

Contract Review Checklist

Agreed Remedies to Limit Engineer's Liability

- Entitle "Agreed Remedy" rather than "Limitation of Liability"
- Particularly important when Engineer's fee is relatively low
- Limit to Engineer's fee or amount parties agree upon
- Limitation should include all causes of action, including but not limited to, negligence, strict liability, breach of contract or breach of warranty

Billing and Payment

- Upon payment for services rendered, Engineer should not release all claims, only claims for payment

Certifications, Guarantees, and Warranties

- Delete guarantees, warranties, and certifications
- If have to give a certification, modify with "to the best of Engineer's knowledge, information, and belief" or "in Engineer's opinion"
- Avoid use of words such as "all"; "every"; "insure"; "ensure"; "assure"
- Do not certify contractor built in compliance with code or in strict accordance with plans and specifications (modify to include "in general" compliance and "to the best of Engineer's knowledge, information, and belief")

Code and Law Compliance

- Agree to comply with "applicable" codes and regulations in accordance with standard of care, not "all" codes and regulations
- Include language that Client recognizes possibility of various, and possible contradictory, interpretations of codes and regulations
- Delete warranties

Confidentiality

- Ensure Engineer's obligation to maintain confidential information is not absolute
- Include exceptions if information is in public domain; if disclosure is in compliance with legal orders; and if disclosure is reasonably necessary for Engineer to defend itself in a claim

Delays

- Delete any liquidated damages provisions
- Allow for delay due to *force majeure* events
- Engineer only responsible for delay costs to the extent those delays costs are caused by the Engineer's negligence

Dispute Resolution

- Recommend non-binding mediation as a condition precedent to litigation
- Discourage the use of arbitration
- If client insists on arbitration, require some limited discovery and adherence to the rules of evidence and limit the scope of arbitration to those claims that do not exceed \$100,000, inclusive of interest and attorney's fees
- If client insists on arbitration, require both parties' consent to any joinder and consolidation

Indemnity Obligation to Client

- Delete duty to defend
- Delete "claims"; "suits"; "causes of action"; "actions"; "demands"; "allegations" since these words suggest a duty to defend
- Limit the indemnity obligation "to the extent damages are caused by the engineer's negligence"
- Avoid broad definition of Indemnitees and limit the indemnity obligation to the Engineer's Client, the Client's employees, officers, and directors and delete "agents"; "parent company"; "subsidiaries"; "related and affiliated companies"; "assigns"; "lenders"; and "subcontractors"
- Limit the indemnity obligation to Engineer and the Engineer's consultants for whose actions the Engineer "is legally responsible" and delete language obligating the Engineer to indemnify for the actions of those for whom the Engineer "may be liable" and those whom the Engineer "directly or indirectly retained"

Instruments of Service

- Try to maintain copyright and ownership (or joint ownership)
- Limit Client's use of instruments of service to the completion, use, and occupancy of the current project
- Any reuse without written consent of Engineer on other projects or modifications to the current project should be at Client's risk without liability or legal exposure to Engineer
- Include document defense and indemnity protection running in favor of Engineer for re-use and modification of instruments of service, regardless of who has ownership rights
- If Client requests electronic documents, include language that electronic documents may be unintentionally altered; are for informational purposes only and not intended as an end product; Engineer makes no warranties

regarding fitness or suitability; and Client will defend and indemnify Engineer for claims relating to unauthorized use, reuse, or alteration of the electronic documents

Record Drawings

- Engineer can provide the record drawings to Client, but is not responsible for errors in information provided by others in the record drawings
- Avoid use of "as-built" terminology and replace with "record drawings"

Scope of Service

- Ensure scope is sufficiently detailed and defined
- Delete broad language requiring "any and all services necessary"; "complete design services"; and "adequate to meet the needs of the project"

Standard of Care

- Make sure reasonable and negligence-based
- Should be limited to the skill, care, and judgment ordinarily exercised by similarly situated engineers performing same services
- Delete language that elevates standard of care beyond ordinary, reasonable standard, such as "highest"; "best"; "first-class"; "first rate"
- Delete "to the satisfaction of the client"; "in the client's sole judgment"; "non-negligent manner"

Termination

- Engineer should be paid for expenses if terminated by Client for convenience
- If terminated, do not deliver instruments of service until paid for services rendered
- Engineer should have right to suspend performance if Client is in default, including untimely payment for services rendered
- Require Client to provide reasonable notice of termination (ex: 7 days)

Timeliness of Performance

- Engineer should perform as expeditiously as is consistent with the professional standard of care
- Delete "time is of the essence" provisions
- Time limits established by agreed upon schedule can be exceeded under reasonable circumstances

The information set forth is intended as general risk management information and should not be construed or relied upon as legal advice. It is not intended as a substitute for consultation with counsel. There could be specific issues under the applicable law for which you may want to seek the assistance of a local attorney.