Chiumento McNally, LLC

The Minutes

Summer 2014

Summer 2014 — Anniversary Edition!

Inside this issue:

- **BE ON THE LOOKOUT FOR:**
- Teaching Seminars Specifically Tailored for the Design Professional Community given by the Attorneys of Chiumento McNally, LLC.!

Dear Readers,

Chiumento McNally, LLC is very pleased to announce the opening of its Philadelphia, Pennsylvania as of June 1, 2014. Although admitted in Pennsylvania since its beginning, the office at 1845 Walnut Street, 16th Floor, Philadelphia, PA 19103 represents our first physical location in Pennsylvania. The presence in Philadelphia permits us to meet with our Pennsylvania clients in a convenient environment while serving their needs more efficiently and directly. Our telephone number is (215) 231-9820 and meetings at the office can be arranged by appointment. We look forward to working with you in New Jersey and Pennsylvania to resolve your legal and business needs.

In celebration of the third anniversary of our firm newsletter *The Minutes*, we present as a service to our readers "*Ten Things You Want in Your Next Contract – And Five Things You Don't!*" We are pleased to provide this service to our loyal readers in light of the increasing importance of bolstering the protections available to our Clients in the document that establishes the Owner/Design Professional relationship.

While we heartily endorses the AIA and EJCDC Standard Forms of Agreement, we also recognize that each Owner/Professional relationship is distinct and may not always allow for inflexible use of such form agreements. This list is not, and cannot be, all inclusive. Rather, it is representative of common contract deficiencies easily cured with proper planning and use of carefully thought-out and specifically tailored provisions.

We hope you enjoy and benefit from the contents of this article. It is important to keep in mind, however, that the examples given here are not meant for direct use in any specific Agreement but are included to demonstrate situations in which specific contract provisions may benefit the Business and Design Professional. Please remember that we are available **at any time** (now in either our New Jersey or Philadelphia Office) to consult and guide you with regards to contractual issues that may arise in the course of your work.

GARY C. CHIUMENTO, ESQUIRE

CHIUMENTO McNALLY, LLC

TEN THINGS YOU WANT IN YOUR NEXT CONTRACT

AND FIVE THINGS YOU DON'T!

TEN THINGS YOU WANT IN YOUR NEXT CONTRACT

1. **Limitation of Liability**
2. **Waiver of Subrogation**
3. **Defining and Limiting Errors and Omissions**
4. **Ownership of Documents as Instruments of Service**
5. **Limitation on Safety Responsibility**
6. **Indemnification by Contractor to Owner**
7. **"Scope of Services" Description**
8. **Lawsuit Limitations**
9. **No Pay - No Play Provisions**
10. **No Damages for Delay (i.e., no consequential damages)**

FIVE THINGS YOU DON'T WANT IN YOUR NEXT CONTRACT

1. **Arbitration**
2. **Inspection Responsibility**
3. **Enhanced Standards of Care**
4. **One Way Indemnification**
5. **Contractual Responsibility to Other Parties**

N.B. The examples given throughout this edition of *The Minutes* should not be used verbatim in every contract but should be analyzed for appropriateness and tailored to the circumstances of the project.

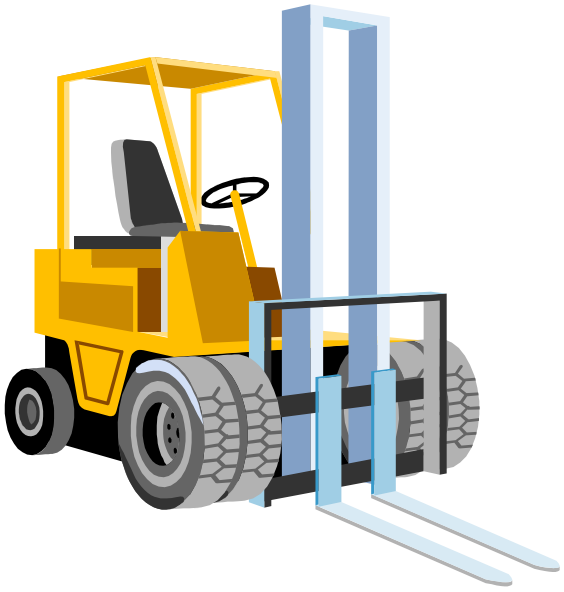
Ten Things You *Want* in Your Next Contract

1. Limitation of Liability.

A little known fact to many is the availability of limitation of liability provisions under New Jersey law. So long as all parties to an Agreement are aware of the limitations indicated within the contract, a Design Professional can limit liability within reason. Ordinarily, these should be "bargained for" considerations. While a court is not likely to agree to a limitation of liability in which the Design Professional bears no responsibility under any set of circumstances, it is possible to limit the Design Professional's liability either to his "fee for services" or to the amount of his liability insurance policy for whatever the circumstances may be (general liability or professional liability). This can be an important aid to the Design Professional as threats by plaintiffs to seek damages far in excess of the Design Professional's limitation of insurance coverage are often a factor in making decisions as to whether or not a case can or will settle. If the Design Professional knows that no matter what happens, his liability will be limited to the amount of his insurance policy, he may be able to make strategic decisions more freely regarding whether or not a case can or should settle. The key in any limitation of liability provision is clarity of expression, in this context to insure that the Design Professional's liability is limited to a certain dollar amount (e.g., his total fee for all services rendered or to the specific fee obtained for the specific service rendered).

Reprinted below is an example of a typical limitation of liability clause. *

"The Owner agrees to limit the Design Professional's liability to the Owner and to all construction Contractors and Subcontractors on the project, due to the Design Professional's professional negligent acts, errors or omissions, such that the total aggregate liability of each Design Professional to all those named shall not exceed $50,000.00 or the Design Professional's total fee for services rendered on this project.



Should the Owner find the above terms unacceptable, an equitable surcharge to absorb the Architect's increase in insurance premiums will be negotiated.

The plans and specifications shall not be used by the Owner on other projects, for additions to this project, or for completion of this project by others, except by agreement in writing with the appropriate compensation to the Design Professional, provided the Design Professional is not in default under this agreement."

2. Waiver of Subrogation.

This provision of the contract requires the Owner to agree, and further to require that the Contractor also agree in the Contractor's contract, to accept in complete resolution of any claim that the Owner may have for property damage of any type the amount of any insurance proceeds he receives from his own carrier. In effect, the provision eliminates the possibility that an insurance company, having paid a property or casualty loss for the Owner (or Contractor for that matter) will "subrogate" the loss. The insurance company has the right to "stand in the shoes" of its insured and take whatever legal action the insured would be permitted to take against any party to compensate the carrier for having paid the claim of its insured. However, a "waiver of subrogation" provision restricts the insurance company and precludes it from subrogating the loss against the parties to the agreement. While this does not preclude the insurance company from suing other parties who do not have the protection of the waiver of subrogation, it does protect those who are parties to this agreement. Waiver of subrogation provisions are found both in the AIA documents regarding Owner/Design Professional Agreements and also the "General Conditions" which include the Contractor as well as the Owner and the Design Professional.

Reprinted below is a typical Subrogation Waiver.*

"To the extent damages are covered by property or casualty insurance during construction, the Owner and the Design Professional waive all rights against each other, the consultants, agents and employees of the other for damages. The Owner shall require of the Contractor similar waivers."

3. Defining and Limiting Errors and Omissions – Safe Harbor Agreements.

A "safe harbor" provision in a contract can address the problem of liability for cost overruns. While a majority of courts have held that the Design Professional does not guarantee a perfect set of plans, Owners often fail to recognize the risks of construction and the need for inclusion of a contingency in the budget. As a result, Owners often try to hold the Design Professional responsible for costs in excess of those budgeted for the project.

It is possible to address the issue of cost overruns, particularly where the amounts in controversy are not substantial, by a specific agreement to this effect. It is important to understand, however, that such protection is not available unless specifically bargained for.

Many Design Professionals are under the impression that it is "standard" in the construction industry to see cost overruns of anywhere from 6% to 10% on renovation projects and 3% to 5% on original construction. They, therefore, believe that keeping cost overruns to these statistical amounts are within "good practice" and they cannot be held liable for such cost overruns. Unfortunately, this is not at all the case.

In a recent case in which an Engineer presented testimony that the total cost of construction including all changes was within 6% of the bid price and that this was evidence of a "good job," the court swiftly dismissed this argument by stating "it is not considering the appellant's overall professional competence but rather considering allegations of individual design deficiencies." In other words, even a cost overrun of a dollar, if the result of a Design Professional's deviation from standards of care, is recoverable from the Design Professional. As such, this precedent requires that the Design Professional proceed with caution.

Of course, this is a double-edged sword. Owners must prove that the Design Professional deviated from standards of care and practice to recover even one dollar of cost overrun and the proof of any specific dollar amount of cost overrun is not, in and of itself, evidence of liability on the part of the Design Professional. Rather, the Owner must proof **both** a cost overrun **and** a deviation from the standard of care by the Design Professional.

Such "safe harbor" provisions in the contract can address these issues of liability which the law, otherwise, would not address. These provisions contemplate and liquidate between the parties a specific percentage of cost overrun for which the Design Professional cannot and will not be held responsible. This is typically the result of the Owner recognizing the uncertainty of construction and accepting a certain limited risk that the Design Professional's services will not be perfect.

Additionally, a safe harbor provision will not only protect the Design Professional from responsibility for specific percentages of cost overruns for a project, regardless of the reason for that cost overrun, but it could also protect the Design Professional from responsibility for the entire construction costs of "omissions" in addition to cost overruns caused by errors. However, it should be noted that this provision is not automatic and must be expressly mentioned.

If protection against omissions is separately obtained, the Design Professional is not responsible for any costs that the Owner would have incurred if the covered change order work had been included originally without any "omission" on the contract documents. Such a provision should also include a specific statement that nothing in the provision creates a presumption that, or changes the professional liability standard for determining if, the Design Professional is liable for the cost of covered change orders in the first place As such, it should be clear that use of the applicable standard of care remains the measuring device for Design Professional responsibility and has not in any way been waived by the Design Professional.

Further protection can be achieved by seeking the indemnification of the Owner for any covered change orders not in excess of such percentage stated above where a claim is brought by the Contractor as to any such "covered change orders." This situation, however, seems less likely to be a problem as the Owner is usually (although not necessarily) the target of the Contractor for change orders.

Reprinted below is an example of a "Safe Harbor" provision used by the Engineers Joint Contract Document Committee.*

"*Agreement Not to Claim for Certain Change Orders.* OWNER recognizes and expects that certain Change Orders may be required to be issued as the result in whole or part of imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies in the Drawings, Specifications, and other design documentation furnished by ENGINEER or in the other professional services performed or furnished by ENGINEER under this Agreement ("Covered Change Orders"). Accordingly, OWNER agrees not to sue and otherwise to make no claim directly or indirectly against ENGINEER on the basis of professional negligence, breach of contract, or otherwise with respect to the costs of approved Covered Change Orders unless the costs of such approved Covered Change Orders exceed _____% of Construction Cost, and then only for an amount in excess of such percentage. Any responsibility of ENGINEER for the costs of Covered Change Orders in excess of such percentage will be determined on the basis of applicable contractual obligations and professional liability standards. For purposes of this paragraph, the cost of Covered Change Orders will not include any costs that OWNER would have incurred if the Covered Change Order work had been included originally without any imprecision, incompleteness, error, omission, ambiguity, or inconsistency in the Contract Documents and without any other error or omission of ENGINEER related thereto. Nothing in this provision creates a presumption that, or changes the professional liability standard for determining if, ENGINEER is liable for the cost of Covered Change Orders in excess of the percentage of Construction Cost stated above or for any other Change Order. Wherever used in this paragraph, the term ENGINEER includes ENGINEER's officers, directors, partners, employees, agents, and ENGINEER's Consultants."

4. Ownership of Contract Documents as Instruments of Service.

Typical "homemade" agreements by Design Professionals rarely include language concerning the ownership of the documents. Under normal circumstances, the documents created by the Design Professional should be viewed not as valuable in and of themselves, but only valuable as they evidence the Design Professional's "instruments of service." Such documents are entitled to protection, normally, as a matter of copyright under the "Copyright Act." However, particularly in public contract law, the Owner often seeks to obtain "ownership" of the construction documents.

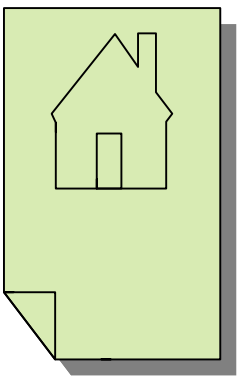
Except in those instances where the ownership of the documents by the Owner is "non-negotiable," the Design Professional should always include a provision expressly in the document indicating his/her ownership of the documents and the "license" (which is nothing more than permission under the law) for the Owner to use the documents to build the structure which is the subject of the agreement between the parties.

While the AIA Document B141-1997 Standard Form of Agreement Between Owner and Design Professional provides an elaborate scheme for ownership, licensure and limitations on the licensure, a more acceptable way of handling this scenario is by simply making it expressly clear in the agreement that the Design Professional is the owner of all contract documents, plans, specifications, sketches, drawings, pictorial or graphic representations of any type (including those in electronic form) prepared by the Design Professional and the Design Professional's consultants. Further, this provision should expressly state that such documents are instruments of service for use solely with respect to this project. The Design Professional and the Design Professional's consultants shall be deemed the authors and owners of their respective instruments of service and shall retain all common law, statutory and other reserved rights, including, but not limited to, copyrights.

Reprinted below is a typical example of a Document Ownership Provision.*

"Drawings, specifications, and other documents and electronic date furnished by the Architect are instruments of service. The Architect and other design professionals shall retain all common law, statutory and other reserved rights, including copyright, in those instruments of services furnished by them. Drawings, specifications, and other documents and electronic data are furnished for use solely with respect to this Agreement. The Owner shall be permitted to retain copies including reproducible copies, of the drawings, specifications, and other documents and electronic data for information and reference in connection with the Project.

Submission or distribution of the Architect's documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the rights reserved in this Agreement."



5. Limitation on Safety Responsibility.

To the Design Professional, the prospect of being held responsible for personal injury on the job site is particularly frightening. Further complicating matters, such "safety" claims are often "open ended" as opposed to property damage claims where the risk can be fairly easily defined. Additionally, the Design Professional often feels isolated with little opportunity to control the situation, particularly if its participation in construction is somewhat limited.

Furthering these fears, courts in the State of New Jersey have recently decided that the mere fact that the Design Professional is not responsible for day-to-day activities on the construction site, even though the Design Professional and Owner may have specifically assigned the role of safety responsibility to the General Contractor or subcontractors, does not necessarily immunize the Design Professional from responsibility for personal injury. The case of *Carvahlo v. Toll Brothers Construction Company* is particularly instructive on this point. There, Mr. Carvahlo was fatally injured when a trench in which he was working collapsed. Carvahlo's widow sued not only the owner of the project, but also the general contractor and the engineer. The engineer's representative, who appeared on site regularly, indicated that he was aware that the trench in which Carvahlo was working was potentially dangerous but did not feel that it was his responsibility to "stop the work," particularly in light of the fact that the general contractor had overall responsibility for safety on the site. Unfortunately, both the New Jersey Appellate Division and the New Jersey Supreme Court decided that although the engineer may have had an agreement with the contractor and the owner not to have safety responsibility, no such agreement had been made with Mr. Carvahlo. Accordingly, the Court held that the engineer owed Carvahlo a duty to call out to the owner or the contractor observed instances of unsafe construction even if it meant "stopping the work." This was due, at least in part, to the fact that the engineer did have the obligation to insure that the job went smoothly and that the owner was protected from "defects in the work." The court concluded that injuries on the job slowed construction and constituted defects in the work and so the engineer had an obligation to tell the owner and/or the contractor about the unsafe activities on the work site. This is a far cry, however, from having a specific role of searching out defective work or unsafe work conditions. It is important to remember that, here, the engineer's representative admitted that he was aware of the dangerous condition but took no action in any event.

As a response to the potential unfair treatment of engineers in areas where they are not responsible for safety, the New Jersey Legislature enacted a law in 1996 that specifically protects engineers from responsibility for work site accidents based on certain conditions. One of those conditions is that the engineer specifically be exempt from responsibility for safety on the work site and that one or more of the contractors has specific responsibility for safety on the work site.

For this reason, we urge all Design Professionals working on projects where there is at least a possibility of personal injury (i.e., virtually every single construction project) to insure that each contract with the Owner requires the Owner to exempt the Design Professional from site safety responsibility and specifically requires the Owner to place site safety responsibility on the Contractor.

Below is an example of a typical clause exempting the Design professional from safety responsibility and agreeing to assign such responsibility to the Contractor.*

"Owner and Architect expressly agree that the Architect shall have no responsibility for job site safety before, during or after construction. The Contractor who is responsible for the means and methods of construction shall, to the fullest extent permitted by law, be assigned by contract all responsibility for maintaining a safe and hazard free environment at the work site and for conducting all construction activities in a safe manner."

6. Indemnification by Contractor to Owner.

It is often the case that a Contractor, hungry for work, will sign agreements, perhaps without scrutinizing them for what would otherwise be objectionable provisions. They often assume duties and responsibilities that prudence might dictate they not accept. Indemnification immediately comes to mind as an example. The Design Professional should always include in his/her contract with the Owner that the Owner will require of the Contractor that the Contractor will indemnify not only the Owner but also the "Owner's agents, servants, representatives, including but not limited to, consultants and design professionals retained by the Owner."

Further, this indemnification agreement, which is to be executed by the Contractor, should not be limited simply to circumstances in which the contractor is "negligent" or limited to his "negligent acts or omissions" but should require the contractor to indemnify, defend and hold the Owner and the Owner's representatives (including, but not limited to the Design Professional), harmless from all injuries, damages, causes of action, in law or in equity, or from any other source arising in any way from the work of the Contractor. This type of indemnification will cause the Contractor to be responsible, without necessarily having to prove that the Contractor is negligent. Additionally, such an indemnification provision should also apply without regard to whether or not the Contractor is entitled to some form of immunity itself as a result of workers' compensation statutes if its own employee is injured.

Please note that while we urge you to require the Owner to include such indemnification by the General Contractor and the Prime Contractor(s) and/or Subcontractor(s), we urge you just as strongly to refrain from agreeing to indemnify the Owner.

**Reprinted below is an example of a provision requiring Owner to use specific indemnity language with Contractor.*

"Owner and Architect agree that the Owner will require of the Contractor and all Prime or Subcontractors indemnification in language as follows:

(A) Contractor shall secure and maintain for the duration of the contract such insurance as will protect it from claims under the Workers Compensation Statute for the state in which the work is located and from such claims for bodily injury, death or property damage as may arise in the performance of Contractor's services under this Agreement, such coverage to be equal or greater than the minimum limits hereinafter set forth.

(B) The contractor hereby agrees and covenants to assume the entire responsibility and liability for any and all injuries or death of any and all persons and any and all losses or damage to property caused by or resulting from or arising out of any part of the work of Contractor, its agents, officers, employees, subcontractors or servants in connection with this Agreement or with the prosecution of the work hereunder, whether covered by the insurance specified herein or not. Contractor shall indemnify, defend and save harmless the Owner, its agents, officers, employees, affiliated entities, and Owner's Design Professional(s) from any and all claims, losses, damages, fines or penalties, legal suits or actions including reasonable attorney's fees, expenses and costs which may arise out of any and all such claims, losses, damages, legal suits or actions for the injuries, deaths, losses and/or damages to persons or property.

(C) Contractor shall assume and defend, at its sole expense, any suit, claim or legal or other proceedings for which indemnity is hereby required, with legal counsel subject to approval by Owner or Design Professional(s) respectively."

7. Scope of Services Description.

It is extremely important that the work of the Design Professional be specifically described. Whether this is done by a narrative description of each and every service or a breakdown by phases, it is very important that there be a clear understanding of what the Design Professional is required to do in order to fulfill his/her contractual duties and what he or she is not required to do. This can avoid problems not only in terms of the responsibility of the Design Professional to complete certain tasks but also responsibility for a particular item in the event that a liability situation arises based on that item. In other words, it is less likely (albeit not impossible) to be sued over an issue for which you had no professional responsibility. It would also be appropriate to discuss those items for which the Design Professional is not responsible unless and until there are specific instructions in writing from the Owner indicating that such services should be deemed "additional" services for which a pre-agreed amount shall be paid for such services.

Additionally, the Design Professional's services should also be limited by time. A legitimate and realistic determination of the likely time that it will take to complete the task (particularly with regard to construction contract administration services) should be identified and adhered to. In the event that the project goes substantially in excess of the specific time frame mentioned in the contract, then the parties should have already agreed, in advance, that such services thereafter shall be deemed as "additional services" and billed on the same basis, whether this is an hourly rate, unit pricing, etc.

Such provisions have a dual benefit. Not only do they avoid problems requiring Design Professionals to do far more work than was originally envisioned or planned, but such clarity in scope of services also can provide a mechanism for dismissing claims against the Design Professional for work or services which the Design Professional never expressly agreed to provide.

Reprinted below is a typical example of a clause that permits additional fee if the project should not be completed by a certain time through no fault of the Design Professional.*

"If the services of this Agreement have not been completed within _____months of the date herein, through no fault of the Design Professional, any and all services rendered beyond such time shall be compensated by an hourly rate for principals and employees identified in Appendix 1.

8. Lawsuit Limitations.

The agreement should also include procedural devices which assist the Design Professional in the convenient handling of any litigation. For instance, the agreement should include the following provisions:

(A) Verbal Integration Clause: The written agreement makes up the entire contract between the parties and no oral information outside of the contract is part of the contract unless reduced to a writing and signed by both parties to the agreement;

(B) Choice of Law: The law, which is to be utilized in determining whether or not the Design Professional is responsible to the Owner, should be the law of the state where the Design Professional has his/her principal place of business. Even though Design Professionals can be admitted in multiple jurisdictions, responsibility can differ from state to state. The Design Professional is probably most familiar with the law of his own state and should not be required to adhere to the law of other states in terms of responsibility to the Owner. Obviously, where the Owner is a "public body," it will probably be impossible to enforce this obligation but as to private entities, it is much more likely to be enforceable.

(C) Forum Selection: Forum selection is different from choice of law as it dictates the place where lawsuits can be brought by or against the Design Professional. The Design Professional agreement should specifically indicate that lawsuits can only be brought against the Design Professional in the state in which his principal place of business is located and the venue for such lawsuits can only be in the county or local venue of the Design Professional rather than one which is more convenient for the Owner. The amount of time and money that can be saved by the Design Professional by having the lawsuit "in his own back yard" rather than traveling across the State for depositions, conferences and trial, cannot be understated. These forum selection clauses are every bit as enforceable as are arbitration clauses.

(D) Jury Trials: The United States and New Jersey Constitutions generally guarantee the right of a party to a jury trial, not only for criminal cases, but for most civil cases as well. However, decisions of both the New Jersey and United States Supreme Courts have indicated that the parties can, under certain circumstances, waive their right to a jury trial. Indeed, the selection of arbitration as a dispute resolution mechanism is little more than a waiver of the right to a jury trial and determination that a private body will resolve the dispute rather than the court. For some, an effective compromise is to utilize the benefits of the court system for discovery and procedure but knock out the requirement of a jury. In such instances, the case will be tried by a judge sitting without a jury who will decide not only the legal issues, but the factual issues as well. For those who are concerned about the time, expense and "inexperience factor" of working with a jury, this may be an appropriate compromise. Additionally, even though a jury trial waiver is included in the contract, it may be possible for the parties to agree to have a jury trial if that is what all the parties want.

(E) Interpretation of Ambiguities: Typically the author of an Owner –Architect Agreement is the Architect although sophisticated Owners (in either Public or Private sector) are more frequently demanding the use of their own forms. Where the Architect wins the "Battle of the Forms," however, the contract should include a clause disavowing the fact that its form was adopted *in toto* by Owner as this may carry with it the legal requirement of interpretation of "ambiguities" (unclear items which can be reasonably interpreted in more than one way) against the author of the document. If the parties agree that no single entity authored the contract, then the courts often abandon this rule of interpretation.

Reprinted below are examples of Integration, Choice of Law, Forum Selection and Interpretation Clauses:*

"This Agreement is the full and complete Agreement between the parties. Its terms cannot be changed or modified unless in writing signed by all parties to this Agreement."

"The law which shall be used to interpret this Agreement, including the 'Choice of Law' Rules shall be the law of the jurisdiction where the Design Professional has its principal office for business."

"The parties hereby agree that the Design Professional may only be sued (or arbitration commenced) in the state in which the Design Professional has its principal office for business and only in the county or local judicial district in which said office is located."

"It is hereby acknowledged that both Parties to this Agreement participated in its preparation and, had the opportunity to have reviewed by counsel of their own choosing. Accordingly, neither party is recognized to be the sole or predominant author (and no provision shall be interpreted against a party as the drafter), thereby making unnecessary the use of any device or rule of construction concerning the interpretation of this Agreement regarding any alleged ambiguity."

9. No Pay Equals No Play Provisions.

A recurring problem for Design Professionals is the unwillingness of Owners to pay Design Professionals pursuant to the contract when the Owner perceives that the Design Professional has committed an error or an omission for which the Owner may have to pay. Often the Owner will utilize this "self-help" device by simply holding back total or partial payment of an invoice. The contract with the Owner should include a provision which indicates that the Design Professional has a right to terminate the contract and the continuous provision of professional services for nonpayment of invoices on seven days' notice to the client. There should be a specific provision indicating that invoices are due upon presentation and that the Owner is specifically precluded from informally "back charging" the Design Professional for claims of errors and omissions which have not been reduced to a judgment.

Below is an example of a provision forbidding informal back charges and permitting termination for nonpayment.*

"Payment on account of services rendered and for reimbursable expenses shall be made (quarterly/ monthly) upon presentation of the Design Professional's statement of services. No deduction shall be made from the Design Professional's compensation on account of penalty, liquidated damages or other sums withheld from payments to Contractors or on account of the cost of changes in the work other than those for which the Design Professional has been specifically judged to be responsible.

If the Owner fails to make payment to the Design Professional within 30 days of the presentation of the statement for services rendered, such failure shall be considered substantial nonperformance and cause for termination of the Agreement, or at the Design Professional's option, suspension of further work under the Agreement. The Design Professional shall provide 7 days notice of his/her intention to terminate or suspend and shall not thereafter be liable to the Owner for any delays or damages resulting from such suspension or termination. Before resuming services, the Design Professional shall be paid all sums due and owing prior to suspension and any expenses incurred by the interruption and resumption of services."

10. No Damage for Delay.

The Design Professional should insist on a no "damage for delay" provision in its contract with the Owner. This provision should also be couched in very general terms as "no consequential damages." This means that while the Design Professional may still be responsible for problems with the construction which cost the Owner money to fix, he or she cannot be held responsible for the Owner's inability to use the project based on the time frame anticipated by the Owner.

Of even greater importance is the requirement in the contract that the Owner include and enforce in its agreement with the Contractor a similar "no damage for delay" provision and that such a provision apply not only to the Owner, but also to the agents, servants and representatives (including, but not limited to, the Design Professionals) of the Owner.

While these provisions are oftentimes considered "unenforceable" in public sector construction, attempts should be made, at the very least, to limit the amount of "delay damages" of the Contractor to direct costs and expenses of the work as opposed to indirect costs such as "home office overhead" (so called Eichele Formula damages). There is currently no New Jersey case which has interpreted the availability of "Eichele Formula" damages in a New Jersey construction setting.

Reprinted below is typical example of a No Damage for Delay clause.*

"The Design Professional and the Owner waive consequential damages for claims, disputes, delays or other matters in question, arising out of or relating to this Agreement. The Owner further agrees to obtain by contract, to the fullest extent permitted by law, like waivers from any and all Contractors to the work."

Five Things You *Don't Want* in Your Next Contract

1. Arbitration.

Arbitration has been touted for more than 40 years as being an inexpensive, efficient and swift means of resolving construction-related problems. However, personal experience with arbitration reveals that nothing could be further from the truth. Arbitration provisions ordinarily should be struck from agreements with a specific provision indicating that not only do the parties not wish to arbitrate their grievances, but that the Design Professional cannot be brought into any arbitration with any party simply because the Owner has an agreement to arbitrate with them.

Reasons to avoid Arbitration provisions include:

Arbitration is expensive (fees of $1,000 to $2,000 per day per arbitrator for the life of the arbitration proceeding plus AAA administrative expenses and initial filing fees). Arbitration can be long and drawn out (arbitration rarely concludes in a day or two and can take many different hearing days over quite a number of months in order to get all the parties together at one time;

Arbitration can wind up being a "trial by ambush." There is very little, if any, discovery permitted and this is especially difficult if one is defending a claim of liability on behalf of a Design Professional;

Arbitrators almost always make some award to plaintiffs so that they do not go away "empty handed," and;

Arbitrators are not able to administratively dispose of a case through a "summary judgment" or motion to dismiss for such items as Statute of Limitations, Statute of Repose, the absence of an expert report or other technical defenses to which the Design Professional may be entitled.

In the event that arbitration is an inevitable requirement of a contract, the

Design Professional should seek certain limitations on arbitration, including the fact that no other arbitration between the Owner and any other party can be linked to the arbitration between the Design Professional and the Owner, and that the Design Professional is entitled to certain discovery, including a written expert report at least 60 days prior to the first arbitration date, the right to depose a representative of the Owner as well as the right to depose the Owner's expert. If these provisions are not in the contract, the AAA will not honor a request for such discovery.

2. Inspection Responsibilities.

The Design Professional's role during construction is that of a consultant, specifically to assist the Owner in the administration of the construction contract. The Design Professional is not a supervisor, superintendent, inspector or constructor manager. Rather, depending on the specific wording of its construction contract administration responsibilities, it is often a person making observations of the work in order to determine general conformance with the plans and specifications. The Design Professional, for this reason, does not make continuous or exhaustive inspections of the work but should only be present at appropriate intervals in order to observe the Contractor's progress.

From these visits, the Design Professional is able to inform himself as to the progress of the work and be in a position to carry out other duties that may be within his or her role of construction contract administrator, including responding to requests for information, reviewing submittals, arbitrating disputes and reviewing and approving payment requests.

Indeed, the only time that the Standard AIA Contract utilizes the word "inspection" is after the Contractor has declared "substantial completion" and later "final completion."

ect" the work, you should be paid separately for it with full knowledge that you will be held responsible for any deficiency in the work that occurs afterward.

The word "inspection" often conveys a meaning to a lay jury which was never intended by a detailed description of the Design Professional's services. Don't use words such as "inspect," "supervise," "superintend," "manage," or any other word which connotes an aggressive posture with construction. The contract should be scrupulously examined for such words which should be eliminated from the contract.

If you are going to "inspect" the work, you should be paid separately for it with full knowledge that you will be held responsible for any deficiency in the work that occurs afterward.

3. Enhanced Standards of Care.

More and more frequently, Design Professionals are being asked in the contract to observe higher standards of care than are normally expected or anticipated of design professionals under the "common law." The common law of virtually every state i requires professionals to adhere to normal and reasonable standards of care of that person's profession. Ordinarily, this requires a jury to make a determination not of the best design professional in the country, or of the worst, but of the mythical "average design professional." Usually this requires the jury to select between competing "spins" or opinions on the Design Professional's work provided by opposing experts. If the design professional's conduct in any particular case is equivalent to or above that of the "average design professional" then that design professional will not be found liable for any injury or damage caused by his or her work. On the other hand, if the design professional's work is deemed to deviate from or fall below the standard of care of the "average design professional," then any damages directly or proximately following from such deviation will be attributed to the design professional who will, in turn, be responsible to the Owner for damages.

It is important to be wary of such phrases as "to the highest standards of the architectural/engineering profession" or any other phrase which requires the design professional to adhere to a standard of care other than that of the average practitioner in his profession. Ordinarily, this subject should not be treated at all rather than risk forcing your client to agree that you only need to be considered the "average design professional." Rather, it should be sufficient for your client to know that your insurance carrier, if advised that you had voluntarily executed an agreement suggesting that you are willing to be held to the "highest standards" of the Design Professional profession, would most likely invalidate your coverage and therefore leave the owner bereft of protection in the event of a deviation from these "highest standards" of Design Professional care and practice.

It is also important to look closely at any language which requires you to adhere to all "standards, laws, rules, regulations, codes, etc." To the extent that such laws, standards, codes, etc. require you to perform at a standard essentially higher than that of the "average design professional," they again can be read to heighten the standard of care to which you are required to adhere and should be avoided. Your agreement to code adherence should be limited to specific and applicable building codes.

"Enhanced Standards" language rarely grants anything of any great importance to the Owner except to provide him/her with the false security of believing that any mistake on your part will virtually insure "strict liability" for damages. For that reason alone it should be avoided at all costs.

4. Indemnification.

Wherever possible, Design Professionals should avoid executing an indemnification agreement in favor of Owners. Put succinctly, these provisions should simply be struck from the agreement. In the event that the Owner requires an indemnification agreement, care should be taken to insure that the Design Professional is indemnifying the Owner only for the Design Professional's negligent acts or omissions and not simply indemnifying the Owner for all injury damages, costs, etc. "arising from the work of the Design Professional." The difference in these two phrases is not immediately apparent. In the former, the Design Professional is only responsible if a court of competent jurisdiction has specifically determined that it has deviated from standards of professional care and practice and can be held responsible for injury or damage to a third party. Further, in this situation the Design Professional is only responsible for damage or injury to a third-party to the extent that the Owner is required to pay to that same third party sums in excess of its specific negligence.

In the latter situation, however, the Owner can insist that the Design Professional indemnify, defend and hold the Owner harmless even though the Design Professional may never be found "guilty" of any negligent act or omission simply because the injury or damage occurred "arising from the work" of the Design Professional. For that reason, insure that you are only indemnifying the Owner against your own negligent acts or omissions.

Additionally, reciprocal indemnifications should be required. That is to say that the Owner should also be required to indemnify you in the same fashion as you are indemnifying it. Sometimes, that reciprocity alone will cause the Owner to back off of an insistence of an indemnification agreement.

5. Contractual Responsibility to Other Parties.

A key fact of Construction life is the importance of Construction Financing. Often, the first stop for the Owner/Developer is not the Design Professional but the Construction Financier. Typically, Financiers will attempt to require assignment of the benefit but not the payment obligations of the Design Professional/Owner Agreement. This leaves you in the worst of all worlds: required to provide continuing services to a client who is very demanding but under no obligation to pay.

Owners will typically seek to have the Design Professional specifically acknowledge the importance of such financing and require the Design Professional to make concessions to the financier, including enhanced reporting and inspection requirements a swell as enhanced liability.

The Design Professional would do well to scrutinize any provision of the contract which attempts to waive anti-assignment provisions which grant overt concessions to the Construction Financier.

CONCLUDING REMARKS

We hope you have found the contents of this pamphlet insightful, informative, and, most importantly, of appreciable use in your professional practice. We believe that the knowledge and insight within "*Ten Things You Want in Your Next Contract – And Five Things You Don't!*" will help you, our readers, fully prepare to protect your professional interests while at the same time safeguarding against the ever-present threat of liability and litigation. As always, we are available at any time to consult and guide you with regards to any contractual issues that may arise in the course of your work. And remember, we invite your comments and feedback concerning this and every edition of *The Minutes*. We look forward to hearing from you!

HAPPY SUMMER!

Chiumento McNally, LLC