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THE BRIGHT GRAY LINE

Yes, Never, and Maybe Contract Clauses
for Design Professionals
(and how to find the difference)



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Severson & Werson
June 14, 2011

Agenda

- Analyzing the Contract
- The Scope of Work as a “Work Around”
- The IROPE Model of Contract Evaluation & Management
- Application of the IROPE Model to the Greatest Challenges

The Three Rs of Design Agreements

- Relationships
- Rewards
- Risks

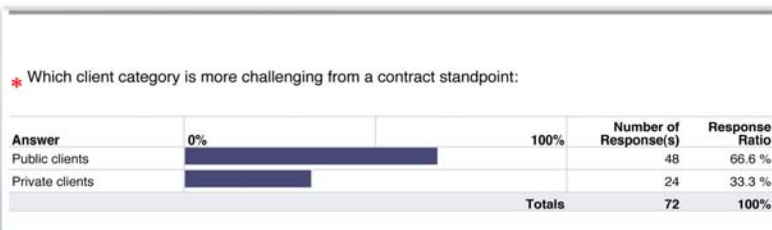


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Common Contract Structure

Most design professional Agreements are organized by:

- Chronology
- Compartments

Both formats typically leave a miscellaneous “grab bag” at the end.

To correlate *all* the terms, functionality may be the best organization for analysis.

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Dominant Functions in Contract Clauses

- Relationships
- Scope of Responsibility
- Performance Standards
- Procedures
- Financial Rights & Responsibilities
- Liability

Sixteen Clauses That Matter

Relationship/Project

- Scope of Work
- Additional Services
- Parties
- Assignability

Economic/Liability

- Limitation of Liability
- Indemnity
- Insurance
- Dispute Resolution
- Payment Terms

Sixteen Clauses That Matter

Procedural

- Electronic Communications
- Ownership of Documents
- Termination

Mixed/Blended

- Dispute Resolution
- Owner Rights/Responsibilities
- Warranties/Guarantee
- Third-Party Rights
- Other Agreements

Focal Points for Evaluation

- **Subject Matter**

- The Project
- The Client
- The Team

- **Risk Allocation**

- Between Contracting Parties
- Third-Party Responsibilities



The Go-No Go Evaluation

Each Project, Client, and Team should be evaluated prior to committing to a project.

The key evaluation is whether each can and should succeed. *If not, stop!*

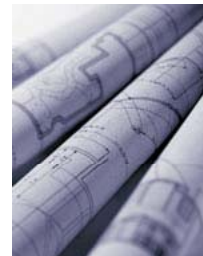
Likely or critical failure points should be identified with a corresponding and proactive plan for identification and response. *If not, stop!*

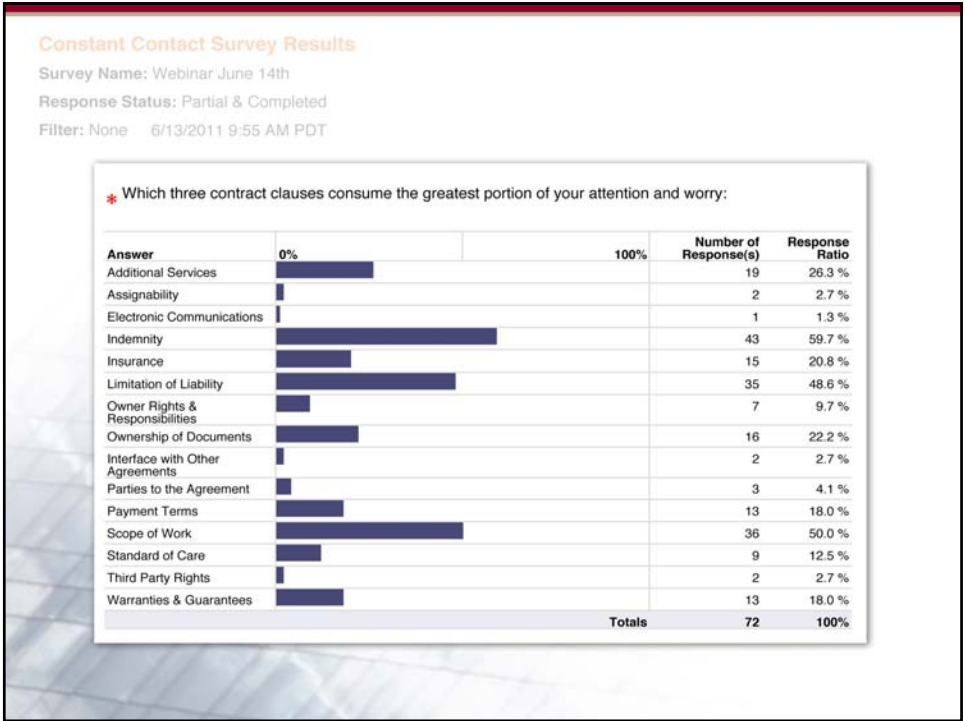
Principles of Contractual Risk Evaluation

The party with the ability to control a risk, should bear that risk.

Challenges:

- Open-ended obligations
- Third-party reliance
- Outside factors
- Risk vs. Reward





A Contract Evaluation Matrix

Clause	Open-Ended	Third-Party Issues	External Factors	Risk Exceeds Reward	Other	Response
Scope of Work						
Other						

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* Which category represents the greatest portion of your contracts:

Answer	0%	100%	Number of Response(s)	Response Ratio
Industry forms (i.e. AIA, ACEC, EJCDC, AGC)			17	23.6 %
Your own standard agreement			42	58.3 %
Client generated agreement			14	19.4 %
Totals			72	100%

The Scope of Work as a "Work Around"

Elements for a Contract/Risk Management Scope of Work:

- Intended Beneficiaries & Uses
- Standard of Care
- Assumptions & Additional Services
- Closure

The Scope of Work as a "Work Around"

Consultant'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, Consultant'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.

The Scope of Work as a "Work Around"

*Consultant's services shall be provided consistent with **and limited to** the standard of care applicable to such services, which is that Consultant shall provide its services consistent with the professional skill and care ordinarily provided by consultants practicing in the same or similar locality under the same or similar circumstances.*

The Scope of Work as a "Work Around"

Consultant's services shall be limited to those expressly set forth above, and Consultant shall have no other obligations or responsibilities for the Project except as agreed to in writing or as provided in this Agreement.

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* Are the majority of your project to be:

Answer	0%	100%	Number of Response(s)	Response Ratio
Held and used by the developer/client			63	87.5 %
Sold/transferred to a third party			9	12.5 %
Totals			72	100%

IROPE

- Issue
- Risks
- Options
- Plan
- Execute



IROPE Issue

- Client & Project Selection
- Sixteen Contract Clauses (and others)
- Four-plus Elements of Evaluation
 - Open-ended obligations
 - Third-party reliance
 - Outside factors
 - Risk vs. Reward

IROPE Risks

- **Identify the Risks:**

- Internal
- External
 - Client
 - Contractors
 - “Project”
 - Others



- **Weigh the Risks for:**

- Probability
- Severity

IROPE Options

- List options applicable to risks.
- Coordinate and combine where possible.



IROPE Plan

- Develop a strategic and proactive plan from the options.
- Focus first and foremost on risks with the greatest combined probability and severity.
- Identify the specific steps, tools, and procedures to implement the plan.
- Monitor the issues and risks over time on a regular schedule.

IROPE Execute

Although it seems so simple, a partially completed or ignored project delivery plan is the greatest risk of all.

Adjust the plan as necessary as the project proceeds.

An IROPE Example

Consultant shall defend, indemnify, and hold harmless Client (including its agents and representatives) from any and all claims which arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of Consultant or any person or entity for whom Consultant is responsible.

An IROPE Example *Issues*

- Includes duty to defend.
- Not proportionate.
- Obligation not limited to client.
- Responsibility extends beyond firm.



An IROPE Example *RISKS*

- Duty to defend is not covered by insurance.
- Duty to unidentified parties.
- Duty to defend may begin upon allegation of negligence under statute or common law, regardless of actual negligence.
- “Hold harmless” may extend even beyond indemnity and defense.
- May be financially and legally responsible for others who do not or cannot respond effectively or adequately.

An IROPE Example *Options*

Improve language to:

- Limit to indemnity alone.
- Exclude third parties from obligation and responsibility.
- Make proportionate.
- Require causation.



An IROPE Example *Options*

- Modify by broad standard of care provision which applies to and limits any and all obligations under the Agreement or with respect to the project.
- Limit the exposure by tying the obligation to issues, as opposed to parties.
- Seek to establish anticipatory or contemporaneous joint defense arrangements.
- Seek to limit responsibility for third parties by provisions limiting joint and several liabilities with others.
- Require co-extensive indemnity and defense obligations from others.

An IROPE Example *PLAN*

- Coordinate all indemnity obligations in agreements to be equal to or greater than these.
- Seek indemnity protections from third parties through contracts or general conditions.
- Clearly define and document divisions of responsibilities and inputs with third parties.
- Respond promptly and proactively in the event of any claim or allegation.

An IROPE Example *Execute*

- Consistent documentation.
- Monitor insurance renewals/status.
- Respond proactively and professionally.



Questions & Answers Thank You!

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