Drafting, Reviewing, and Negotiating Contract Documents for Engineering Services

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Contract Documents

- Offer
- Acceptance
- Consideration/"Peppercorn" Theory

Contract Documents

- Clear and concise contract terms substantially reduce the risk of business and financial disputes as well as the risk of professional liability problems with clients and other project stakeholders.

Contract Documents

- Somes about risk and contracts…
  - Definition: “Uncertainty of financial loss”
  - Risk may be…
    - Avoided
    - Retained
    - Transferred
    - Shared
    - Reduced/Mitigated

Contract Documents

- Somes about law and contract…
  - Civil law = public statutes, regulations, court decisions, etc.
  - Contracts = an opportunity to shape their legal relationship (to the extent consistent with civil law)

Contract Documents

- Indicators of success in the contracting process:
  - The expectations of the parties are clearly articulated and reasonably integrated;
  - The rights and obligations of the parties are clearly expressed;
  - Risk and reward are clearly addressed and fairly allocated with each source of risk allocated to the party in the best position to control or otherwise manage the risk;
**Contract Documents**

- Indicators of success in the contracting process (continued):
  - Insurance is available to support any indemnity obligation;
  - Mechanisms exist to reasonably accommodate change during the course of the project;
  - The parties mutual understanding is confirmed in writing.

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**Contract Documents**

- There are five basic types of professional service agreements:
  1. Oral agreements
  2. Letter agreements
  3. Purchase orders
  4. Standard Forms of Agreement
  5. Custom Agreements

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**Contract Documents**

- Basic questions to ask when reviewing custom contracts:
  - What does the language say?
  - What does the language mean?
  - Why is this language “better” than the standard language?
  - What problem is this language intended to solve?
  - How does the language affect the engineer’s responsibilities?
  - Will the language have an adverse impact on the working relationship?

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**Contract Documents**

- Factors to Consider in the Contracting Process:
  - Client sophistication and capabilities;
  - Proposed method of project delivery;
  - Size and complexity of project;
  - Duration of project;
  - Nature of Services to be performed;
  - Prior experience or relationship of the engineer and the client

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**Contract Documents**

- Factors to Consider in the Contracting Process (continued):
  - Level of pre-project planning, if any;
  - Time allowed for the contract negotiation process;
  - Bargaining position of the engineer;
  - Contracting constraints of the client;
  - General or project-specific risk management concerns or considerations;
  - Third party requirements, such as those of public or private project funding sources

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**Contract Documents**

- There are five major reasons why written agreements are preferred to oral agreements:
  1. A written agreement provides objective, documented evidence of the intent of the parties.
  2. Putting pen to paper encourages reflection about specific terms.
  3. A written agreement provides a stronger basis for dispute resolution by a third party such as a judge, jury or arbitrator.
  4. The process of negotiating a written agreement provides an opportunity to evaluate the client.
  5. A written agreement may be used by the engineer to help assess whether it is meeting its project commitments.
Contract Documents

- Letter agreements may be appropriate for use on small projects with well-defined and relatively routine services.
- In addition to project-specific information and terms such as the scope of services and compensation/payment terms, a letter agreement should explicitly reference general condition terms incorporated as part of the agreement.
- Letter agreements should be signed by both parties.

Contract Documents

- Purchase order forms will probably contain provisions that are not appropriate for use in procurement of engineering services and should be modified appropriately.

Contract Documents

- The Engineers Joint Contract Documents Committee (EJCDC) publishes standard forms of agreement and standard general conditions for use in various engineering and construction projects.

Contract Documents

- Some projects or client may require the preparation and use of custom agreements.
- This might occur where the engineer is being asked to participate in a unique type of project.
- Review and advice of competent legal counsel is strongly advised.

Contract Documents

- Professional service agreements contain two broad categories of terms and conditions:
  - Project-Specific Terms
  - General Conditions Terms

Contract Documents

- Project Specific Terms include:
  - The engineer’s responsibilities
  - The owner’s responsibilities
  - Terms related to schedule and time of performance
Contract Documents

- **General Condition Terms** include:
  - Guarantee/Warranty/Certification Provisions;
  - Ownership and use of documents;
  - Consent to assignment of agreement to lender or other entities;
  - Suspension/Termination of Services for non-payment;
  - Indemnification/defense obligation provisions;

Contract Documents

- **General Condition Terms** include:
  - Limitation of liability provisions
  - Waiver of subrogation
  - Additional insured provisions
  - Dispute resolution
  - Contractual limitation period for assertion of claims
  - Standard of Care
  - Cost estimates

Contract Documents

- **General Condition Terms** include (continued):
  - Responsibility for the work
  - Worker safety

Contract Documents

- Assignments should not alter the material terms of the owner-engineer professional agreement.
- Suspension of service may be used as an alternative to termination in the event of nonpayment by the owner.
- Enforceability of indemnification provisions and their interpretation varies depending in jurisdictions, statutes and case law.
Contract Documents

- A limitation of liability clause does not extinguish all liability, rather it merely limits the amount or extent of liability exposure.
- Waiver of subrogation provisions serve the purpose of ensuring finality for claims made by certain project participants that are compensated by insurance.

Contract Documents

- An engineer may be named as an additional insured on a Builders All Risk Insurance policy or on a Commercial General Liability insurance policy that has been obtained by other parties in the construction process.
- Anticipating the possibility of disputes or claims, an agreement may provide for mediation, arbitration, litigation, or some combination of those types of dispute resolution.

Contract Documents

- Contractual limitation periods for assertion of claims are allowed in most states as long as the period is not unreasonably short.
- An improper or enlarged definition of the standard of care in the agreement can create unclear and uninsurable obligations for the engineer.

Contract Documents

- Cost estimates should be carefully qualified and should acknowledge that the engineer has no control over market conditions or bidding procedures and is offering estimates based on experience and judgment.
- Contractor is responsible for the means, methods, sequences and procedures of the construction work.

Contract Documents

- Contractor alone is contractually responsible for the safety of the construction workers, the client, others on the site and adjacent property owners.

Strategies/Tactics in Dealing with Clients on Contract Issues

- What Do You Do?
- Responses
- Possible Clauses
Contract Document

- Contract Issue #1: Your client is reluctant to accept your standard agreement form, such as the EJCDC document and wants to procure your services “quickly and simply” such as by an oral contract or at most a purchase order.

  - What do you do?

Contract Document

- Contract Issue #2: Your client insists on assigning its contractual rights to a lender that requires your consent to the assignment and your certification of project information.

  - What do you do?

Contract Document

- Contract Issue #3: Your client has presented you with a certification form that seems to make your responsible for anything that has to do with the project.

  - What do you do?

Contract Document

- Response #1: Discuss the potential uncertainties for both parties having an oral contract, downside of purchase order, etc. Propose using the EJCDC Short Form Agreement between Owner and Engineer for Professional Services (EJCDC E-520). It is a clear and brief document and covers the essentials to provide reasonable legal protections for both parties.

Contract Document

- Response #2: You may have no contract obligation to consent to assignment, to provide certification or services to lender. The contract may prohibit assignment or be silent, permitting you to negotiate with owner, and limit any certification or extending any rights to lender that might prejudice your interests.

Contract Documents

- Possible clause: “Neither party may assign, sublet or transfer any rights under or interest in this agreement without the written consent of the other. Unless specifically stated to the contrary in any written consent to assignment, no assignment will release or discharge the assignor from any duty or responsibility under this agreement…”

Contract Documents

- Contract Issue #3: Your client has presented you with a certification form that seems to make your responsible for anything that has to do with the project.

  - What do you do?
Contract Documents

- **Response #3:** You need to educate your client to gain an understanding of the contractual, legal, insurance and ethical constraints on your ability to issue a certification. Certifications should:
  - Be based on contractual services;
  - Identify the purpose of the certification;
  - Specify time and entity for which certification is being made;
  - Be a professional opinion based on knowledge information and belief.

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Contract Document

- **Possible Clause:** “In accordance with Section 5.A. of the January 1, 2009 contractual agreement between Smith Engineering and Client for Engineering Design Services, based upon all information known to me as of 1/5/2009 in connection with the project located at 5000 East Main Street, Anywhere, USA, I hereby offer the following professional opinion and certify based upon my knowledge, information and belief…”

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Contract Documents

- **Contract Issue #4:** Your client expects you to pay the cost of any change order required to allow the contractor to construct the project according to the clients intentions.

  - What do you do?

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Contract Documents

- **Response #4:** Design professionals, clients and contractors should have a common understanding of how the change order process will work and the need for strict adherence to that process. Clients need to understand that a certain amount of imprecision and incompleteness is to be expected in the design documentation.

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Contract Documents

- **Contract Issue #5:** Your client presents you with a contract stating that your services and design will “meet all applicable codes and standards and be complete in every way…”

  - What do you do?

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Contract Documents

- **Response #5:** Communicate with your client that the language is too absolute. There are thousands of laws, regulations, codes, standards that relate to design and construction and all are subject to change, interpretation and conflict.
Possible Clause: “Engineer shall review laws, regulations, codes, and standards in effect as of the date of this agreement that are applicable to the Engineer’s services and shall exercise professional care and judgment to design in compliance with requirements imposed by governmental authorities having jurisdiction over the project.”

Contract Issue #6: Your client has drafted a contract provision that establishes a broad duty to keep information confidential and to indemnify the client for any damage resulting from your alleged breach of the requirement.

What do you do?

Response #6: Although your client may have a rational basis for demanding confidentiality, you should be aware that a broadly worded provision may conflict with your duty to the public, limit your ability to provide services or defend yourself against a future claim, and transfer your technical expertise and design details to your client. You may also be required to indemnify your client for damages outside the coverage of your professional liability insurance policy.

Possible clause: “Engineer shall maintain the confidentiality of the Client’s information except under circumstances where maintaining confidentiality would violate the law, create a risk of significant harm to the public or prevent the Engineer from establishing a claim or defense in an adjudicatory proceeding.”

Contract Issue #7: Your client wants to include a provision under which you would be liable for lost profits caused by your delay in completing the engineering design and other service you provide under the agreement.

What do you do?

Response #7: You should negotiate a mutual waiver of consequential damages. Waiving consequential damages means that both parties acknowledge known and calculable risks and recognize that there are many unclear and incalculable risks. A mutual waiver of consequential damages is not a totally exculpatory clause for either party, but one that simply limits the liability of each party to a significant amount.
Contract Documents

Possible Clause: “To the fullest extent permitted by law, Owner and Engineer waive against each other, and the other’s employees, officers, directors, members, agents, insurers, partners, and consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project.”

Contract Documents

Contract Issue #8: Your client’s major concern is that the cost of the project does not exceed the budget and wants you to estimate the cost of your design, making sure the project’s construction does not exceed that estimate.

What do you do?

Contract Documents

Response #8: Client needs to be made aware that the Engineer’s estimate is an opinion of probable cost that, although prepared in good faith and with reasonable care, can be no more accurate than the information on which the Engineer based the calculation. Given the many variables in the construction market, estimates can never be precise and Engineers are challenged to design to a specific budget.

Contract Documents

Possible Clause: “When included in Engineer’s scope of services, opinions or estimates of probable construction costs are prepared on the basis of Engineer’s experience and qualifications and represent Engineer’s judgment as a professional generally familiar with the industry. However, since Engineer has no control over the cost of labor, materials, equipment, or services, furnished by others, over contractor’s methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual construction costs will not vary from Engineer’s opinions or estimates of probable construction costs.”

Contract Documents

Contract Issue #9: Your client has decided it wants to administer the construction contract by itself or through another party.

What do you do?

Contract Documents

Response #9: If construction phase services are not envisioned in the original agreement or are severed from the contract, the Engineer should be protected against all claims except to the extent that the cost of those claims is the direct result of the Engineer’s professional negligence. It is reasonable that if the client is assuming the responsibility for decisions made during the construction phase, the client should also assume the risk. Similarly, the substitution of another entity to administer the construction contract should relieve the Engineer from the risk associated with those services.
**Contract Documents**

- Possible Clause: “Engineer and Client agree that because the Engineer’s services shall not include Construction Phase Services, the Client shall be solely responsible for interpreting the Contract Documents and observing the work of the Contractor to discover, correct or mitigate errors, inconsistencies or omissions. If the Client authorizes deviations, recorded or unrecorded, from the documents prepared by the Engineer, Client shall not bring any claim against the Engineer and shall indemnify and hold the Engineer, its agents and employees harmless from and against claims, losses, damages and expenses, including but not limited to defense costs and time of the Engineer to the extent such claim, loss, damage or expense arises out of or results in whole or in part from such deviations, regardless of whether or not such claim, loss, damage or expense is caused by a party indemnified under this provision.”

- Contract Issue #10: Your client presents you with a contract that neither addresses dispute avoidance nor establishes a dispute resolution mechanism.

- Response #10: If adversarial attitudes and disputes can be reduced, all parties to a design and construction project benefit. The process of dispute resolution has its beginning in the structuring of a dispute avoidance mentality and course of conduct. Realistically allocating the risks on a project by contract, promoting teamwork rather than adversarial relationships, establishing the techniques for resolving issues before they become disagreements, and developing a rational method of managing disagreements before they become disputes all reduce the threat of damage and the cost of litigation.

- Contract Issue #11: Your client has requested you perform your services under “work for hire” and that you agree to assign ownership of your work to the client so the client can convert your electronic files for future use (changes and additions to the project).

- Contract Issue #12: Your client wants you to provide construction contractors with your CADD files and provide a final set of all project information in an electronic format that the client can use.

- Response #10: Engineers are not retained to produce documents such as plans and specification; they are retained to perform professional services that may be expressed through “instruments of service” such as reports, studies, plans and specifications. The design and ownership of the documents and the right to use information contained in the instruments of services should be retained by the engineer. The client may be given the right to retain copies of the information for reference purposes in connection with the use and occupancy of the project, but the documents are not intended for reuse by the client or other for modification to the project or on any future projects.

- Possible Clause: “Owner and Engineer agree to negotiate all disputes between them in good faith for a period of 30 days from the date of notice prior to invoking the procedures of Exhibit H or other provisions of this Agreement, or exercising their rights under law. If the parties fail to resolve a dispute through negotiation under, then either or both may invoke the procedures of Exhibit H. If Exhibit H is not included, or if no dispute resolution method is specified in Exhibit H, then the parties may exercise their rights under law.”
Response #11: While engineers see CADD as a tool to enhance the design process, better coordinate the interprofessional services and minimize design conflict; clients often see CADD as a means of producing documents that are faster, cheaper and reusable.

Possible Clause A: “All Documents are instruments of service in respect to this Project, and Engineer shall retain an ownership and property interest therein (including the copyright and the right of reuse at the discretion of the Engineer) whether or not the Project is completed. Owner shall not rely in any way on any Document unless it is in printed form, signed or sealed by the Engineer or one of its Consultants.”

Possible Clause B: “Either party to this Agreement may rely that data or information set forth on paper (also known as hard copies) that the party receives from the other party by mail, hand delivery, or facsimile, are the items that the other party intended to send. Files in electronic media format of text, data, graphics, or other types that are furnished by one party to the other are furnished only for convenience, not reliance by the receiving party. Any conclusion or information obtained or derived from such electronic files will be at the user’s sole risk. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern. If the parties agree to other electronic transmittal procedures, such are set forth in Exhibit J.”

Possible Clause C: “Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data’s creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files.”

Possible Clause D: “When transferring documents in electronic media format, the transferring party makes no representations as to long-term compatibility, usability, or readability of such documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the documents’ creator.”

Possible Clause E: “Owner may make and retain copies of Documents for information and reference in connection with use on the Project by Owner. Engineer grants Owner a limited license to use the Documents on the Project, extensions of the Project, and for related uses of the Owner, subject to receipt by Engineer of full payment for all services relating to preparation of the Documents and subject to the following limitations: (1) Owner acknowledges that such Documents are not intended or represented to be suitable for use on the Project unless completed by Engineer, or for use or reuse by Owner or others on extensions of the Project, or for any other use or purpose, without written verification or adaptation by Engineer. (2) any such use or reuse, modification, or adaptation by Owner shall be at Owner’s sole risk, without liability or legal exposure to Engineer or its officers, directors, members, partners, agents, employees, and Consultants. (3) Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Consultants from all claims, damages, losses, and expenses, including attorneys’ fees, arising out of or resulting from any use, reuse, or modification of the Documents without written verification, completion, or adaptation by Engineer, as appropriate for the specific purpose intended; will be at Owner’s sole risk, and without liability or legal exposure to Engineer or to its officers, directors, members, partners, agents, employees, and Consultants. (4) Owner shall not create any rights in third parties.”
Contract Documents

- Possible Clause F: “If Engineer at Owner’s request verifies the suitability of the Documents, completes them, or adapts them for extensions of the Project or for any other purpose, then Owner shall compensate Engineer at rates or in an amount to be agreed upon by Owner and Engineer.”

Contract Documents

- Contract Issue # 13: Your client wants you to provide design services on a site that contains, or could reasonably expected to contain, asbestos, lead or some other existing pollutant that could generate liability claims

Contract Documents

- Response #13: Your client should recognize that your services on a project whenever environmental hazards exist should be afforded special protections so that you can assist in solving the client’s problem. If there is asbestos, lead or any other material that may generate claims by third parties against you, the client should be willing to consider providing appropriate protections for you.

Contract Documents

- Possible Clause A – In Client-Engineer Agreement: “To the fullest extent permitted by law, Client shall indemnify and hold harmless Engineer, its employees and agents from and against all claims, loses, damages, and costs (including but not limited to court or other dispute resolution costs, and the time of the Engineer expended in defense of such claims) caused by, arising out of or relating to the presence, discharge, dispersal, release, or escape of the environmental hazard at, on, under or from the site.”

Contract Documents

- Possible Clause B – In Client-Contractor Agreement: “Contractor agrees to hold harmless and indemnify Client and Engineer from and against any claim or liability arising out of Contractor’s performance of the removal of the environmental hazard including any time spent or expenses incurred by Engineer or Client in defense of any such action.”

Contract Documents

- Contract Issue # 14: Your client wants to change the existing contract document language stating that you are to “visit the side to observe and become generally familiar with the progress of the work on the construction site…” to you are to “inspect the work to ensure that it is properly completed.”
Response #14: A client may have a mistaken belief that the engineer has been paid to ensure that the client receives that which it is entitled to receive under the construction contract. To accomplish this, the design professional may be expected by the client to watch over the contractor to make sure proper construction is achieved and to assume responsibility if the contractor does not perform the work properly. No engineer has the authority to do this or is compensated for the services and risks that such a guarantee requires.

Possible Clause: “The purpose of Engineer’s visits to, and representation by the Resident Project Representative, if any, at the Site, will be to enable Engineer to better carry out the duties and responsibilities assigned to and undertaken by Engineer during the Construction Phase, and, in addition, by the exercise of Engineer’s efforts as an experienced and qualified design professional, to provide for Owner a greater degree of confidence that the completed Work will conform in general to the Contract Documents and that Contractor has implemented and maintained the integrity of the design concept of the completed Project as a functioning whole as indicated in the Contract Documents.”

Contract Issue #15: Your client asks you to warrant or guarantee your services or the results of the project for which you are providing your services.

Response #15: Explain to your client why guarantee language is inappropriate for professional service contacts and is not in your client’s best interests. The reasoning against such express warranties or guarantees includes the fact that (1) they are not realistic/effective; (2) they are inconsistent with the legal standard applied to all professionals (professional negligence); such standards will ultimately increase the overall cost and potential scope of the project and (4) such contractual commitments are not within the coverage of professional liability insurance.

Possible Clause: “The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer’s services.”

Contract Issue #16: Your client wants you to agree to defend it from any claims resulting from your services, and to indemnify it for any and all costs, losses or damages to it because of your services on the project.
Contract Documents

Response #16: An indemnification provision that obligates an engineer to defend the client, or to indemnify or rectify damage to a client or third party not resulting from the engineer’s failure to meet the standard of care, represents a risk to the engineer beyond normal liability and outside the scope of professional liability insurance.

Response #17: The insurance requirements of some contracts reflect a lack of understanding of the nature and the scope of professional liability insurance. In many cases, the requirements either make no sense, are contrary to the interests of the client or are impossible to accommodate within the available professional liability coverage options.

Contract Documents

Possible Clause: “Engineer shall indemnify Client for costs, losses, and damages to the Client to the extent they are caused by the negligent acts, errors, omissions of the Engineer in providing services on the project.”

Contract Documents

Contract Issue #17: Your client wants to be a “named insured” on your professional liability policy, and requires the policy to be endorsed to cover an indemnification provision and to provide notice of any changes in coverage.

Contract Issue #18: Your client asks you to use sub-consultants of the client’s choice or others who are to provide services about which you have no knowledge or over which you will have no control.

Response #17: The insurance requirements of some contracts reflect a lack of understanding of the nature and the scope of professional liability insurance. In many cases, the requirements either make no sense, are contrary to the interests of the client or are impossible to accommodate within the available professional liability coverage options.

Response #18: You should consider negotiating either the use of sub-consultants for whom you are willing to take responsibility for or an arrangement for the consultants or specialty service providers to contract directly with the client. If the contract is between the client and the other professional, you are not vicariously liable for their actions. Because the prime engineering consultant is legally responsible for the acts of its sub-consultants, significant, and perhaps uninsurable risks could be shifted to you as the prime design professional.
Possible Clause in Engineer-Sub-consultant Agreement: “Sub-consultant agrees to defend, indemnify and hold harmless Engineer from claims, damages and losses arising out of personal injury including death or property damage caused by Sub-consultant’s negligent acts, errors or omissions in performing and furnishing professional services on this Project.”

Contract Issue #19: You want to assist your client on a project that involves risks you have identified as being beyond your control or far in excess of any benefit you will receive by performing services for your client.

Response #19: If you and your client reach and understanding that a particular risk on a project is one over which you have no direct control should continue to be a client risk, or would have such an adverse impact that the fee for your services is disproportionate to the risk, you and your client can agree to limit your risk to your fee, (or a specific dollar amount, or insurance limits).

Cautions about Limitations of Liability Contractual Provisions:
– Disfavored in some jurisdictions by the courts;
– Sophisticated Client;
– Demonstrate freely negotiated;
– Adequate Notice and Acceptance/Acknowledgement;
– Legal Indemnification Issues

Possible Clause – Liability Limited to Professional Fee: “To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer’s officers, directors, members, partners, agents, employees, and Consultants, to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied of Engineer or Engineer’s officers, directors, members, partners, agents, employees, or Consultants shall not exceed the total compensation received by Engineer under this Agreement.”

Contract Issue #20: Your client’s standard contract requires the Engineer to “approve shop drawings to assure compliance with the work...”
Contract Documents
- Response #20: Assuming responsibility for “assuring” compliance is providing a guarantee that is not reasonable. It is also a contractual obligation not covered by insurance.

Contract Documents
- Possible Clause: “Engineer shall review and approve or take other appropriate action in respect to Shop Drawings and Samples and other data which Contractor is required to submit, but only for conformance with the information given in the Contract Documents and compatibility with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.”

Contract Documents
- Contract Issue #21: Your client asks you to review the contractor’s safety program to protect the public safety on the site and to expedite completion of the project.

Contract Documents
- Response #21: The contractor is in control of the site and the workers. Therefore the contractor is in the best position to implement and monitor the safety program. The engineer does have an obligation as a professional to take some action when a dangerous condition is seen and recognized. The engineer must act in a reasonable manner, such as immediately reporting the observation to the contractor’s superintendent and following up with proper notice to the client.

Contract Documents
- Possible Clause: “Engineer shall not at any time supervise, direct, control, or have authority over any contractor work, nor shall Engineer have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor, or the safety precautions and programs incident thereto, for security or safety at the Site, nor for any failure of a contractor to comply with Laws and Regulations applicable to such contractor’s furnishing and performing of its work.”

Contract Documents
- Contract Issue #22: Your client wants you to agree to perform to the “highest professional standard…”
Contract Documents

- Response #22: The common law standard of care applied to the performance of professional design services has been described as a “duty to exercise the degree of learning and skill ordinarily possessed by a reputable design professional practicing in the same or similar locality and under similar circumstances.” This common law standard of care is imposed on the engineer if a contract is silent as to the standard of care.

Possible Clause: “The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer’s services.”

Contract Documents

Engineers Joint Contract Documents Committee (EJCDC)

For more than 30 years, the Engineers Joint Contract Documents Committee (EJCDC), a broad coalition of stakeholders in the project delivery process has been developing and endorsing quality contract documents and encouraging their use through education and promotion.

EJCDC documents are prepared with the advice of legal counsel and reflect the experience and knowledge of the many engineers, owners, contractors, and other construction-related professionals who comprise the committee.

The Engineers Joint Contract Documents Committee (EJCDC) issued most recent edition of its standard professional services contract, EJCDC E-500, Agreement Between Owner and Engineer for Professional Services in 2008. The new document replaces the 2002 edition of E-500 and is available for purchase at www.nspe.org

EJCDC publishes standard contract documents that are used for the design and construction of public and private infrastructure projects throughout the United States. The four EJCDC sponsoring organizations are the American Council of Engineering Companies (ACEC), the American Society of Civil Engineers (ASCE), the Associated General Contractors of America (AGC), and the National Society of Professional Engineers (NSPE).
The EJCDC documents are drafted with the active participation of representatives of the four sponsoring organizations (engineers and contractors), together with public owners; risk managers; professional liability insurers; surety and insurance experts; construction lawyers; various professional societies; and construction managers.

The EJCDC documents are principally intended for use on public and private infrastructure projects designed by engineers, including water and wastewater treatment and conveyance facilities; utility work; solid waste handling and disposal facilities; highway, bridge, and other transit projects; production, power, and processing facilities; site development work; environmental remediation projects; street, curb, and gutter work; tunneling and excavating projects; and similar applications.

The 2008 edition of EJCDC E-500 maintains the solid base of terms and conditions found in prior editions of this flagship document, while making carefully considered changes that enhance clarity and reflect current design and construction-phase engineering practices. Highlights of the 2008 EJCDC E-500 are the following:

- **Safety**: EJCDC has revised the Agreement to provide that the Owner must inform Engineer of specific safety requirements that Engineer must follow at the project site. In most cases Engineer's compliance with Owner's and construction contractor's safety rules will be a basic included service. If a safety requirement is added after the effective date of the Agreement, and is more extensive than typically required, then compliance will be treated as an additional service.

- **Owner's Policies and Procedures**: The new E-500 clarifies that to the extent that the Owner has policies or procedures that apply to the professional services to be rendered by Engineer (for example, required procedures for drafting and organizing specifications, or for reviewing contractor payment applications), such policies and procedures are to be provided to Engineer prior to entry into the Agreement. This will allow the parties to account in the pricing of Engineer's services for any costs associated with compliance with the policies and procedures. E-500 also notes that Engineer is required to comply with such policies and procedures only to the extent that doing so is not contrary to professional practice requirements.

- **Insurance**: Because most design engineers do not provide insurance advice as part of their professional practices, the EJCDC documents provide that as between the Owner and Engineer, the Owner (presumably through its risk managers, attorneys, brokers, and other insurance advisers) must take responsibility for making insurance decisions such as setting required policy limits—see EJCDC C-051, Engineer’s Letter to Owner Requesting Instructions Concerning Bonds and Insurance.
Contract Documents

EJCDC has therefore added a provision to E-500 emphasizing that Engineer's services do not include providing insurance or bonding advice to Owner, or enforcing insurance-related requirements of the Owner's construction contract. Also, the new edition lists the insurance coverages that Owner must require from the construction contractor (workers' comp, commercial general liability, property damage, and motor vehicle damage), rather than merely cross-referencing the requirements set out in the EJCDC standard construction general conditions (EJCDC C-700).

Contract Documents

Indemnification: Project owners typically require that engineers contractually indemnify the owner with respect to negligence that results in personal injury or damage to the property of others. It is less common for owners to provide the same indemnification to the engineer, often for public or corporate policy reasons, or based on the position that an owner's less active role in the design and construction reduces the call for such an indemnification.

Contract Documents

To be consistent with common practice, EJCDC has structured its indemnification provisions such that the Engineer's indemnification of Owner is a standard clause, and the Owner's indemnification of Engineer is an option that may be selected when appropriate for a particular project.

Contract Documents

Definitions: The previous edition of E-500 incorporated many standard definitions from the EJCDC construction general conditions (EJCDC C-700) by reference. The 2008 edition contains the actual definitions, so the user does not need to refer to a second document to confirm a definition.

Contract Documents

Certification Against Corrupt and Collusive Practices: As part of an international initiative to improve procurement practices, the 2008 E-500 requires Engineer to certify that it has not engaged in corrupt, fraudulent, collusive, or coercive practices with respect to obtaining the contract. Other EJCDC documents contain similar requirements with respect to construction procurement.

Contract Documents

Contested Invoices: The new document requires that if Owner contests an invoice from Engineer and withholds payment of all or a portion of the invoiced amount, then Owner promptly must inform Engineer of the specific basis for doing so.
Review of Substitution Requests and Submittals:
The Engineer's basic services are expanded to include the review of routine substitution and "or equal" requests made during the bidding process, if such requests are allowed by the instructions to bidders. The 2008 E-500 further provides that if it is necessary for Engineer to conduct an excessive number of substitution or "or-equal" requests (whether submitted during the contractor selection process, or during the construction process), or review a shop drawing submittal more than three times, then the excess reviews will be treated as an additional engineering service.

Rejection of Defective Work:
The previous edition of E-500 required the Engineer to identify defective work and recommend to the Owner that Owner reject the defective work. Recognizing common construction practice, as described in current and past EJCDC standard general conditions, and the common expectation of the Owner that the Engineer is the party best positioned to identify and administer the rejection of defective work, the 2008 edition provides the Engineer with the authority to reject defective work directly, and further clarifies the standards under which work would be deemed defective.

Mediation:
If a dispute between Owner and Engineer is mediated, the mediation process is expressly noted to be confidential, and must be conducted within 120 days.

Additional Services:
Reorganization of the scope of services sections to clarify which services are basic included responsibilities and which are additional services and thus entitled to compensation under the specific provisions for additional services. The modifications should allow for better pricing and budgeting for all parties.

Estimated Engineering Costs:
Expanded discussion of Owner's options when compensation for engineering services is estimated, not fixed, and costs approach the estimate prior to completion of services.

Beginning in 2009, EJCDC will also issue revised editions of its other professional services documents, including the standard master agreement (EJCDC E-505, Agreement Between Owner and Engineer for Professional Services, Task Order Edition), the short form (EJCDC E-520), and various professional services sub-agreements, as well as a narrative guide to using the EJCDC Engineering Series documents.
Contract Documents

The Engineers Joint Contract Documents Committee (EJCDC) issued the most recent edition of its Construction Series of standard documents in 2007 and is available for purchase at www.nspe.org. The Construction series, including the Standard General Conditions of the Construction Contract (C-700) consists of 21 documents for use in establishing and administering the contractual relationship between a project owner and a construction contractor. These new documents replace the 2002 Construction series. The 2007 series is the first major EJCDC release since the Associated General Contractors of America (AGC) became an EJCDC sponsoring organization.

Contract Documents

The 2007 EJCDC Construction series maintains the solid base of forms, terms, and conditions found in prior editions, while making carefully considered changes that enhance clarity and reflect current construction contracting practices. Highlights of the 2007 Construction series are the following:

Safety. EJCDC's Standard General Conditions (EJCDC C-700) are revised to specify the responsibility of the Contractor to inform Owner and its Engineer of specific safety requirements that must be followed at the site, and the corresponding obligation of Owner and Engineer to comply with such requirements. Contractor is also required to comply with any applicable Owner safety programs. The new documents also clarify that the site safety responsibilities that are contractually allocated to Contractor do not reduce the safety duties of subcontractors at the site.

Site Conditions. The Suggested Instructions to Bidders (EJCDC C-200), Suggested Bid Form (EJCDC C-410), and Suggested Owner-Contractor Agreement Forms (EJCDC C-520, Stipulated price; EJCDC C-525, Cost-Plus) are revised to provide that contractors must take into consideration not only information furnished by Owner but also their own actual knowledge of site conditions, and information commonly known about local conditions.

Progress Payment Applications. EJCDC's payment application form, EJCDC C-620, is for the first time provided in a spreadsheet format allowing for ease of use and accurate calculations of totals.
Contract Documents

- **Insurance.** The insurance provisions of the Standard General Conditions (C-700) are updated to reflect changes in insurance terminology. Because most design engineers lack insurance expertise, the 2007 documents also confirm that as between the Owner and Engineer, the Owner (presumably through its risk managers, attorneys, brokers, and other insurance advisers) must take responsibility for making insurance decisions such as setting required policy limits—see EJCDC C-051, Engineer’s Letter to Owner Requesting Instructions Concerning Bonds and Insurance.

Contract Documents

- **Reporting Discrepancies in Design.** Contractor’s duty is specified to be limited to reporting errors or conflicts in the specifications and drawings only if Contractor had actual knowledge of such discrepancies. 2007 Standard General Conditions (EJCDC C-700).

Contract Documents

- **Bid Form.** The Suggested Bid Form (EJCDC C-410) has been made more user-friendly by eliminating the requirement that prices be stated in words—as of 2007 numeric figures are sufficient.

Contract Documents

- **Certification against Corrupt and Collusive Practices.** At the request of The American Society of Civil Engineers (one of EJCDC’s four sponsoring organizations), the 2007 Suggested Bid Form (EJCDC C-410) and Owner-Contractor Agreement Forms (EJCDC C-520, Stipulated Price; EJCDC C-525, Cost-Plus) require bidders and Contractors to certify that they have not engaged in corrupt, fraudulent, collusive, or coercive practices with respect to obtaining the contract.

Contract Documents

- **Expanded Commentary.** EJCDC provides extensive commentary on use of the new documents in its Narrative Guide to the 2007 Construction Documents (EJCDC C-001). EJCDC has also expanded and revised the numerous notes to users that are interspersed throughout the text of various documents, including the Suggested Instructions to Bidders, Suggested Bid Form, Suggested Owner-Contractor Agreement Forms, and Guide to the Preparation of Supplementary Conditions (EJCDC C-800).

Contract Documents

- **On-line Access to Supplementary Conditions.** EJCDC and its sponsoring organizations are providing free public access to the 2007 Guide to the Preparation of Supplementary Conditions (C-800) at their websites. From time to time, as the need arises, EJCDC will update this document to include more options for modifying the 2007 Standard General Conditions (EJCDC C-700). For more information, please visit: www.nspe.org
Contract Documents

- Final Drafting Do's and Don'ts:
  - Use clear and precise language;
  - Use language consistently
  - Avoid ambiguity;
  - Keep it simple;
  - Avoid verbosity;
  - Headings should be consistent with content;
  - Make sure essential terms are present

Contract Documents

THANK YOU !!!

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