ARCHITECTURE IN A TIME OF PANDEMIC:
PROFESSIONAL PRACTICE ISSUES & COVID-19

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THIS IS **NOT** LEGAL ADVICE
INTRODUCTION

PRIMARY GOALS

(1) Anticipation of problems
(2) Preparing for/building against future blame game
(3) ID available protections (including within the contract)
(4) Avoiding the mushroom cloud scenario
Walk-through of contract provisions:

- AIA
- AGC ConsensusDocs
- DBIA
- EJCDC
"HELP! There’s a pandemic out in the world right now! What should I do?"
—The panicked sound of the voice inside many architects’ heads right now
WHAT ARE THE WORST THINGS THAT CAN HAPPEN?

• Delays and inefficiencies
• Team instability
• Illness/injuries
• Job shutdown/suspension
• Job cancellation
• Unpaid invoices
• Unpaid consultants
• Can you perform under your contract, under the circumstances?
  • Law and policy directives are evolving in real time
WHAT TO DO

RTFC — Read the Freakin’ Contract
WHAT TO DO

Make a Plan

• Find your contract—and read it
  • Find all subconsultant agreements and read them
• Figure out what insurance policies are in play—and get copies of them
• Identify known problems, both at your own firm and outside your firm
• Engage in advance thinking about what you can do proactively to stay ahead of the curve:
  • What notices can you send out?
  • What can you do NOW to avoid problems later?
  • How can you make a record of what you need to say now, so the record will reflect the good things that you’re trying to do?
WHAT TO DO

Paper Up the Record — all along the way
WHAT TO DO

Basic vs. Additional Services

Remember the distinction & note when it’s approaching
WHAT TO DO

Negotiate better Ks
WHAT TO DO

Live by the contract!

• Wondering what to do?
• Dispute/claim breaking out or looming?
  • Actually pull out contract and read it
  • Insist that others do the same
WHAT NOT TO DO

- Don’t panic
- Don’t circulate internal guidance/memos that you don’t later want broadcast everywhere
- Don’t rush into a solution
- Don’t do more than your K requires
  - Stay in your lane (Scope/Not Scope)
SOURCES OF POTENTIAL TROUBLE

• Virtual CA?
• How about site visits by FaceTime? Zoom? MS Teams?
  • Or with a drone?
  • This is like evaluating the world by looking through a series of keyholes; comes with inherent challenges
POSSIBLE EXPOSURE: CONSTRUCTION OBSERVATION

• Take a picture of the entire wall?
  • Are you comfortable with taking responsibility for the built conditions of that picture of an ENTIRE wall?

• What if somebody zooms in? What will they see?
  • Lack of bracing and blocking?
  • Are those joints soldered, or just balcony components sitting next to one another?
  • Long nails vs. lag bolts—which got installed?
  • Etc.
NEVER agree to “defend”

- You’ll get to pay for two sets of lawyers, not just your own
- And you won’t have insurance for it
- Indemnity might be ok if the clause is very narrowly drafted and tied to your percentage of negligence
What about serving as an IDM?

• Resist calls for you to say how much delay has been caused
• Are you prepared to render an opinion about whether something affected the critical path?
  • Who owns the float?
  • Was there a concurrent delay?
• Don’t get out over your skis
  • JUST THE FACTS
There’s a nice AIA National white paper about being a good IDM:

https://www.aia.org/articles/6253019-how-to-manage-risk-when-acting-as-initial-
SEND UP A FLARE: NOTICE

- Send notice: EARLY AND OFTEN (and per contract)
- Provide owner greater knowledge—
  - Be vocal about any proposed solutions
  - (But think it through)
- Don’t be afraid to advocate for yourself
- PAPER THE RECORD whenever possible
- Record-keeping: utterly critical
  - Particularly in proving claims for time/money
**FORCE MAJEURE**

- Tidal wave coming
  - Seeking excuse for delays in performing the work
- Relief: Compensable or not?
- FM scenarios often entitle a party to time, but not cost
- MUST LOOK TO THE CONTRACT

**DIFFERING SITE CONDITION?**

- Possible alternative relief
  - Time *and* money?
- Look to AIA forms for example
PL CLAIMS: Long Tail?

• Claims can often materialize late
  • Industry survey: TWO THIRDS of A/E claims arose 2+ YEARS AFTER design services
• Consider policy w/extended reporting period
  • Maintain investment in years ahead

E&O claims bump likely coming
LEED Us Not Into Temptation

- Impossible to guarantee LEED certification
- Certification elements discretionary and outside architect’s control
- Serious potential downside risk
  - **Gauge in terms of the standard of care**
  - Reasonable efforts to comply/achieve
Don’t Ignore the Red Flag

• Temptation to take on projects outside core experience or focus
• Or disregard signs of troubled project/client
• Common refrain of post-2008
Internal memos: DISCOVERABLE

Communications within design team: DISCOVERABLE

Both of these will be projected onto a screen larger than your living room wall if it can be used to a claimant’s advantage
**Liens:** Securing your receivables

- If contract is directly with owner, compliance is easy: prepare a lien affidavit
  - Timing and content are complicated and job-specific
  - If contract is not directly with owner
- No liens on public jobs
Contingent payment clauses:

There’s a Texas statute controlling them

• But it doesn’t apply to design professionals
WHAT IF YOU’RE NOT PAID

Enforce your rights under the IOS clause!

• Suspend or revoke the license to use the design

• No such specific industry form and/or clause? A client who breached first may still be warned
  • Stomp on the brakes if your invoices aren’t brought current
What’s a claim?
• A demand for money, or for services

What’s not a claim?
• Trust your gut
• Circumstance/pre-claim

What else is out there that might be reported?
• Subpoena?
  • Deposition notice?
  • Document request?
  • TBAE grievance (God forbid)
Big ways to imperil your coverage

- Fail to report a claim
- Promise something that you wouldn’t typically have to do as part of your professional services
  - Indemnity/defense
  - Higher standard of care
  - FIDUCIARY?
  - Etc.
"HELP! There’s a pandemic out in the world right now! What should I do?"

RTFC
First, evaluate whether you can perform on time.
§ 3.1.3 As soon as practicable after the date of this Agreement, the Architect shall submit for the Owner’s approval a schedule for the performance of the Architect’s services. The schedule initially shall include anticipated dates for the commencement of construction and for Substantial Completion of the Work as set forth in the Initial Information. The schedule shall include allowances for periods of time required for the Owner’s review, for the performance of the Owner’s consultants, and for approval of submissions by authorities having jurisdiction over the Project. Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner’s approval, the Architect shall adjust the schedule, if necessary, as the Project proceeds until the commencement of construction.
Contract Time: Force Majeure

Force majeure is a French word meaning “superior force,” and is defined in the law as “[a]n event or effect that cannot be anticipated nor controlled.”
1.2.8 **Force Majeure Events** are those events that are beyond the control of both Design-Builder and Owner, including the events of war, floods, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God.

8.2.1 If Design-Builder is delayed in the performance of the Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom Design-Builder is responsible, the Contract Time(s) for performance shall be reasonably extended by Change Order. **By way of example, events that will entitle Design-Builder to an extension of the Contract Time(s) include...Force Majeure Events.**

8.2.2....however, that the Contract Price shall not be adjusted for Force Majeure Events unless otherwise provided in the Agreement.

DBIA Standard Form of General Conditions (DBIA 535, 2010 version)
Template Clause

“The Design Professional shall not be responsible for delays caused by factors beyond the Design Professional’s reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, government ordered industry shutdowns, power or server outages, acts of nature, widespread infectious disease outbreaks (including, but not limited to epidemics and pandemics), failure of any governmental or other regulatory authority to act in a timely manner, failure of the Client to furnish timely information or approve or disapprove of the Design Professional’s services or work product, or delays caused by faulty performance by the Client or by contractors of any level. When such delays beyond the Design Professional’s reasonable control occur, the Client agrees that the Design Professional shall not be responsible for damages, nor shall the Design Professional be deemed in default of this Agreement.”
§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

Owner-Modified B101, § 2.2

§ 2.2 The Architect shall perform its services consistent with the time parameters set forth in this Agreement and as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.
Time is of the essence. The Design Professional has provided the Client with a "Design Services Schedule". The Design Professional agrees to complete the performance of the Scope of Services in conformance with the Design Services Schedule.
1.5.4 Design-Builder and Design Consultant mutually agree that time is of the essence with respect to the dates and times set forth in the Design Schedule, Project Schedule and Contract Documents.
• Engineer shall complete its obligations **within a reasonable time**. Specific periods of time for rendering services, or specific dates by which services are to be completed, are provided in Exhibit A, and are hereby agreed to be reasonable.

• **If, through no fault of Engineer**, such periods of time or dates are changed, or the orderly and **continuous progress of Engineer’s services is impaired**, or Engineer’s services are delayed or suspended, then the **time for completion of Engineer’s services, and the rates and amounts of Engineer’s compensation, shall be adjusted equitably**.

• If Engineer fails, through its own fault, to complete the performance required in this Agreement within the time set forth, as duly adjusted, then Owner shall be entitled, **as its sole remedy, to the recovery of direct damages, if any, resulting from such failure**.
A/E REMEDIES FOR DELAY

• Your fee was based on an assumed contract timeline, which has now likely been blown.

• Common Options:
  (1) asking for more money;
  (2) terminating or suspending the agreement.
Compensation for Delays not the fault of the A/E

AIA — Additional Services for extended timeline

§ 4.2.5 If the services covered by this Agreement have not been completed within «» («») months of the date of this Agreement, through no fault of the Architect, extension of the Architect’s services beyond that time shall be compensated as Additional Services.

AIA B101–2017
§ 4.2.1 Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following Additional Services until the Architect receives the Owner’s written authorization:

AIA B101–2017
§ 3.1.2 The Architect shall coordinate its services with those services provided by the Owner and the Owner’s consultants. The Architect shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of, services and information furnished by the Owner and the Owner’s consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission, or inconsistency in such services or information.
§ 4.2.1 Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following Additional Services until the Architect receives the Owner’s written authorization:

1. Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including size, quality, complexity, the Owner’s schedule or budget for Cost of the Work, or procurement or delivery method;

2. Services necessitated by the enactment or revision of codes, laws, or regulations, including changing or editing previously prepared Instruments of Service;
Right to Terminate or Suspend the Agreement in the Event of Delays not the Fault of A/E

Termination by Architect for Project Delays

§ 9.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days’ written notice.
§ 9.2 If the Owner suspends the Project, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect’s services. The Architect’s fees for the remaining services and the time schedules shall be equitably adjusted.
Termination for Convenience

§ 9.5 The Owner may terminate this Agreement upon not less than seven days’ written notice to the Architect for the Owner’s convenience and without cause.

AIA B101–2017
§ 9.6 If the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall compensate the Architect for services performed prior to termination, Reimbursable Expenses incurred, and costs attributable to termination, including the costs attributable to the Architect’s termination of consultant agreements.
§ 9.7 In addition to any amounts paid under Section 9.6, if the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall pay to the Architect the following fees:

.1 Termination Fee: ___
.2 Licensing Fee if the Owner intends to continue using the Architect’s Instruments of Service: ___
CLIENT WITHHOLDING MONEY

Evaluate whether your client may have a valid basis for withholding payment.

**Excuses for Performance**

- Doctrine of Impossibility
- Force Majeure
- Design Professional Breach
- Contingent Payment Clause
Contingent Payment

- Pay if paid/pay when paid
SEGMENT III

PROTOCOLS
RECOMMENDED PROTOCOLS

• Messaging to employees and subconsultants re: WFH
• City of Austin Work Safe Rules
• Symptom protocol: Get advice, select a process, notify your team, and stick to it
• Digital tech for online meetings
  • Zoom
  • GoToMeeting
  • MS Teams
  • Many others out there
• Temperature checks before arriving on site
• Communicate with client re: need to space construction team on site
• **WRITE A COMPLIANCE SPEC TELLING THE WHOLE TEAM TO OBEY ALL APPLICABLE FEDERAL, STATE, COUNTY, LOCAL, AND OTHER APPLICABLE STANDARDS**
• Conduct site visits at times when site not busy—if they can go forward
• Compliance with group size limits
  • Gov. Abbott’s order says groups no larger than 10
• Compliance with social distancing requirements
  • OSHA’s 6’ distance between individuals
    • Model good behavior—but just as with refusing to get involved with controlling means & methods, be careful about getting in too deep
    • Walking the line between good steward and snitch is going to be difficult
  • Incorporated into local orders
RECOMMENDED PROTOCOLS
(CONTINUED)

• Appropriate equipment
• What if you can’t get it?
• Are you excused from further performance?
• Law of impossibility/illegality
SEGMENT IV

28 COMMANDMENTS

News from on High: 28 Commandments of Drafting & Negotiating Contracts.
# Project Tracking

<table>
<thead>
<tr>
<th>Project Name</th>
<th>Client</th>
<th>Status</th>
<th>Signed Contract</th>
<th>Contract Fairness</th>
</tr>
</thead>
<tbody>
<tr>
<td>La Quarantine Inn and Suites</td>
<td>Bob Builder INC</td>
<td>CA</td>
<td>YES</td>
<td>UNFAIR</td>
</tr>
<tr>
<td>Drive Thu-R-US</td>
<td>King Contractors</td>
<td>CA</td>
<td>YES</td>
<td>QUESTIONABLY FAIR</td>
</tr>
<tr>
<td>The Good Place</td>
<td>We Build Gud LLC</td>
<td>SD</td>
<td>YES</td>
<td>FAIR</td>
</tr>
</tbody>
</table>
COMMANDMENTS OF ARCHITECTURAL SERVICES CONTRACTS

I. Thou Shalt Obtain a Limitation-of-Liability Clause
   • And make it CONSPICUOUS

II. Thou Shalt Waive Consequential Damages
    • See the AIA forms for a good example

III. Thou Shalt Disclaim Delay Damages
    • Beware “Time Is of the Essence” Clauses – could form basis for automatic breach finding
    • Don’t cavalierly sign on to a schedule

IV. Thou Shalt Waive Subrogation
    • Look to the AIA forms for language that helps

V. Thou Shalt Avoid Personal Liability
    • Establish a sole-recourse-against-firm provision
VI. Thou Shalt Include a TBAE Statement of Jurisdiction

- The language is waiting for you right in the Board’s rules

1.106 OTHER PROFESSIONAL RESPONSIBILITIES

(a) An Architect shall provide a written statement of jurisdiction to each client for whom the Architect renders an architectural service in Texas.

(b) The statement of jurisdiction shall: (1) state that "The Texas Board of Architectural Examiners has jurisdiction over complaints regarding the professional practices of persons registered as architects in Texas"; (2) include the Board's current mailing address and telephone number; and (3) be placed within every written contract for architectural services.

(c) If an Architect provides an architectural service to a client without entering into a written contract with the client, the Architect shall provide the client with the statement of jurisdiction: (1) by including the statement of jurisdiction in each bill for architectural services presented to the client; or (2) if the client visits the Architect's office, by posting the statement of jurisdiction on a sign prominently displayed in the Architect's office.
COMMANDMENTS OF ARCHITECTURAL SERVICES CONTRACTS

VI. Thou Shalt Include a TBAE Statement of Jurisdiction
   • The language is waiting for you right in the Board’s rules

VII. Thou Shalt Not Intrude Into Means & Methods
    • Neither in the contract, nor in practice
    • Doing so could expose you to personal injury liability

VIII. Thou Shalt Define Thy Scope of Work

IX. Thou Shalt Establish What’s Not in Thy Scope

X. Thou Shalt Paper the File
   • More of a post-contract matter
   • Still relates to written requirements for changing the terms
   • Always remember: **NO UNANSWERED BULLETS**
XI. **Thou Shalt Not Transfer Thy IP Rights**
- Public entities often insist
- Look to AIA forms for good language on Instruments of Service
- Danger lies in later reuse of design elements

XII. **Thou Shalt Not Get Behind on Fees**
- Amass maximum percentage distribution for payment in early stages
- Too many times, owners will carve an architect out of the mix during construction
- This happens even when the project is non-exempt
- And sometimes the owner will hire a new architect who has had nothing to do with the job to handle CA

XIII. **Thou Shalt Not Indemnify Nor Defend Thy Neighbor**
- Probably not insurable
- There are other causes of action available to potential claimants
- The world won't end without indemnity/defense
COMMANDMENTS OF ARCHITECTURAL SERVICES CONTRACTS

XIV. Thou Shalt Not Accept an Elevated Standard of Care
• Highest and best duties or responsibilities: not OK
• Fiduciary duty = the other F-word
• These may well wipe out insurance coverage

XV. Thou Shalt Avoid Betterment Damages – No Windfalls for the Owner
• Something left out of the design? Owner would have had to pay in the first place

XVI. Thou Shalt Select Wise Dispute Resolution Mechanisms
• Mediation as condition precedent to formal claims process
• Arbitration vs. Litigation
• Non-Joinder?

XVII. Thou Shalt Establish Comparative Fault
• Even in breach-of-contract claims
• Every party gets considered for its own conduct

XVIII. Thou Shalt Require a Certificate of Merit Before Claims Can Proceed
XIX. Thou Shalt Disclaim Third-Party Beneficiaries
• Only the client gets the benefit of your services

XX. Thou Shalt Impose a Severability Clause
• If one clause dies, the rest of the contract survives

XXI. Thou Shalt Refuse to Name Additional Insureds
• E&O policies don’t work this way
• Won’t be insurable
• Instant breach of contract

XXII. Thou Shalt Impose Subconsultant Flowdown Clauses
• All of them owe the same duties to you as you owe your client

XXIII. Thou Shalt Disclaim Responsibility for Project Costs
• No liability for project budget
XXIV. Thou Shalt Beware Condos
• Insurance requirements—for you, and for the project
• Maintenance requirements
• Limitation-of-liability requirements that run with the property

XXV. Thou Shalt Disclaim Input/Advice on Contractors

XXVI. Thou Shalt Disclaim Any Role on Building Science and Building Envelope Expertise

XXVII. Thou Shalt Get the Contract SIGNED

XXVIII. Thou Shalt Secure Governmental Approval Through Proper Channels
QUESTIONs?

Additional Resources:

How AIA contracts address issues arising due to the COVID-19 pandemic


Allensworth & Porter Legal Updates

Jobsite COVID-19 Exposure Protocol (April 2, 2020)
City of Austin Will No Longer Prohibit Commercial or Residential Construction Projects (April 2, 2020)
Analysis of Governor Abbott’s Executive Order GA-14 (March 31, 2020)
Initial response to Governor Abbott’s Executive Order No. GA-14 relating to statewide continuity of essential services and activities during the COVID-19 disaster (March 31, 2020)
Analysis of City of Austin and Travis County Updated Guidance for the Construction Industry (March 30, 2020)
Analysis of CISA 2.0 Advisory Memorandum (March 30, 2020)
Analysis of Essential Business and Critical Infrastructure Exempted by City of Austin (March 26, 2020)
Analysis of the City of Austin’s “Guidance” to the Construction Industry (March 24, 2020)
Analysis of City of Austin Stay Home – Work Safe Order (March 24, 2020)
Analysis of Travis County Community Gathering Order (March 19, 2020)

https://www.aiaaustin.org/
https://texasarchitects.org/
https://www.aia.org/