



PART III

Sample Contract

Because contracts are important legal documents, you should consult with your legal counsel before executing any agreement. Just as each client, project and scope of services is unique, each contract should be unique as well. But every firm should have a sample or model agreement that should be used as a starting point for negotiations, as a tool to educate your client as to the services you will provide and what is legally required of design professionals, and as a way to manage and document the expectations of each party.

There are various sources for standard or model agreements, including those published by the professional societies. On the following pages is one example of what a professional service agreement may look like for a simple project. This example, or those published by other organizations, may serve as a model and guide in developing a professional service agreement appropriate for your firm.

Sample contract developed in collaboration with David Ericksen, Esq.

David Ericksen joined Severson & Werson in 1991, and has been a member since 1997. He has been the firm's lead construction trial counsel since 1996. David Ericksen leads the firm's construction/environmental litigation and transactional practice, as well as focusing on liability and insurance issues. He also focuses on contractual, risk management and litigation issues affecting the design and construction professional community.

Agreement is made effective _____, 20____

between

the “Client”

Name: _____

Address: _____

and the “Design Professional”

Name: _____

Address: _____

Covering Design Professional’s services relative to as set forth below with respect to the following project:

Professional Service Terms and Conditions

Scope of Services: Design Professional’s Services shall be limited to those expressly set forth in Exhibit A. Design Professional shall have no other obligations or responsibilities for the Project except as agreed to in writing. All of Design Professional’s actions and communications relative to the Services shall be subject to this Agreement.

Additional Services: Additional Services will be subject to review and authorization by both Parties prior to start of additional services. Where Design Professional believes additional services are appropriate, it shall notify Client. Client shall respond within three (3) business days to such notification. If Client does not respond within such time period, at its option and based on its professional opinion, Design Professional may proceed with such services on a time-and-material basis to be paid by Client or decline to proceed with such services based on a lack of authorization.

Standard of Care: Design Professional’s services shall be provided consistent with and limited to the standard of care applicable to such services, which is that Design Professional shall provide its services consistent with the professional skill and care ordinarily provided by Design Professional practicing in the same or similar locality under the same or similar circumstances. Such standard of care is not a warranty or guarantee, and Design Professional shall have no such obligation.

Warranties and Guarantees: Design Professional warrants that it is properly licensed to perform the services under this Agreement and that it shall perform the services in accordance with the applicable professional standard of care. No other expressed or implied warranties or guarantees are created related to this Agreement or the professional services to be provided.

Invoicing and Payments: Design Professional shall issue invoices at _____ for services provided and reimbursable costs incurred. Client’s payment shall be due within thirty (30) days of the invoice date and shall incur interest at the rate of ____% per month thereafter. Client shall promptly review Design Professional’s invoice upon receipt and shall notify Design Professional of any dispute of any portion of such invoice within _____ days of receipt.

Any dispute identified thereafter shall not be a basis for withholding any payment except as agreed by the Parties or as determined by audit or other investigation at the end of the Project. In the event that Client disputes any portion of an invoice, Client shall pay all undisputed portions of such invoice as required by this Agreement. Client shall not withhold any payment or portion thereof as an offset to any current or prospective claim. Client may withhold payment as to those specific services that Client claims were improperly performed.

If Client fails to make payments to Design Professional as set forth above, such failure shall be cause for immediate suspension or termination or, at the Design Professional’s option, cause for suspension of performance of services under this Agreement. Before resuming services, the Design Professional shall be paid all sums due prior to suspension and any expenses incurred in the resumption of Design Professional’s services. The Design Professional’s fees for the remaining services and the time schedules shall be equitably adjusted.

Client-supplied Information: Design Professional is entitled to rely on information supplied by the Client and other consultants retained directly by the Client. Design Professional has no obligation to check the accuracy or completeness of Client-supplied information but will bring to the Client's attention any discovered discrepancies.

Allocation of Responsibilities: Design Professional shall be responsible for acting as an independent contractor responsible for its performance, as well as for those it has retained. Design Professional shall not be responsible for the acts or omissions of the Client, Owner, Contractors, other Design Professionals and their respective agents or employees, or any other persons or entities performing work on the Project who are not under the direct control or authority of Design Professional.

Construction and Site: Design Professional shall have no responsibility for construction means, methods, sequences, scheduling or job site safety, as all of the foregoing shall be the sole responsibility of Client and/or Contractor.

Intended Uses and Beneficiaries: Design Professional's services are intended for the Client's sole use and benefit and solely for the Client's use on the Project. Except as agreed to in writing, Design Professional's services and work product shall not be used or relied on by any other person or entity, or for any purpose following substantial completion of the Project.

Permits and Approvals: Design Professional shall obtain all professional licenses, permits and approvals required for the Design Professional to legally provide the services required under this Agreement and shall assist the Owner in securing those licenses, permits and approvals customarily required for the completion of the project.

Assignments: This Agreement, as well as the obligations, services and deliverables hereunder, may not be assigned for any purpose except with the written consent of both Parties.

Instruments of Service: Instruments of Service are drawings, specifications, models, etc., including those in electronic form, prepared by the Design Professional with respect to this Project. Upon execution of this Agreement, Design Professional grants to Client a nonexclusive license to use Design Professional's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that Client substantially performs its obligations, including prompt payment of all sums when due, under this Agreement.

Client assumes full responsibility for any unauthorized use of Design Professional's Instruments of Service and shall indemnify and defend the Design Professional for any claims that may arise from such unauthorized use.

Suspension/Termination: If the Project is suspended or terminated for any reason outside the exclusive control of Design Professional, Design Professional shall have no liability to Client or any other Party for any associated delay or damage caused to Client or others because of such suspension of services, and Client shall indemnify Design Professional for any claims associated with such suspension.

Reductions in Services: Design Professional's commitments, as set forth in this Agreement, are based on the expectation that all of the services described in this Agreement will be provided. In the event Client later elects to reduce Design Professional's scope of services, Client agrees to indemnify Design Professional from any and all claims, damages, losses or costs in any way associated with or arising out of such reduction in services.

Maintenance and Operation: All construction projects require inspection and maintenance following completion. Operation, inspection and maintenance are the sole responsibility of Client, and Design Professional shall have no responsibility for any failures by the Client or others to properly operate, inspect or maintain the Project.

Consequential Damages: Client and Design Professional expressly waive any and all claims for consequential damages for the Project including, but not limited to, loss of use, profits, business, reputation, financing, rental expenses, loss of income and overhead.

Sources of Recovery: The Parties waive any claim otherwise covered or paid for by insurance and expressly agree that any liability arising out of this Project shall be limited to the Parties and shall not be the basis of personal liability as to either Party's owners, officers, directors or employees.

Dispute Resolution: In the event of any dispute between the Parties related to the Project, the Parties agree to first negotiate in good faith toward a resolution with participation by representatives of each Party holding sufficient authority to resolve the dispute. If such dispute cannot be resolved within fifteen (15) business days, before any action or litigation is initiated other than as required to secure lien rights, the dispute shall be submitted to mediation using a mediator mutually selected by the Parties. Such mediation shall be completed within forty-five (45) days of the either Party's written demand, with each Party to bear its share of the mediation fees and its own respective costs.

Initiation of Claims: Any claim in litigation between these Parties must be filed not later than the earlier of the expiration of the applicable statute of limitation or four (4) years from either substantial completion or Design Professional's last services on the Project.

Indemnity: Client and Design Professional, to the extent permitted by applicable law, shall each indemnify the other with respect to any demand, claim, liability, costs, expenses, fines or penalties to the extent caused by such Party's negligent act, error or omission in any way related to the Project or this Agreement. In the event of any claim, allegation or demand by any third party involving the negligent performance of the scope of services or responsibilities of either Party, such Party shall promptly assume responsibility for the investigation, defense and response to such issues.

Final Integrated Agreement: Each party represents that it has full authority to enter this Agreement and acknowledges that this Agreement represents the entire and integrated agreement between the parties and supersedes prior negotiations, representations or agreements, either written or oral. This Agreement may be amended or modified only by mutual written agreement by Client and Design Professional.

Executed

Client

By: _____

Title: _____

Design Professional

By: _____

Title: _____

Exhibit A

Scope of Services

Schematic Design Phase

Design Professional shall review Client's program and other information, evaluating feasibility and options for design and construction, and shall prepare for Client's evaluation and approval a preliminary design illustrating the scale and relationship of various project components.

Design Development Phase

Based on Client's approval or adjustments to the schematic design, Design Professional shall further develop the design to incorporate appropriate levels of materials, systems, structural elements and other requirements as may be appropriate to further fix and describe the Project.

Construction Documents and Procurement Phase

Based on Client's approval or adjustments to the design development documents, Design Professional shall further develop the design to establish in sufficient detail the materials, systems, structural elements and other requirements that are appropriate and needed to construct the Project. Client acknowledges that the Contractor will provide additional information such as shop drawings, samples and other similar submittals that will be required to construct the Project.

Design Professional shall assist the Client with and prepare necessary documents for the evaluation of construction procurement options and assist the Client with the evaluation and selection of construction services.

Construction Phase Contract Administration

Client recognizes that the Contractor and Subcontractors will be in control of the Project site and exclusively responsible for construction means and methods, job-site safety, and compliance with the Project Plans and Specifications and all other Contract Documents. Accordingly, Client shall require all contractors and subcontractors to defend and indemnify Client and Design Professional from any and all claims, losses, suits, damages and liabilities, including attorneys' fees and costs, arising in any way from such contractors' or subcontractors' services or work product, except to the extent caused by Design Professional's negligence. In support of this obligation, Client shall require all contractors and subcontractors to include Client and Design Professional as additional insureds under its insurance policies applicable to the Project. Design Professional shall not be responsible for damages, losses, costs or claims caused by contractors or subcontractors, except only to the extent caused by Design Professional's negligence.

Design Professional's Plans and Specifications are to be read and applied together. In the event of varying standards or requirements, the more stringent requirement shall apply to Contractor's obligations. Contractor and Subcontractors shall be required to review the Plans and Specifications together and in such time as to adequately plan for and prepare for its performance, including reasonable time necessary to submit and receive a response to any questions seeking clarification or further direction. Contractor shall promptly notify Design Professional of any discrepancies, conflicts or inconsistencies in the Plans and Specifications. Not all information shall be set forth in the Plans and Specifications. Accordingly, Contractor shall proceed with the work where appropriate using the Plans and Specifications as a guide.

Design Professional shall only be responsible for those Construction Phase Services expressly agreed to below. Client (or others) shall be responsible for all other construction phase issues. If the Client authorizes deviations, recorded or unrecorded, from the documents prepared by the Design Professional, the Client shall indemnify the Design Professional from and against all claims, losses, damages and expenses.

Schedule: As requested and agreed to in writing, Design Professional shall advise Client with respect to Project schedules, including reviews of schedules prepared by others. Such review shall not make Design Professional responsible for the timely performance of other parties or such other parties' scheduling, schedule compliance or delays.

Budget/Cost: Design Professional shall advise Client as requested with respect to probable construction costs and budgets based on Design Professional's experience and qualifications. Such services are only Design Professional's professional opinion and judgment and shall not be construed or relied upon as a guarantee or warranty, as Design Professional has no control over and is not responsible for variations in the cost of labor, materials or equipment; the means, methods or sequencing of construction; or market conditions.

Requests for Information: With reasonable promptness consistent with the stage of the Project, Design Professional shall respond to Contractor's requests for clarification or interpretation. Contractor's requests for clarification or interpretation shall include at a minimum where the Contractor looked for the information and what the Contractor believes is an appropriate response. If the Contractor's requests for information, clarification or interpretation are, in the Design Professional's professional opinion, for information readily apparent from reasonable observation of field conditions or a review of the Contract Documents, or are reasonably inferable therefrom, or are untimely, Design Professional may so advise Contractor and Client and shall be entitled to compensation for Design Professional's time spent responding to such requests.

Submittals: Design Professional shall review and take appropriate action on required Contractor submittals such as shop drawings, product data, equipment specifications, samples and other data, but only for the limited purpose of checking for conformance with the design concept and the information shown in the Construction Documents. Design Professional shall not be responsible for the accuracy or completeness of details, such as quantities, dimensions, weights, fabrication, means, methods, sequencing, coordination with other trades, or safety, all of which are the sole responsibility of the contractor. Review of a specific item shall not indicate that the Design Professional has reviewed the entire assembly or its components. Contractor shall remain solely responsible for compliance with the Contract Documents except as expressly permitted in writing.

Substitutions/Value Analysis: Upon the written request or direction of Client, Design Professional shall evaluate and advise Client with respect to proposed or requested changes in materials, products or equipment. Design Professional shall be entitled to rely on the accuracy and completeness of the information provided in conjunction with the requested substitution. Design Professional shall not be responsible for errors, omissions or inconsistencies in information by others or in any way resulting from incorporating such substitution into the Project.

Observation: Design Professional shall visit the project site at intervals as agreed to in writing to observe the progress and quality of the Project and work by Contractors. Such visits and observations are not intended to be an exhaustive check or inspection of the Contractor's performance, but only to become generally familiar with the progress of the work and whether in general if the Project is proceeding in accordance with the Contract Documents. Design Professional shall advise Client with respect to deviations and defects actually identified in the course of such observations. Contractor shall be solely responsible for compliance with the Contract Documents, manufacturers' instructions, and directions of building officials and Client representatives.

Change Orders: Upon Client's request, Design Professional shall review proposed change orders from Contractor or others, but solely for purposes of confirmation of consistency with the general intent of the Contract Documents prepared by Design Professional. Design Professional shall not be required to review such proposed change orders for causation, entitlement, cost or schedule, and shall have no responsibility therefore except as expressly stated by Design Professional in writing.

Contractor Pay Applications: Design Professional shall assist the Client in processing the Contractor's applications for payment. Based on its on-site observations and other relevant information received by Design Professional, Design Professional shall advise Client to the extent of Design Professional's information, knowledge and belief, the amounts due to Contractor and that the work has progressed to the point indicated in the payment application based on the schedule of values submitted by the Contractor.

Certifications: Upon completion of the Project or such other time as is agreed to in writing, Design Professional shall provide a written report based on its limited site observations and project role whether based on actual knowledge and professional opinion, that the project has been constructed in general or substantial compliance with the approved plans and specifications. Design Professional may note limitations and may rely on information received from others. Design Professional shall not be required to sign any documents that would result in the Design Professional's certifying, guaranteeing or warranting the existence of conditions which Design Professional has not or cannot ascertain.

Record Drawings: Within a reasonable time after substantial completion of the Project, Design Professional shall compile and provide to Client a final record of set of drawings for the project based on its own information as well as information received from other consultants, contractors, manufacturers, building officials and Client. Design Professional shall only be responsible for its own information and shall be entitled to rely on the accuracy and completeness of information received by others without assuming responsibility for such information from others. To the extent based on third-party information, Design Professional shall not be responsible for the accuracy and completeness except to the extent of its actual knowledge.



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