

Contract risk management

Paying close attention, knowing what to look for, and including the firm's attorney or insurance broker during contract review can help prevent uninsured claims.



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GUEST
SPEAKER

A key component of any architect or engineer's (A/E's) risk management plan must be evaluating and minimizing inappropriate risks assumed by contract. This can be a difficult undertaking in light of the pressures to win more work in a competitive market, inflexible project owners with high-priced lawyers, and governmental entities that have limited or no ability to modify their standard agreements.

Even against this backdrop, it is critical for design professionals to review their contracts carefully before signing them. At the very least, they should seek to understand the additional risks and ideally mitigate them by modifying the contract wording. This may require input from a knowledgeable attorney and/or an experienced insurance broker, who can evaluate the contract against the insurance coverages the design professional carries.

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A few of the key issues to keep in mind during the contract review process are:

- **Standard of care.** Design professionals are, by law, held to a "standard of care" that does not require perfection. That is, unless you, by contract, give away this protection and accept a higher level of contractual liability. Do not allow this to happen and be sure that any contract includes a reasonable standard of care clause. An example of "good" language is:

"The Design Professional will perform its services using the degree of care and skill ordinarily exercised by design professionals performing similar services in the same locality under similar circumstances and conditions."

- **Express warranties and guarantees.** Keep in mind that the A/E's professional liability insurance policy typically excludes any liability assumed by contract, unless the liability would have "existed in the absence of the contract." This includes any express warranties and guarantees and reinforces the importance of avoiding contract phrases such as "fitness

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for use," "time is of the essence," "best," "error-free," etc. This issue is often misunderstood by project owners accustomed to working with contractors who have a very different risk-reward situation and often make explicit warranties regarding fitness for use, time of delivery, etc.

- **Indemnification.** Project owners, and their attorneys, are often confused by this issue because of their experience working with contractors, who rely on their general liability insurance for their primary liability protection. General liability insurance policies include broad contractual liability protection as a standard coverage, allowing these contractors to sign contracts with relatively onerous indemnification clauses.

Meanwhile, the typical A/E insurance policy states that any "liability of others assumed under contract" is excluded, unless "the liability would have existed in the absence of the contract." This is a very narrow coverage grant that limits a design professional's protection to only those instances where the A/E is otherwise negligent. Any indemnification clause must be tied to negligence and, even then, only to the extent of this negligence. Absent this modifying language, there is the likelihood that any claim for indemnification will be uninsured.

A related issue is the "duty to defend" (versus the duty to reimburse reasonable legal fees). Most insurers consider the duty to defend to be a contractual commitment that goes beyond the coverage provided under the professional liability insurance policy. This is because, at the time the duty to defend kicks in, there has been no finding of fault or

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ON THE MOVE

THORNTON TOMASETTI ANNOUNCES PROMOTIONS The board of directors of [Thornton Tomasetti](#) (New York, NY), an international engineering firm, announced the following promotions:

New York

- **Chief Administration Officer:** Andrew Goldbaum
- **Senior Principal:** James Feuerborn Jr.
- **Principal:** Robert Kornfeld Jr., Scott Lomax, Stephen Szycher
- **Associate Principal:** Colin Brown, Michael Gerasopoulos
- **Vice President:** Ali Ashrafi, Michele Becker, Reza Farimani
- **Senior Associate:** Damon Baumann, Amy Macdonald
- **Associate:** Vincent Aleo, Austin Allcot, Anita Asokan, Cristian Butnaru, Liling Cao, William Cooch, Armela Dervishi, Michelle Dionisio, Tonia Gotsis, Justin

Gumberich, Onur Ihtiyar, Misael Rojas, Michael So, Luis Valderruten, Zachary Wiegand, Melissa Wong

- **Senior Project Engineer:** Christina Chu, Ignacio Fernandez Ortega, Efe Karanci, Fengxia Ouyang, Christopher Ward, Boris Weinstein, Natalie Wolfram
- **Project Engineer:** Patrick Kenny, Karen Nelson, Edwin Yu
- **Senior Project Director:** Charu Chaudhry, Haider Himairi, Brogan McIlwrick, Odysseas Olysseou, Viviana Vumbaca
- **Project Director:** Asta Fivgas, Christos Mavroudis, Lauren Millman, Silverio Patrizi, Catherine Wang
- **Senior Engineer:** Ronald Ademaj, Jason Andrew, BenedetArgento, Virginie Arnaud, Aditya Bhagath, Juan Chen, Scott Cipoletti, Eric Gargiulo, Jason Glenn, Corey Henriquez, Erin Kelly, Ian King, Dmitri Lamianski, Jason Lu, Francis Nagel, Marissa Peragine, Kylie Schalz,

Jennifer Tsang

- **Senior Designer:** Aikaterini Kefalogianni
- **Director of Application Development:** Benjamin Howes
- **Senior Building Information Modeler:** Pinki Changrani, Luz Gault, Adrian Paulino
- **System Administrator:** Frank Reilly
- **Senior Manager of Administrative Services:** Lyn Stevens
- **Marketing Coordinator:** Amanda Spencer

Newark

- **Vice President:** Sergio Londono
- **Associate:** Bahadir Ekinci
- **Project Engineer:** Adam Beckmann
- **Senior Engineer:** Jameson Allen, Benjamin Nichols

Boston

- **Vice President:** Lisa Davey

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negligence on the part of the A/E. The phrase “defend” should be struck whenever possible.

- **Ownership of documents/reuse.** All too often we see contracts that allow the client to reuse the project documents and, even worse, do so without any protection for the design professional involved. Preferably, such plans, drawings, and specifications should be considered as “instruments of service” representing the design professional’s intellectual property and requiring his/her authorization for any additional use. Additionally, any future use of the documents should be at the client’s risk, and they should hold the design professional harmless from any claims arising from that reuse.
- **Construction phase services.** Often project owners will attempt to require their architect or engineer to “inspect” the project during the construction phase. This implies a higher level of scrutiny and typically includes a requirement to “assure the quality of the work” or in some other way guarantee performance of the contractor as to defects and deficiencies (see earlier section on Warranties and Guarantees). Such language should be avoided and replaced with the more typical “observe the work and exercise reasonable care in determining that it conforms generally to the contract documents.” Separately, be careful about taking on responsibility for site safety. This is a contractor responsibility, and design professionals do not want to inadvertently assume a risk that they don’t control.
- **Other provisions of concern.** There are a host of other provisions that can create unfair or inequitable risk for design professionals. A few that come to mind are consequential damages, certifications, shop drawings, and reliance on owner-provided information. These too should be reviewed and, if necessary, modified.

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While the focus of this article is to point out contract areas of concern, keep in mind that there are also contract provisions that can assist in protecting architects and engineers. These can be important and include mutual waivers of subrogation, limitation of liability, waiver of consequential damages, minimum insurance requirements on other parties (including that the design professional be listed as an additional insured on any contractor general liability policy), etc.

The most important step is to recognize that contracts do impact risk and that you need a formal process to review your firm’s proposed contracts and seek changes if need be. Seeking expert advice from your attorney and your insurance broker can also help. At the end of the day, business requires taking some risk in order to reap the rewards. Just be sure your eyes are open and you have a full understanding of your options. ▀

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EDITOR'S NOTE

This column is in response to the “[Firms under fire](#)” article that ran in [THE ZWEIG LETTER, issue 1111, on July 13](#). To share your thoughts on or experiences with contract liability or any topic in *TZL*, please email your comments to Managing Editor Andrea Bennett at abennett@zweiggroup.com.