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A&E Briefings

Structuring risk management solutions

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Risk Allocation Differences in Owner-Design Professional Agreements of AIA and ConsensusDOCS

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As previously described in the Zurich A&E Briefings, the standard form contract agreements between design professionals and owners published by the American Institute of Architects (AIA), the Engineering Joint Contracts Documents Committee (EJCDC), and the Associated General Contractors of America (AGC) were completely revised a few years ago. It always takes a couple years before the older versions of the forms cease being used and the new ones take their place. Because we are now being asked with greater frequency to review contracts based on these new forms, we would like to share insights and comments on some key clauses affecting the allocation of risk that are found in the AIA B101 – 2007 document as well as in the ConsensusDOCS 240 and 245 documents that take the place of previous AGC documents.

There are some significant differences between the AIA documents and the ConsensusDOCS when it comes to allocating risk and responsibility to the design professional. The ConsensusDOCS may create greater risk for the design professional than might be expected for a standard form document. In this regard, it is important to note that although the ConsensusDOCS were sponsored by many organizations including associations representing contractors, subcontractors, and project owners, no design professional association or organization is a part of the consensus group of sponsors. Design professionals should beware of the unique risks assigned to them in the ConsensusDOCS in contrast to what they have learned to expect in the AIA documents and the ECJDC documents.

The first portion of this newsletter is based on an excellent paper that was presented to the American Bar Association (ABA) Forum on the Construction Industry, which has been heavily edited and abbreviated for space requirements.

For the first time the AIA Owner-Architect Agreement explicitly states the standard of care to which the architect must perform.

Comments on AIA B101–2007.

AIA B101 – §2.2 Standard of Care

For the first time the AIA Owner-Architect Agreement explicitly states the standard of care to which the architect must perform. Section 2.2 reads as follows:

> The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

The first sentence, which describes the standard of care, is the formulation most commonly applied by the courts. Even though it has not previously appeared as an explicit term in AIA Owner-Architect contract forms, it nevertheless would be considered an implied term in any contract for professional design services, unless the contract provides otherwise.

AIA B101 – §3.1.4 Owner Decisions

The Owner is responsible for decisions it makes without the involvement of the Architect or made by the Owner over the objection of the Architect. Section 3.1.4 reads:

> The Architect shall not be responsible for an Owner's directive or substitution made without the Architect's approval.

AIA B101 – §3.2.3 Preliminary Evaluation

Section 3.2.3 requires the Architect to discuss with the owner environmentally responsible design approaches. It provides:

> The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches. The Architect shall reach an understanding with the Owner regarding the requirements of the Project.

Two concepts in this paragraph are new: environmentally responsible design and the requirement to reach an understanding.

Awareness of environmental issues and, in particular, "green design," is a theme that runs throughout the 2007 edition of the AIA Documents. The AIA deemed environmental issues sufficiently important to list them explicitly as an element of discussion at the various stages of the Project. Although Section 3.2.3 does not bind an Owner to include environmentally responsible approaches in the design, it functions to raise Owners' awareness of environmental issues.

The last sentence requires that the Architect and Owner reach "an understanding" regarding the Project requirements.

AIA B101 – §3.2.5.1 Basic Environmental Design

This provision requires the Architect to consider environmental issues as part of its Basic Services for design. Section 3.2.5.1 states:

> The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner's program, schedule and budget for the Cost of Work. The Owner may obtain other environmentally responsible design services under Article 4.

Section 3.2.5.1 obligates the Architect to "consider environmentally responsible design alternatives," It will be important that the Architect document how it met this requirement.

AIA B101 – §3.4.1 Construction Documents Level of Detail

The concluding sentence of this paragraph states:

> The Owner and Architect acknowledge that in order to construct the Work the Contractor will provide additional information, including Shop Drawings, Product Data, Samples and other similar submittals, which the Architect shall review in accordance with Section 3.6.4.

Although issues involving shop drawings and other submittals are dealt with in Section 3.6.4 of the B101-2007 and in all of the prior versions of the AIA Owner-Architect Agreements, this is the first time that they have been discussed in the section on Construction Documents. This clarifies that although the Construction Documents are supposed to set forth "in detail the . . . requirements for the construction," the Contractor must provide a further level of detail before construction can begin.

AIA B101 – §3.6.2.1 Evaluations of the Work

This paragraph provides:

> The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.3.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work.

A major change is made from the B141-1997 by deleting the phrase, "to endeavor to guard the Owner against defects and deficiencies in the Work" as being the ultimate purpose of the Architect's site observation. Note also that the Architect is only required to report "known deviations" and "defects and deficiencies observed." This makes it an objective test of whether the Architect met it duty rather than a subjective one of what the Architect should have discovered and reported.

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the Architect is only required to report "known deviations" and "defects and deficiencies observed."

AIA B101 – §3.6.3.1 Certificates for Payment

This paragraph obligates the Architect to review and certify amounts due to the Contractor and contains the Architect's representations regarding the progress and quality of the construction, as well as caveats to those representations. It concludes by providing:

> The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work as provided in Section 3.6.2 and on the data comprising the Contractor's Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents.

The limitation to knowledge, information and belief precedes and modifies the representation regarding the progress of the Work, rendering it more of a representation regarding the Architect's state of mind than a pure factual representation.

AIA B101 – §3.6.4.1 & §3.6.4.2 Review of Submittals

The Architect's time for reviewing shop drawings and other submittals is linked to a submittal schedule prepared by the Contractor. Section 3.6.4.1 states:

> The Architect shall review the Contractor's submittal schedule and shall not unreasonably delay or withhold approval. The Architect's action in reviewing submittals shall be taken in accordance with the approved submittal schedule or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review.

Section 3.6.4.2 echoes this concept, requiring the Architect to review shop drawings and other submittals "in accordance with the Architect-approved submittal schedule."

AIA B101 – §5.6 Owner's Consultants

This provision adds significant additional detail to the prior version of the provisions governing Owner's consultants. The new provision reads:

> The Owner shall coordinate the services of its own consultants with those services provided by the Architect. Upon the Architect's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's consultants. The Owner shall furnish the services of consultants other than those designated in this Agreement, or authorize the Architect to furnish them as an Additional Service, when the Architect requests such services and demonstrates that they are reasonably required by the scope of the Project. The Owner shall require that its consultants maintain professional liability insurance as appropriate to the services provided.

Several concepts in this paragraph are new. It is the Owner who is responsible for coordinating the consultant's services with those of the Architect. The "scope of service" portion of the consultant's contract must be furnished to the Architect. The Architect must "demonstrate" the need for the Owner to hire the consultants. The Owner may authorize the Architect to hire the consultants directly. And the consultants are required to maintain the same kinds of insurance as the Architect.

AIA B101 – §7.1
Copyright and Electronic Documents

This is a new provision without a predecessor in earlier versions of the AIA Owner-Architect Agreement. It consists of two separate topics and states:

> The Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project. If the Owner and Architect intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

The first sentence is a warranty of the right to use any drawings or other documentation that one party transmits to the other. This applies not only to design and construction documents prepared by the design team but also to drawings, such as "as-builts" or preliminary sketches, or other information provided to the design team by the Owner. The second sentence requires the parties to agree on terms and conditions under which the Architect would provide its drawings or other documents in digital format. This is an important issue because the electronic nature of the medium may cause errors or other glitches to appear in the documentation that do not appear in the hard copy of the same documentation.

AIA B101 – §7.3.1
Owner's Use of Plans without Architect

Section 7.3.1 provides both for a release of liability as well as indemnification against third party claims arising out of the Owner's use of documents without the Architect's participation. It reads as follows:

> In the event the Owner uses the Instruments of Service without retaining the author of the Instruments of Service, the Owner releases the Architect and the Architect's consultants from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its consultant(s) from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such cost and expenses arise from the Owner's use of the Instruments of Service under this Section 7.3.1. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.

Section 7.3.1 provides both for a release of liability as well as indemnification against third party claims arising out of the Owner's use of documents without the Architect's participation.

AIA B101 – §8.1.1
Statute of Repose

This provision does not establish when the statute of limitations will begin to run but, instead, contractually establishes a 10-year statute of repose commencing at Substantial Completion, stating:

> The Owner and Architect shall commence all claims and causes of action, whether in contract, tort or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

The effect of this language is to establish contractually a 10-year period of repose beginning with Substantial Completion but without superseding any applicable state or other law that may set forth other restrictions, including a shorter repose period.

The new B101 employs a check-box approach to selecting a binding dispute resolution forum. Unless the parties check a box to elect arbitration, disputes will be resolved by litigation.

AIA B101 – §8.2.4
Choice of Binding Dispute Resolution

The new B101 employs a check-box approach to selecting a binding dispute resolution forum. Unless the parties check a box to elect arbitration, disputes will be resolved by litigation. The introductory language to the check-box states:

> If the Owner and Architect do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.

AIA B101 – §10.1 Choice of Law

This paragraph represents a conceptual change from the approach of the B141-1997 which stated that the "principal place of business of the Architect" would provide the applicable law. The new provision defines the applicable law as that of the "place where the Project is located."

AIA B101 – §10.4
Certificates and Consents

The B141-1997 edition allowed the Architect 14 days of advance review of any certificate before having to sign it. The new paragraph extends the same principle to consents:

> If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with its Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution.

This reflects the concern that the language of lender's consent is often imprecise or overbroad, requiring negotiation and modification. However, to be consistent with the language in the prior sentence applicable to certificates, the final words of the new sentence should probably read: "at least 14 days prior to the requested dates of execution."

AIA B101 – §11.10.3
Withholding Architect's Fee

This paragraph prohibits the Owner from withholding a portion of the Architect's fee to offset other losses or damages unless the Architect agrees or has been found to be liable for the sum withheld. The new paragraph states:

> The Owner shall not withhold amounts from the Architect's compensation to impose a penalty or liquidated damages on the Architect, or to off set sums requested by or paid to contractors for the cost of changes in the Work unless the Architect agrees or has been found liable for the amounts in a binding dispute resolution proceeding.

AIA B101 – §13.2.2
Digital Data Protocol Exhibit

This paragraph refers to an Exhibit which is new with the B101-2007. The paragraph states that the new Exhibit, denominated AIA Document E201-2007 and entitled "Digital Data Protocol Exhibit," is incorporated by reference if filled out. Presumably, if left blank, it is not part of the parties' agreement.

Comments on ConsensusDOCS 240 Owner-Design Professional Agreement

ConsensusDOCS 240 was first published in 2007 along with Document 245, the form used for smaller projects. Perhaps due to issues raised by the design community concerning some of the provisions of the form, a revised edition was issued in January 2011. Those parties using the ConsensusDOCS should pay special attention to what version is being used, because there are substantive differences in them affecting the allocation of risk. In addition, there are significant differences in the provisions of 240 and 245 – such that you can't assume that because you understand what is contained in the one you know what is contained in the other. Finally, there are several risk provisions that may adversely affect the risk allocation and the insurability of risks. Consequently, before agreeing to use the 240 document, it would be advisable for a design professional to have its legal counsel review it and propose an addendum of changes to address issues such as those outlined in the balance of this newsletter. The article and paragraph numbers cited in the balance of this newsletter are to document 240 unless otherwise indicated.

before agreeing to use the 240 document, it would be advisable for a design professional to have its legal counsel review it and propose an addendum of changes

Standard of Care

ConsensusDOCS 245, Short Form Agreement, includes a standard of care similar to that in AIA B-101. ConsensusDOCS 240, as originally published in 2007, however, did not define the standard of care. Instead, Paragraph 2.2 defines the relationship of the Owner and Design Professional in terms of "trust and confidence", potentially implying a fiduciary relationship and thus a heightened standard of care which could be uninsurable under the typical Professional Liability policy. These provisions were revised, effective January 1, 2011 to provide as follows:

> 2.1. Standard of Care
>
> Design Professional shall furnish or provide the architectural and engineering services necessary to design the Project in accordance

terms of "trust and confidence", potentially implying a fiduciary relationship

with the Owner's requirements, as outlined in the Owner's Program and other relevant data defining the Project, which is attached as Exhibit A. The architectural and engineering services shall include Basic Services plus Additional Services as may be authorized by the Owner. Services shall be performed in accordance with the standard of care required for a Project of similar size, scope, and complexity, during the time which the Services are provided.

2.2. Relationship of the Parties

The Design Professional accepts a relationship of trust and confidence with the Owner for this Agreement and will cooperate and exercise the skill and judgment required above in furthering the interests of the Owner. The Design Professional represents that it possesses the skill, expertise, and licensing to perform the required services. The Owner and Design Professional agree to work together on the basis of mutual trust, good faith and fair dealing, and shall take actions reasonably necessary to enable each other to perform this Agreement in a timely, efficient and economical manner. The Owner and Design Professional shall endeavor to promote harmony and cooperation among all Project participants.

The 2007 version of article 2.2. "Relationship of the Parties," was substantially different and created and even higher standard of care, and likelihood of a court finding there to be a fiduciary duty. It reads as follows:

The Architect/Engineer accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and exercise the Architect/Engineer's skill and judgment in furthering the interests of the Owner. The Architect/Engineer represents that it possesses the requisite skill, expertise, and licensing to perform the required services. The Owner and Architect/Engineer agree to work together on the basis of mutual trust, good faith and fair dealing, and shall take actions reasonably necessary to enable each other to perform this Agreement in a timely, efficient and economical manner. The Owner and Architect/Engineer shall endeavor to promote harmony and cooperation among all Project participants.

Construction Documents – Complete Design

Another article that affects the design professional's standard of care is 3.2.5, which in the 2007 edition provided: "The Construction Documents shall completely describe all work necessary to bid and construct the Project." In the 2011 revision, the word "completely" has been removed. Contractors and design professionals frequently debate whether disputed Work is reasonably inferable from the Construction Documents. The stipulation in the ConsensusDOCS that the designer must *"completely describe all work necessary to bid and construct the Project"* will undoubtedly aid the Contractor in a dispute over the quality of the Documents. This clause as revised in the 2011 edition by deleting the word "completely" nevertheless remains inconsistent with the normal scope of service to be provided by the design professional, and the normal expectation that the documents will not describe all work "necessary" but that the contractor through its own means, methods, procedures and techniques is expected to fill in the details to do the work. This requirement to "describe all work" (even as revised by the 2011 edition) may create an elevated and unreasonable standard of care since design professionals are not expected within their scope of service to actually provide the level of detail in the Construction Documents that this might suggest.

Indemnity

Article 7 provides for mutual indemnity. Good points about the indemnity is that it is limited to bodily injury and property damage claims that arise out of negligent performance of the services. There are problems with the ConsensusDOCS indemnity, however, in that the Design Professional is required to indemnify not only the Owner, but a whole host of people including one broad category called "Others" whoever that might be. Another problem is that the clause requires "indemnity and hold harmless" not just for damages but also for "claims." To hold harmless someone against "claims" suggests a duty to defend the indemnitee. Although the clause does not explicitly include a duty to defend, that duty seems to be implied by virtue of a sentence at the end of the clause that states "The Design Professional shall be entitled to reimbursement of any defense costs paid above the Design Professional's percentage of liability for the underlying claim to the extent provided for under subsection 7.1.2". Subparagraph 7.1.1 provides the following:

> 7.1.1. To the fullest extent permitted by law, the Design Professional shall indemnify and hold harmless the owner, the Owner's officers, directors, members, consultants, agents, and employees, the Constructor, Subcontractors, and Others (the Indemnitees) from and against all claims, losses, damages, liabilities including reasonable attorneys' fees, costs, and expenses, for bodily injury, sickness or death, and property damage (other than to the Work itself), that may arise from the performance of or the failure to perform Services under this Agreement, but only to the extent caused by the negligent acts or omissions of the Design Professional, the Design Professional's consultants or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Design Professional shall be entitled to reimbursement of any defense costs paid above the Design Professional's percentage of liability for the underlying claim to the extent provided for under subsection 7.1.2.

There are problems with the ConsensusDOCS indemnity

Paragraph 7.1 of ConsensusDOCS 240 provides for mutual indemnities between the Architect and Owner. Both provisions have been narrowly drafted to encompass only the indemnitor's negligent acts and omissions. In addition, the indemnitor is entitled to be reimbursed for any defense costs paid above its comparative liability.

Owner's Consultants

Under Subparagraph 3.2.6 of ConsensusDOCS 240 (2007), the Design Professional must coordinate the services *"of all design consultants for the Project, including those retained by the Owner."* Under the wording of ConsensusDOCS, if the Owner's consultants do not properly perform, the Owner could claim that the Design Professional contributed to the problem by failing to properly coordinate the services of its consultants. This article was revised in the 2011 version of the documents by eliminating the offending language about coordinating the Owner's consultants.

Redesign Obligation

Article 3.1.2 states that the Design Professional must "promptly revise . . . without compensation" those documents:

- "which have not been previously approved by the Owner and to which the Owner has reasonable objections."
- "identified by Constructor and reasonably accepted by the Owner as presenting constructability problems."
- "needing revisions to reflect clarifications and assumptions and allowances on which a guaranteed maximum price is based."

This establishes an unreasonable duty to revise the Documents without additional compensation even if the revision was not required due to a violation of the standard of care. Why should the Design Professional be required to do constructability redesign services for the convenience of the Constructor and not be paid for it? In addition, if the Constructor claims a constructability problem and the Owner accepts the Constructor's position, the Design Professional must redesign the Documents without compensation. There is no requirement that the Constructor's position be reasonable or correct.

Why should a Design Professional be required to do constructability redesign services for the convenience of the contractor and not be paid for it?

The Design Professional's Consultants

Article 3.5 dictates certain vital terms of the Design Professional's agreement with its subconsultants. It provides the Design Professional shall not engage the services of any consultant without first obtaining the Owner's written approval. It also states the "Owner shall be considered an intended beneficiary of the performance of their services." And it states that the "Design Professional shall bind its consultants in the same manner as the Design Professional is bound to the Owner under this Agreement." Although the provision states no contractual relationship between the Owner and subconsultant is created, the affect of saying that the Owner is the intended beneficiary of the subconsultant's services could potentially create the same kind of rights in the Owner to enforce an action against the subconsultant. This provision interferes with the ability of the Design Professional to negotiate reasonable contract terms with its subconsultants. Consider, for example, that some design professionals agree to elevated standards of care and indemnification provisions in their agreements with Owners that their subconsultants will not agree to in the sub-agreement. Unless this article 3.5 is stricken from the contract, the Design Professional will be unable to enter into a subcontract with any subconsultant that insists on prudent risk allocation clauses that are at odds with the onerous provisions agreed to between the Design Professional and Owner.

Payment Certification

Article 3.2.8.5 contains payment certification language that almost sounds like a warranty. It states:

> Design Professional shall assist the Owner in processing the Constructor's applications for payment. Based on its on-site observations and other relevant information, the Design Professional shall certify to the Owner the amounts due the Constructor and that the Work has progressed to the point indicated...."

What is missing from this certification provision is the type of protective language found in AIA B101 with regard to it being based on the "best of knowledge, information and belief.

Mutual Waiver of Consequential Damages

Article 5.4 provides for mutual waiver of consequential damages that from the Design Professional's perspective looks good. This waiver provides:

> 5.4.1. The Owner and Design Professional waive claims against each other for consequential damages … including but not limited to losses of use, profits, business, reputation, or financing, except for those specific items of damages excluded from this waiver, as mutually agreed upon by the Parties and identified below. The Owner agrees to waive damages including but not limited to the Owner's loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, loss of profits not related to this Project, loss of reputation, or insolvency. The Design Professional agrees to waive damages including, but not limited to, loss of business, loss of financing, loss of profits not related to this Project, loss of reputation, or insolvency. The following are excluded from this mutual waiver: _____.

Professional Liability Insurance

Subparagraphs 7.2.4, 7.2.5, and 7.2.6 of ConsensusDOCS 240 provide the following unreasonable terms with respect to Professional Liability coverage:

- The Design Professional must furnish certificates of insurance and a copy of its Professional Liability policy.
- The Design Professional cannot cancel or modify a policy without 30 days' prior notice to the Owner (except modifications caused by claims made against the policy).
- The Design Professional and its Professional Liability insurance carrier must notify the Owner within 30 days of any claims made or loss expenses incurred against the Professional Liability policy.
- The Owner has the right to directly notify the Design Professional's Professional Liability insurance carrier of a claim against the policy.

This provision interferes with the ability of the Design Professional to negotiate reasonable contract terms with its subconsultants.

It may be difficult or impossible for the Design Professional to comply with these requirements. Design Professionals should rarely agree by contract to give a copy of their E&O policy to their client. A certificate of insurance should be sufficient. ConsensusDOCS literally requires the Design Professional and the insurance carrier to notify the Owner each time the Design Professional or its carrier makes a payment to an attorney or expert in the defense of any claim, lawsuit, or arbitration. It is also important to note that the reporting requirement applies equally to claims unrelated to the project in question. Design professionals will want to consider modifying the Agreement to eliminate or modify this notice.

Owner's License to Use the Design Professional's Documents

Article 3.2.10 grants a license to the Owner, its Contractor, and its consultants to use the Documents or Instruments of Service to construct the Project. This section provides:

> Except as otherwise provided in this Agreement, the Design Professional shall grant an appropriate license to use design documents prepared by the Design Professional to those retained by the Owner or the Constructor to perform construction services for the Project.

Note that this license is not made conditional on any performance obligations of the Owner such as making payment to the Design Professional for the Services rendered.

Design Professionals should rarely agree by contract to give a copy of their E&O policy to their client.

Rights of the Owner to Use Documents after Completion of the Project

Article 10.1.3 provides two significant prongs. First, after completion of the Project, the Owner is only authorized to reuse the Documents for *"the purpose of maintaining, renovating or expanding the Project at the Worksite."* If the Owner reuses the Documents on other projects or without the Design Professional's involvement, such use will be at the Owner's sole risk (except to the extent of the Design Professional's indemnity obligations to the Owner), and the Owner will indemnify and hold harmless the Design Professional against damages arising out of the reuse of the documents. Pursuant to Subparagraph 10.1.3 of ConsensusDOCS 240:

> After completion of the Project, the Owner may reuse, reproduce, or make derivative works from the Documents solely for the purpose of maintaining, renovating, remodeling or expanding the Project at the Worksite. The Owner's use of the Documents without the Design Professional's involvement or on other projects is at the Owner's sole risk, except for the Design Professional's indemnification obligations pursuant to Paragraph 3.9, and the Owner shall indemnify and hold harmless the Design Professional and its consultants, and the agents, officers, directors and employees of each of them, from and against any and all claims, damages, losses, costs and expenses, including reasonable attorneys' fees and costs, arising out of or resulting from any such prohibited use.

Copyright of the Documents

Article 10.1.1 provides that the copyright interest in the Documents may be transferred to the Owner for an agreed price.

> The Parties agree that Owner _____ shall/ ____ shall not (indicate one) obtain ownership of the copyright of all Documents. The Owner's acquisition of the copyright for all Documents shall be subject to the making of payments as required by Paragraph 10.1 and the payment of the fee reflecting the agreed value of the copyright set forth below: If the Parties have not made a selection to transfer copyright interests in the Documents, the copyright shall remain with the Design Professional.

ConsensusDOCS 240 requires the parties to make a conscious decision about the ownership of the copyright by marking the box. If the parties fail to make that selection, the Agreement states that the Design Professional will own the copyright interest. ConsensusDOCS 245, Short Form Agreement, does not provide a check-the-box approach to ownership of the copyright. Instead, the Design Professional retains its copyright in the Documents (§14). The Owner receives property rights to the Documents upon payment in full, either at completion of the project or at the time of termination.

Design Professional's Use of the Documents

Where the Design Professional has transferred its copyright interest in its documents to the Owner, the ConsensusDOCS 240, §10.1.4, states that the Design Professional may nevertheless continue to use the "constituent parts" of its documents in the future. The provision reads as follows:

> Where the Design Professional has transferred its copyright interest in the Documents under Subparagraph 10.1.1, the Design Professional may reuse Documents prepared pursuant to this Agreement in its practice, but only in their separate constituent parts and not as a whole.

Site Safety

Article 3.2.8.4 creates potential site safety responsibility for the design professional that would not exist in common law in many states. It provides:

> The Design Professional shall not be responsible for the Constructor's safety precautions and programs. However, it the DP has actual knowledge of safety violations, the DP shall give prompt written notice to the Owner.

This might be called the New Jersey rule, based on a court decision in the case of Carvallo v. Toll Brothers, holding that design professionals that have actual knowledge of site conditions posing imminent danger have a duty to individuals exposed to that danger even if the design professional's contract states otherwise. In contrast to the New Jersey rule, Pennsylvania holds exactly the opposite (Herzog case) – and finds that the design professional's duty is limited to what is stated in the contract and what actions it might actually, on its own, take in the field. Article 3.2.8.4 effectively imposes the New Jersey standard on design professionals regardless of where the project is located. Even if it might be appropriate due to factual circumstances to report site safety issues to the Owner, it is ill advised for the design professional to contractually obligate itself to so.

Even if it might be appropriate due to factual circumstances to report site safety issues to the Owner, it is ill advised for the design professional to contractually obligate itself to so.

Conclusion

It should be readily apparent that there can be risk allocation problems even when using standard form contracts. This overview of the contract forms is intended to provide a concise educational tool to assist design professionals in assessing the risks allocated to them in these forms. Advice of legal counsel is advisable to negotiate contract language appropriate to the jurisdiction and any specific project.

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