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ARCHITECTS & ENGINEERS NEWSLETTER

FORM DOCUMENT PITFALLS

The intent of this Newsletter is to give an overview/comparison of the Owner A/E Agreements that are commonly used in Ohio. The focus is on those provisions that are problematic and can become major liability pitfalls. The form documents include Consensus, DBIA, OFCC, and EJCDC. AIA documents that are unaltered are not at issue. This article is not all inclusive of the potential liability pitfalls but rather is an effort to address the most glaring.

DOCUMENTS – Pitfalls

AIA – B Series

All Owner/Architect Agreements have acceptable provisions unless edited.

CONSENSUS (the old American General Contractors documents)

Owner and Design Professional Agreement 240

2.1 STANDARD OF CARE – provides that services "to design in accordance with Owner's requirements, as outlined in Owner's Program (Exhibit A) and in accordance with the Scope of Services (Exhibit B)."

COMMENT – There is no standard of care language. The AGC Comments for this Agreement specifically state that a definition of the standard of care is not included because the drafters determined it would "be better for the design professionals to be held to a standard imposed on them by their own profession, rather than one defined by this Agreement." The Comments go on to warn contractors and owners to not add standard of care language that is above customary and normal for design professionals in the same time and location because it might result in voiding professional liability coverage.

How well defined are the "Owner's requirements"? How well defined is the "Owner's program"? Who creates "Exhibit A"? Is "Exhibit A" a joint document? This provision could be considered a guarantee of sorts.

Despite above COMMENT from AGC author, standard of care language should be inserted. The designer needs to have the language in the Agreement so there is no doubt what standard applies. Further, any reference to the design in accordance with the Owner's requirements or Program should be qualified to make certain it is understood the intent is not to modify the standard of care.

2.2 RELATIONSHIP OF THE PARTIES – requires the Design Professional to accept the relationship of trust and confidence with the Owner in exercising its skill and judgement in furthering the interests of the Owner.

COMMENT – The intent seems to put more burden on the Design Professional to satisfy the Owner. If no standard of care language is added in 2.1 this provision could be relied upon by the Owner as setting the standard.

5.1 TIME FOR SERVICES – time is of the essence – requires services "shall" be done in timely manner.

COMMENT – This clause is not normally associated with owner/designer documents. A violation of the time requirements is a material breach of contract.

5.2 DELAYS BY DESIGN PROFESSIONAL – if there are delays to the Project as a result of "any error, inconsistency, or omission of the Design Professional *which* violates its standard of care, Design Professional shall compensate Owner for and indemnify it against all damages…."

COMMENT – This is just a poorly written provision but the interpretation is not in favor of the designer if this provision is interpreted to apply to any single error or omission. A single error or omission is seldom a violation of the standard of care, but it could cause a delay in the project thus requiring the Design Professional to compensate and indemnify the Owner against all damages. The saving grace appears to be that many of the damages are waived under the waiver of consequential damages in 5.4.

7.1 INDEMNITY – this is a third party indemnity provision meaning it relates only to bodily injury or property damage. It does include indemnity and attorney fees.

CONTINUED on pg. 2

COMMENT – Payment of attorney fees may not be insured depending on the policy. Further, 7.1.3 provides that even if the agreement has a limitation of liability provision it will not apply to the indemnity obligation.

8.2 TERMINATION BY OWNER FOR CONVENIENCE – allows Owner to terminate for convenience but there is no similar right for designer.

10.1 OWNERSHIP OF TANGIBLE DOCUMENTS – Owner receives "ownership" of documents prepared by designer but not copyright.

COMMENT – The Owner gets more than just a license but actual ownership of the instruments of service. However, because the Design Professional retains copyright the Design Professional maintains the right to copy and create derivative works.

10.1.1 USE OF THE DOCUMENTS IN EVENT OF TERMINATION – even in the event of a termination for convenience, Owner is entitled to use, reproduce, and make derivative works of the documents to complete the Project.

COMMENT – The Owner can terminate Design Professional for no reason and is able to finish Project using instruments of service. My concern is owner terminating services for construction administration in effort to save dollars and creating exposure for Design Professional who could have caught any errors.

10.1.2 OWNER'S USE OF THE DOCUMENTS AFTER COMPLETION OF THE PROJECT – the Owner is entitled to "reuse, reproduce or make <u>derivative</u> works" after completion of the Project for "maintaining, renovating, remodeling, or expanding the Project at the Worksite."

COMMENT – This provision gives the Owner broad use of the instruments of service for enlarging and creating similar "derivative" additions without additional compensation to Design Professional and perhaps creating liability exposure for the Design Professional that Design Professional is entirely unaware exists. This is a broad license to the Owner for future development of the Project.

DESIGN BUILD INSTITUTE OF AMERICA (DBIA)

Standard Form of Agreement Between Design-Builder and Design Consultant 540

1.4.3 Design Consultant is entitled to rely on Owner's Design Criteria to same extent Design Builder has agreed to in the prime agreement.

COMMENT – It is critical as the designer for project to understand to what extent Design Builder has the right to rely on Owner's Design Criteria.

1.5.3 Design-Builder is responsible to coordinate design consultants with whom Design-Builder has hired. Design Consultant is responsible to coordinate with "services performed by other design professionals" – this would make Design Consultant coordinate with any design consultants Owner hires.

1.5.4 Time is of the essence provision – requires compliance with design schedule and violation would be considered a material breach.

2.2.1 Requires providing services with the "care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project."

2.3.1 Design Consultant is to perform services "in accordance with all applicable Legal Requirements."

COMMENT – "Legal Requirements" is defined in 1.2.1.14 as all applicable laws, codes, rules, orders and decrees from any government or quasi-government entity. This provision raises the standard of care for designer above what is normally accepted and negates the standard of care language set forth in 2.2.1.

3.4.1 Provides "nothing in this Agreement shall relieve Design Consultant of responsibility for errors, inconsistencies, or omissions in the Services."

COMMENT – this seems to suggest regardless of the standard of care Design Consultant is going to be held accountable for any error/omission – is this perfection?

4.1 If Design-Builder grants to Owner ownership/copyright of the instruments of service then Design Consultant is required to provide same to Design-Builder.

4.4.1 If Design-Builder terminates Design Consultant for convenience, upon payment of fees owed, the Design-Builder is granted license to use instruments of service to complete the project.

5.4.1 Design Consultant is responsible to indemnify Design-Builder for all costs, damages, and expenses, as a result of "any act, neglect, or omission, that causes a delay to the Project and damages to the Design-Builder."

COMMENT – The duty to indemnify is not tied to negligence (standard of care). Any act of Design Consultant that causes delay will subject Design Consultant to potential significant damages.

6.2.4 Pay when paid provision.

6.3.1 Retainage held by Owner is passed down to Design Consultant.

6.4.1 Allows Design-Builder to withhold paying Design Consultant if it feels Design Consultant was "not entitled to all or part of an Application for Payment." Design Consultant is to pursue dispute resolution which could take months to resolve.

6.5.1(iii) Upon receipt of final payment Design Consultant provide release as to all claims it may have except those pending.

11.3.4 Provides that if Owner contends Contract Documents have been breached and it is determined responsibility of Design Consultant then costs associated with breach including attorney fees and "litigation expenses" are to be paid by Design Consultant.

COMMENT – This may not be insurable.

11.7.2 Allows Design-Builder to recover liquidated damages that Design-Builder is assessed by Owner from Design Consultant to extent "attributable to Design Consultant."

COMMENT – Not tied to violation of standard of care; not insurable.

OHIO FACILITIES CONSTRUCTION COMMISSION (OFCC)

Exhibit A – A/E Standard Terms and Conditions (2018 version)

1.9 STANDARD OF CARE – "shall perform its Services consistent with the professional skill and care ordinarily provided by registered architects, landscape architects, professional engineers, and professional surveyors in the same or similar locality under the same or similar circumstances."

5.8 PERFORMANCE – requires A/E to continue to perform during dispute resolution process.

5.8.2 Allows owner to withhold payments of those matters in dispute, but matters not in dispute are to be paid.

6.4 METHOD AND TERMS OF PAYMENT

6.4.1.4 Allows owner to "setoff" all claims owner has against A/E.

COMMENT – The intent is to allow the "State" to set off any claim it has <u>on any project</u> against fees owed on the project that is the basis of the Agreement.

7.4.1 LIABILITY OTHER THAN PROFESSIONAL LIABILITY – requires A/E to "indemnify, defend, and hold harmless,….(including fees and charges of attorneys…all court, arbitration, or other dispute-resolution costs) arising out of or in connection with the Project, provided that any such claim, cost, damage,…is attributable to:"

7.4.1.3 "a violation of Applicable Law but only to the extent attributable to the A/E or a Person for whom the A/E may be liable."

COMMENT – The indemnity provision has a number of problems:

1. *It modifies the standard of care by requiring A/E to indemnify for "a violation of Applicable Law" - this is contrary to the standard of care set forth in 1.9;*
2. *7.4.1.3 is not related to negligence – any violation of "Applicable Law" would trigger indemnity provision;*
3. *Even though "Applicable Law" is upper case it is not a defined term;*
4. *It requires duty to defend.*

9.7 TIME OF THE ESSENCE – requires compliance with schedule; violation of the schedule is a material breach of the Agreement.

9.8 SUCCESSORS AND ASSIGNS

9.8.1 precludes A/E from assigning but not owner or Contracting Authority.

CONTINUED on pg. 4

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ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

E-500 Standard Form Agreement Between Owner & Engineer for Professional Services

6.01 STANDARDS OF PERFORMANCE

A. Standard of Care. The standard of care for all professional engineering…. 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.

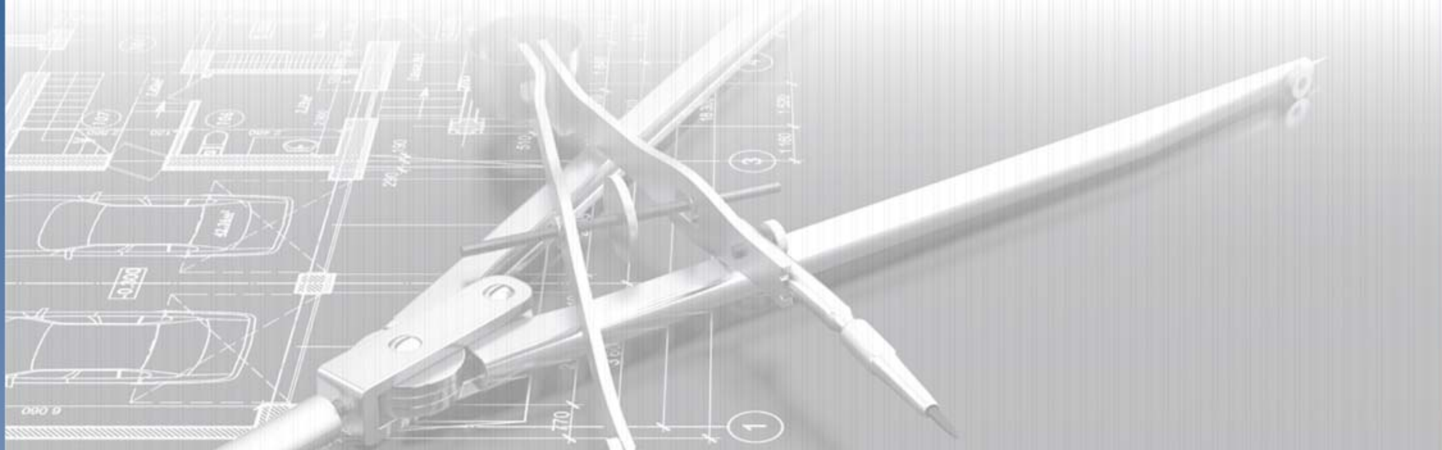
E. Compliance with Laws and Regulations, and Policies and Procedures

1. Engineer and Owner shall comply with applicable Laws and Regulations.

COMMENT – The standard of care set forth in A is modified by E.1. The use of "shall" in E.1. requires compliance so that the engineer must comply with "applicable" laws and regulations. This raises the standard of care and creates liability for a design that does not account for applicable laws and regulations such as a provision of a building code.

2. Engineer shall comply with the policies, procedures, and instructions of Owner that are applicable to Engineer's performance of services under this Agreement and that the Owner provides to Engineer in writing, subject to the standard of care set forth in Paragraph 6.01.A, and to the extent compliance is not inconsistent with professional practice requirements.

COMMENT – This provision, unlike E.1., ties the obligation to the standard of care.



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David T. Patterson is a Partner with Weston Hurd LLP. He has represented architects and engineers for over 25 years. David has been recognized in *The Best Lawyers in America® 2023* for Construction Law, including receiving the *"Lawyer of the Year"* Award 2023. David has received further recognition as an *Ohio Super Lawyer* in the field of Construction Law.

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