

Sample Contract Provisions

These sample contract provisions are a synthesis of contract language compiled from insurance company recommendations, standard agreements, and practical business experience. APDC makes no warranties, express or implied, regarding the applicability of these terms to any specific agreement. Although it is believed that the use of these provisions is good and fair practice, the user should seek the advice of their insurance agent, legal counsel, and business advisors prior to entering into any formal agreement.

Assignments

Assignments should be prohibited without mutual consent and compensation for increased cost caused by the assignment.

Certifications

Any certification of construction quality or performance by the Consultant shall simply constitute a representation that *to the best of the Consultant's knowledge, information & belief*, the work is in accordance with the Contract Documents.

Code Compliance

Consultant shall review laws, codes, and regulations applicable to the Consultant's services. The Consultant shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project.

Note: Do not agree to "comply with all" if possible. It is impossible to comply with "all" requirements because invariably there are conflicts within the laws, codes, and regulations.

Confidentiality:

Consultant agrees to keep confidential and not to disclose to any person or entity any data or information furnished to Consultant by Owner. This contractual commitment is not valid if maintaining confidentiality would violate the law; create the risk of significant harm to the public; or prevent the Consultant from establishing or defending a claim.

Note: Accept this with caution, as information is easily transmitted electronically. File folders for confidential projects should be annotated as "Confidential".

Construction Phase Services

(From EJCDC)

A. It is understood that the Contractor is responsible the construction of the Project and that Consultant shall not at any time supervise, direct, or have control over any contractor's work, nor shall Consultant have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor, for safety precautions and programs incident to a contractor's work progress, nor for any failure of any contractor to comply with laws and regulations applicable to contractor's work.

B. Consultant neither guarantees the performance of any contractor nor assumes responsibility for any contractor's failure to furnish and perform its work in accordance with the contract between Owner and such contractor.

C. Consultant shall not be responsible for the acts or omissions of any contractor, subcontractor, or supplier, or of any contractor's agents or employees or any other persons (except Consultant's own employees) at the Project site or otherwise furnishing or performing any of construction work; or for any decision made on interpretations or clarifications of the construction contract given by Owner without consultation and advice of Consultant.

Document Ownership, Copyrights and Work Products

Short version (EJCDC)

All design documents prepared or furnished by Consultant are instruments of service, and Consultant retains an ownership and property interest (including the copyright and the right of reuse) in such documents, whether or not the Project is completed.

Enhanced Version (multiple sources)

All documents prepared or furnished by Consultant under this agreement, including Drawings and Specifications, are Instruments of Service in respect of the project for the sole use and benefit of the project Owner. All copyrights and work products shall remain the property of Consultant, whether or not the project is completed.

- a) Consultant grants the **Owner** a perpetual and non-transferable license to use the Instruments of Service for their intended purpose, including the right to reproduce them for additional purposes such as construction, modification and upkeep of its facilities and the operation and maintenance of equipment and systems.
- b) Distribution of documents shall be by hard copy, portable electronic storage media, password protected file transport sites, and similar controlled methods of conveyance; placement on the world wide web is specifically prohibited.
- c) The Instruments of Service may be incomplete unless used in conjunction with Consultant's interpretations, decisions, observations, administration and commissioning.

- d) The Instruments of Service are not suitable for any other purpose than originally intended. Client and Owner agree to indemnify the Consultant from and against any claims and liability, including damages, expenses, and attorneys' fees, arising from the unauthorized use or modification of the Instruments of Service for other than their original intended purpose without the Consultant's express written permission.

Note: If for good reason the Owner requires and insists upon ownership of copy rights and the work products, then co-ownership with the Owner may be acceptable. Consultant should always retain copyrights and ownership of work products. Remember: The Consultant probably does not actually own all copyrights to the documents, as many details and specifications are either in the public domain or owned by a third party, such as a manufacturer, who grants their reuse. Also note that the evolution and reuse of work products is the Consultant's stock in trade; giving up work products is giving away the business.

Bottom line:

- (a) Consultant must retain all rights to reuse the constituent elements of all documents and work products. This is essential; without this right the Consultant may soon be out of business.*
- (b) Reserve your right to reuse information*
- (c) Disclaim any warranties that might exist*
- (d) Get indemnification for claims resulting from future use of the documents*

Dispute Resolution

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. Any mediation shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association, effective as of the date of this Agreement.

Electronic Documents (and use of electronic documents for shop drawings)

Electronic deliverables, if transmitted, are for the Owner's use only. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. Because electronic records are subject to unforeseen corruption, only duplicates of the original printed final documents (also known as hard copies) may be relied upon as true copy. Electronic deliverables will be in Consultants-standard format including file conventions and document properties; unless prior arrangements are made in advance.

The contract drawings are road maps to construction but are not shop drawings; shop drawings are the Construction Contractor's contractual demonstration of independent thought and coordination. Electronic CAD versions of drawings furnished to the Construction Contractor shall be limited to architectural floor plans only, for use limited in development of coordination and shop drawings.

If applicable, add:

All uses of electronic deliverables are subject to a license agreement which will be included with the deliverables. A copy of the license agreement is available upon request.

Notes: Owner's and Contractor's sometimes request electronic documents (architectural floor plans, structural, and mechanical drawings), to assist in the preparation of shop drawings. This should be discouraged.

- 1. The Owner is paying the Contractor to **think**-through the construction process and then to prepare shop drawings and submittal documents accordingly. This is a contractual requirement.*
- 2. The A/E drawings are road maps to construction, not shop drawings.*
- 3. The A/E community has seen many occasions (some with financial consequences) where the A/E drawings, provided in good faith, come back later attached to a change order that would not have been created if the contractor had merely executed the work according to their own procedures, methods, means sequences and techniques.*
- 4. Evidence shows that Contractor reliance on A/E drawings limits Contractor coordination and creativity. The Contractor's own thoughtful deliberative coordination is lost.*
- 5. The documents are copyrighted as intellectual property. When the A/E retains control of the electronic documents, problems can be avoided. .*

Recommendation: Provide electronic CAD versions of the architectural floor plans only, for use in developing shop drawings and other coordination drawings.

Indemnity

The Consultant shall indemnify and hold harmless the Owner from and against any claim of, or liability for **negligent acts, errors or omissions** of the Consultant under this agreement. The Consultant shall not be required to indemnify the Owner for a claim of, or liability for, the independent negligence of the Owner. If there is a claim of, or liability for, the joint negligent error or omission of the Consultant and the independent negligence of the Owner, the indemnification and hold harmless obligation shall be **apportioned on a comparative fault basis**. "Consultant" and "Owner", as used within this article, include the employees, agents and other consultants/contractors who are directly responsible, respectively, to each. (State of Alaska)

(The State of Alaska also adds this to limits its own liability, but the consultant is better off without it.): The term "independent negligence" is negligence other than in the Owner's selection, administration, monitoring, or controlling of the Consultant and in approving or accepting the Consultant's work.

Note: Do NOT accept the word “defend” in the list of consultant responsibilities, least we be required to tender a defense for alleged claims that are not due to our sole negligence. If we are at fault, the Owner may recover his reasonable costs for defense at the time of final settlement.

Standard of Care

The standard of care for all professional services performed or furnished by under this Agreement will be the *care & skill ordinarily used by members of Consultant’s profession practicing under similar circumstances at the same time and in the same locality*. Consultant makes no warranties, express or implied, under this Agreement.

Note: the agreement should address the reliability Owner-supplied information and Consultant’s access to the site if field verification is required.

Termination of Contract

Owner may terminate this Agreement with seven days prior written notice to Consultant for convenience or cause. Consultant may terminate this Agreement for cause with seven days prior written notice to Owner. Failure of Owner to make payments when due shall be cause for suspension of services or, ultimately, termination, unless and until Consultant has been paid in full all amounts due for services, expenses and other related charges.

Jurisdiction; Choice of Law.

Any civil action rising from this Contract shall be brought in the Superior Court for the Third Judicial District of the State of Alaska at Anchorage. The law of the State of Alaska shall govern the rights and obligations of the parties under this Contract.

Modifications

The parties may mutually agree to modify the terms of the Agreement. Modifications shall be incorporated into the Agreement by written amendments.

Time Constraints (if any)

The Consultant’s services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Project.

Waiver of Consequential Damages

The Consultant and the Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement.

Warranties

Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services.