

# THE **TOP 5** CONTRACT CLAUSES YOU SHOULD KNOW



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# Prelude - Some Basics

Written Contracts  
Defined Scope of Work  
- Additional Services  
Instruments of Service  
Limitation of Liability  
- Standard Terms and Conditions  
Indemnity  
Breaches and Remedies



# SCOPE OF WORK

Scope of Work Defined  
- and what's *not* included  
Additional Services

## APPENDIXES

### Appendix A Scope of Work and Workshop Agenda

#### STATEMENT OF TASK

The National Research Council (NRC) will convene a one-day workshop formed under the auspices of the Division on Engineering and Physical Sciences (DEPS) in consultation with other NRC divisions to explore specific avenues of university research in advancing the nation's capabilities for developing new science and technology to anticipate, prevent, and mitigate the effects of catastrophic terrorist events. The workshop will identify specific topical multidisciplinary and crosscutting research areas where universities can contribute most effectively to the Department of Homeland Security and to improvements in detection, prevention, and mitigation of terrorism. The areas of interest identified by the workshop will be used by the Department to help inform the selection of research priorities and to support the development of security centers of excellence.



12-1 p.m. Lunch and informal discussions

# SCOPE OF WORK DEFINED

- Defined in Contract
- Exhibit to Contract
- Proposal vs. Final Contract
- Subject to or Incorporating Prime Agreement
- What's Not Included
- Standard of Care

## **“Standard of Care**

In providing services under this Design Phase Agreement, [DESIGNER] and their consultants or engineers shall perform services in a manner consistent with that degree of care and skill ordinarily exercised by members of the same professions currently practicing under similar circumstances in the Scottsdale/PV area.”

A note regarding Arizona's “Certificate of Merit”

# ADDITIONAL SERVICES

- Defined in Contract
- Oral vs. Written request/approval

8. Additional Service: Any services beyond those specified within the Contract will be provided for separately under an Amendment to Agreement or separate Contract approved by both parties.

- Unjust Enrichment/Quantum Meruit Claims

# INSTRUMENTS OF SERVICE



§ 6.3 The Consultant's Instruments of Service, which include drawings, specifications and other documents prepared by the Consultant, are for use solely with respect to this Project, and unless otherwise provided, the Consultant shall be deemed the author and Design Builder of these documents and shall retain all common law, statutory and other reserved rights, including copyrights.

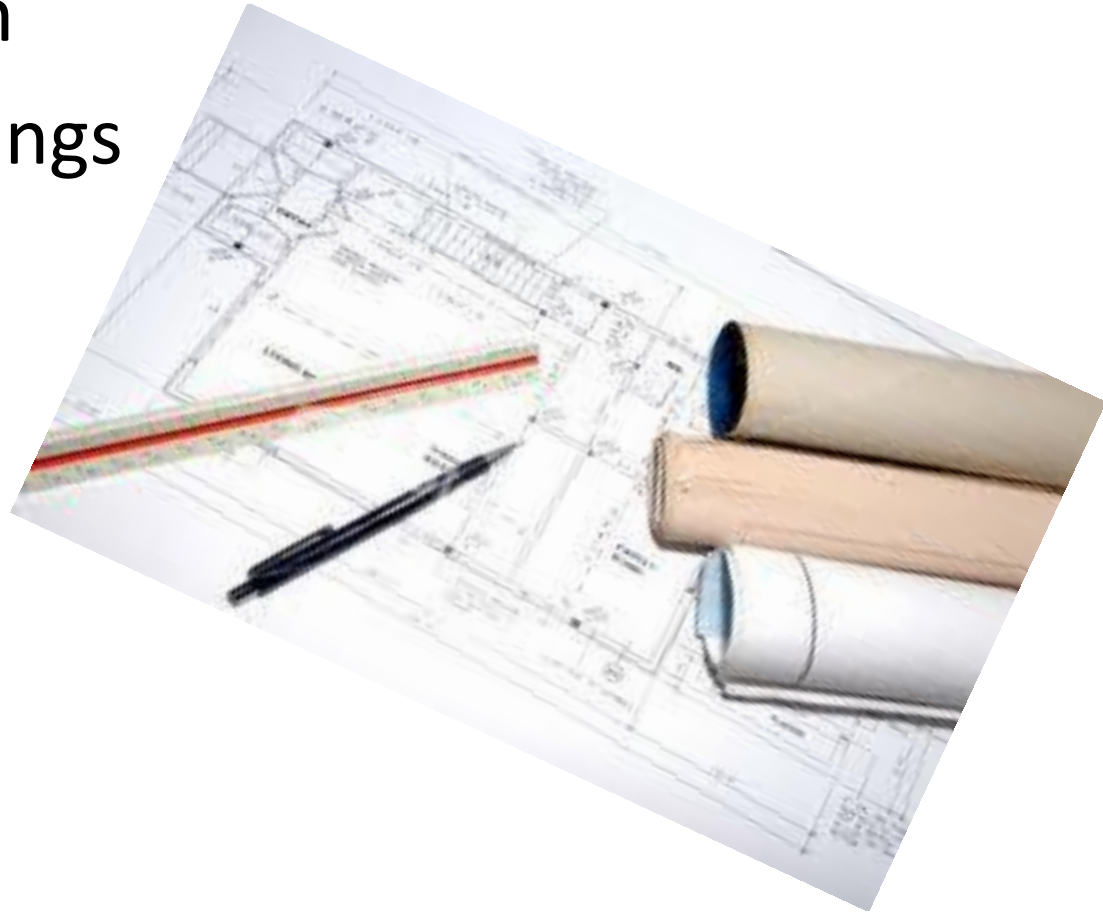
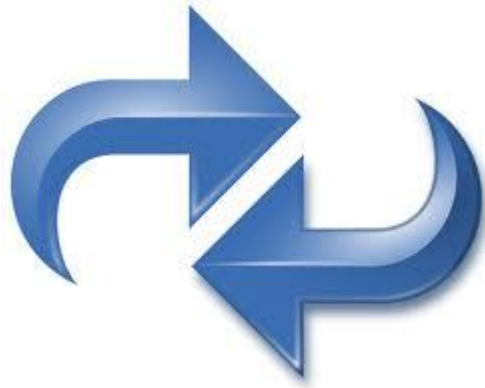
## Ownership of Documents

If [DESIGN-BUILDER] terminates this agreement, or if Owner terminates the agreement for cause, or after [DESIGN-BUILDER] has completed the construction, Owner will thereafter have complete ownership of and rights to use the construction documents, but only for projects on Lot [X] of [DEVELOPMENT]. If Owner terminates the agreement without cause, or refuses to sign a construction contract with [DESIGN-BUILDER], the construction documents will remain property of [DESIGN-BUILDER].

# INSTRUMENTS OF SERVICE

(cont'd)

- Terms of Contract
- Partial Completion
- Transferring Drawings
  - Indemnity



# LIMITATION OF LIABILITY

- Examples

OWNER'S AGENT agrees to limit [redacted] Engineering, Inc. and its agents, employees, representatives, and subconsultants liability to OWNER'S AGENT and all contractors and subcontractors on the Project arising from negligent acts, errors or omissions, such that the total aggregate liability to all those named shall not exceed \$100,000 or [redacted]'s total fee for services, whichever is greater.

## LIMITS OF LIABILITY:

Neither the Engineer, the Engineer's consultants, nor their agents or employees shall be jointly or individually liable to the Owner in an amount in excess of the design contract with the Engineer. The Engineer shall not be held liable for any contamination of

drawings, or other documents not signed and sealed by SURVEYOR and SURVEYOR'S LIABILITY LIMITED TO THE TOTAL AMOUNT OF THIS CONTRACT  
11) CLIENT agrees that SURVEYOR'S aggregate liability for this project will be limited to the total amount of this contract within thirty (30) days after invoice(s) have been rendered, then CLIENT



7. Client agrees that the liability of [REDACTED], its agents and employees, in connection with services hereunder to the Client and to all persons having contractual relationships with them, resulting from any negligent acts, errors, and/or omissions of [REDACTED] its agents, and/or employees is limited to the total fees actually paid by the Client to [REDACTED] for services rendered by [REDACTED] hereunder.

**CLIENT** and [REDACTED] have discussed their respective tasks, rewards and benefits of the Project and [REDACTED]'s total fee for services, and they have allocated the risks such that if **CLIENT** makes a claim against [REDACTED], **CLIENT** is limited in the amount it may recover as "Damages" to the lesser of the amount of fees that [REDACTED] has collected from **CLIENT** under this agreement or Ten thousand dollars (\$10,000.00). This provision shall be applicable to the fullest extent permitted by law. The term "Damages" as used herein shall include but is not limited to any type of damages that are or could be awarded by any court or arbitration tribunal, such as, by way of general example, tort damages, contract damages, strict liability damages, liquidated damages, quantum merit damages, and/or punitive damages.

# **LOL – LIABILITY LIMITED TO INSURANCE PROCEEDS**

Neither the Architect, the Architect's consultants, the Architect's affiliated business entities, nor their agents or employees shall be jointly or individually liable to the Owner for an amount in excess of the proceeds of the available insurance coverages listed in [later sections].



# LOL – WAIVER OF CONSEQUENTIAL DAMAGES

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 [a later section].



# INDEMNITY

- Indemnity Defined
- Express/Contractual vs. Implied/Common Law
- To Defend or not to Defend
- Negligence of Indemnitee



To the fullest extent permitted by law, Architect shall defend, indemnify and hold harmless Owner, its agents, officers, officials and employees from and against all tortious claims, damages, losses and expenses (including but not limited to attorney fees, court costs, and the cost of appellate proceedings), relating to, arising out of, or alleged to have resulted from the acts, errors, mistakes, omissions, work or services of Architect, its agents, employees, or any tier of Architect's subconsultants in the performance of this Agreement. Architect shall defend Owner against any claims allegedly arising out of the negligent acts, errors or omissions of Architect in performing or furnishing professional services for Owner and shall indemnify and hold Owner harmless to the extent a cost, loss or damage to Owner is the result of the negligence of Architect or any other party providing professional services through Architect.

# ***Washington Elementary School District No. 6 v. Baglino Corporation***

The contract between the School District and Contractor contained an indemnification provision that states:

## **4.18 INDEMNIFICATION**

4.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the School District and the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) 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, and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, *regardless of whether or not it is caused in part by a party indemnified hereunder.*

“Therefore, we must determine whether the words in this particular indemnity provision, ‘regardless of whether or not [the injury] is caused in part by a party indemnified hereunder,’ clearly and unequivocally protect the School District against its own active negligence. We believe they do. The words ‘caused in part’ are broad enough to encompass behavior that includes the indemnitee's active negligence.”

# BREACHES AND REMEDIES

- What Constitutes a Breach?
- Notice (Written?)
- Time to Cure/Remedy
- Cost-Benefit Analysis
  - Relationship(s)
  - Statutes of Limitations
  - Limitations of Liability
  - Potential Counterclaims



