



Contract Clarity and Professional Duty: Managing Design Firm Responsibilities during Construction

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1

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Contract clarity and professional duty: Managing design firm responsibilities during construction

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2

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3

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4



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5

- 1. Introduction
- 2. Two Obligations, One Project
- 3. Contract Language That Protects
- 4. Construction Phase Services
- 5. Negotiation Strategies

Agenda

6

Introduction

1

7

The Central Tension

Every design professional working on a construction project operates under two simultaneous, independent sets of obligations.

PROFESSIONAL DUTY

Source: State licensing laws and professional codes of ethics (NSPE, AIA, ASCE)

Nature: Non-negotiable. Persists regardless of what any contract says.

Focus: Protection of public health, safety, and welfare

Key implication: Cannot be waived. A contract clause purporting to override it is unenforceable as contrary to public policy.

CONTRACTUAL OBLIGATION

Source: The Professional Services Agreement (PSA) with the client

Nature: Fully negotiated. Can be well-defined or dangerously vague.

Focus: Client's interests: budget, schedule, contractor relationships

Key implication: Most construction-phase scopes are under-negotiated, leaving gaps the firm must fill without compensation.

8

Where the Two Obligations Collide

Client Direction That Conflicts with Professional Obligation

An owner may direct the firm to accept a substitution, approve a change, or allow construction to proceed in a manner that violates the building code. Contract language purporting to require the firm to follow owner direction on technical matters does not override the professional duty. The firm must document its position and formally reject the nonconforming condition — regardless of resulting friction with the client.

Scope Creep from Undefined Construction-Phase Obligations

Open-ended scope language — “respond to RFIs,” “review submittals,” “observe the work” — without limiting volume, frequency, or deliverables, converts an undefined contractual duty into uncompensated service. Without an additional service provision, there is no contractual mechanism to recover that cost.

The Financial Consequence of Ambiguity

A client who believes the contract entitles them to unlimited RFI responses, unlimited site visits, and unlimited submittal reviews has a reasonable basis for that position when the contract is silent. What is not defined will be disputed — and the dispute will almost always resolve in the client's favor.

9

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3

Two Obligations,
One Project

2

10

The Professional Duty: Its Sources and Limits

The design professional's duty to protect public health, safety, and welfare derives from three independent sources:

State Licensing Laws

Every state licensing statute for architects and engineers includes a duty to protect the public. Violation can result in license revocation, civil liability, and in extreme cases, criminal exposure.

Professional Codes of Ethics

NSPE, AIA, and ASCE all establish as a fundamental canon that the professional's primary obligation is to the public — not to the client. This duty is not subordinated by the existence of a fee agreement.

Common Law

Courts have long recognized that design professionals owe a duty of care not only to their clients but to foreseeable users of the structures they design. This duty runs to third parties who are never party to the contract.

11

The Contractual Obligation: Where Gaps Appear

Construction-phase service scopes are often under-negotiated. The gaps that result are predictable — and preventable.

- No definition of frequency or minimum number of site visits
- No limit on RFI volume or defined response timeframe
- No submittal review schedule required from the contractor
- No mechanism to bill additional services when scope expands
- No clear definition of what constitutes a complete and timely submittal
- No language distinguishing observation from inspection
- No defined deliverables for construction-phase services
- No automatic termination or suspension rights when the owner impedes performance

Each gap listed here is not a hypothetical risk. It is a documented source of professional liability claims.

12

Contract Language that Protects

3

13

Anatomy of Weak Construction-Phase Scope Language

Scope language that describes construction-phase services in general, unqualified terms creates four distinct problems:

No Frequency Defined

"Observe the work" establishes no minimum visit schedule. The contractor may claim weekly visits were required; the owner may believe monthly was sufficient. The contract is silent — and silence favors the claimant.

No Deliverables Specified

Without a defined deliverable — a written site visit report, a submittal log, a formal RFI response letter — there is no contractual record of the firm's construction-phase activities.

No Volume Limits or Timeframes

"As necessary" and "as requested" give the contractor and owner control over the firm's workload. There is no contractual basis for declining to respond or for billing additional services.

No Compensation Trigger

When scope expands — and it will — there is no mechanism to authorize additional compensation. The firm has accepted an open-ended obligation for a fixed fee.

14

Essential Contract Provisions

1

Defined Scope — Office and Field Services Listed Separately
Enumerate each deliverable explicitly: submittal review log, RFI response letters, site visit reports, punch list inspection, certificate of substantial completion.

2

Explicit Limits of Authority
State that the design professional is not a construction manager and has no authority over the contractor's means, methods, techniques, sequences, or safety procedures. This language is standard in AIA and EJCDC documents but is frequently deleted in owner-drafted agreements.

3

Response Timeframes Tied to Contractor Obligations
The firm's RFI and submittal review clock begins only when a complete, properly formatted package is received. Include a right to return incomplete submittals without review and without starting the clock.

4

Additional Compensation Triggers
Define what constitutes an Additional Service and include automatic triggers: RFIs beyond a monthly threshold, re-submittals beyond a defined number, site visits beyond a defined frequency, contractor claims response.

5

"Observation" — Not "Inspection," "Supervision," or "Oversight"
"Inspection" implies a duty to discover all defects. "Observation" describes the limited nature of periodic visits. The word choice determines the standard of care applied in litigation.

15

Standard Contract Vehicles: A Quick Comparison		
AIA B101	EJCDC E-500	Owner-Drafted PSA
Typical Use Architecture / Building Strengths Well-tested in courts. Clear owner-architect relationship. Solid construction administration structure in Article 3.	Typical Use Civil / Infrastructure Engineering Strengths Engineering-focused. Detailed scope exhibits allow precise definition of construction-phase services. Watch For Less familiar to building-focused owners. May require explanation during negotiation. Ensure the owner has reviewed and accepted the scope exhibits.	Typical Use Public agencies, developers, CM firms Strengths Can be tailored to a specific project. Starting point for negotiation. Watch For High risk. Frequently omits additional service provisions, observation limits, limitation of liability, and mutual indemnification. Every clause requires review against the firm's standard positions.

16

Construction Phase Services

4

17

Requests for Information

 Must be in writing or in the form of drawings

 Must be consistent with:

The intent of the parties
Code requirements
Industry practice
Good faith and fair dealing

 Cannot add or take away rights or responsibilities of either party

18

Requests for Information

RFIs are risk management tools

Establish and enforce clear RFI procedures (RFI form in project manual)

Require specificity

If abuse occurs, elevate the problem at the progress meeting



19

Shop Drawings and Submittals

What are Shop Drawings?

Shop drawings show the construction means and methods not typically found in the construction documents.

Shop drawings are communication tools.

Under the AIA and EJCDC contract systems, shop drawings are not Contract Documents

Delays in reviewing and approving shop drawings create claims

Shop drawing review should not be a contractor quality control substitute



20

Shop Drawings and Submittals

Design Professional Responsibility

The design professional is responsible for:

- Comparing the information in the shop drawings to the information and design concept in the Contract Document.
- Noting any deviances and informing the contractor.
- Reviewing and approving the aspects for which the design professional is responsible.
- Placing a review and approval stamp and returning to the contractor.
- Clients at times change the review process to a guarantee.



21

Shop Drawings and Submittals

Common Mistakes

Over-reviewing: verifying dimensions, quantities, and shop drawing accuracy creates a duty beyond the professional service and is typically uncompensated

Rubber-stamping: approving without meaningful review generates exposure for nonconforming materials or methods incorporated into the work

Failing to track re-submittals: without a log, the firm cannot demonstrate the scope of its review work or bill for excess re-submittals



22

Substitution Requests

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Require the contractor to certify the proposed substitution will:

- Perform adequately the functions and achieve the results called for by the design, and
- Be similar in substance and function the same as the original item.

2

Require the contractor to state impact on schedule and cost.

3

Require the contractor to identify whether proposed substitution in the Work will require a change in the Construction Documents.



23

Substitution Requests



Obtain feedback and comments from the Owner regarding substitutions and reinforce your contractual obligations.



If needed, seek additional data about proposed substitute item (which should be for additional compensation.)



Establish that you are sole authority on the matter (as provided by the contract.)



No substitution until your review is complete and you determine it is an acceptable substitute.



24

Substitution Requests



Advise contractor in writing if you do not approve the proposed substitution.



If you approve a substitution request, your determination needs to be shown by Change Order showing:

The substitution itself and all related impacts, and
Change in Contract Price and/or Contract Time.



Track your time reviewing substitution requests and charge for your services.



25

Observation vs. Inspection

	OBSERVATION	INSPECTION
Scope	Periodic visits to determine general conformance with design intent	Continuous, comprehensive monitoring of all construction activity
Duty	Professional judgment applied during visits; not present for all work	Implies a duty to discover all defects, including those not visible during periodic visits
Applicability	Standard for design professional construction administration	Standard for special inspectors (concrete, structural steel, masonry, etc.)
Legal Effect	Supports limitation of liability defense when used consistently throughout the project	Courts may impose a higher standard of care; strengthens plaintiff's theory on undiscovered defects
Use in PSA	Always use this term	Avoid this term



26

The Site Visit Report

The site visit report is the primary documentary record of the design professional's construction observation activities —and the primary defense document in a construction claim.

Every Report Should Include:

- Date, time, weather conditions, and all attendees
- Description of work observed and general progress status
- Items of concern or nonconforming work observed, with specific reference to contract document requirements
- Items specifically not observed during this visit
- Photographic documentation indexed to the report narrative
- Follow-up items required from contractor or owner, with deadlines

CRITICAL PRACTICE

The phrase "items not observed" is as important as the record of what was observed.

Documenting that structural work in a specific area was not accessible or not performed during a particular visit establishes that the firm's observation was limited in scope — a critical defense element if a defect in that area is later discovered.

Firms that omit this language leave open the inference that they observed everything and missed the defect.



27

Site Observations and Evaluations



During the usual site visits, the design professional must be alert to obvious instances of defects or deficiencies in the work.



If the design professional had wanted to see some aspect of the work but was not permitted or unable to do so for some reason, that should also be noted.



This cannot be replaced by remote observations unless:

Your contract allows such an alternative.
The General Conditions require the contractor to respond to your detailed requests, and
Proper disclaimer language is used.



28

Duty to Reject Nonconforming Work



Rejecting nonconforming work may be an absolute obligation



The contract might require the rejection of any nonconforming work without any conditions on visibility or severity. That level of responsibility should be accompanied by a higher fee.



An owner can decide to accept nonconforming work against the design firm's recommendation – unless the nonconforming work violates a code, standard, or regulation and is a life-safety concern.



Professional ethics and professional licensing laws both generally require the design firm first to try to prevail on the owner to insist that the violating nonconforming work be rejected. Documentation should be kept of such efforts by the design professional.



29

Negotiation Strategies

5

30

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10

Protecting the Professional Duty in the Contract

Suggested Contract Language

LANGUAGE TO INCLUDE

Notwithstanding any other provision of this Agreement, [Firm] shall have the right and obligation to exercise independent professional judgment to protect public health, safety, and welfare in accordance with applicable licensing laws and professional standards of practice. In the event that [Firm]'s professional judgment conflicts with any direction from the Owner, [Firm] shall provide written notice to the Owner of such conflict, and the parties shall resolve the matter in good faith prior to proceeding.

Why Clients Accept This Language

- It describes an obligation that already exists by law — the contract language does not create new exposure for the owner
- Sophisticated clients understand that a design professional without independent judgment is not providing professional services — it is providing clerical services
- The notice requirement benefits the owner by surfacing conflicts before they escalate

Termination-for-Cause Provision

- The contract should allow the firm to withdraw without penalty if the owner directs it to violate applicable professional standards or licensing laws
- This provision is rarely invoked but is essential protection in extreme situations
- Include in all agreements — the difficulty of the conversation is far less than the consequences of remaining on a project where integrity is compromised



31

Protecting Against Claims: Consequential Damages



Each party waives claims for lost profits, loss of use, lost revenue, and other damages beyond direct, actual losses



Without this provision, a contractor delay claim could seek damages that dwarf the design firm's fee many times over



Typically stated as a mutual waiver— applying to both parties equally



Standard in AIA and EJCDC agreements; frequently absent in owner-drafted PSAs



32

Certificate of Substantial Completion



Triggers warranty periods and shifts insurance and maintenance responsibilities to the owner



Establishes the boundary between active construction administration and post-construction services



Conduct a thorough pre-substantial-completion examination before issuing



Document all outstanding punch list items as exhibits to the certificate



Prematurely issuing a certificate of substantial completion — under pressure from the owner or contractor — can shift warranty periods, affect the firm's claims exposure, and undermine the firm's ability to require correction of outstanding deficiencies. The certificate should not be issued until the firm has conducted a formal examination and documented all known punch list items.



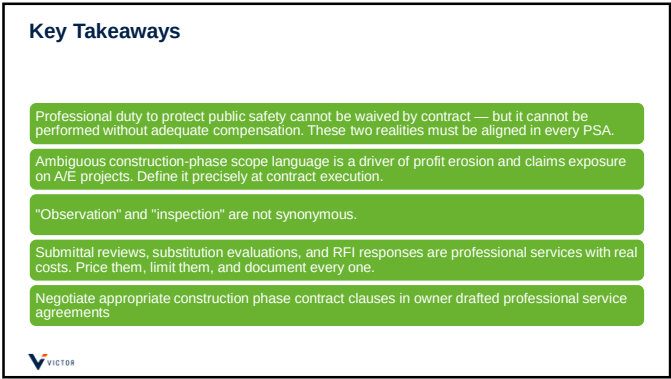
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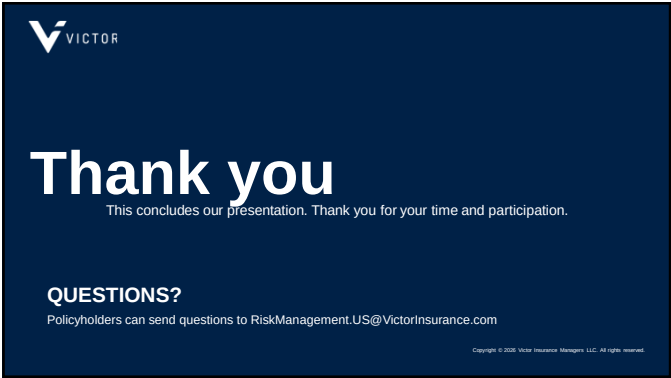
11



34



35



36
