

Onerous? Fair? Protective?

What is in the agreements you are signing and why it is critical to contractually manage your exposures



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ONEROUS CONTRACTS
Unfair, unmanageable, and uninsurable exposures

Watch out for contracts that seek to impose:

- An elevated, unrealistic standard of care
- Liability that would not exist in the absence of the contract
- Responsibility for risks outside of your control
- Unreasonable waiver of rights in the event of a dispute
- Onerous, unfair, one-sided obligations



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ONEROUS CONTRACTS
Unfair, unmanageable, and uninsurable exposures

Standard of Care
Elevated standard of care or replacement with a fiduciary obligation or warranty.

Right to Rely
No right to rely on information provided by the client or client's consultants.

Duty to Defend/Indemnify
Broad defense and indemnity obligations not tied to actual harm.

Insurance Obligations
Unreasonable insurance obligations

IP/Termination
Transfer of IP rights with no payment obligation and client right to terminate without consequence.

Flow Down Requirements
Uncontrolled flow down requirements or incorporation by reference.


Liquidated Damages
Liquidated damages provision with no recognition of actual damages.

Legal Fees
Transfer of legal fees in any dispute.

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The Value of AIA and EJCDC Standard Contract Language



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STANDARD INDUSTRY DOCS
The value of standard contract provisions

AIA Contract Documents

EJCDC ENGINEER-JOINT CONTRACT DOCUMENTS COMMITTEE

DBIA DESIGN-BUILD INSTITUTE OF AMERICA

Fair and Balanced
Carefully crafted with input from all the different stakeholders on a project.

Coordinated Documents
Rights and obligations of the parties are coordinated throughout the document series.

Tested
Court decisions have interpreted the language of these standard documents.



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The Justification for Using Standard Provisions in “Fair” Contracts

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PROTECTIVE PROVISIONS
From the AIA B101-2017, B103-2017 and EJCDC E-500 2020

- Standard of care definition (§2.2) (6.01 A)
- Reliance on owner information and consultants (§3.1.2) (6.01 B, 6.01 D)
- Evaluations of the work disclaimer (§3.6.2.1)
- Quasi-judicial immunity (as initial decision maker) (§3.6.2.4)
- Reassessment of payments upon Substantial Completion (§3.6.3.1)
- Limited shop drawing/submittal review (§3.6.4.2)
- Requirements of contractor submitting RFIs (§3.6.4.4)
- Limitation of liability in redesign situations (§6.7)
- Waiver of consequential damages (§8.1.3) (6.10 E)
- Limitation of liability for certifications (§10.4)
- Indemnity within and limited to insurance (AIA B103, §8.1.3)
- Additional insured status on contractor's CGL policy (A201, Exhibit A §A.3.1.3)



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STANDARD OF CARE

AIA B101-2017

§ 2.2 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.

EJCDC E-500, 2020

§ 6.01(A) Standard of Care: The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer.



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RIGHT TO RELY

AIA B101-2017

§ 3.1.2 The Architect shall coordinate its services with those services provided by the Owner and the Owner's consultants. The Architect shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of, services and information furnished by the Owner and the Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission, or inconsistency in such services or information.

EJCDC E-500, 2020

§ 6.01(B) Technical Accuracy: Owner shall not be responsible for discovering deficiencies in the technical accuracy of Engineer's services. Engineer shall correct deficiencies in technical accuracy without additional compensation, unless such corrective action is directly attributable to deficiencies in Owner-furnished information.

§ 6.01(D) Reliance on Others: Subject to the standard of care set forth in Paragraph 6.01.A, Engineer may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.



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CASE LAW

RIGHT TO RELY

Navy awarded a design build contract for housing units at the Marine Corps Base in Kaneohe Bay. The RFP included a government report which indicated the site soils had "slight" expansion potential. Design-Builder incurred more than \$4.8 million in additional work due to differing soil conditions.

Trial court found no right to rely on the initial report. Appellate court reversed.



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EVALUATION OF WORK DISCLAIMER

AIA B101-2017

§ 3.6.2.1 The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.2.3, 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 promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work.



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QUASI-JUDICIAL IMMUNITY

AIA B101-2017

§ 3.6.2.4 Interpretations and decisions of the Architect shall be consistent with the intent of, and reasonably inferable from, the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and **shall not be liable for results of interpretations or decisions rendered in good faith.** The Architect's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.



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REASSESSMENT OF PAYMENTS
Upon Substantial Completion

AIA B101-2017

§ 3.6.3.1 The Architect shall review and certify the amounts due the Contractor and shall issue certificates in such amounts. 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, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified.** **The foregoing representations are subject to (1) an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, (2) results of subsequent tests and inspections, (3) correction of minor deviations from the Contract Documents prior to completion, and (4) specific qualifications expressed by the Architect.**



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SHOP DRAWING/SUBMITTAL REVIEW
Limited review

AIA B101-2017

§ 3.6.4.2 The Architect shall review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but **only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or construction means, methods, techniques, sequences or procedures.** The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.



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CONTRACTOR RFIs

AIA B101-2017

§ 3.6.4.4 Subject to Section 4.2, the Architect shall review and respond to requests for information about the Contract Documents. **The Architect shall set forth, in the Contract Documents, the requirements for requests for information. Requests for information shall include, at a minimum, a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested.** The Architect's response to such requests shall be made in writing within any time limits agreed upon, or otherwise with reasonable promptness. If appropriate, the Architect shall prepare and issue supplemental Drawings and Specifications in response to the requests for information.



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REDESIGN SITUATIONS
Limitation of liability to the redesign effort

AIA B101-2017

§ 6.7 If the Owner chooses to proceed under Section 6.6.4, the Architect shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. If the Owner requires the Architect to modify the Construction Documents because the lowest bona fide bid or negotiated proposal exceeds the Owner's budget for the Cost of the Work due to market conditions the Architect could not reasonably anticipate, the Owner shall compensate the Architect for the modifications as an Additional Service pursuant to Section 11.3; otherwise the Architect's services for modifying the Construction Documents shall be without additional compensation. In any event, **the Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6.**



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CONSEQUENTIAL DAMAGES


Waiver of right to collect consequential damages

AIA B101-2017

§ 8.1.3 The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

EJCDC E-500, 2020

§ 6.10(E) Mutual Waiver: To the fullest extent permitted by Laws and Regulations, Owner and Engineer waive against each other, and the other's officers, directors, members, partners, agents, employees, subconsultants, and insurers, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to this Agreement or the Project, from any cause or causes. Such excluded damages include but are not limited to loss of profits or revenue; loss of use or opportunity; loss of good will; cost of substitute facilities, goods, or services; and cost of capital.

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CERTIFICATIONS

Limitation of liability of broad-form certifications

AIA B101-2017

§ 10.4 If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. 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 this Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution. The Architect shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement.



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INDEMNIFICATION


Limitation of liability to your negligence

AIA B103-2017

§ 8.1.3 The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement.

The Architect's obligation to indemnify and hold the Owner and the Owner's officers and employees harmless does not include a duty to defend.

The Architect's duty to indemnify the Owner under this Section 8.1.3 shall be limited to the available proceeds of the insurance coverage required by this Agreement.

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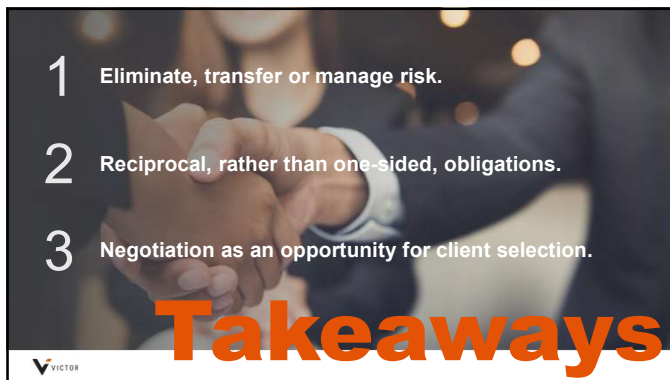
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July 23, 2024

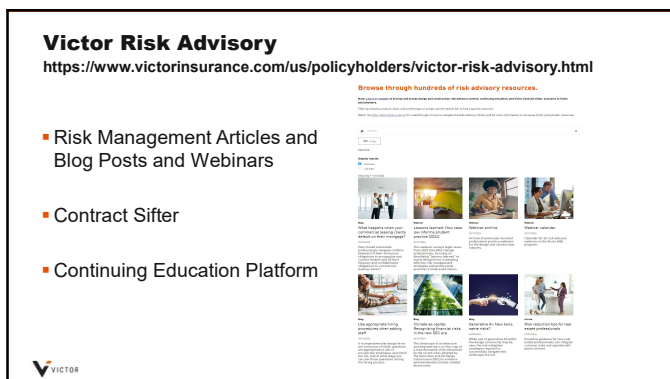
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