



DONOVAN

HATEM LLP

counselors at law

Introduction to the Federal Acquisition Regulation and Indemnity Clauses

For ACEC/MA Risk Management Forum

Presented by: Gwen P. Weisberg, Esq.
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Boston | Connecticut | New York | New Jersey | Rhode Island



FAR: Introduction

- To engage in commercial transactions, including construction projects, with the federal government, Design Professionals need a basic understanding of what is contained in the Federal Acquisition Regulation (FAR) and how it potentially impacts the Design Professionals' contractual obligations.
- The federal government describes FAR as:

The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives." (48 CFR 1.102)



FAR: Introduction

- The importance of FAR to Design Professionals

FAR is important for Design Professionals because many of the contracts awarded by the federal government pertain to construction, including infrastructure projects highways, government buildings, ports, docks, and much more. As funding under the federal Infrastructure legislation is rolled out it is important for Design Professionals to understand the underpinnings of FAR and its implications for their practices.
- Construction and Architect Engineer Contracts

FAR Part 36.00 pertains to the rules and regulations for Architecture and Engineering services:

 - FAR Subpart 36.2: Special Aspects of Contracting for Construction
 - FAR Subpart 36.5: Contract Clauses involves specific contract clauses
 - FAR Subpart 36.6: Architect-Engineer Services
 - FAR Subpart 36.7: Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

FAR Part 52.00 contains the Architect and Engineer contract provisions.



FAR: Scope / Division of Acquisition Process

- The FAR applies to most agencies in the Executive Branch whose agencies issue supplemental regulations that include purchasing rules unique to those agencies like Federal Department of Transportation.
- Some “quasi-governmental” agencies, such as the United States Postal Service and the Federal Deposit Insurance Corporation, are exempt from implementing the FAR.
- The FAR is divided into 53 parts, each part dealing with a separate aspect of the acquisition process.
 - The first six parts cover general government acquisition matters.
 - The next six parts cover aspects of acquisition planning.
 - The rest of the FAR pertains to topics such as simplified acquisition thresholds, large dollar value buys, labor laws, contract administration, applicable clauses, and forms.
- The relevant parts for construction contracts includes Parts 36 and 52, which contains the standard terms and conditions contained in a government contract.



FAR Acquisition Methods: Sealed Bid

- Sealed bid is characterized by a rigid adherence to formal procedures to provide all bidders an equal opportunity to bid on a federal project.
- Once a federal agency decides to proceed with an acquisition, it must solicit sealed bids if:
 - time permits the solicitation, submission and evaluation of sealed bids;
 - the award will be made on the basis of price and other price-related factors;
 - it is not necessary to conduct discussions with the responding offerors about their bids; and
 - there is a reasonable expectation of receiving more than one sealed bid.
- The FAR requires an affirmative finding of responsibility prior to awarding the contract to the lowest bidder:
 - the prospective awardee must have the ability and capacity to perform the contract.
- The agency must award to the responsible bidder who submits the lowest responsive bid (price).



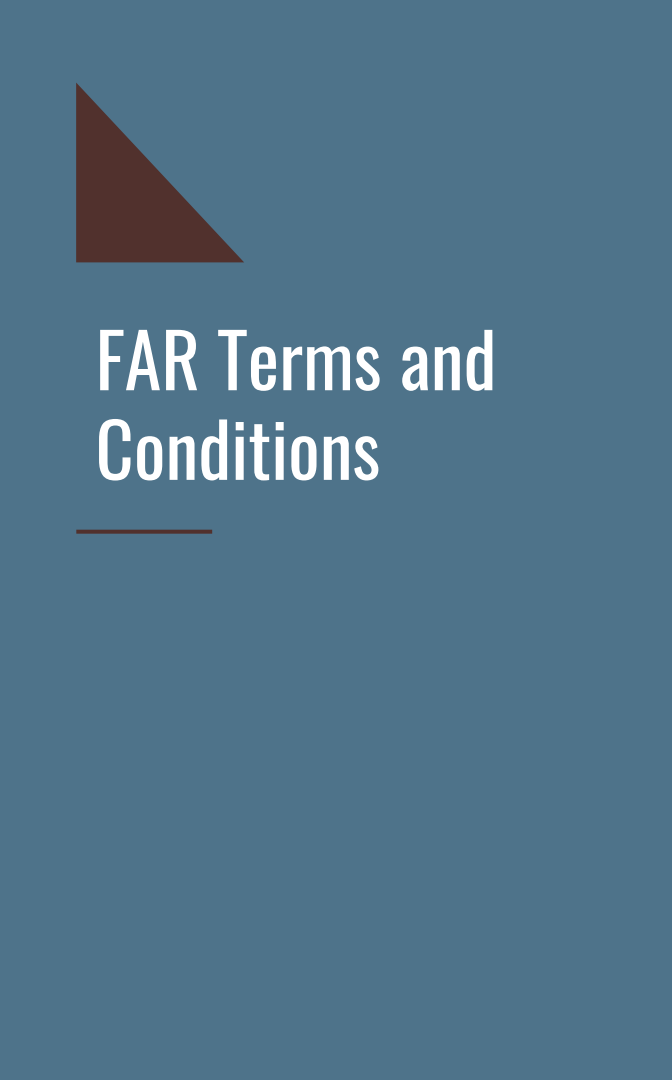
FAR Acquisition Methods: Competitive Negotiation

- Competitive negotiation offers flexibility in contract awards. Instead of sealed bids, the Contracting Officer (CO) is permitted to discuss the project and process with bidders and may consider non-cost factors including, but not limited to, managerial experience, technical approach and past performance in evaluating proposals.
- The process begins with issuance of a Request for Proposal (RFP) that identifies an agency's need for a particular project, anticipated contractual terms and conditions, information that a contractor must include in its contract and the agency will consider in proposal evaluation and contract award.
- The CO analyzes final offers in conjunction with the RFP, and selects the bidder whose proposal is most advantageous to the governmental agency.



FAR Terms and Conditions


- Government contracts are comprised of standard terms and conditions clauses, many of which are non-negotiable pursuant to the Code of Federal Regulations (CFR).
- According to interpretive case law, a mandatory contract clause affecting fundamental acquisition policy will be incorporated by referenced into a contract even if it is not present through omission or otherwise:
 - 52.102: Incorporating provisions and clauses.
- a) Provisions and **clauses should be incorporated by reference to the maximum practical extent**, rather than being incorporated in full text . . .
- b) Except for provisions and clauses prescribed in 52.107, **any provision or clause that can be accessed electronically by the offeror or prospective contractor may be incorporated by reference in solicitations and/or contracts**. However, the contracting officer, upon request, shall provide the full text of any provision or clause incorporated by reference.
- c) Agency approved provisions and clauses prescribed in agency acquisition regulations, and provisions and clauses not authorized by subpart 52.3 to be incorporated by reference, need not be incorporated in full text [if the contracting officer includes specific terms and conditions in the solicitation and contract].
- d) An agency may develop a group listing of provisions and clauses that apply to a specific category of contracts. An **agency group listing may be incorporated by reference in solicitations and/or contracts in lieu of citing the provisions and clauses individually**, provided the group listing is made available electronically to offerors and prospective contractors.
- e) A provision or clause that is not available electronically to offerors and prospective contractors shall be incorporated in solicitations and/or contracts [under certain circumstances].



FAR Terms and Conditions

Examples of three of the more significant clauses unique to standard government contracts are:

- “Termination for Convenience” Clause
 - This clause permits the government to terminate the contract, at any time, without cause, if the termination is in “the government’s best interest.”
- “Changes Clause”
 - This clause enables the government to unilaterally revise the contract, even during performance, if the changes pertain to the contract’s scope.
- “Default Clause”
 - This clause permits the government to terminate a contract if a contractor breaches the contract by failing to:
 - deliver the supplies or perform the services within the time specified in the contract;
 - make progress, thereby endangering performance of the contract; or
 - perform any other material provision in the contract.
 - It also enables the government to reprocure supplies or services required under the terminated contract and charge any cost overruns to the terminated contractor.



FAR Terms and Conditions

Other FAR clauses that may be applicable to Design Professionals include:

52.203-13: Contractor Code of Business Ethics and Conduct

52.204-2 Security Requirements

52.204-5 Women-Owned Business (Other Than Small Business)

52.204-8 Annual Representations and Certifications

52.204-21 Basic Safeguarding of Covered Contractor Information Systems

52.211-6 Brand Name or Equal

52.211-9 Desired and Required Time of Delivery

52.211-10 Commencement, Prosecution, and Completion of Work

52.211-12 Liquidated Damages-Construction

52.211-13 Time Extensions

52.211-16 Variation in Quantity



FAR Terms and Conditions

52.211-18 Variation in Estimated Quantity

52.212-2 Evaluation—Commercial Products and Commercial Services

52.212-4 Contract Terms and Conditions—Commercial Products and Commercial Services

- This section contains specific terms, including but not limited to, those as to inspection/acceptance, changes, disputes, excusable delays, termination for cause/convenience, warranty, limitation of liability and order of precedence and total cost that must be incorporated into each contract for a project.

52-219-08 Utilization of Small Business Concerns, Set-Asides and Reserves (into following clauses)

52-222-23 Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction

52.222-26 Equal Opportunity

52.222-54 Employment Eligibility Verification [E-Verify]



FAR Terms and Conditions

52.225-10 Notice of Buy American Requirement - Construction Materials

- This potentially impacts Design Professionals' specifications and Standard of Care; see also (52-225-21 Required Use of American Iron, Steel and Manufactured Goods]

52.228, et seq. re: Insurance Requirements

52-232-20 Payments under Fixed-Price Architect-Engineer Contracts

- To ensure “satisfactory completion” – not performance consistent with the Standard of Care”

52.232-26 Prompt Payment for Fixed-Price Architect-Engineer Contracts [and for Construction Contracts under 52.232-27]

52.233-1 Disputes

52.236-2 Differing Site Conditions




FAR Terms and Conditions

52.236-21 Specifications and Drawings for Construction

52.236-22 Design Within Funding Limitations

52.236-23 Responsibility of the Architect-Engineer Contractor

- (a) The Contractor shall **be responsible for the professional quality, technical accuracy, and the coordination** of all designs, drawings, specifications, and other services furnished by the Contractor under this contract. The Contractor shall, **without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.**
- (b) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government **caused by the Contractor's negligent performance of any of the services furnished** under this contract.
- (c) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.
- (d) If the Contractor is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.



FAR Terms and Conditions

52.236-24 Work Oversight in Architect-Engineer Contracts

52.236-25 Requirements for Registration of Designers

52.242-14 Suspension of work

52.242-17 Government Delay of Work

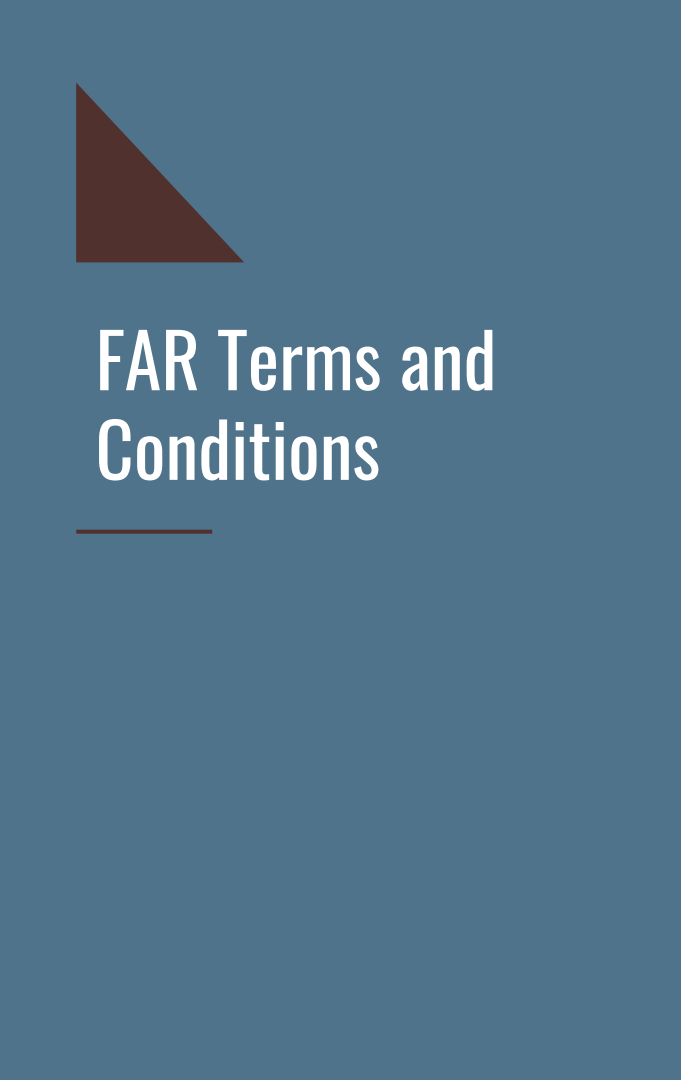
52.243-1 Changes-Fixed-Price [right of government to make changes to, among other elements, design]

52.243-2 Changes-Cost-Reimbursement

52.243-4 Changes [By government generally]

52.244-4 Subcontractor and Outside Associates and Consultant (Architect-Engineer Services)

52.244-5 Competition in Subcontracting



FAR Terms and Conditions

52.246-19 Warranty of Systems and Equipment under Performance Specifications or Design Criteria

52.246-20 Warranty of Services

(a) Definition. "Acceptance," as used in this clause, means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing and identified supplies, or approves specific services, as partial or complete performance of the contract.

(b) Notwithstanding inspection and acceptance by the Government or any provision concerning the conclusiveness thereof, **the Contractor warrants that all services performed under this contract will, at the time of acceptance, be free from defects in workmanship and conform to the requirements of this contract.** The Contracting Officer shall give written notice of any defect or nonconformance to the Contractor _____ [Contracting Officer shall insert the specific period of time in which notice shall be given to the Contractor: e.g., "within 30 days from the date of acceptance by the Government,"; within 1000 hours of use by the Government;" or other specified event whose occurrence will terminate the period of notice, or combination of any applicable events or period of time]. This notice shall state either-

- 1) That the Contractor shall correct or reperform any defective or nonconforming services; or
- 2) That the Government does not require correction or reperformance.

(c) If the Contractor is required to correct or reperform, it shall be at no cost to the Government, and any services corrected or reperformed by the Contractor shall be subject to this clause to the same extent as work initially performed. If the Contractor fails or refuses to correct or reperform, the Contracting Officer may, by contract or otherwise, correct or replace with similar services and charge to the Contractor the cost occasioned to the Government thereby, or make an equitable adjustment in the contract price.

(d) If the Government does not require correction or reperformance, the Contracting Officer shall make an equitable adjustment in the contract price.



FAR Terms and Conditions

52.246-25 Limitation of Liability-Service_s

(a) Except as provided in paragraphs (b) and (c) of this clause, and except to the extent that the Contractor is expressly responsible under this contract for deficiencies in the services required to be performed under it (including any materials furnished in conjunction with those services), **the Contractor shall not be liable for loss of or damage to property of the Government that-**

(1) **Occurs after Government acceptance of services** performed under this contract; and

(2) **Results from any defects or deficiencies in the services performed or materials furnished.**

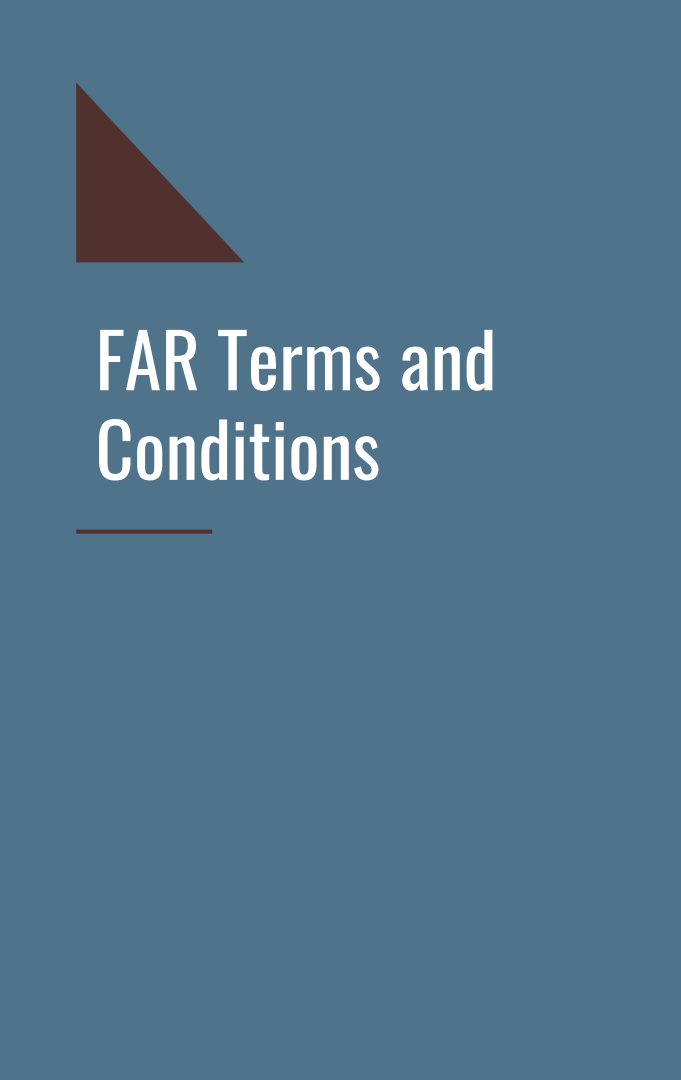
(b) The limitation of liability under paragraph (a) of this clause shall not apply when a defect or deficiency in, or the Government's acceptance of, services performed, or materials furnished results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through the Contractor's performance of services or furnishing of materials under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects and deficiencies in, services performed or materials furnished under this contract.



FAR Terms and Conditions


52.247-5 Familiarization with Conditions

52.248-2 Value Engineering-Architect-Engineer

a) General. The Contractor shall (1) perform value engineering (VE) services and submit progress reports as specified in the Schedule; and (2) submit to the Contracting Officer any resulting value engineering proposals (VEP's). Value engineering activities shall be performed concurrently with, and without delay to, the schedule set forth in the contract. The services shall include VE evaluation and review and study of design documents immediately following completion of the 35 percent design state or at such stages as the Contracting Officer may direct. Each separately priced line item for VE services shall define specifically the scope of work to be accomplished and may include VE studies of items other than design documents. The Contractor shall be paid as the contract specifies for this effort, but shall not share in savings which may result from acceptance and use of VEP's by the Government.

(b) Definitions. "Life cycle cost," as used in this clause, is the sum of all costs over the useful life of a building, system or product. It includes the cost of design, construction, acquisition, operation, maintenance, and salvage (resale) value, if any.

Value engineering, as used in this clause, means an organized effort to analyze the functions of systems, equipment, facilities, services, and **supplies for the purpose of achieving the essential functions at the lowest life cycle cost consistent with required performance, reliability, quality, and safety.**



FAR Terms and Conditions

- 52.248-3 Value Engineering-Construction
- 52.249-2 Termination for Convenience of the Government (Fixed-Price)
- 52.249-4 Termination for Convenience of the Government (Services) (Short Form)
- 52.249-7 Termination (Fixed-Price Architect-Engineer)
- 52.249-10 Default (Fixed-Price Construction)
- 52.249-12 Termination (Personal Services)
- 52.249-14 Excusable Delays
- 52.250-1 Indemnification Under Public Law 85-804
- 52.252-2 Clauses Incorporated by Reference



FAR: Cost Principles Contracts

- The FAR Cost Principles
 - Part 31 identifies when, and to what extent, costs can be recovered.
 - Before a contractor may recover certain costs, they must be
 - (a) allowable
 - (b) allocable
 - (c) reasonable
 - The government can recover any costs already paid to a contractor if such costs are later determined not allowable, reasonable or allocable to the particular contract.
- Government Audit Rights
 - Under certain circumstances, the government is entitled to audit a contractor's price proposal prior to negotiations.
 - The government is also permitted to audit relevant records, books and other contractor information at any time within three years following final payment to the contractor.



FAR: Social-Economic Obligations

- **Equal Opportunity and Affirmative Action**
 - A contractor cannot discriminate against any employee or applicant on the bases of race, color, religion, sex or national origin.
 - For contracts valued over \$10,000, contractors and their subcontractors must affirmatively ensure applicants and employees are treated without regard to race, color, religion, sex or national origin.
- **Subcontracting Plan**
 - For contracts valued at \$500,000 and \$1,000,000, a contractor must submit a written subcontracting plan to the government that demonstrates the contractor's specific efforts to ensure small businesses, small disadvantaged businesses, women-owned small businesses, and businesses located in historically underutilized business zones will be provided equal opportunity to compete for subcontracts.
- **Drug-Free Workplace Requirements**
 - For contracts valued over \$100,000, a contractor must meet certain requirements intended to maintain a (illegal) drug-free workplace.



FAR: Supplements

- Government agencies may issue agency acquisition supplements to the FAR, but they cannot conflict with, or supersede, any relevant FAR provisions, and are interpreted in conjunction with the FAR.
- As such, in preparing a proposal in response to an RFP, Design Professionals must review, not only the applicable FAR clauses, but also any relevant supplement to ensure compliance with all aspects of the FAR for a particular project.
- When in doubt, ask the agency for a list of regulations that govern its acquisition procedures.



FAR: Updates

- The FAR is issued in hard copy by the Government Printing Office (GPO) or available on the internet at: <https://www.acquisition.gov/far>
- When a FAR is amended or a new one adopted, the Government Services Administration (GSA) issues a Federal Acquisition Circular (FAC) which is published in the Federal Register.
- The GSA loose-leaf circulars is also found at the above internet address.



FAR: Overview

- Design Professionals should understand the FAR provisions incorporated by reference or otherwise in project agreements to avoid costly mistakes.
- As demonstrated in this presentation, engaging in construction projects with the federal government is “far” different than contracting with private contractors and owners.
- Relevant parts of the FAR that pertain to construction contractors include Part 36, and Part 52, the latter of which contains the standard terms and conditions contained in a contract for a federal project.



Indemnification Clauses

INDEMNITY OBJECTIVES:

- Indemnification rights can run in favor of or against the Design Professional.
- Any indemnity clause should be based on the Design Professional's adjudicated negligent acts.
- Indemnification language should be narrowly tailored such as "to the extent caused by the Design Professional's negligence," requiring the owner or third party to prove negligence should a claim arise.
- Indemnification should be limited to just the Design Professional's negligence; if the owner, or anyone the owner is legally responsible for, is also negligent, then the indemnification should not be triggered and/or should run in favor of the Design Professional.



Indemnification Clauses

INDEMNITY OBJECTIVES:

- The Design Professional should strive to limit the scope of the indemnity language.
- Delete any broad language such as "arising out of or resulting from" and insert "to the extent caused by."
- Narrow the list of indemnitees to just those to whom the Design Professional owes a duty.
- Base the provision on proven negligent acts or omissions.
- Delete any language that requires the Design Professional to defend the Owner.



Indemnification Clauses

- Typical Indemnification clause without duty to defend – why is it acceptable?
 - To the full extent permitted by law, the Design Professional agrees to indemnify and hold the Owner harmless from and against liabilities, damages and costs (including reasonable attorney’s fees) to the extent caused by the negligence of the Design Professional in performance of services under this Agreement.
 - No defense obligation
 - Negligence-based
 - Responsible only for Design Professional’s own negligence
 - Consistent with professional liability insurance coverage
 - Needs to flow down to sub-consultants (very important)
- Alternatively:
 - To the extent adjudicated liable and as permitted by law, the Design Professional agrees to indemnify and hold the Owner harmless from and against liabilities, damages and costs (including reasonable attorney’s fees) to the extent caused by the negligence of the Design Professional in performance of services under this Agreement.

Indemnity Clauses

Typically found in Contractor/Design Professional Design-Build agreements:

To the fullest extent permitted by law, Designer shall indemnify, defend, and hold harmless the Indemnitees from and against all claims, proceedings, damages, losses, liability, costs, fees (including but not limited to reasonable attorneys' fees) and expenses to the extent caused by resulting from the negligent or wrongful performance of Designer's Design Services hereunder or any negligent error or omission of Designer, or a subconsultant or of anyone for whom Designer is liable. Except as set forth herein, Designer agrees to indemnify and defend Design Builder to the same extent that Design Builder has indemnified Developer and the Indemnitees under the DBA, to the extent caused by Designer's or its subconsultants', or any one for whom Designer is legally liable for such negligent or wrongful acts or omissions, or the Design Services to be provided by Designer hereunder.

Notwithstanding the aforementioned or any other provision herein or in the Design Build Agreement to the contrary, with respect to claims that are covered under professional liability insurance, there shall be no duty to defend and Designer's indemnity obligation shall only be to the extent of its negligence.

Designer shall include in each agreement with a subconsultant an indemnity provision substantially similar to the provisions in this Article, which shall also expressly provide that the subconsultant shall defend, indemnify and hold harmless the Indemnitees, in addition to Design Builder, as set forth above in [this Article], and that the Indemnitees are third party beneficiaries of this Article

Indemnity Clauses

Alternative:

To the fullest extent allowable under the law, Designer shall indemnify, defend (but only with respect to Designer's rendering of non-professional services), and hold harmless Design Builder, Owner, and the shareholders, directors, officers, employees and agents of each (the "Indemnified Parties") from and against losses, damages, claims, liability, and costs and expenses incidental thereto (including costs of defense, settlement and reasonable attorney's fees) (the "Claim") which any or all of them may hereafter incur, be responsible for or pay out as a result of bodily injuries (including death) to any person, or damage, but only to the extent such damages are directly caused by (i) any negligent acts, negligent omissions or willful misconduct of Designer in the performance of the Services; or (ii) Designer's material breach of this Agreement. In the event adjudicated liable, Designer shall indemnify Design Builder amounts for which it is determined liable pursuant to any such Claim, including, without limitation, expenses of litigation, including reasonable attorneys' charges, and court costs.



Questions?

THANK YOU

Gwen P. Weisberg, Esq.
Donovan Hatem LLP
53 State Street – 8th Floor
Boston, Massachusetts 02109
617.406.4591
gweisberg@donovanhatem.com