



Owner Favorable Contracts for Design and Construction, Part I, Contracts with an Architect

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Owner-Favorable Contracts For Design Services And Construction – Part I

An Owner contemplating the construction of a new facility may be surprised to learn that the Owner is often the least protected of all the parties in many of the so-called standard contracts (such as those written by the American Institute of Architects) for architectural services and construction. A strong contract for the Owner will clarify for all parties exactly what the rights, obligations, and expectations are for the Owner, Architect, and Contractor. A strong contract will serve as a useful tool to prevent disputes later, and as a method of resolving those disputes when they arise. Although Owners are often inclined to begin a business relationship on a friendly basis by avoiding confrontation, a robust negotiation of contract terms at the outset, led by an expert consultant or an attorney, will yield many benefits in keeping the project on track. A good contract need not be about unfairly shifting risk to the other party, but should be about spelling out all the details to avoid future misunderstandings and conflicts. Part I of this article takes a look at contracting with architects.

After developing a detailed facility program, the Owner will usually be ready to contract with an architect (or engineer) for the design of the facility. The Architect will want to limit its liability for errors and omissions, to avoid being tied to strict definitions of performance and time, and to have an unfettered right to payment. Most complaints from Owners about their contracts with Architects involve misunderstandings about deliverables, the right of the Architect to fees for additional services, use of the drawings, and Project cost overruns.

Following are some of the major issues which should be addressed in forming a contract with an Architect along with suggested approaches:

Responsibilities of the Parties

- Many contracts will permit the Architect to rely completely on information provided by the Owner (or Owner's consultants). This can lead to errors in the work. To avoid misunderstanding, require Architect to notify Owner in writing if any such information is unsuitable, improper or inaccurate, and, most importantly, prevent Architect from proceeding unless Owner confirms in writing how it wishes Architect to proceed.
- Many printed form contracts prevent the Owner from changing its Project budget, and require the Owner to name a representative with complete decision-making authority. These requirements are often incompatible with the structure of governance for many owners. Specify limitations on the authority of individuals, including the specific dollar amount authority given to specific employees and officers, and including which decisions will have to be referred to an institution or organization's Board.
- The AIA contracts give the Architect certain rights with respect to Owner's legal, insurance, and accounting needs and services. Owner will normally not want to agree with a third party (the Architect in this case) about such services.

The Architect

The “standard of care” is the legal standard to which the Architect will be held if the Architect is accused of negligence in the performance of its duties. The AIA contract will include the most basic standard.

- If you have hired the Architect because of its special skills or the special nature of the project, consider requiring a higher standard of care. Also make sure that the contract requires Architect’s services and designs to be “in accordance with all applicable laws, codes, and regulations.”
- Include detailed lists of requirements for each phase of the Architect’s services (schematic design, design development, construction documents, bidding and negotiation, and construction administration). For example, specify the scale of all of the drawings, at what point outline specs are developed, requirements for sections and elevations, what types of engineering services are included, and presentations before community groups.
- For any significant project, always require errors and omissions (professional malpractice) insurance from the Architect.

Drawings and Specifications

Many Owners are surprised to learn that they do not own the drawings. When an architect is terminated, the Owner may not have the right to use the drawings to finish the Project until the Owner complies with the Architect’s payment and other demands under the contract, even when the right to some payments is in dispute. Under the AIA contract, terminating the contract can actually terminate the Owner’s right to use the drawings.

- The Owner should have the right to use the drawings and specs unless it is in default under the agreement in the payment of an *undisputed* amount. It is essential that the Owner have the right to hire a substitute architect (without an adjudicated default by the Architect) with the substitute architect having the right to use the drawings and specs to finish the Project.
- It is perfectly legitimate to negotiate a provision which gives ownership of the drawings and specs to the Owner.

Changes in Services

An Architect’s fees can significantly increase through claims from the Architect that it is due additional compensation under the Contract or by custom. Avoid later confusion by prohibiting increases in compensation for:

- “official interpretations” such as those by building officials. Require the Architect to meet all codes and regulations, including interpretations enforced by field inspectors.

- a change in procurement method, such as from a hard bid to a negotiated price with the contractor.
- failure of performance by Contractor, unless additional services are required by Architect to re-bid or re-negotiate the contract, or the original time frame is substantially exceeded.
- any work performed by the Architect for which a signed, written detailed approval is not obtained in advance from the Owner.

Payments

Owners are often dismayed to learn that the Architect is due a payment even when such payment puts the Owner's position in jeopardy. Depending on the circumstance, the Owner should be able to withhold a payment completely, or a portion of a payment needed to cover the problem. Contract with the Architect to give Owner the right to withhold payment when:

- the Architect is in breach or default under the contract.
- any part of such payment is attributable to services which were not performed in accordance with the contract.
- the Architect has failed to make payments promptly to its consultants for services for which the Owner has already paid the Architect.
- the Owner has paid the Architect for more of its services than have actually been completed. For example, when the Owner has paid the Architect 75% of its fee allocated for preparing the drawings, but the drawings are only 50% complete.

Project Budgeting

The best course of action is to require a real cost estimate (rather than mere opinions) from the Architect if a third-party consultant has not been engaged specifically for that purpose. Consider requiring the Architect to employ and pay a recognized and specialized company, acceptable to the Owner, to prepare detailed construction cost estimates of the construction project, in a form acceptable to the Owner, following the Construction Specifications Institute (CSI) format. The estimates are submitted with plans and specifications when submitted for review at the completion of the Design Development phase and at various stages of completion of the Construction Documents. The Owner has little recourse with the Architect for contractor prices which exceed the budget unless interim cost estimates are obtained and the contract requires corrective action from the Architect.

- If a construction cost estimate at the end of design development or construction documents indicate a cost which exceeds the budget, then require the Architect to revise the Project scope or quality to lower the cost below Owner's budget without an increase in fee.

Conclusion

By following the simple contracting guidelines above, and by seeking the advice of an expert consultant or attorney to negotiate and draft actual contract terms, an Owner can do much to ensure a smoother relationship with its Architect, and to avoid unnecessary expense and delay. In Part II of this article, we will look at how the Owner can protect itself during the construction process with a thoughtful choice of contract terms and general conditions for use with a contractor or construction manager.

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