. Any violation of these obligations can expose the party committing it to sanctions of law”.

- Contract Reference Guide Fourth Edition



What is a Contract?

Types of Verbal Contracts

- Written Agreement (email, letter, etc.)
- Oral Agreement (handshake, he-said/she-said)

Internal Versus External

- **Internal:** Your Company's standard agreement that you ask a Client to execute.
- **External:** An agreement provided by a Client for an authorized person in your company to sign (do you know who has authorization to sign External contracts in your company?)

Agreement Elements

Subject to Negotiation

- Scope (excluded services)
- Schedule
- Fees
- **General Terms and Conditions**

Other Contract Elements

- Definitions
- “Project Description” or
“Assumptions and Understandings”

Process for “Binding” Agreement

Two-parts:

- Step 1: Offer by one party to perform services
- Step 2: Acceptance by the other party (Competent person)

General Terms and Conditions

- How risks will be allocated
- How problems should be dealt with if they occur
- Never agree to abide by terms you don't understand or that you/your attorney have not reviewed.
- Never assume the "standard" general terms and conditions from a client haven't changed from one project to the next or that your previously negotiated terms have been incorporated into an agreement.

General Terms and Conditions

Developing or Refining your Company Standard Agreement

- Does your Company contract include terms and conditions that your company wouldn't accept?
- Reference the EJCDC, ASCE, ACEC, NSPE, etc. model contracts for example contract language.
- Review the contract with your legal team.

External Contract Review

Negotiation Process

- Suggest contract revisions
- Fear of insulting client
- “Other firms sign our contract without complaining”
- References to a “Prime Agreement” (need to review)
- Invite your Subconsultants to the table
- Purchase Order and Construction Contracts
- Understand the fee-risk relationship
- Learn to say “no”.

Contract Elements

- **Indemnification and Defense**
- **Standard of Care**
- **Waiver of Subrogation**
- **Insurance (PLI and General)**
- **Payment Conditions**
- **Warranty/Guarantee/Certification**
- **Dispute Resolution**
- **Sovereign Immunity (for projects on Tribal land)**

Contract Elements

Indemnification and Defense

- Indemnify: The duty of the Consultant to financially compensate the Client for any loss, damage, or liability.
- Defense: The obligation of the Consultant to defend the Client in the event of a lawsuit.
- Transfers risk from Client to Consultant
- Add “Negligence”, “Reimbursement”, and “Reasonable Defense” clauses
- Push for mutual indemnification
- Strike the words “defend”, “agents”, “lenders”, or “volunteers” if possible.

Contract Elements

Indemnification and Defense Example

CONSULTANT shall indemnify, ~~defend~~ and hold CLIENT and its directors, officers, ~~agents~~ and employees harmless from any and all damages, lawsuits, liabilities, costs and/or other claims arising from, or in any way relating to, the negligent performance of the work or other actions by CONSULTANT and/or its employees, ~~agents and/or subcontractors~~ under the terms of this agreement. ~~CONSULTANT agrees to defend and pay all costs in defending these claims, including attorney's fees.~~ CONSULTANT shall not be required to indemnify or defend pursuant to this section if the loss or damage is caused by the sole negligence of CLIENT and its directors, officers, agents, employees and third parties.

Contract Elements

Standard of Care

- Definition: “the ordinary diligence exercised by fellow practitioners in your area performing the same services under similar circumstances at the same time.
- Clearly define standard of care in your contract
- Avoid an “elevated” standard of care

Contract Elements

Standard of Care Example

CONSULTANT warrants that CONSULTANT's experience, knowledge, and expertise qualify CONSULTANT to implement CONSULTANT's scope of service in accordance with the highest professional standards.

Contract Elements

Waiver of Subrogation

- A request from the Client for the Consultant's insurer to waive their right to sue the Client when the Client causes the loss.
- Most PLI providers do not allow this.
- Agreeing to give away your insurance providers rights and money.

Contract Elements

Waiver of Subrogation Example

There shall be no right of subrogation against OWNER and this waiver of subrogation shall be endorsed upon all policies of insurance.

Contract Elements

Insurance

- Professional Liability Insurance (PLI)
- Commercial General Liability Insurance (GLI)
- Understand your provider limits
- “per occurrence” and “in the aggregate”

Contract Elements

Payment Conditions

- “Pay when paid”
- Late charges
- Payment disputes

CONSULTANT’s invoices will be approved and presented by Client to owner. Client will pay Consultant amounts due promptly after owner pays CLIENT.

Contract Elements

Warranty/Guarantee/Certification

- Push to strike this from an agreement.
- Engineers provide services, not products
- Typically included when “Contractor” agreements are converted to “Consultant” agreement.

Contract Elements

Warranty/Guarantee/Certification Example

Section 5 – ~~Warranty~~Standard of Care

CONSULTANT ~~warrants that it~~ shall perform its services in accordance with the Service Agreement and with care, skill and diligence in accordance with applicable professional standards currently recognized by such profession. CONSULTANT shall be responsible for the professional quality, technical accuracy, completeness and coordination of the Work and other services furnished under the Service Agreement.

Contract Elements

Dispute Resolution

- Require mediation prior to arbitration
- Binding versus non-binding arbitration
- Specify the location of courts if there is a dispute (state in which the project is located).
- Specify a statute of limitation for filing claims.

Contract Elements

Dispute Resolution Example

Client and Subconsultant shall negotiate all disputes arising out of this Agreement between them in good faith for a period of 30 days from the date of notice of such disputes. All claims or disputes not resolved through negotiation shall first be addressed through non-binding mediation and no litigation or arbitration shall occur unless said mediation is unsuccessful in resolving any such claims or disputes.

Contract Elements

Sovereign Immunity

- Tribal land considerations
- Seek tribal rider or amendment from your insurance provider if the Tribe will not accept a sovereign immunity clause.

Contract Elements

Sovereign Immunity

The Client hereby expressly, unequivocally and irrevocably waives its sovereign immunity from mediation or suit, in state or federal court of the state in which the project is located, by or involving Consultant, arising out of or in any way related to this Agreement. This limited waiver of sovereign immunity includes, but is not limited to, any action for money or damages, including injunctive relief and declaratory relief. Client agrees that it will not raise sovereign immunity as a defense in any judicial action or mediation brought by Consultant to enforce this provision.

Best Practices to Minimize Legal Conflicts

- **Understand your client's needs/expectations**
- **Don't overstep your professional expertise**
- **Deliver on your commitments (both fees and schedule)**
- **Establish relationships with your Clients**
- **Enforce a contract review and execution process within your company**
- **Improve your risk awareness**
- **Do not select work that historically has generated high percentage of claims and high loss ratios**



Summary

- Read and understand your Firm's contract
- Get to know your legal team
- Don't agree to unfair or one-sided terms and conditions (learn to say no)
- Don't agree to terms and conditions you don't understand or can't meet
- Your best insurance is not what insurance provides. Your best line of defense is to provide quality, on-time services to reasonable clients.

THANK YOU



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