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Contract Review Checklist

Risk management begins with your contract. We recommend use of your company's standard agreement or an industry-standard association form that clearly identifies the duties and obligations of the parties to the construction project and properly allocates risk to the entities best able to manage the risk. However, contractors, CMs, and design-builders are frequently presented with a client-drafted agreement that may be unbalanced and unfairly seek to shift inordinate risk to the construction (and design) professionals. Regardless of which type of contract you use, it should be clear about the scope of services and the responsibilities of the project participants: owner/client, construction professional, contractors, and design professional.

TOP 10

Berkley Construction Professional offers resources to help you draft, review, and negotiate contracts that equitably apportion risk. This handy checklist identifies the "Top 10" areas for your initial review and risk assessment.

1 Project Description

Your contract should reflect as much relevant information as possible known to you and your client at the time of execution. A solid understanding of the scope and intent of the project at the outset is essential for clear definition of project intent and as the basis for communication and documentation throughout the life of the project. Your agreement should contain a clear description of the following Initial Information categories:

- ☐ Functional and technical program defining owner/client intent and requirements
- ☐ Project location and site characteristics
- ☐ Owner-provided information including site surveys, geotechnical and environmental reports
- ☐ Expectation for sustainable project goal (such as LEED or other certification), if any
- ☐ Project team members including design and construction professional consultants, pre-selected construction trades, owner consultants
- ☐ Construction delivery method
- ☐ Project and Construction Budget
- ☐ Schedule including key design and construction phase milestones, pricing/cost commitments such as GMP establishment, permit/AHJ submittals, actual construction performance period, and other project schedule parameters and milestones

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2 Standard of Care

In your role as a construction professional, you operate under a standard of care. You are providing a service, not a product. Perfection is not on the table. We recommend including an affirmative Standard of Care clause in your agreements—and that you use it as an opportunity to educate your clients as to the nature of your professional services. Warranties or guarantees should be limited to the contractors actually performing construction work. Clear definition in your contract of the difference between the standard of care for a professional and warranty/guarantee standard for a contractor helps establish realistic owner/client expectations from the outset. Important areas to include in such a clause:

- ☐ Services are consistent with the professional skill and care usually provided by others practicing in your locale and under similar circumstances (while CMs are not licensed professionals, the performance of qualified construction professionals establishes a normal standard of care)
- ☐ Statement that there are no express or implied warranties with respect to your professional services

Note that if you are acting as a CM as Constructor (CMc), also known as CM at Risk (CMAR) or CMGC, your responsibilities usually include both professional and non-professional duties and obligations, which should be distinct in your contract.

3 Scope of Services

A clear scope of services for each project participant is key to establishing a collaborative effort of the project team to promote successful and profitable project results. In general, the scope of services for the construction professional should address responsibilities, obligations, and deliverables in a thorough and concise manner in the following categories:

- ☐ Services you will perform for the fees negotiated (basic services)
- ☐ Services you can perform for additional fees (additional services)
- ☐ Services you will not perform

Other services for the general contractor or CM to consider include the following:

- ☐ Consultation, including advice to owner and design professionals, on functional/technical program and project intent, site utilization, constructability, logistics, project delivery process procedures and coordination, and material and systems and selection
- ☐ Review and opinion of reports/documents prepared by others (e.g. site surveys, geotechnical and environmental reports contracted by owner/client, design team progress documents and services)
- ☐ Cost management and control including preliminary and phased cost estimating based on design and project phases, budget development/revisions, alternatives, value engineering, and preparation and timing of the GMP or any other cost guarantees (caution: need sufficient development of design/construction documents prior to fixed price or GMP commitment)
- ☐ Project and construction schedule preparation and management including phased construction approach (completion goals, fast-track, multiple bid packages, material/systems availability and advance procurement strategies, impact of governmental or other funding entitlements, AHJ reviews/approvals)
- ☐ Subcontractor and supplier prequalification, selection, and other considerations
- ☐ Compensation and payments for pre-construction services

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4 Construction Phase Responsibilities

During the construction process, the design becomes reality—and this is where many claims surface. Risks can be managed with appropriately defined and contracted construction phase services.

- ☐ Administration
  - Bidding/procurement/contracting of subcontractor Work
  - Schedule preparation (detailed) and updates
  - Coordination and documentation of on-site project meetings
  - Progress reporting
  - Review and processing of submittals and RFIs
  - Subcontractor payment application and processing
  - Cost control and GMP management
  - Other services
- ☐ Unless you are in a CMc or CMAR role, disclaim responsibility for jobsite safety and means and methods of subcontractor Work and assign to subcontractors and construction trades
- ☐ Compensation and payments for construction phase services (basis, method, limitations, timing, fees, reimbursable expenses)
- ☐ Definition of GMP (components of cost of the Work, subcontracts, material/systems procurement, general and temporary conditions, contingencies, changes/equitable adjustments, permits, royalties/licenses, other costs)

5 Owner's Responsibilities

Agreements generated by owners can be notoriously silent on their own responsibilities. The project—and the successful performance of your scope—is dependent upon the client's actions. Your contract should state that the client is responsible for:

- ☐ Providing project information (program, objectives, schedule, budget)
- ☐ Identifying a project representative who is authorized to make decisions on the client's behalf
- ☐ Making decisions and approvals in a timely manner including design/project phase reviews and approvals, change order and pay request processing
- ☐ Establishing and updating the project and construction budget, including reasonable contingencies
- ☐ Furnishing services of design professionals and other consultants contracted directly by the client, such as geotechnical engineers, environmental consultants, construction material testing (CMT) (and that you have the right to rely on the information provided)
- ☐ Providing assurance of project funding and financial resources and owner-provided insurance
- ☐ Legal and accounting services to meet owner's needs including process and advocacy for entitlements, zoning/planning/economic development, interface with and approvals of other authorities having jurisdiction (AHJ)

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Indemnification

An indemnity clause is a common tactic for clients to shift risk, sometimes unfairly, to you. Your professional liability insurance (PLI) policy covers you for damages related to your professional errors and omissions—and is not designed to cover additional risk that you may assume by contract. In some states, such as California, the duty to provide a defense may be implied in connection with an indemnity clause. Our first recommendation is to delete the clause entirely. If your client insists upon an indemnification from you, here are some strategies you can use to mitigate your exposure:

- ☐ Understand the difference between what is insurable under a CGL policy as compared to a PLI policy (this checklist focuses on insurability and fairness under PLI)
- ☐ Narrowly define the parties you are indemnifying—the client, its officers and employees (strike language referring to its "agents" or other parties)
- ☐ Make sure the indemnification is specifically tied to your negligence and is proportionate to the extent caused by your negligence
- ☐ Indemnification should only apply to claims brought by third parties
- ☐ Remove the word "defend" from the clause—and specifically disclaim the duty to provide a defense for an indemnified party prior to a finding of fault
- ☐ Provide for reasonable attorneys' fees/expenses but only if recoverable by law in your jurisdiction and as determined in the dispute resolution process

Important: subcontractor indemnification obligations should match yours as general contractor or CM.

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Subcontractor Insurance

Your subcontractors and subconsultants should carry the same insurance policies and policy limits that you as general contractor or CM are required to maintain in your contractor with your client (owner) so that losses and damages caused by subcontractor or subconsultant negligence or non-performance are covered by their insurance. Applicable insurance policies include the following:

- ☐ Commercial General Liability (CGL)
- ☐ Professional Liability
- ☐ Pollution Liability
- ☐ Automobile Liability
- ☐ Excess or Umbrella Liability
- ☐ Workers' Compensation (statutory limits)

You should be named as additional insured either by endorsement or by contract on the above policies, except for professional liability and workers' compensation. Additionally, as noted above, subcontractor indemnification obligations should extend to you in a manner similar to your obligation to your client (owner). You should also obtain a copy of the actual policy and not just the certificate of insurance.

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8 Dispute Resolution

Problems, issues, and disputes can and will arise on your project. It is critical that you negotiate with your client and memorialize in your agreement how you will handle them. Having a dispute resolution strategy can help you promptly address issues and mitigate potential claims. If not addressed in your contract, your default dispute resolution method is litigation. Rather than leaving it to the courts to decide, we recommend that you include proactive processes in your agreement:

- ☐ Include a "Meet-and-Confer" session as the first step, which includes decision makers from both parties in an attempt to resolve an issue in its early stages
- ☐ If the "Meet-and-Confer" session is not successful, your contract should specify that the parties will enter into formal mediation (mediation is often successful, and can save legal costs and result in a voluntary settlement)
- ☐ If the mediation process is not successful, the next step in your contract should allow the parties to move into binding dispute resolution such as litigation or arbitration (both litigation and arbitration are insurable if properly defined, but litigation is preferred due to the preservation of the rules of law and the ability to appeal an unfavorable decision)

Dispute Resolution in your subcontractor or subconsultant agreements should match your agreement with your client (owner) so that you are not litigating a dispute in multiple forums.

9 Suspension of Services & Termination

You should have the right to suspend services in the case of non-payment or other material failure of the client to perform its contractual duties (such as the failure to make a critical decision or provide necessary owner information). This decision should not be made lightly—improperly based project suspensions can create significant risk exposure for project delay.

- ☐ Clearly define a notification and cure period and process in the contract
- ☐ Require rectification of failure (e.g., payment for services rendered)
- ☐ Disclaim liability for delays and include an equitable adjustment to schedule and fees upon resumption of services
- ☐ In the event of termination, address the client's rights and restrictions related to your instruments of service (design documents, plans, and specifications that you created)

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Waiver of Consequential Damages

"Direct" damages, such as the cost to complete unfinished work, may be very small compared to the "consequential" damages, such as the loss of operating revenue a client might claim as a result of the delay. Similar to the philosophy with limitation of liability clauses (see "Bonus" clause below), because consequential damages can be so out of proportion with the rewards of a typical construction contract (e.g., your professional fees compared to the value of the constructed project), they should be waived or limited.

- ☐ Make the clause mutual—you and your client each waive the right to claim consequential damages against the other
- ☐ Have it be applicable to any claim or dispute arising out of the contract regardless of which legal theory is applied (contract, warranty, tort, negligence, strict liability, other)
- ☐ If you cannot negotiate this waiver, be prepared to invest resources to carefully document all causes of delay during construction to avoid becoming a scapegoat

BONUS

Limitation of Liability

Limitation of Liability (LoL) clauses can be used to help balance the risks and rewards of a project. The client is the primary beneficiary of the completed project—and accordingly has a greater share of the rewards. Strive for an LoL clause on projects where there is particularly elevated risk to the construction professional. While LoL clauses are enforceable in most jurisdictions, here are some best practices:

- ☐ Be explicit in the contract—in some jurisdictions, it is necessary to use font treatments such as all capitals and or bold text to highlight LoL clauses
- ☐ Consider requiring initials next to the clause to demonstrate that the clause was fairly negotiated and agreed to
- ☐ You can set the limit as a lump sum—a fixed amount or your fee, typically whichever is greater
- ☐ You can set the limit to the available insurance required by your contract, which may be less than your policy limits and takes into account any erosion of your policy limits due to expenses or other claims

You should not grant an LoL to a subcontractor or subconsultant if you do not have an LoL in your contract with your client (owner).

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For more information, contact:

Ed Sheiffele
Executive Vice President
esheiffele@berkleycp.com

Andrew D. Mendelson, FAIA
Executive Vice President,
Chief Risk Management Officer
amendelson@berkleyalliance.com

Diane P. Mika
Senior Vice President,
Risk Management Officer
dmika@berkleyalliance.com

412 Mt. Kemble Avenue, Suite G50
Morristown, NJ 07960

In California:
a division of Berkley Managers Insurance Services, LLC
CA License #0H05115

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