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SEVEN KEY PROVISIONS OF PRIME DESIGN AGREEMENTS

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Prime design agreements can be long, detailed, and complicated, often exceeding one hundred pages. Each provision is important, with potential ramifications. However, whether the Agreement is one hundred pages or two, experience shows that seven provisions can and do have the greatest impact. Those provisions and their key considerations are as follows.

1. Scope of Work

Without a question, the scope of work is **the** most important section of any Service Agreement because it defines the consultants' commitment and responsibility to the client. Accordingly, these provisions should be as detailed and exhaustive as possible. The benefits of doing so are numerous: (a) they demonstrate the value of the services received to the client; (b) they help to avoid dangerous scope creep during the course of the project; and (c) they set the stage for an easier discussion of additional services when the need arises.

The scope of work should also appropriately limit itself to the services expressly identified. Again, this helps preserve the opportunity for additional services and helps avoid erroneous client expectations as to a more expansive scope of "implied" services.

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** *Severson & Werson has provided legal services throughout California and the country for more than fifty years. The firm provides counseling and litigation support to all members of the construction process, including design professionals, construction managers, environmental professionals, owners, contractors, and insurance carriers.*

2. Intended Beneficiaries

The second most important focus of the Agreement should be the identification of the intended beneficiaries of the services. Generally, those persons identified as intended beneficiaries are the most likely to bring a claim against the professional. By expressly identifying those intended beneficiaries and excluding all others, the professional can go a long way toward limiting its potential liability to unidentified third parties. Such a provision might provide:

“Services are intended for the sole benefit of Client and _____ and are not intended to create any rights or benefits for any other parties.”

Of course, to be enforceable, such a provision must be consistent with reality. Accordingly, project documents and conduct must conform to this provision.

3. Standard of Care

Although it should be defined by operation of law, it is frequently a good idea to expressly define the standard of care which will govern the delivery of services. Such statements are useful to avoid any argument that by virtue of marketing or proposal materials which have touted the professional’s services in laudatory terms such as “highest”, “specialized”, etc., the professional has assumed a higher standard of care for the project or guaranteed a particular result. Such a provision might provide:

“Architect’s services shall conform to the recognized professional standards of care for similarly situated architects practicing under similar conditions in the same locale.”

4. Indemnity

Often the most contentious of provisions in any Service Agreement, indemnity provisions often represent the greatest financial threat to the professional. This is particularly true when the proposed language would make the professional responsible for the actions of others, regardless of the professional’s comparative responsibility. Accordingly, provisions which create potential financial liability for the actions of others should be avoided. In order to do so, it is best to limit the obligation “to the extent caused by the negligence” of the professional.

Equally important, wherever possible, the professional should seek to obtain appropriate indemnity obligations to its benefit from owners, contractors, subconsultants, and others.

5. Ownership of Documents

With the growing use of electronic technology, the ownership of project documents has become an increasing concern and point of contention in contract negotiations. By wholly transferring ownership of the project records to the client, the professional may undermine its ability to perform work on subsequent projects and may create genuine liability risks outside its control. For example, absent appropriate restrictions, a grant of ownership to the client may (a) allow the client to transfer the work product to others for use on other projects; (b) expose the professional to claims on those other projects for which they have received no compensation; and/or (c) preclude the professional from using similar details or portions of the work product on other projects.

Accordingly, wherever possible, the professional should retain ownership of documents and convey only copies of the documents to the client with a restricted license to use those documents **solely** for the project in question. The professional's written consent should be required for any transfer of that license. Electronic copies should be provided as a convenience only, with hard copies representing the project deliverable.

Where such an approach is not feasible, the professional should grant only a limited right of use restricted to the completion of construction of the project covered by the Agreement.

6. Compliance with Laws

Claims related to Code compliance can and do create situations where even minor deviations from Code requirements may establish liability, regardless of the applicable standard of care. Although it may not be entirely effective, it may be helpful to redefine the obligation in this regard by providing:

“Consistent with its professional standard of care, Professional’s work product shall comply with applicable laws and codes and official interpretations thereof.”

7. **Warranties/Guaranties**

Similarly, the words “warrant”, “guarantee”, and “ensure” may create absolute obligations whereby the professional becomes economically responsible for even the most minor errors, omissions, or defects. Accordingly, a good Agreement will expressly disclaim any such obligations (which should be none) except as expressly set forth in the agreement.