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DIFFERENT WORKS



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Contracting for Small Projects

DPLE 246
June 6, 2018

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Course Description

For many design professionals, a typical project is of short duration and relatively low cost and may involve team members with whom you have pre-existing relationships.

Negotiating a lengthy contract might not make sense and could take longer than the project itself.

Some design professionals “solve” that problem by not having a contract at all, but we all know that’s not an ideal solution.

Today’s webinar will provide some ideas on how to write contracts for small projects.

Learning Objectives

Participants will:

Consider some key aspects of professional service agreements for small projects.

Analyze AIA's short form agreement for small projects.

Identify the key concepts and provisions of the E505 – the Engineers Joint Contract Document Committee's continuing service agreement.

Evaluate the IDIQ approach taken by certain governmental agencies.

DISCLAIMER

NOTHING PRESENTED HEREIN IS A SUBSTITUTE FOR ACTUAL LEGAL ADVICE THAT CAN ONLY BE PROVIDED IN THE EVENT THAT AN ATTORNEY CLIENT RELATIONSHIP IS FORMED AND AGREED TO BY BOTH THE ATTORNEY AND THE CLIENT. FURTHERMORE, THE PRESENTATION INVOLVES HYPOTHETICAL FACTS AND IS NO SUBSTITUTE FOR LEGAL ADVICE BASED ON THE ACTUAL FACTS AND CIRCUMSTANCES OF A PARTICULAR SITUATION.

PS – THE LAWYER MADE ME DO THIS...

Preparing for the Contracting Process

Why do we need written contracts?

State licensing statutes and regulations



Opportunity to develop a bond with client



Early communication tool



Record preservation



Fee collection



Documentation



Components of a Contract

The Scope of
Services

The Schedule

Payment
Terms

**General
Terms &
Conditions**

Types of Written Agreements

Standard Forms
of Agreement –
e.g., AIA; EJCDC

Your Firm's
Terms &
Conditions

Owner/Client
Drafted
Contracts

Purchase
Orders

Letter
Agreements

Examples of Standard Agreements



AIA

Case law



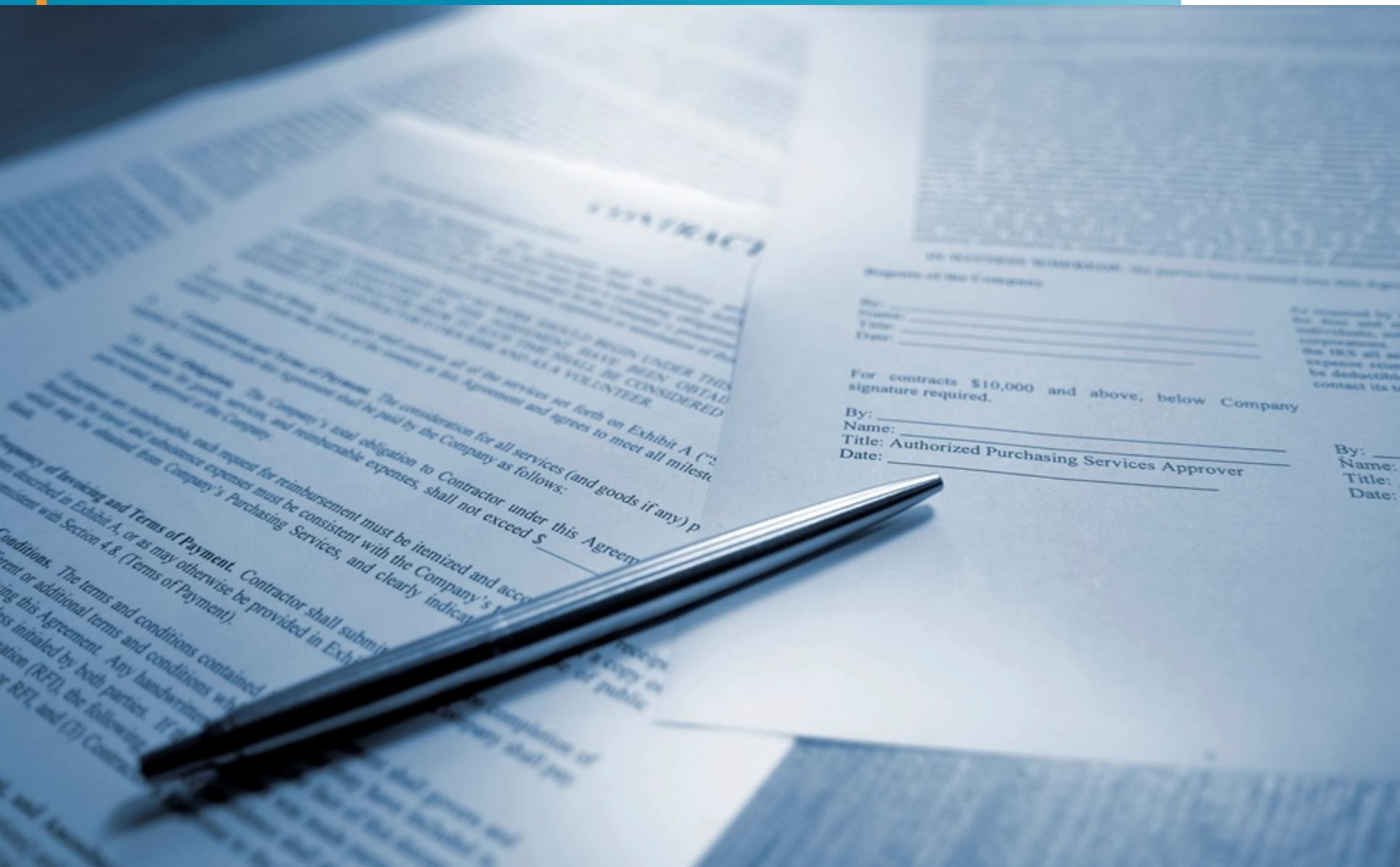
EJCDC®
ENGINEERS JOINT CONTRACT
DOCUMENTS COMMITTEE

Documents are
coordinated



Modifications
to one are easy
to make
to others

Terms and Conditions/Master Service Agreements



Sample Terms and Conditions for Discussion

Entire Agreement	Suspension/ Termination	Certifications
Right of Entry	Changes or Delays	Third Parties
Standard of Care	Governing Law	Consequential Damages
Hazardous Materials	Dispute Resolution	Ownership of Documents
Approvals	Limitation of Liability	Billing and Payment
Compliance	Reliance	Site Visits

Entire Agreement—Precedence

These Contract Provisions and the accompanying Proposal constitute the **full and complete Agreement** between the parties and may be **changed, amended, added to, superseded, or waived** only if both parties specifically **agree in writing** to such amendment of the Agreement. In the event of any **inconsistency** between these Contract Provisions and any proposal, contract, purchase order, requisition, notice to proceed, or like document, **these Contract Provisions shall govern.**

Right of Entry

When entry to property is required for CONSULTANT to perform its services, the **Client** agrees **to obtain legal right-of-entry** to the property.



Standard of Care

CONSULTANT and its employees, subsidiaries, independent professional associates, subconsultants, and subcontractors will exercise **that degree of care and skill ordinarily practiced at the same point in time and under similar circumstances by professionals providing similar services**. Client agrees that services provided will be rendered **without any warranty**, express or implied.



Hazardous Materials

The scope of CONSULTANT's services for this Agreement does not include any responsibility for **detection, remediation, accidental release**, or services relating to **waste, oil, asbestos, lead**, or other **hazardous materials**, as defined by Federal, State, and local laws or regulations.



Approvals

Client acknowledges that the **approval process** necessary to estimate or maintain a project **timeline** is both **unpredictable** and **outside of the Professional's control**. Professional does not guarantee reviews or approvals by any governing authority or outside agency, nor the ability to achieve or maintain any project timeline.

Compliance



Consultant shall perform its services in accordance with the **laws, rules, regulations, and codes** that are applicable to the project and **in force at the time of the completion of the construction documents.**

Suspension/Termination

The **Client** may, at any time, by written notice, **suspend** further services by CONSULTANT. The Client shall **remain liable for**, and shall promptly **pay CONSULTANT** for all services rendered to the date of suspension of services, **plus suspension charges**, which shall include the cost of assembling documents, personnel and equipment, rescheduling or reassignment, and commitments made to others on Client's behalf.

Client shall pay CONSULTANT pursuant to the rates and charges set forth in the Proposal. CONSULTANT will submit monthly invoices to Client for services rendered and expenses incurred. If **Client does not pay invoices within thirty (30) days** of submission of invoice, **CONSULTANT may**, upon written notice to the Client, **suspend further services until payments are brought current**. The **Client** agrees to **indemnify and hold CONSULTANT harmless from any claim or liability resulting from such suspension**.

Changes or Delays

Unless the accompanying Proposal provides otherwise, the proposed fees constitute CONSULTANT's estimate to perform the services required to complete the Project. **Required services often are not fully definable in the initial planning; accordingly, developments may dictate a change** in the scope of services to be performed. Where this occurs, changes in the Agreement shall be negotiated and an equitable adjustment shall be made.

Costs and schedule commitments shall be subject to **renegotiation** for unreasonable delays caused by the **client's failure to provide specified facilities, direction, or information**, or if CONSULTANT's failure to perform is due to any **act of God, labor trouble, fire, inclement weather, act of governmental authority, failure of transportation, accident, power failure, or interruption or any other cause beyond the reasonable control of CONSULTANT**. Temporary stoppage caused by any of the above may result in additional cost beyond that outlined in the accompanying Proposal.

Governing Law

The laws of the state in which the **CONSULTANT office executing this Agreement** is located shall govern the validity and interpretation of the Agreement.



This Agreement shall be governed by the law of the place **where the Project is located**, excluding that jurisdiction's choice of law rules...

AIA B101-2017, Article 10.1

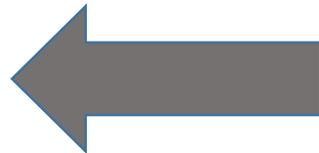
Dispute Resolution

The Client and CONSULTANT agree to submit all claims and disputes arising out of this Agreement to **non-binding mediation** prior to the initiation of legal proceedings. This provision shall survive completion or termination of this Agreement; however, **neither party shall seek mediation of any claim or dispute arising out of this Agreement beyond the period of time that would bar** the initiation of legal proceedings to litigate such claim or dispute under the applicable law.

Arbitration

Litigation

Other



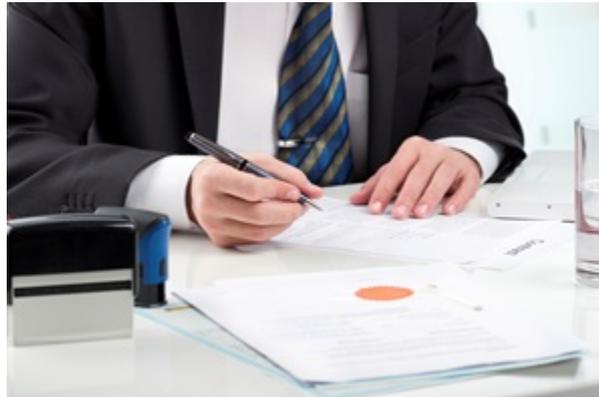
Which does your counsel prefer?

Limitation of Liability

To the fullest extent permitted by law, the **total liability**, in the aggregate, of **CONSULTANT** and CONSULTANT's **officers, directors, employees, agents, and subconsultants** to **Client** and **anyone claiming by, through or under Client**, for any and all **injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to CONSULTANT's services**, the Project or this Agreement, from any cause or causes whatsoever, **including but not limited to, negligence, strict liability, breach of contract, or breach of warranty** shall not exceed the **total compensation** under this Agreement.

Reliance on Information Provided by Others

CONSULTANT shall be **entitled to rely**, without liability, on the **accuracy and completeness of any and all information provided by Client**, Client's consultants and contractors, and information from public records, without the need for independent verification.



Certifications

CONSULTANT shall not be required to sign any documents, no matter by whom requested, that would result in CONSULTANT's having to certify, guaranty, or warrant the existence of conditions that CONSULTANT cannot ascertain.

Third Parties

Nothing contained in this Agreement shall create a **contractual relationship** with, or a **cause of action in favor of, a third party against either the Client or CONSULTANT.** CONSULTANT's services hereunder are being performed **solely for the benefit of the Client**, and no other entity shall have any claim against CONSULTANT because of this Agreement or CONSULTANT's performance of services hereunder.

Consequential Damages Waiver

Neither the Client nor the CONSULTANT shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to **loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value** and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.

Ownership of Documents

All reports, notes, drawings, specifications, data, calculations, and other documents, including those in electronic form prepared by CONSULTANT are **instruments of CONSULTANT's service that shall remain CONSULTANT's PROPERTY**. The **Client agrees not to use CONSULTANT-generated documents** for marketing purposes, **for projects other than the project for which the documents were prepared by CONSULTANT**, or for future modifications to this project, without CONSULTANT's express written permission.

Any **reuse or distribution to third parties without such express written permission or project-specific adaptation by CONSULTANT will be at the Client's sole risk and without liability to CONSULTANT** or its employees, subsidiaries, independent professional associates, subconsultants, and subcontractors. Client shall, to the fullest extent permitted by law, **defend, indemnify, and hold harmless CONSULTANT** from and against any and all costs, expenses, fees, losses, claims, demands, liabilities, suits, actions, and damages whatsoever arising out of or resulting from such unauthorized reuse or distribution.

Billing and Payment

Client shall **pay** CONSULTANT pursuant to the **rates and charges set forth in the Proposal**. CONSULTANT will submit monthly invoices to Client for services rendered and expenses incurred. If Client does not pay invoices within thirty (30) days of submission of invoice, CONSULTANT may, upon written notice to the Client, **withhold deliverables and/or suspend further work** until **payments are brought current**. The Client agrees to **indemnify** and **hold CONSULTANT harmless** from any claim or liability resulting from such suspension.

Site Visits

In the event that Professional's scope of services listed under Exhibit A shall include site visits during the construction phase, Professional shall be serving only in the capacity as a **consultant** to advise Client on **issues involving progress and general design compliance**. The Professional does **not assume any responsibility** for the **quality, sequences, techniques, or timeliness of any contractor's work, job site safety, continuous onsite inspections**, or any issues that fall outside of the Professional's scope of services as defined herein.

Bad Language

@#\$\$#@%\$#

in-dem-ni-ty

1. a. security against loss or damage.
b. exemption from incurred or future penalties or liabilities

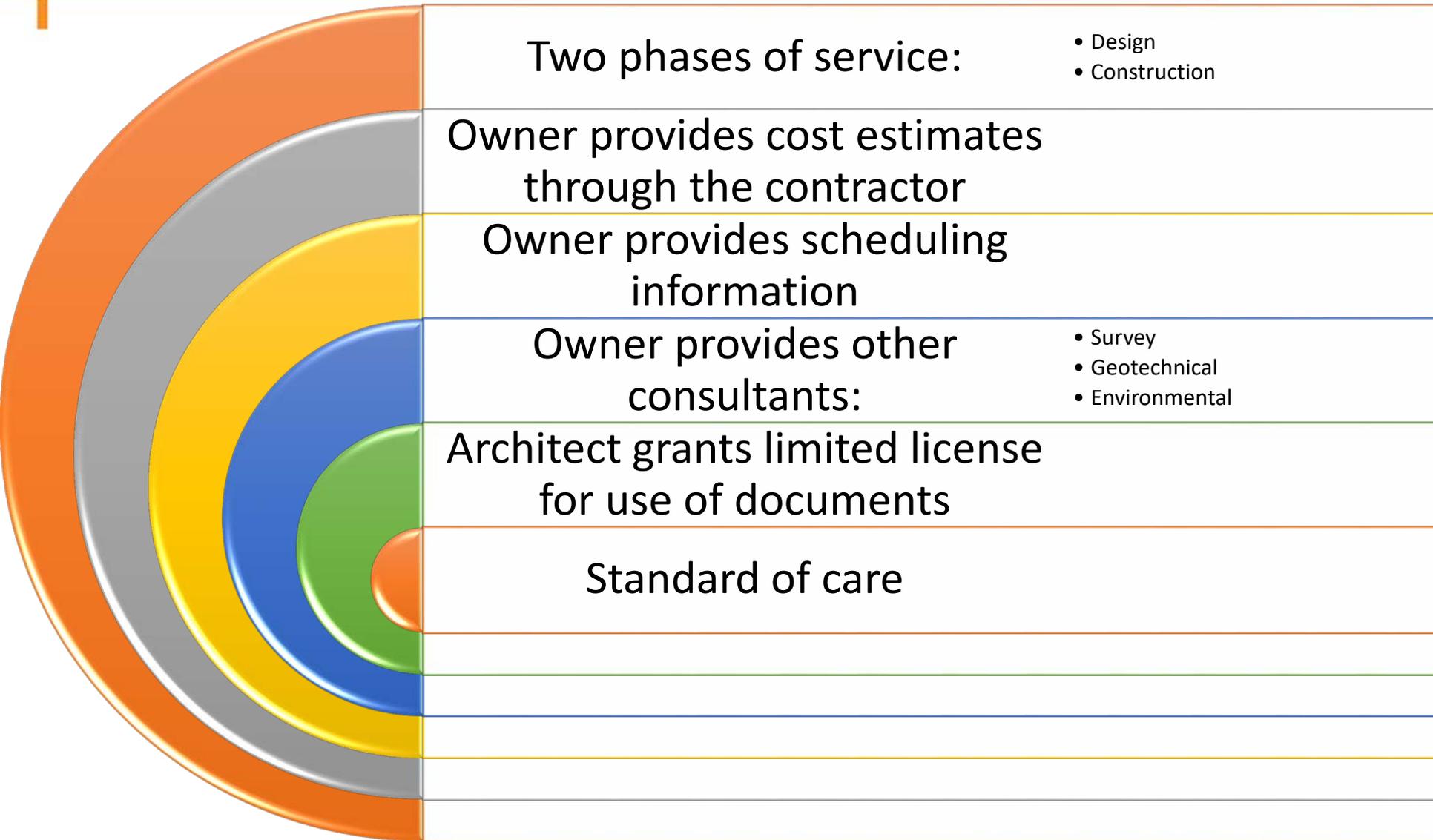
Indemnity Clause - Bad Language

To the fullest extent permitted by law, Consultant shall defend, indemnify and hold harmless Developer...against any and all claims... including the reasonable fees of attorneys, arising out of or in any way connected with any act or omission of Consultant...whether such claims, liens, demands, damages, losses or expenses are based upon...any other legal...theory whatsoever, and regardless of whether or not such claim...is caused in part by a party indemnified hereunder, including the partial negligence of any such party.

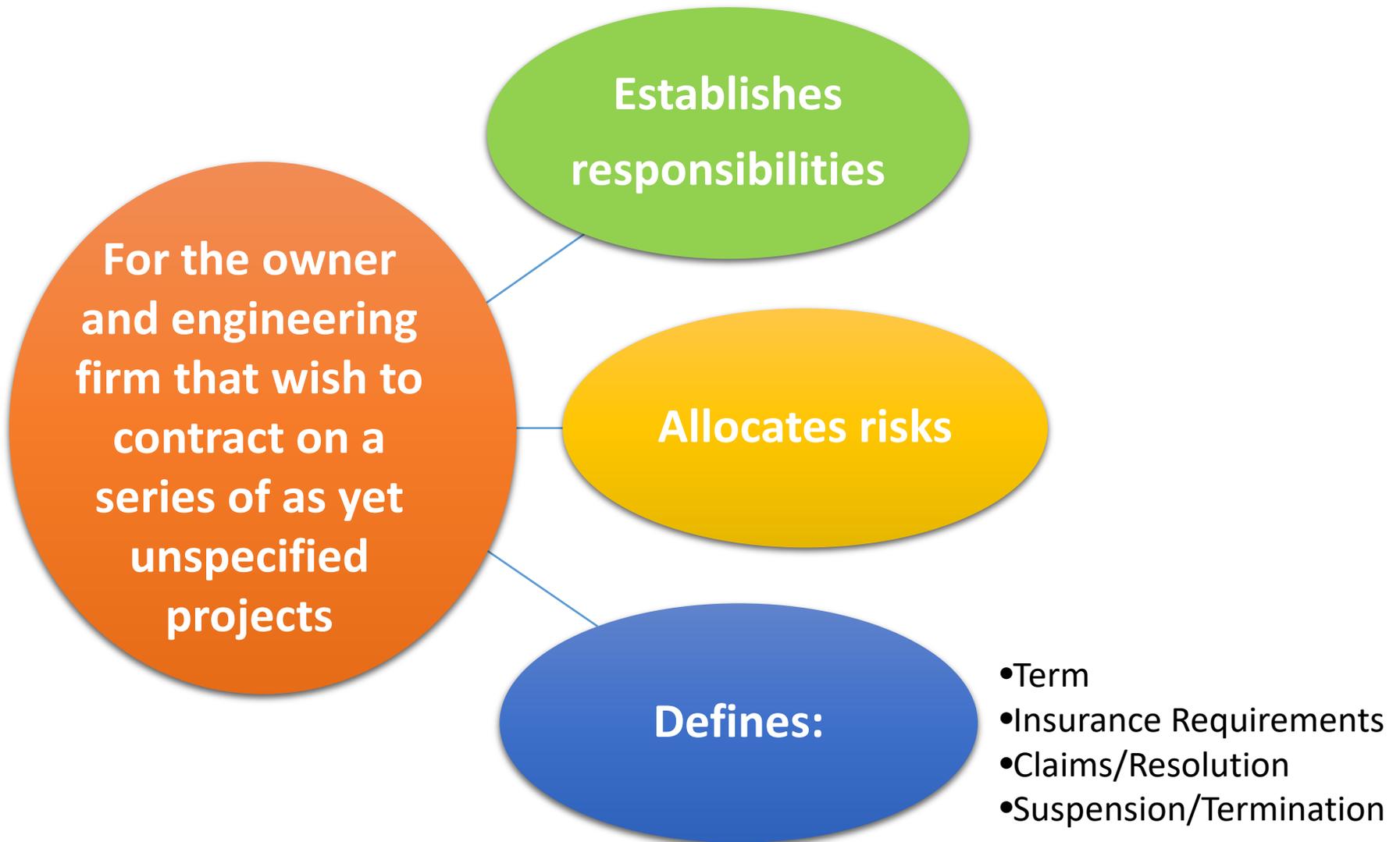
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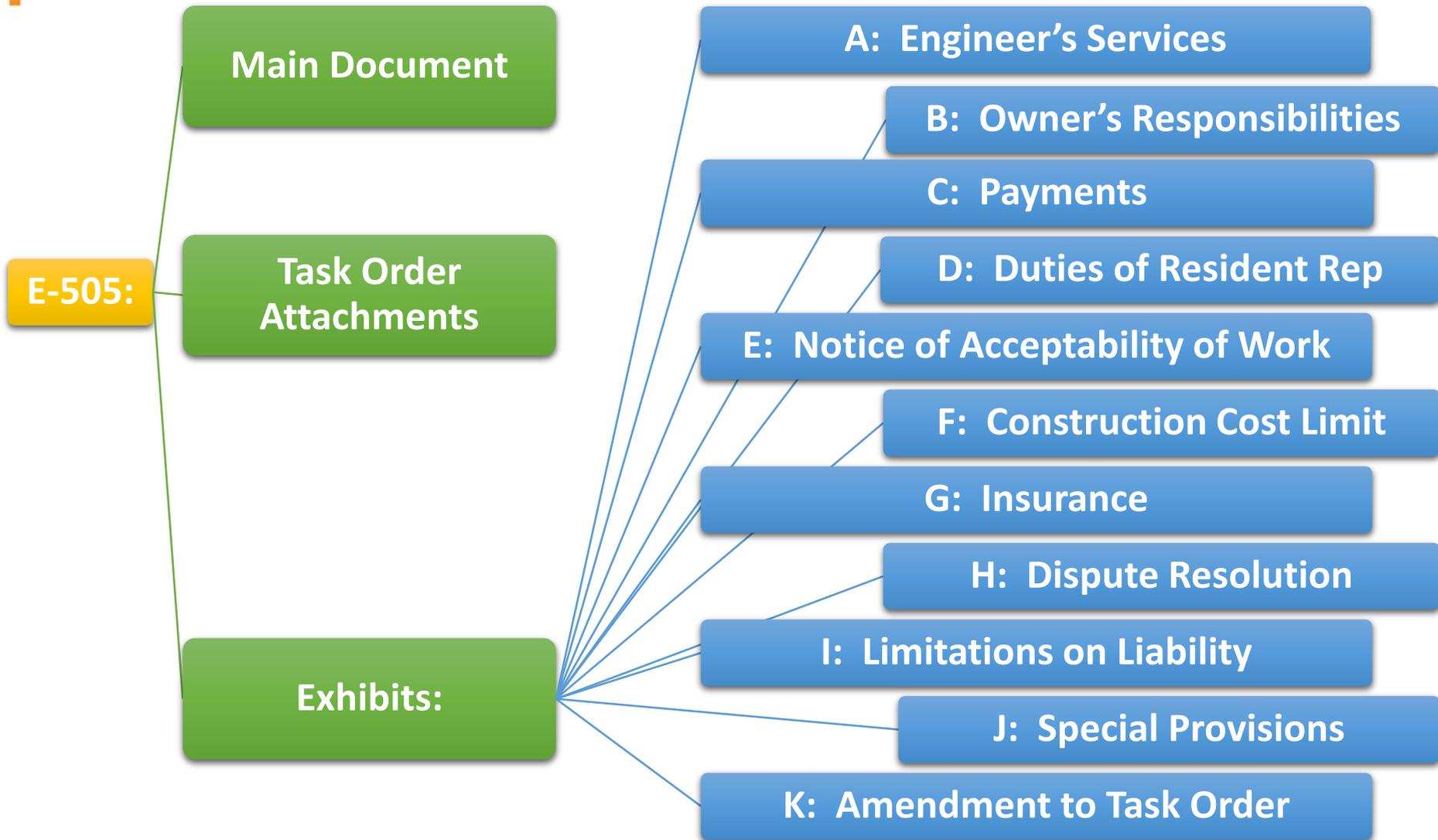
Document Review: AIA B105



Document Review: EJCDC E-505 (2014)



Document Review: EJCDC E-505 (2014)



Indefinite Delivery, Indefinite Quantity Contracts

Provide for an **indefinite quantity of services** for a **fixed time**.

Used when the **Owner can't determine**, above a specified minimum, the **precise quantities of services** that will be required during the contract period.

Help **streamline the contract process** and speed service delivery.

Awards are often for **base years + option years**.

Owner places **task orders** against a basic contract for individual requirements.

Minimum and maximum quantity limits are specified in the basic contract as dollar values.

Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects
Continuing Education Systems Program

Jennifer Walton, Coordinator

Jennifer.Walton@rlicorp.com

Barbara Sable, Assistant Vice President

Barbara.Sable@rlicorp.com

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