# Design Professionals Newsletter

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## CONTRACT WISH LIST FOR DESIGN PROFESSIONALS – PART I

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It is not news to any design professional insured that their contract for services is linked inseparably with their exposure to risk. The terms and conditions that comprise a design professional contract directly impact an insured's exposure to risk and potential for a claim against its Great American policy. However, an insured often has little if any, input on the terms and conditions of their services contract or ability to alter the terms to mitigate their risk. This frequent scenario leads some design professionals to disengage from the contract negotiation process and potentially lose opportunities to request risk mitigating language. But what if this were not the case?

Dream up a scenario where you are given total contract drafting freedom. What do you want in (or out of) your contract and why?

### LIMIT ON THE AMOUNT OF LIABILITY

One valuable protection a contract can contain is a limit on the total amount of money an insured is subject to pay in the event of a design error or omission. It is frequently the case where an insured's fee for services is dwarfed several times over by the potential cost of remediating a design error or omission, leading to excessive exposure to risk for a modest reward. By inserting limitation of liability language in a contract, an insured can expressly limit the amount of damages that may be recovered due to an error or omission. While this limit of liability does not protect an insured from third-party claims, it limits the amount the contracting party may seek and therefore significantly reduces an insured's exposure. The AIA has provided the following model language:

> "Except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's consultants, nor their agents or employees shall be jointly, severally or individually liable to the Owner in excess of _____ Dollars ($_____)," with the dollar amount being equivalent to the architect's expected profit. AIA Document B503™ – 2017 Guide for Amendments to AIA Owner-Architect Agreements Section C-6.

## LIMIT ON THE TYPE OF TYPE OF LIABILITY

**Betterment:** Betterment is a legal term which defines the portion of damages due to a design error or omission that are not recoverable as the costs represent an addition or modification to the design that benefits the owner and does not subject it to greater costs absent the error or omission. By inserting language in a contract that eliminates a designer's responsibility for betterment, an insured can eliminate one of the most request basis for claims against its Great American Policy. The AIA has proposed the following model language:

> "For any change in the Project caused by the Architect, the Architect shall not be responsible for costs associated with the change to the extent the costs would have otherwise been incurred by the Owner had the act or omission by the Architect, resulting in the change, not occurred." AIA Document B503™ – 2017 Guide for Amendments to AIA Owner-Architect Agreements Section A-2.

**Unforeseen/Concealed Conditions**: Increased costs stemming from changes in the design of a project due to the discovery of unforeseen or concealed conditions are a common source of claims against design professionals. Depending on the nature of the renovation or rehabilitation and the owner's prior investigation, the likelihood of encountering unforeseen or concealed conditions is high. If given the opportunity, an insured can explicitly limit its liability by inserting language like that proposed by the AIA:

> "The Architect shall utilize documentation regarding existing conditions furnished by the Owner in the preparation of the Architect's Instruments of Service and, in doing so, the Architect shall be entitled to rely on the accuracy and completeness of the information provided. If the existing conditions materially differ from the documentation furnished by the Owner, the Architect shall have no responsibility for any costs or expense incurred by the Owner as a result of the differing conditions. In addition, if the Architect is required to make changes to the Architect's Instruments of Service, the Owner shall compensate the Architect for such services as an Additional Service." AIA Document B503™ – 2017 Guide for Amendments to AIA Owner-Architect Agreements Section B-2.

## LIMIT ON INSURED'S INDEMNIFICATION OBLIGATIONS

Design professional contracts frequently contain an indemnity provision against third-party claims that provides that the design professional has a duty to indemnify the owner against third party claims. However, these provisions are often drafted broadly (often beyond what is insurable!) to permit owner the maximum ability to impute the defense of claims to the design professional. Any insured should take every opportunity to restrict and limit the scope of its indemnity obligations to the contracting party to only those damages directly caused by the insured's negligence. An insured can also remove its obligation to defend the owner, which causes insurability issues and delete any language for intent-based actions (i.e. terms such as "recklessness", "wrongful acts", "intentional misconduct", "willful misconduct" and "gross negligence". It is also recommended that the definition of "indemnitee" be narrowed to the entity with whom you are contracting and

to delete broad undefined terms such as “assigns”, “parent company”, “subsidiaries”, “agents”, “related and affiliated companies” and “lenders”. The following is suggested in the AIA model language:

> “The Architect shall indemnify and hold the Owner and the Owner’s officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys’ fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. The Architect’s obligation to indemnify and hold the Owner and the Owner’s officers and employees harmless does not include a duty to defend. The Architect’s duty to indemnify the Owner under this provision shall be limited to the available proceeds of the insurance coverage required by this Agreement.” AIA Document B503™ – 2017 Guide for Amendments to AIA Owner-Architect Agreements Section C-7.

We hope that you have enjoyed dreaming of a world where you are in the driver’s seat to mitigating your risk through contractual amendment. Contractual terms matter and have an impact far beyond the signing of the document. Advocating for amendments such as those contained in this article are well worth the time and effort to seek to insert into your next contract! Stay tuned for Part 2 in our next newsletter!