

# Understanding your Contract: the Importance of Contract Negotiations

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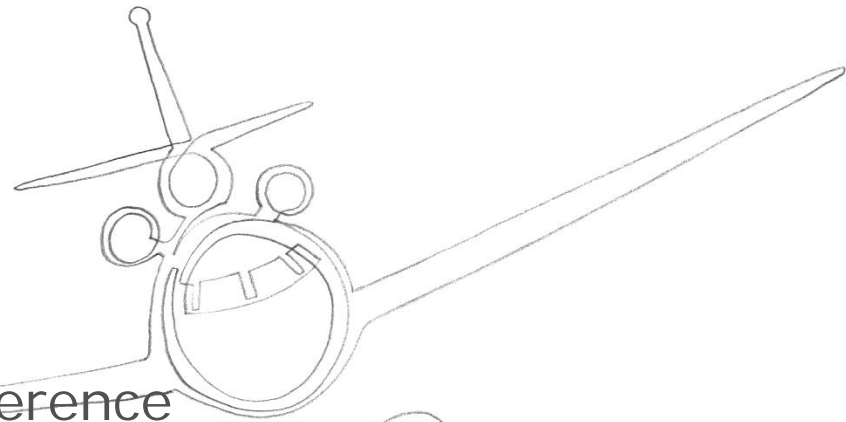
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# What's on the agenda?

- ❖ Scope of services
- ❖ Standard of care
- ❖ Indemnity
- ❖ Incorporation by reference
- ❖ Dispute resolution



# Contracting Practices



# Contract Negotiations – Not Just For Lawyers

- A dialogue that sets the stage for the Project
  - Assessment of Client expectations (reasonable/unreasonable)
  - Chance to educate Client re: your customary role & value of services
  - Self-assessment of services, risks, and rewards
- Barometer of desirability of the Client, Project, risk, and reward
  - Effect of current economy on contract negotiations
  - “take it or leave it” approach by Clients
  - Should you walk away?
- Undermining your contract aka extra-contractual liability

# Scope of Services

# Scope of Services

Clearly define your responsibilities:

- Clarity
- Definition
- Competency



# Standard of Care

Yep, we're **STILL** talking about it!



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## Let's remember...

Standard of care: "In law of negligence, that degree of care which a reasonably prudent person should exercise in same or similar circumstances." - Black's Law Dictionary, 6<sup>th</sup> edition

### Standard of Care:

"The Engineer's services shall be performed in a manner consistent with that degree of skill and care **ordinarily exercised by practicing design professionals performing similar services** in the same locality, at the same site and under the same or similar circumstances and conditions. The Engineer makes no other representations or warranties, whether expressed or implied, with respect to the services rendered hereunder."

# Standard of Care – DANGERS

- Watch out for standard of care with:

Warranties, guarantees, certifications

Perform services to the “highest”, “best”, “first-class”, “first-rate” standard of care as opposed to ordinary, reasonable standard

Perform in accordance with Client’s standards; “to the satisfaction of Client”; “in Client’s sole judgment”; “non-negligent manner”

## **Suggested qualifying language for Client standards:**

“...nothing herein shall be construed as holding Engineer to a standard of care that is more stringent than the general accepted standard of professional skill and care ordinarily exercised by similarly situated professionals...”

## **Fiduciary duty obligations**



## Contract Blooper #1 – Standard of Care

In addition to all other representations and warranties, Engineer warrants that its services under this Agreement will be first-class and consistent with the highest standards applicable to the Engineer's profession and will meet, or exceed, the standards promulgated by the Client. Engineer warrants that its services shall be complete, 100% accurate, and fit for the Client's intended purpose.

## Revised Provision #1 – Standard of Care

~~In addition to all other representations and warranties, Engineer warrants that shall perform its services under this Agreement will be first class and consistent with, and limited to, the highest the generally accepted standards applicable to the Engineer's profession ordinarily exercised by professionals performing similar services at the same locality and under the same conditions and circumstances. This standard of care shall apply to all services provided by the Engineer, including but not limited to Engineer's efforts to comply with any and will meet, or exceed, the standards promulgated by the Client. Engineer warrants that its services shall be complete, 100% accurate, and fit for the Client's intended purpose.~~

# Indemnity

# Indemnity

## What is Indemnification?

Agreement whereby one party agrees to assume the liability of another in the event of a loss.



## Polling Question

What type of indemnity obligation do you typically **accept** in professional service agreements with clients?

“

1. No indemnity
2. Broad provision not based on your negligence, with a duty to defend
3. Broad provision not based on your negligence, no duty to defend
4. Negligence-based provision, with a duty to defend
5. Negligence-based provision, no duty to defend

”

# Indemnity

## Key Points:

- Ideal position: no indemnity!
- Reality: ensure the obligation is acceptable
  - 3 aspects to consider:
    - Who are the Indemnitees?
    - Is there a duty to defend?
    - Is the obligation negligence-based?
- And a note on mutual indemnity provisions...



# Indemnity...if you have to have one

## SAMPLE LANGUAGE:

"To the full extent permitted by law, the Engineer agrees to indemnify and hold the Client harmless from and against any liabilities, damages and costs (including reasonable attorney's fees) **to the extent caused by the negligence of the Engineer** in performance of services under this Agreement. In no event shall the indemnification obligation extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by any applicable statute of repose or statute of limitations."

## Contract Blooper #1 – Indemnity

Engineer shall defend, indemnify and hold harmless Owner in accordance with, and to the same extent required by the obligations to defend, indemnify and hold harmless Owner which are required of Client in the Prime Agreement, including Owner's obligations to defend, indemnify and hold other parties harmless.

Engineer shall defend, indemnify and hold harmless Client and all of its parent companies, subsidiaries, affiliates and subconsultants, including their respective officers, directors, employees, principals and partners, agents successors and assigns (collectively, "Client Indemnitees") from and against any and all claims that may be brought or made against Client Indemnitees on account of liabilities, damages, losses, costs, expenses, caused by, arising out of, or contributed to by any actual or alleged breach of the terms of this Agreement, or violation of any applicable federal, state, and local law, rule or regulation, by, or any negligent acts, errors, omissions, or willful misconduct of, Engineer except to the extent the Claims are determined to have been caused by the negligence or willful misconduct of Client.

# Revised Provision #1 – Indemnity

~~Engineer shall defend, indemnify and hold harmless Owner in accordance with, and to the same extent required by the obligations to defend, indemnify and hold harmless Owner which are required of Client in the Prime Agreement, including Owner's obligations to defend, indemnify and hold other parties harmless.~~

Engineer shall ~~defend~~, indemnify and hold harmless Client and all of its ~~parent companies, subsidiaries, affiliates and subconsultants, including their respective officers, directors, and employees, principals and partners, agents successors and assigns~~ (collectively, "Client Indemnitees") from and against ~~any and all claims that may be brought or made against Client Indemnitees on account of liabilities, damages, losses, costs, expenses, caused by, arising out of, or contributed to by any actual or alleged breach of the terms of this Agreement, or Engineer's violation of any applicable federal, state, and local law, rule or regulation, to the extent such violation constitutes a breach of the Engineer's professional standard of care, by, or to the extent caused by any negligent acts, errors, or omissions, or willful misconduct of, Engineer except to the extent the Claims are determined to have been caused by the negligence or willful misconduct of Client.~~ **In no event shall the indemnification obligation extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by any applicable statute of repose or statute of limitations.**

## Contract Blooper #2 – Indemnity

Engineer shall indemnify Client from any Loss arising from or in any way related to any of Engineer's Acts under this Agreement. For purposes of this provision, the following terms shall have the following meanings:

1. "Indemnify" shall mean the obligation to be legally liable for, indemnify, defend and save Client harmless;
2. "Loss" shall mean any expenses, reasonable attorneys' fees, costs, losses, claims, causes of action, damages or legally liability including those attributable to personal injury, property damage or loss of use of property.
3. "Engineer" shall mean Engineer, its agents, employees, subconsultants, invitees, or anyone else for whose acts Engineer may be legally liable.
4. "Acts" shall mean negligent acts or omissions including any errors or omissions in Engineer's performance of this Agreement, willful misconduct, or the failure of Engineer to perform, or any default by Engineer in the performance of, any services described in this Agreement.

Without limiting Engineer's obligation to defend Client as provided in this provision, Engineer will not be required to indemnify Client for the portion of any judgment that a court of competent jurisdiction determines in a final judgment to have been caused by the negligence or willful misconduct of Client and, in the event of such final judgment, Client shall reimburse Engineer, within 10 business days after receipt of a detailed invoice, an allocable share of the additional costs, if any incurred by Engineer to defend Client in such action.

## Revised Provision #2 – Indemnity

Engineer shall indemnify Client from any Loss ~~arising from or in any way related to~~ **the extent caused by** any of Engineer's Acts under this Agreement. For purposes of this provision, the following terms shall have the following meanings:

1. "Indemnify" shall mean the obligation to be legally liable for, indemnify, ~~defend~~ and save Client harmless;
2. "Loss" shall mean any expenses, reasonable attorneys' fees, costs, losses, ~~claims, causes of action,~~ damages or legally liability ~~including those~~ attributable to personal injury, property damage or loss of use of property.
3. "Engineer" shall mean Engineer, its ~~agents,~~ employees, subconsultants, ~~invitees,~~ or anyone else for whose acts Engineer **is** ~~may be~~ legally liable.
4. "Acts" shall mean negligent acts or omissions ~~including any errors or omissions in~~ Engineer's performance of this Agreement, ~~willful misconduct, or the failure of Engineer to perform, or any default by Engineer in the performance of, any services described in this Agreement.~~

~~Without limiting Engineer's obligation to defend Client as provided in this provision, Engineer will not be required to indemnify Client for the portion of any judgment that a court of competent jurisdiction determines in a final judgment to have been caused by the negligence or willful misconduct of Client and, in the event of such final judgment, Client shall reimburse Engineer, within 10 business days after receipt of a detailed invoice, an allocable share of the additional costs, if any incurred by Engineer to defend Client in such action.~~ **In no event shall the indemnification obligation extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by any applicable statute of repose or statute of limitations.**

# Incorporation by Reference



# Incorporation by Reference - Inherently Dangerous!



## Key Points:

- May create significant risk management and liability issues
- Effectively makes the incorporated document part of Engineer's agreement
- Has the Client provided the document incorporated by reference?
  - If so,
    - Is the document acceptable and consistent with your contract?
    - Make sure your agreement governs if inconsistent
    - If Client objects, list provisions you agree to incorporate (preferred tactic) OR those you reject after thorough review and evaluation of document
  - If not, do not execute agreement

# Dispute Resolution



# Dispute Resolution

## Key Points:

- Recommend mediation as condition precedent to litigation

- ☑ **Mediation:**

- » Voluntary
- » Non-binding
- » Confidential
- » Opportunity for Creative Resolution

- ☑ **Arbitration:**

- » No rules of evidence or discovery
- » Binding
- » Arbitrary Decisions
- » No appeal



# Dispute Resolution

## **SAMPLE LANGUAGE:**

“Prior to the initiation of any legal proceedings, the parties agree to submit all claims, disputes or controversies arising out of or in relation to the interpretation, application or enforcement of this Agreement to non-binding mediation. Mediation shall be conducted under the auspices of the American Arbitration Association or such other mediation service or mediator upon which the parties agree. The party seeking to initiate mediation shall do so by submitting a formal written request to the other party to this Agreement. This Article shall survive completion or termination of this Agreement, but under no circumstances shall either party call for mediation of any claim or dispute arising out of this Agreement after such period of time as would normally bar the initiation of legal proceedings to litigate such a claim or dispute under the applicable law.”

# Dispute Resolution

–What if Client insists on arbitration?

- Require limited discovery and that parties follow rules of evidence
- No consolidation/joinder without agreement by both parties
- Limit scope of claims to a certain dollar threshold e.g. \$100,000
- What if Client wants to be able to join Engineer in other proceedings?
  - “...the foregoing is contingent upon Engineer being afforded the opportunity to fully and meaningfully participate in the proceeding, including the selection of arbitrators...”



"Then it's settled. She gets the house, he gets the cars and the video games go to the winner of a game of 'Guitar Hero'."

## Polling Question

Having a prevailing party provision in your agreement is a good idea.

“

1. True
2. False
3. Not sure

”

# Prevailing Party Provisions a.k.a Attorney-Fee-Shifting

## Should they stay or should they go?

### A little background...

#### ❖ American Rule vs. English Rule

##### ❖ American Rule:

- ❖ each party is responsible for paying its own attorney's fees
- ❖ attorney's fees are not awardable to the winning party, unless statutorily or contractually authorized.

##### ❖ English Rule:

- ❖ party who loses in court will pay the other party's attorney's fees
- ❖ rationale for English Rule is that a litigant (whether plaintiff or defendant) is entitled to legal representation and, if successful, should not be left out of pocket by reason of his own legal fees.

# Prevailing Party Provisions a.k.a Attorney-Fee-Shifting

## SAMPLE LANGUAGE:

“In the event that the Client or Engineer shall retain the services of an attorney in order to bring a legal action against the other, including any action for non-payment or breach of this Agreement, the Client and Engineer agree that the prevailing party shall be entitled to recover from the non-prevailing party its costs of enforcing or defending same, including but not limited to, reasonable attorney’s fees, expert witness fees and court costs.”

- **Loser pays the winner’s fees**
- Keep or delete?
  - **Pro**—beneficial if Engineer prevails
  - **Con**—problematic from insurability perspective
  - Ultimately, it’s a business decision, but could be costly!



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