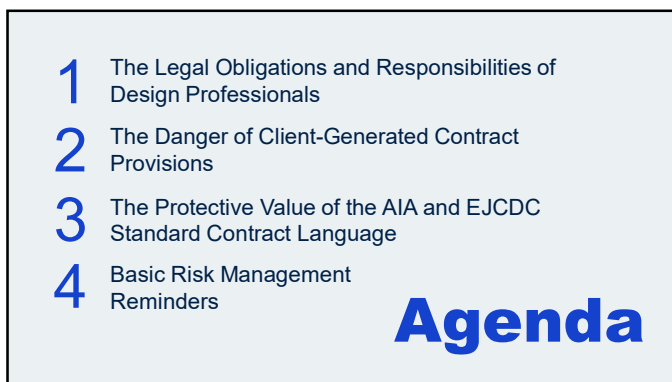


1



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3

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3 ROLES OF A DESIGN FIRM

1 CONSULTANT <ul style="list-style-type: none">Analyze program and design constraintsDevelop design recommendations	2 AGENT <ul style="list-style-type: none">Administer the construction contractManage the Owner-Contractor interaction	3 DISPUTE NEUTRAL <ul style="list-style-type: none">Assume a quasi-judicial capacityReview Owner-Contractor conflicts
---	---	---

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FAULT AND LIABILITY

TORT LAW <ul style="list-style-type: none">Protection of negligence standardLegal framework of professional liabilityBased on the standard of care	CONTRACT LAW <ul style="list-style-type: none">Freedom to assume obligations"Private law" changing or creating rights and dutiesAbility to exceed normal legal liability
---	---

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ELEMENTS OF A NEGLIGENCE CLAIM

- DUTY**
A duty of care existed.
- BREACH**
Defendant failed to meet the standard of care.
- CAUSATION**
Defendant's failure was the actual and proximate cause of plaintiff's harm.
- HARM**
Plaintiff suffered foreseeable losses and/or damages.

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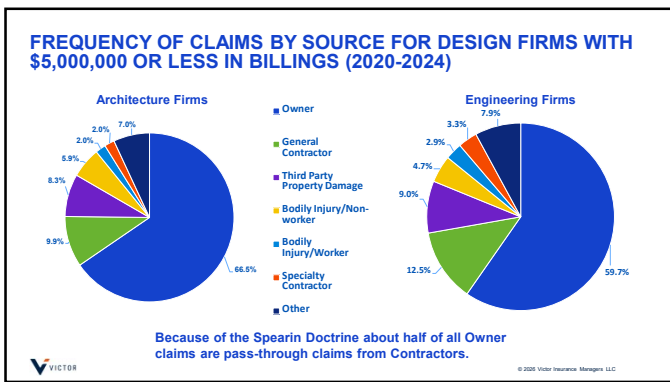
6

ELEMENTS OF A CONTRACT CLAIM

- ① **DUTY**
A contractual duty existed.
- ② **BREACH**
Defendant failed to substantially satisfy the duty.
- ③ **CAUSATION**
Defendant's failure was the cause of Plaintiff's harm.
- ④ **HARM**
Plaintiff suffered losses and/or damages.

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TRIGGERING EVENTS FOR PROFESSIONAL LIABILITY CLAIMS

Chance events: Arbitrary developments that result in loss.
5%

Changed conditions: Financial problems, site issues, or unforeseen situations causing cost recovery efforts.
15%

Technical errors: Design problems that must be corrected.
15%


Managerial deficiencies: Communication, documentation and actions not meeting project requirements, fee disputes, unmet expectations.
65%

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PROFESSIONAL LIABILITY INSURANCE

<p>1</p> <p>COVERED SERVICES</p> <p>"... services that the Insured performs for others ... in the Insured's practice as an architect, engineer, interior designer, land surveyor, LEED® green building program consultant, landscape architect, construction manager, scientist, or technical consultant."</p>	<p>2</p> <p>COVERED LIABILITY</p> <p>"Wrongful act means an error, omission, or other act that causes liability in the performance of professional services for others by you or any person or entity including joint ventures, for whom you are liable."</p>	<p>3</p> <p>COVERED PARTIES</p> <p>"any past or present partner, officer, director, member, stockholder, or employee of the Named Insured ... , but only while acting within the scope of their duties for the Named Insured or newly acquired subsidiary."</p>
--	---	---

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COVERAGE EXCLUSIONS

WHAT IS NOT COVERED?

CONTRACTUALLY ASSUMED LIABILITY


WARRANTIES OR GUARANTEES

"Your alleged liability under any oral or written contract or agreement, including but not limited to express warranties or guarantees."

LIABILITY OF OTHERS

"The liability of others you assume under any oral or written contract or agreement."

This exclusion does not apply to "your liability that exists in the absence of such contract or agreement."

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The Danger of Client-Generated Contract Provisions

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ONEROUS CONTRACTS
Unfair, unmanageable, and uninsurable exposures

Watch out for contracts that seek to impose:

- An elevated, unrealistic, or absolute 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

<p>Standard of Care Elevated standard of care or replacement with a fiduciary obligation or warranty.</p>	<p>IP/Termination Transfer of IP rights with no payment obligation and client right to terminate without consequence.</p>
<p>Verification of Information No right to rely on information provided by the client or client's consultants.</p>	<p>Right to Withhold Fees Unilateral and unconditional right to withhold payment without any determination of fault.</p>
<p>Duty to Defend/Indemnify Broad defense and indemnity obligations not tied to actual harm.</p>	<p>Liquidated Damages Liquidated damages provision with no recognition of actual damages.</p>
<p>Insurance Obligations Unreasonable insurance obligations</p>	<p>Legal Fees Transfer of legal fees in any dispute.</p>

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The Protective Value of the AIA and EJCDC Standard Contract Language



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PROTECTIVE PROVISIONS

From the AIA B101-2017 and B103-2017

- Standard of care definition (§2.2)
- Reliance on owner information and consultants (§3.1.2)
- Owner's approval at each phase of services (§3.4.1)
- Services during construction (§3.6.1.1)
- 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)



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PROTECTIVE PROVISIONS

From the AIA B101-2017 and B103-2017

- Limitation of liability in redesign situations (§6.7)
- Ownership of documents – copyrights (§7.2)
- Ownership of documents – payment before licensing (§7.3)
- Ownership of documents – indemnification for unauthorized use (§7.3.1)
- Protection from future claims (§8.1.1) [And B141-1997 alternative]
- Waiver of consequential damages (§8.1.3)
- Limitation of liability for certifications (§10.4)
- No right to withhold fee without agreement or liability (§11.10.2.2)
- 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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PROTECTIVE PROVISIONS

From the EJCDC E-500, 2020

- Standard of Care (§ 6.01(A))
- Right to Rely - Technical Accuracy (§ 6.01(B))
- Right to Rely – Reliance on Others (§ 6.01(D))
- Mutual Waiver of Right to Collect Consequential Damages (§ 6.10(E))
- Indemnification and Limitation of liability to Your Negligence (§ 6.10(A))
- Standard EJCDC Limitation of Liability (Exhibit I § 1.02)




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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.




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STANDARD OF CARE

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.



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RIGHT TO RELY

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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OWNER'S APPROVAL AT EACH PHASE

AIA B101-2017

§ 3.4.1 Based on the Owner's approval of the Design Development Documents, and on the Owner's authorization of any adjustments in the Project requirements and the budget for the Cost of the Work, the Architect shall prepare Construction Documents for the Owner's approval. The Construction Documents shall illustrate and describe the further development of the approved Design Development Documents and shall consist of Drawings and Specifications setting forth in detail the quality levels and performance criteria of materials and systems and other requirements for the construction of the Work.


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SERVICES DURING CONSTRUCTION

AIA B101-2017

§ 3.6.1.1 The Architect shall provide administration of the Contract between the Owner and the Contractor as set forth below and in AIA Document A201™-2017, General Conditions of the Contract for Construction. If the Owner and Contractor modify AIA Document A201-2017, those modifications shall not affect the Architect's services under this Agreement unless the Owner and the Architect amend this Agreement.



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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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SHOP DRAWING/SUBMITTAL REVIEW

AIA A201-2017

The General Conditions of the Contract for Construction (AIA Document A201) defines the requirements for an effective submittal process:

- The contractor establishes a submittal schedule for approval by the Architect.
- The contractor submits the shop drawings, product data, and similar information as required by the Contract Documents.
- The contractor reviews the submissions of the sub-contractors for compliance with the contract documents prior to forwarding such to the architect.**
- The contractor develops and manages the project schedule and coordinates the sequence of the work in compliance with the approved submittals as returned by the architect.
- The contractor and their sub-contractors, under the contractor's supervision, must not perform any work prior to approval of the submittals by the architect.


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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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OWNERSHIP OF DOCUMENTS
Copyright of design and documents and licensing of use
AIA B101-2017

§ 7.2 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service 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 reserved rights of the Architect and the Architect's consultants.

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OWNERSHIP OF DOCUMENTS
Copyright of design and documents and licensing of use
AIA B101-2017

§ 7.3 The Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations under this Agreement, including prompt payment of all sums due pursuant to Article 9 and Article 11. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement.

- - -

If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.


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OWNERSHIP OF DOCUMENTS
Copyright of design and documents and licensing of use

AIA B101-2017

§ 7.3.1 In the event the Owner uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the Architect and Architect's consultant(s) 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 consultants 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 costs 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.


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PROTECTION FROM FUTURE CLAIMS
Applicability of the statute of repose

AIA B101-2017

§ 8.1.1 The Owner and Architect shall commence all claims and causes of action against the other and arising out of or related to this Agreement, whether in contract, tort, or otherwise, in accordance with the requirements of the binding dispute resolution method selected in this Agreement and **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.**


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PROTECTION FROM FUTURE CLAIMS
Changing the statute of limitations into a statute of repose

Alternative protective language from the AIA B141-1997

§ 1.3.7.3 Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable **statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion.** In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.


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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.




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CONSEQUENTIAL DAMAGES
Waiver of right to collect consequential damages

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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COMPENSATION
No Right to Withhold Fee without Agreement or Liability

AIA B101-2017

§11.10.2.2 The Owner shall not withhold amounts from the Architect's compensation to impose a penalty or liquidated damages on the Architect, or to offset 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.**



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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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INDEMNIFICATION
Limitation of liability to your negligence

EJCDC E-500, 2020

§ 6.10(A) To the fullest extent permitted by Laws and Regulations, Engineer shall indemnify and hold harmless Owner, and Owner's officers, directors, members, partners, agents, and employees, from losses, damages, and judgments (including reasonable consultants' and attorneys' fees and expenses) arising from third-party claims or actions relating to the Project, provided that any such claim, action, loss, damages, or judgment is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, **but only to the extent caused by any negligent act or omission of Engineer or Engineer's officers, directors, members, partners, agents, employees, Subconsultants, or Engineer's Subcontractors.** This indemnification provision is subject to and limited by the provisions, if any, agreed to by Owner and Engineer in Exhibit I, "Limitations of Liability."


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LIMITATION OF LIABILITY
Standard EJCDC Limit of Liability (Exhibit)
EJCDC E-500, 2020

Exhibit I § 1.02 To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer's Subcontractors, officers, directors, members, partners, agents, employees, and Subconsultants, to Owner and anyone claiming by, through, or under Owner for any and all injuries, claims, losses, expenses, costs, or damages whatsoever (including but not limited to direct, indirect, special, incidental, punitive, exemplary, or consequential damages) arising out of, resulting from, or in any way related to the Project, to Engineer's or its Subconsultants' or Engineer's Subcontractor's services, or to this Agreement, from any cause or causes whatsoever, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied, of Engineer or Engineer's officers, directors, members, partners, agents, employees, or Subconsultants, or Engineer's Subcontractors, will not exceed [select one]:


- (A) Stated Amount
- (B) Amount of Engineer's Compensation
- (C) Available Insurance Proceeds

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ADDITIONAL INSURED STATUS
Contractor's CGL policy
AIA A201-2017, Exhibit A

§ A.3.1.3 Additional Insured Obligations. To the fullest extent permitted by law, the Contractor shall cause the commercial general liability coverage to include (1) the Owner, the Architect, and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions for which loss occurs during completed operations. The additional insured coverage shall be primary and non-contributory to any of the Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04.

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Basic Risk Management Reminders

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BASIC RISK MANAGEMENT

- Your role is to help put a capital asset in place – understand the expectations of the client.
- Identify potential liabilities of the project and recognize and manage the risks presented by the client, the contract, and the limitations of the information available.
- Use the contract as a guide to services.
- Follow firm risk management procedures in detail and document performance as required by the procedures.



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VICTOR RISK ADVISORY

www.VictorInsurance.com/us/policyholders/victor-risk-advisory.html

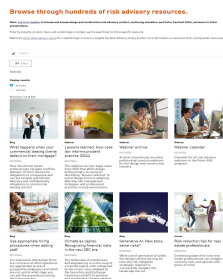
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