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DIFFERENT WORKS



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Five Frustrating but Controllable Aspects of Contracts

DPLE 180

April 19, 2017

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Course Description

This course is designed to introduce and review five standard contract provisions, explore their implications for your services, and propose some key considerations in negotiating more favorable contracts.

Learning Objectives

Participants in this session will:

Identify five typical contract provisions and understand whether they favor or disfavor design professionals

Examine the ways in which contracts impact project liabilities

Explore case law demonstrating the implications of poorly drafted contracts

Use their understanding of contracts to draft or negotiate terms that are critical in avoiding future liabilities

Different Components of a Contract

PURPOSE

PRICE

SCHEDULE

SERVICES

**TERMS &
CONDITIONS**



First Provision

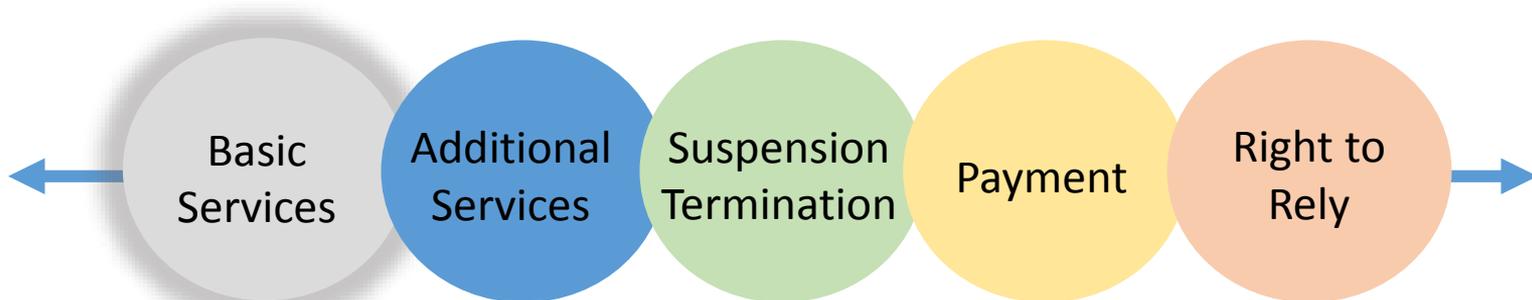
Scope of Basic Services

Definition of Scope of Basic Services

“

A scope of basic services is an agreement between two parties that specifies the obligations of one party to the other.

”



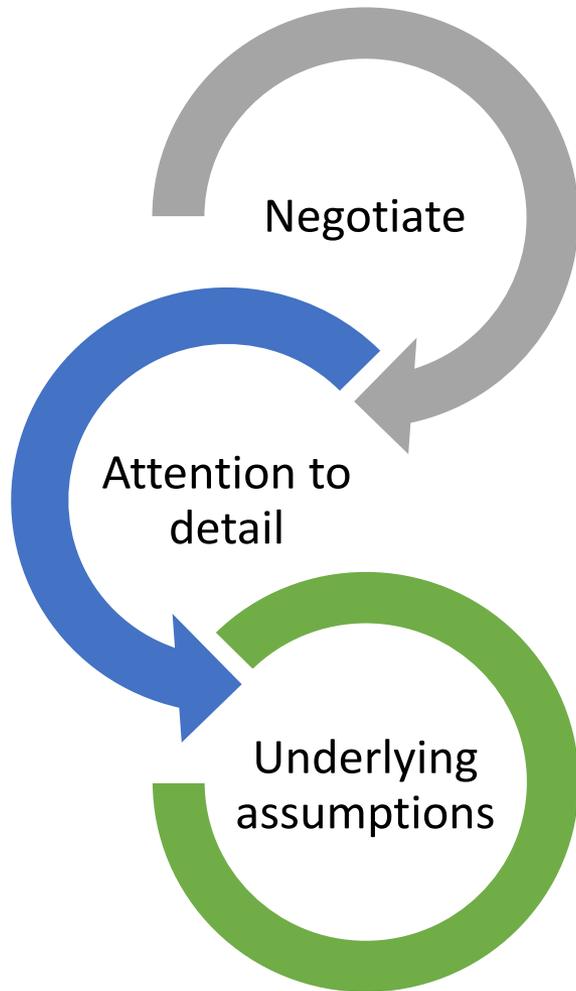
Example

Be wary of language that states:

Design firm will
“provide any and all
design services necessary for the
completion of the project.”



Three Factors to Consider



Specifically tailored to reflect each client's needs

Sufficient specificity

Note underlying assumptions

Content of Scope of Basic Services

- ✓ Services that you will perform for the agreed-to fee
- ✓ Services you can perform for an additional fee
- ✓ Services you will not perform
- ✓ Services that will be performed by a third party

Ossining Union Free School
District v.
Anderson LaRocca Anderson

Engineers held liable in a suit despite a lack of privity of contract with Plaintiff.

“

Recovery may be...where there is actual privity of contract between the parties or a **relationship so close as to approach that of privity.**

”

Black + Vernooy Architects v. Smith

Architects owed a duty to the homeowner. This duty does not extend to third parties who were not intended beneficiaries of the contract.

“

[T]he agreement provided that the **Architects ‘shall neither have control over or charge of, nor be responsible for** the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work...[those obligations] are **solely the Contractor’s rights and responsibilities.**”

”

Sample Scope of Basic Services

AIA

American Institute
of Architects

- Widely used standard form contracts
- Easily modifiable to fit your practice

EJCDC

Engineers Joint Contract
Document Committee

- Updated every 5 years
- Used in many jurisdictions over the past four decades

CASE

Coalition Of American
Structural Engineers

- Updated every 5 to 7 years
- Provides a variety of checklists

E-500 - 2014 §1.01:

Engineer shall provide, or cause to be provided, the services set forth herein and in Exhibit A.

Sample Language: AIA

B503 – 2007 § 7:

The Architect shall have **no responsibility for the components of the Project designed by the Owner's consultant.** Review by the Architect of the consultants' drawings and other instruments of service is **solely for consistency** with the Architect/s design concept for the project.



Second Provision

Additional Services

Additional Services Clause

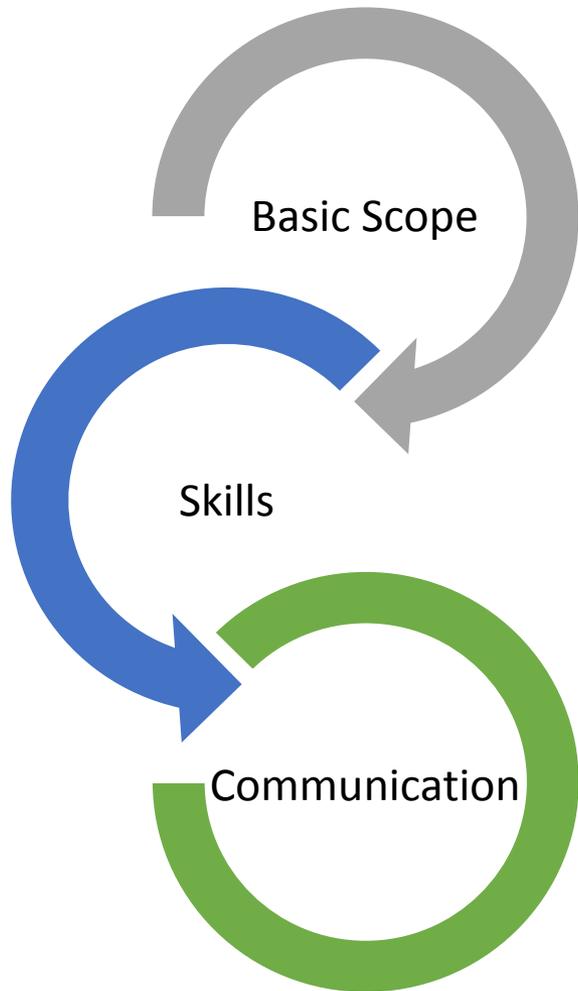
“

A provision that explains services that **may be added** for additional payment, and services that will be **specifically excluded**.

”



Factors to Consider



What services are you already providing?

What additional skills do you have?

Good line of communication with the client?

Components of Additional Services

- ✓ Services not included in the basic services
- ✓ Description of each additional services
- ✓ Obtain client's written authorization

Example

Problem: Excessive Permitting

- Burdensome requirements & more appeals
- Re-formatting & submission fees
- “Unforeseen conditions”

Possible Solution:

Clearly show included transactions, additional for a fee, & excluded

Newman Marchive Partnership, Inc. v. City of Shreveport

- The Louisiana Appeals Court refused to award fees for additional services to the architect because he failed to inform the owner before commencing services.

Patrick Engineering, Inc. v. City of Naperville

- The Illinois Supreme Court refused to grant additional services fees where the engineer failed to follow the procedure outlined in the parties' contract.

Sample Language: AIA

B101-2007 § 4.1:

Additional Services listed below are not included in **Basic Services** but may be required for the Project. The Architect shall provide the listed **Additional Services** only if specifically designated in the table below as the Architect's responsibility, and the owner shall compensate the Architect as provided in Section 11.2.

Sample Language: AIA

AIA B101-2007:

Additional Services	Responsibility (Architect, Owner or Not Provided)	Location of Service Description (Section 4.2 below or in an exhibit attached to this document and identified below)
§ 4.1.6 Building information modeling		
§ 4.1.7 Civil engineering		
§ 4.1.8 Landscape design		
§ 4.1.9 Architectural Interior Design (B252™–2007)		
§ 4.1.10 Value Analysis (B204™–2007)		
§ 4.1.11 Detailed cost estimating		
§ 4.1.12 On-site project representation (B207™–2008)		
§ 4.1.13 Conformed construction documents		
§ 4.1.14 As-designed Record Drawings		
§ 4.1.15 As-constructed Record Drawings		
§ 4.1.16 Post occupancy evaluation		
§ 4.1.17 Facility Support Services (B210™–2007)		
§ 4.1.18 Tenant-related services		
§ 4.1.19 Coordination of Owner’s consultants		
§ 4.1.20 Telecommunications/data design		
§ 4.1.21 Security Evaluation and Planning (B206™–2007)		
§ 4.1.22 Commissioning (B211™–2007)		
§ 4.1.23 Extensive environmentally responsible design		
§ 4.1.24 LEED® Certification (B214™–2007)		
§ 4.1.25 Fast-track design services		
§ 4.1.26 Historic Preservation (B205™–2007)		
§ 4.1.27 Furniture, Furnishings, and Equipment Design (B253™–2007)		
§ 4.1.28 Other:		



Third Provision

Suspension and Termination Clauses

Suspension

“

To stop or delay work in part or entirely at the owner's directive.

”



Reasons for Suspension

Challenges getting appropriate approval

Material breach by client

Financing issues

Nonpayment of fees or dispute with client

Disputes between owner and 3rd parties

Changing project conditions

Unforeseeable circumstances

Termination

“

To stop a contract before it is fully performed or completed.

”

The contract terms or applicable law determine whether or when each party has a right to terminate the contract.



Types of Termination Rights

Non-contractual right to terminate

1. Repudiation
2. Frustration

Contractual right to terminate

1. Termination for convenience
2. Force majeure

Non-Contractual Right

Repudiation

- Other party commits a material breach (examples: refuses to perform, abandons the site, fails to give access to the site)
- Innocent party is excused

Frustration

- Frustrating event makes contract impossible, illegal, or radically different from what the parties agreed to
- Both parties excused

Contractual Right

Termination for Convenience

- Owner's unilateral right to terminate
- Recovery is limited to service performed and closeout costs unless bad faith or abuse of discretion by the owner

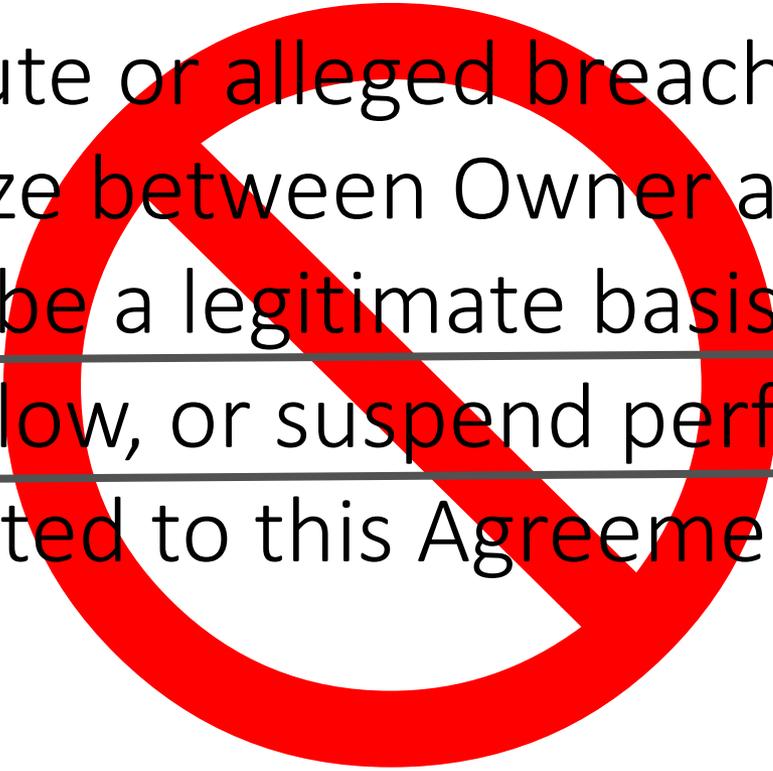
Force Majeure

- Circumstances beyond the control of either party arise (examples: war, riots, fire, hurricane, flood)
- Broader than frustration

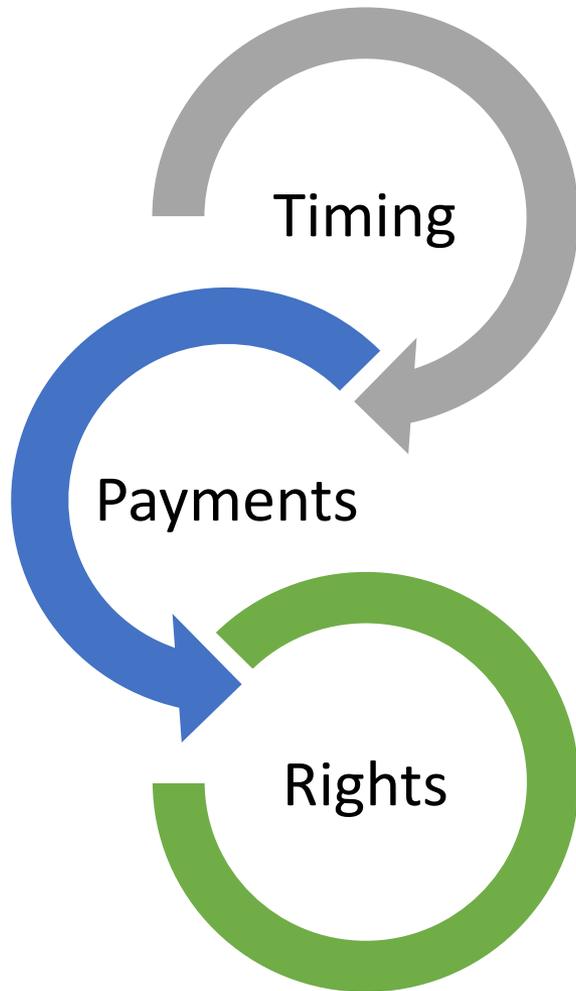
Example

Be wary of language that states:

Any dispute or alleged breach that may materialize between Owner and Architect shall not be a legitimate basis for Architect to stop, slow, or suspend performance of work related to this Agreement in any manner.



Factors to Consider



Advance notice of suspension/termination.
Limit timeframe a project can be suspended
before additional costs are incurred

Payment for (1) work already performed; and
(2) additional costs incurred by the
delay/termination

Right to suspend or terminate

Rights and Obligations

✓ Payment according to contract provisions

✓ Right to terminate

✓ Ownership of designs

✓ No liability

Terminating a Contract

Contractual
Obligation

- Is there a contractual obligation to perform?

Failure to
Perform

- Was there a failure to perform?

Material
Breach

- Does the failure to perform rise to the level of a material breach?

Meridian Engineering Co. v. United States

Engineering firm was not entitled to recover costs for delays because it failed to prove that the project delays were the “sole proximate” result of the government’s inactions.

Swarman Building Co. v. DeGette

Architects awarded \$10,000 because the parties had agreed to an award of specific damages in the event of a termination of project due to the fault of the owner.

Sample Language: AIA

B503-2007 § 11:

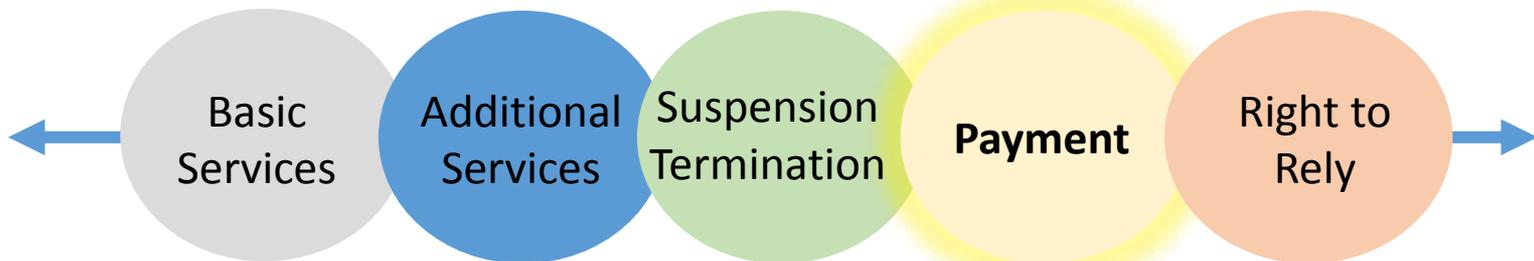
The equitable adjustment to the **Architect's compensation** as required by this Agreement **shall include all reasonable costs incurred by the Architect on account of termination or suspension of the Project**, for preparation of documents for storage, maintaining space and equipment pending resumption, orderly demobilization of staff...rehiring former employees or new employees because of resumption ...and making revisions to comply with Project requirements at the time of resumption.



Fourth Provision

Compensation and Payment Terms

Compensation & Payment Terms



Giving up a Right for Payment



Withholding Payment

Be wary of language that states:

Without limitation of the other terms and conditions herein and to the extent permitted by law, CLIENT may refuse to pay PROFESSIONAL (**in whole or in part and at its sole and exclusive discretion**) for **any** of the following reasons, and the amount withheld shall be determined **by CLIENT** in its sole and exclusive discretion as may be necessary to cure or mitigate **any default or breach** under this Agreement or other non-compliance...

Waddington v. Wick

- The court held that the architect was limited to recover only the price contemplated in the contract, and the price of any additional work would not be included in the recovery.

SmithGroup JJR, PLLC v. Forrest General Hospital

The court held that the architect could not recover fees because the contract was *unclear* as to what “actual construction cost” would be used to calculate the architect’s fees.

E500-2014 § 4.02:

If Owner fails to make any payment due Engineer for services and expenses within 30 days after receipt of Engineer's invoice, then:

- 1. amounts due Engineer will be increased** at the rate of 1.0% per month...; and
- 2. Engineer may**, after giving seven days written notice to Owner, **suspend services under this Agreement**...Owner waives any and all claims against Engineer for any such suspension



Fifth Provision

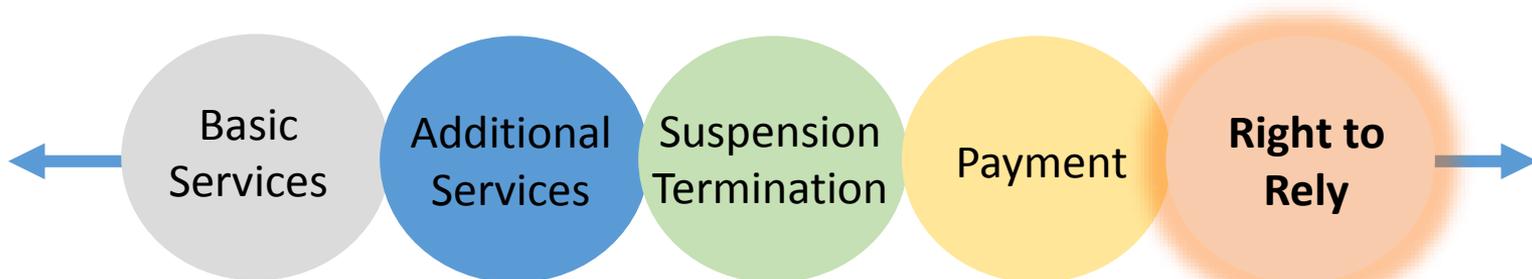
Right to Rely

Right to Rely

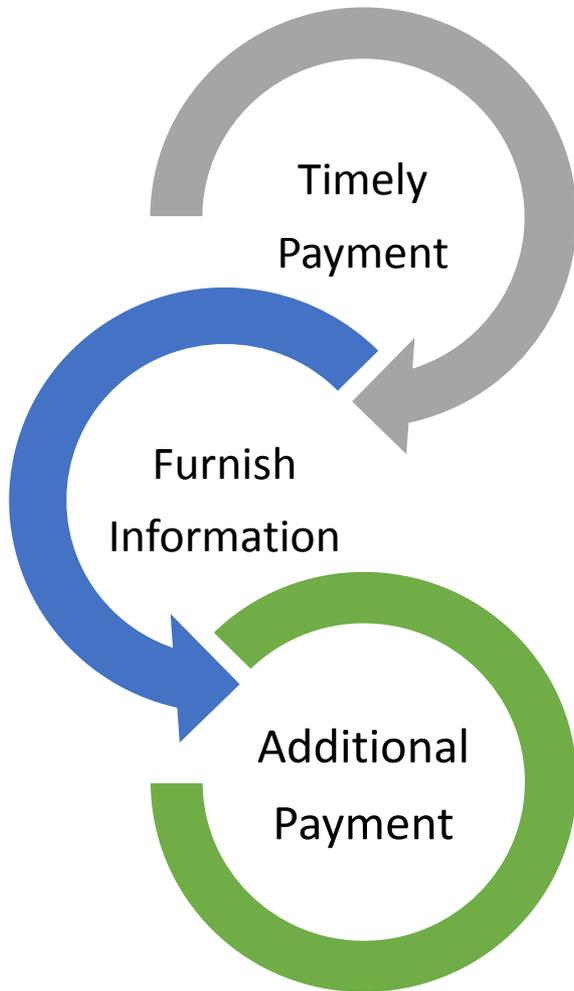
“

Right to rely on drawings,
specifications, and information
furnished by the client...

”



Owner's Responsibility to You



Timely payment for services provided

Right to rely upon the accuracy, completeness and technical sufficiency of information or services furnished by the owner and others through the owner

Payment for additional costs incurred by inaccuracies in the furnished information

Taylor v. DeLosso

The court held that the architect had a right to rely on the information the Owner provided as agreed to by the parties. Owner could not recover absent a showing of professional negligence.

“

all services, information, surveys and reports [Owner is required to furnish] shall be furnished at the Owner's expense and **the Architect shall be entitled to rely upon the accuracy and completeness thereof.**

”

E500-2008 § 2.01:

Owner shall be responsible for, and **Engineer may rely upon, the accuracy and completeness of** all requirements, programs, instructions, reports, data, and other information furnished by Owner to Engineer pursuant to this Agreement.

Sample Language: AIA

B503 - 2007:

The Owner shall indemnify, and hold harmless the Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of the services performed by the other consultants of the Owner.

RECAP

**SCOPE OF
BASIC
SERVICES**

**ADDITIONAL
SERVICES**

**SUSPENSION &
TERMINATION
CLAUSES**

**PAYMENT AND
COMPENSATION
TERMS**

**RIGHT TO
RELY**

Thank you for your time!

QUESTIONS??

**This concludes The American Institute of Architects
Continuing Education Systems Program**

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