

# Legal Potpourri Program

**THURSDAY, JUNE 22 - 8 AM**

## **TRACK 2**

### **8:00 AM - Hiring, Firing, and Discipline**

Best Practices for Employers

Presented by:

Jennifer Frank - Lynn, Jackson, Shultz & Lebrun

Lisa Marso - Boyce Law Firm

Nichole Mohning - Cutler Law Firm

Catherine Cano - Jackson Lewis

### **Construction Contract Drafting: An Act in Two Parts**

### **9:00 AM - Construction Contract Drafting Pitfalls**

Presented by:

Jim Wiederrich - Woods Fuller

### **10:00 AM - Tips & Tricks in Construction Law Negotiating**

Presented by:

Shawna Hanson and Jennifer Clites - Daktronics

Dan Doyle - Lloyd Companies

Amy Arndt - Ballard Spahr

Moderated by:

Jason Unger - Dakota Layers

Co-Chairs - Eric Hanson, Anita Fuoss, Brandy Rhead

**About the Speaker(s):** Jennifer Suich Frank, Esq., AWI-CH, SHRM-SCP is an employment lawyer with the law firm of Lynn, Jackson, Shultz & Lebrun, in Rapid City, SD. Jennifer has been an attorney for 25 years.

Jennifer advises businesses and human resources professionals on a variety of employment issues, including discrimination, FMLA, ADA/disability, wage & hour, hiring/firing/discipline, and non-compete issues. She also counsels and drafts employment contracts, including executive employment agreements, severance plans and separation agreements, as well as reviews, revises and drafts employment handbooks, policies and procedures. Jennifer handles administrative charges of discrimination and employment litigation.

She is a frequent lecturer and trainer on various employment issues affecting employers. In addition, she conducts neutral workplace investigations for a range of organizations and is an AWI certificate holder.

Jennifer is currently the chair of the SD State Bar Labor and Employment Law Committee, and also serves as a committee member for the SD State Bar Sexual Harassment Ombuds Program. She is also active in Black Hills Society for Human Resource Management (BH SHRM), having served on its Board of Directors for 8 years in various capacities.

Jennifer enjoys family time with her husband and two teenagers, hiking, camping, gardening, cooking, canning and reading great beach novels!

Lisa K. Marso

Lisa Marso ([lkmarso@boycelaw.com](mailto:lkmarso@boycelaw.com)) is a partner at Boyce Law Firm, LLP, in Sioux Falls, SD, with whom she has practiced nearly 30 years. Her primary focus is employment and governmental law. Her clients include both the small employer as well as those who employ thousands of employees. Clients represented include banks, cities and counties, manufacturers, insurance companies, franchisors, and health care providers. She is actively involved in litigation, training, investigations, labor negotiations, drafting policies, and providing guidance. She is a member of the State Bar of South Dakota (currently serving as President), the Defense Research Institute, South Dakota Defense Lawyers Association, Federation of Defense & Corporate Counsel, and the American Bar Association. She has been received numerous awards and recognitions including Best Lawyers in America in Employment Law/Management, Chambers USA (Band 1), Super Lawyers, and Corporate Intl Global Awards: Labor & Employment of the Year in South Dakota

Nichole Mohning is a partner with the Cutler Law Firm, LLP. She primarily practices in the area of employment law providing advice and counsel to both public and private employers on human resource policies and practices, state and federal compliance issues, employee benefits and leave, and non-compete agreements. She also assists clients with employment-related claims in the courts and administrative agencies. Originally from Le Mars, Iowa, Nichole graduated from the University of Kansas with a B.A. in history and American studies. Following graduation, she was involved in secondary and higher education where she served as a teacher and in student services. Nichole returned to school at the University of Kansas School of Law. She practiced in Kansas for several years before joining the Cutler Law Firm in 2008. Nichole lives in Sioux Falls with her three children. Along with actively participating in the high school booster club and coordinating of her daughter's softball travel team, she serves on the Board of Directors for Community Health Initiative (CHI) Haiti.



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Catherine A. Cano is a principal in the Omaha, Nebraska office of Jackson Lewis P.C.

Catherine is a member of the firm's Disability Leave and Health Management, Workplace Health and Safety and Labor Practice Groups. Catherine splits her time between providing advice to avoid employment disputes and litigation. Catherine has defended hundreds of charges of discrimination filed with federal, state and local administrative agencies, and regularly appears before the U.S. Equal Employment Opportunity Commission, Iowa Civil Rights Commission and Nebraska Equal Opportunity Commission. Catherine represents in employers in federal and state court proceedings and has successfully defended multiple employment arbitrations. She also counsels clients on workplace drug and alcohol issues, including developing substance abuse policies.



**State Bar of SD – Employment Law CLE**

**Hiring, Firing and Discipline –  
Best Practices for Employers**

**June 22, 2023**

**Nichole Mohning | Jennifer Frank | Catherine Cano | Lisa Marso**  
**(Cutler) (Lynn Jackson) (Jackson Lewis) (Boyce)**

## [ Disclaimer ]

This presentation is intended for educational purposes only. It is not intended to convey legal advice pertaining to any particular situation and is not a substitute for legal advice.

# Hiring Qualified Employees





# Hiring Qualified Employees

As many of you know, there are federal, state and even local laws that protect individuals against discrimination based on protected classifications, such as:



**Age**  
**Race**  
**Color**  
**National origin**  
**Sex/gender**  
**Disability, and**  
**Religion.**

These laws apply to protect applicants for employment as well against improper interview questions and recruitment practices, such as advertising.

# Hiring Qualified Employees

## Job Descriptions

- Clear and specific job duties
  - Identification of primary/essential duties
- Education/Experience
  - Ensure is accurate to the position
  - Accommodations if disability limited applicant's ability to obtain diploma
- Physical Requirements
- Time and Attendance Requirements
- Language Requirements

## Job Postings

- Do include an EEO Statement
  - Any reference to a protected class must be a bona fide occupational qualification
- Be honest
- Review language for statements that may be unintentionally viewed as discriminatory
  - "seeking recent college graduates" or "young and energetic"

# Hiring Qualified Employees

## Applications

- Review the questions for job-related necessity
  - Place of Birth
  - Date of Birth
  - Citizenship
  - Education/Dates Completed
  - Wage History

## Ban-the-Box

- Prohibition on asking whether an applicant has been convicted of a crime at the application stage.
- 35 states and the District of Columbia
  - 13 states have extended to private employers
  - 150 cities and 18 counties

## Use of Online Applications

- Ensure they meet the accessibility standards

# Hiring Qualified Employees

Here are some questions that are improper and suggested better response:

- **Citizenship** - Are you a citizen of the United States?
  - ❑ *Better* – “Are you legally authorized to work in the United States?”
- **National Origin or Place of Birth** – Where were you born or where did your relatives come from?
  - ❑ *Better* – do not ask!
- **Age\*\*** (covered by federal ADEA) – asking for date of birth or age, even year of graduation from high school, college, etc.
  - ❑ *Better* – do not ask!

\*\* not covered by South Dakota law

# Hiring Qualified Employees – cont'd

- **Religion** – asking about religion including whether the applicant can work on a particular holiday or will need additional breaks?
  - *Better* – “Can you work these stated hours or this schedule?”
- **Race** – asking any question which would indicate race or requesting a photograph before hiring
  - *Better* – only ask for photo after a conditional job offer is made if required for certain hiring purposes (e.g. driver's license, ID)

# Hiring Qualified Employees – cont'd

- **Pregnancy** – Are you pregnant or do you plan to become pregnant?

Do you practice birth control?

☐ *Better* – ask about future career or employment plans

- **Sex and/or marital status** – Does your spouse object to you working?

Do you have a spouse? Do you have any young children?

☐ *Better* – “Can you work the stated hours or schedule?”



# Hiring Qualified Employees – cont'd

- **Disability** – asking about the person's disability, if they have a disability,  
how they became disabled or whether they are taking any medications.  
Also, do not ask about applicant's prior Workers' Compensation history.
  - ❑ *Better* – “Can you perform the essential functions of the job with or without an accommodation?”
    - ❖ Show or describe the essential functions of the job to the applicant so there is no ambiguity
- **Criminal Activity** – asking whether someone has been arrested or convicted of a crime – also better not to put this question on your job applications . . .
  - ❑ *Better* - once a condition offer of employment has been made, can do a background check that involves checking for criminal conduct, if done for every other applicant for the same job category.

# Hiring Qualified Employees – cont'd

- **Googling Applicants and Reviewing Social Media**

- ☐ Best practice is to not Google applicants for employment, since an applicant could argue that what the potential employer discovers on the internet could be used in a discriminatory fashion or somehow involves employer bias.
- ☐ Utilize a third-party service
  - ☐ Only review public information
  - ☐ Policy for Monitoring
  - ☐ Document findings





# Hiring Qualified Employees – cont'd

## Conducting Background Checks

- ▶ All background checks that generate a consumer report must comply with the Fair Credit Reporting Act (FCRA).
  - ▶ Prepared by a credit reporting agency; bears on credit standing, character, reputation, etc. and used to establish eligibility for employment (as well as other purposes).
- ▶ Notice and Written Authorization to Conduct the Background Check
  - ▶ Separate from the employment application
  - ▶ Employers will need to certify to the vendor you complied and will not discriminate or misuse the information.
  - ▶ Check State Laws

# Hiring Qualified Employees – cont'd

## Conducting Background Checks

- Receipt and Use of Reports
  - Must advise applicant of the intent to use the report and provide a copy of the report and their rights under the FCRA
  - Advise the applicant of the process to respond and dispute the report
- After take Adverse Action
  - Must advise the applicant in writing of the action and the contact information for the consumer reporting agency and rights to obtain a copy of the full report.
- Use of Investigative Reports (interviews) have additional requirements

# Hiring Qualified Employees

## Criminal background information: what are the rules?

Equal Employment Opportunity Commission (EEOC)

- ▶ Revised guidance in 2012 for employers on the use of criminal background checks in employment decision-making
- ▶ *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 –*

[www.eeoc.gov/laws/guidance/qa\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm)

# Hiring Qualified Employees

Not illegal to ask:

- ❖ Questions about an applicant's background; or
  - ❖ To require a background check.
- 
- An arrest or criminal conviction should not be an automatic bar to employment.
    - The EEOC has found that African Americans and Hispanics are arrested and incarcerated in numbers disproportionate to their representation in the general population.
    - Criminal record exclusions from employment have a disparate impact based on race and national origin.

# A. Hiring Qualified Employees

Best guidelines to consider when making an employment decision based on criminal arrest or conviction:

- ❑ Is exclusion from employment job related and consistent with business necessity?
  - ❑ Arrest alone does not establish that criminal conduct occurred.
    - The underlying conduct, not the arrest, could make individual unfit for position
    - Same consideration for deferred imposition
- ❑ What is the nature of the job held or sought? Essential functions?
- ❑ What is the nature and gravity of the offense or conduct?
- ❑ What is the time that has passed since the offense/conduct and/or the completion of the sentence?
  - The longer the time passed, the more diluted the fact of the offense becomes.

# A. Hiring Qualified Employees

- ❑ Any mitigating measures such as
  - has the person been employed elsewhere
  - been rehabilitated
  - performed community service
  - met the conditions of probation, etc.
- ❑ Individualized assessment – character references, employment references, facts or circumstances surrounding the offense or conduct?
- ❑ Develop written policy and procedure for screening applicants
  - Identify essential functions of the job
  - What specific offenses that may demonstrate unfitness for performing job.
  - Determine appropriate duration of exclusions for criminal conduct
  - Include an individualized assessment.





# A. Hiring Qualified Employees – cont'd

## Pre-Employment Drug Testing

- ❑ Have a written policy identifying which positions and which substances will test for.
- ❑ Utilize outside labs and identify MRO to address initial positives
  - ❑ Remember that in SD lawfully prescribed Medical Cannabis is treated the same as other prescribed medications

## Important Reminder:

- ❑ Train managers, HR and other decision makers with regard to implementing and carrying out policy consistently.
- ❑ Keep information about applicants and employees confidential
  - Use only for purpose gathered.



# Employee Performance Management & Documentation

## Evaluating Employee Performance While Mitigating Liability

- Employee performance is important to every organization

*!!! An organization is nothing without its employees !!!*

- Conducting employee performance reviews is no manager's favorite task, but very important to do and to do correctly.





## Advantages - of employee performance evaluations:

- a) Helps employer document issues
- b) May decrease potential liability for employment-related claims by providing a written defense
- c) Helps center on the importance of job responsibilities
- d) Increase communication and provide clarity
- e) Mechanism to reward employees for hard work and achievements
- f) May inspire employees to stretch to increase skills and goals
- g) Potentially improve morale, and
- h) Assist in decision making of compensation increases



## Disadvantages:

If not done correctly, the employee's performance review can come back to haunt the employer.

Example:

- Employee supervisor or manager does not want to say something negative to employee in fear that employee will become discouraged or feelings will be hurt;
- "sugar-coats;"
- the performance review, a true picture is not represented;
- called "evaluation inflation."



## Disadvantages, cont'd:

When employer wants to discipline or terminate that employee, but has sugar-coated performance reviews, the decision to terminate

- ☐ appears unsupported or fabricated
- ☐ harder to defend its actions
- ☐ Harder to defend a discrimination claim or lawsuit
- ☐ Harder to make a pretext argument (employer's true reason something other than stated reason, thus discriminatory)



## Goals and Tips

1. Addressing an Employee's Performance and Goals
  - Provide examples to the employee about the performance and any problems.
  - Describe issues with specificity and take the opportunity to reinforce performance standards.
  - Plan for improvement or Performance Improvement Plan (date to follow up - provides opportunity for improvement and feedback)
  - Offer help such as training, coaching or classes if needed.



## Goals and Tips

### 2. Document to Mitigate Liability and Provide Clarity –

- written evidence that the performance or behavioral issues were addressed
- employee has participated in the process
- employee is aware of what is being addressed
- employee should sign the performance review
- opportunity for the employee to provide comments
- documentation of success or failure of key components of the employee's job is a critical part of the process
- provides evidence of non-discriminatory reasons for pay or promotion decisions
- provides a basis for a potential disciplinary action, up to and including termination of employment



## Goals and Tips

### 3. Clearly Written and Avoid Problematic Language –

- ▶ performance reviews should be clearly written, be specific, and avoid using subjective language
- ▶ avoid any discriminatory language and not focus on any protected classifications (age, sex, religion, disability, race, etc.)
- ▶ stick to performance and not attitude
- ▶ performance reviews should not make any legal conclusions and should not have legal language contained in them
- ▶ consider the rating system that is utilized (ensure that it is defensible and applied consistently among employees)





## Goals and Tips

### 4. Consider Employee Self-Evaluation –

- mitigate liability to show that you have included employees in their own performance evaluation, and it is not so one sided
- encourages employees to think thoughtfully about their job role and their performance, and to consider what they have contributed to the organization throughout the year
- takes into account where the employees see their future with the company, and where they want to apply their skills and abilities down the road




## Goals and Tips

### 5. Time Frequency –

- ▶ do them regularly and consistently (e.g., annually)
- ▶ provides a routine and regular method to allow communication and feedback to occur
- ▶ Employers should not skip reviews - key way to discuss any issues or performance problems and to document them
- ▶ frequent communication and documentation is key in terms of mitigating employer liability





## What Goes in the Discipline/Discharge Letter?

- The key to employee communications is to be clear and concise.
- No need to over explain, but the employee should understand what error or violation was made and why the decision is being made.



## Disciplinary Letter/Corrective Action

- a. corrective action form
  - guides managers or human resources as well as to provide consistency.
  - key items
    - ✓ employee's name,
    - ✓ employee ID,
    - ✓ date,
    - ✓ employee's job title and/or department,
    - ✓ level of corrective action (e.g., verbal warning, written warning, suspension, termination?),



## **Disciplinary Letter/Corrective Action**

Key items (cont'd):

- ✓ description of the incident(s) or behavior(s), including dates, times and/or locations, expectations about future conduct,
- ✓ consequences of a future violation or if the issue continues, and
- ✓ written acknowledgment by the employee that the employer has met with them and described the disciplinary action.

b. If using a letter format, employers should try to include all of the elements described above


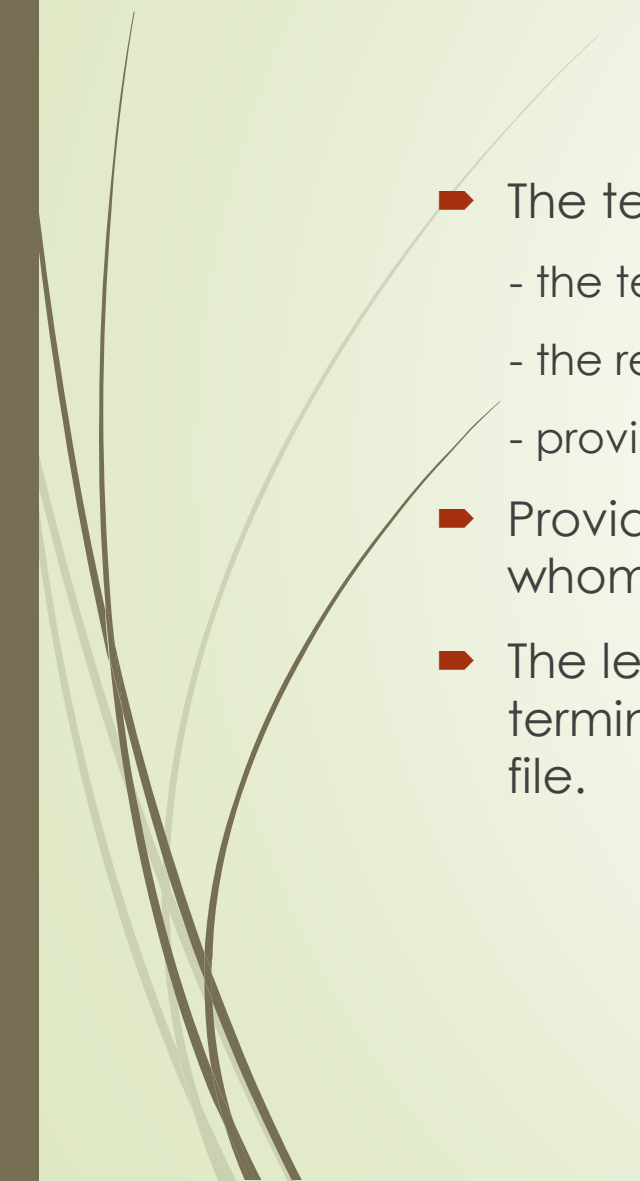
- The letter does not need to be super lengthy, but should be clear and explain the situation with enough detail to get the key points across.



## Discharge/Termination Letter

- a. Similar to corrective action letters or communications, termination or discharge letters need to be
  - clearly worded,
  - succinct,
  - not too brief.

The key is to strike the right balance between getting the reason for termination communicated, but not going into too much detail.

- 
- 
- The termination letter will confirm
    - the termination decision,
    - the reason for the termination, and
    - provide key details that the former employee will need to know.
  - Provide information about the continuation of benefits or whom the former employee can contact for further details.
  - The letter should be handed to the employee at the termination meeting or sent to his or her last known address on file.

# Discipline - Policies and Practices







# Disciplinary Policies

## A. Putting a Discipline Policy in Place Proactively

- Best practice is to develop a sound and thorough discipline policy
- Outline the process and procedure to make expectations and consequences clear to employees
- Serves to minimize potential legal liability or risk
- Establish an effective means of dealing with employee behavior, actions (or inactions) that will not be tolerated, and provide a means to correct problems before they escalate into larger ones
- Consider collective bargaining agreement steps and procedures that are in place (if applicable)



# Disciplinary Policies

Considerations for policy design?

1. What is unacceptable behavior? –handbook should cover various topics ranging from attendance to anti-discrimination/harassment, to proper timekeeping, etc.
2. Penalty or consequence –what penalty or consequence will be imposed for a violation of the particular work rule or policy.
3. Progressive disciplinary policy? Progressive disciplinary policies typically follow a particular order of discipline, and the severity of the discipline increases as each infraction of the rules/policies occurs.
  - a) Common in CBAs
4. Does the policy generally provide for consistency and fairness?



# Disciplinary Policies

A typical progression is as follows:

- Verbal warning
- Written warning
- Suspension
- Termination

Some employers may combine this concept with categories of offenses (i.e., certain offenses will warrant a particular step)



# Disciplinary Policies

## *Advantages of Progressive Discipline*

- Step-by-step system that conveys that you will deal with problems in an orderly and systematic way and that employees ordinarily won't be terminated without warning.
- Employees are better able to determine what their status is on a particular issue or area.
- Avoids inconsistent treatment of similarly situated employees



# Disciplinary Policies

## *Disadvantages of Progressive Discipline*

- More tedious – more documentation and follow-up work.
- Requires supervisors and managers to understand all of the policies and the progressive system well, so that they can apply it fairly and consistently to all.
- If not properly drafted, an employee may argue the policy creates an employment contract.
- It can prolong a situation where the employer knows the relationship is unlikely to work out.



# Disciplinary Policies

Policy violations which may warrant immediate termination – identify these so that there is no confusion of when an employee can be terminated immediately for the offense.

Examples include:

- Harassment or discriminatory behavior (including sexual harassment);
- Theft;
- Vandalism or misappropriation of company property;
- Excessive or extended absenteeism;
- Reporting to work under the influence of drugs or alcohol;
- Fighting;
- Dishonesty or falsification of employer records
- Insubordination



# Disciplinary Policies

The Employer's policy should state:

- not possible to list all of forms of behavior that are considered unacceptable and not tolerated in the workplace
- will not tolerate certain behaviors and employees can be subject to disciplinary action, up to and including termination of employment.
- reserve the right to discipline as it determines is needed, in its discretion, for a situation that may not be listed specifically.
- To the extent possible, similar situations should be handled similarly in terms of discipline or consequences





# Disciplinary Policies

If an employer does not have a policy addressing the topic or a “catch-all policy,” it should:

- Do its best to deal with the employee situation misconduct fairly
  - Similar situations and discipline should be handled similarly
- Be as consistent as possible based on past precedent, and
- Consider developing more policies, or a catch-all policy, to cover itself and particular situations in the future.



# Overview of Termination

- Who can be terminated
- What to review
- Possible termination requirements
- Best practices regarding terminating employees



# Terminations

- No matter how careful the hiring, performance issues arise; termination needs may exist



# Who Can Be Terminated

- At-Will Employees
- For Cause Employees (some union, public due to policies)
- Contract Employees (term)



# Who Can Be Terminated

- Exceptions to ability to terminate
  - If termination violates antidiscrimination laws
  - If termination for taking right-to time off
  - If termination in retaliation of protected act
  - Whistle-blowers, First Amendment, Work Comp, etc.
  - If contract/for cause requirement and conduct not rise to required level



# Making the Termination Decision

- Documents to Review
  - Look at personnel file (MOST IMPORTANT)
  - Look at employment agreement
  - Look at policy manual (especially if public employee)
  - Consider past practices
  - Consider length of employment
  - Have the decision reviewed



# Terminations

- Never Easy
  - Usually unhappy or poor performing employee
  - Employee has warriors on his/her side





# How to Terminate

- Review applicable laws
- Pre-termination Meetings
  - Required for employee with property interest (not at-will (e.g. for cause employee; certain statutory employees))
  - Often required in CBA/union agreements/teachers
  - No decision yet made—"considering terminating"







# How to Terminate

- Follow written procedures
  - For public employees—Loudermill (notice/opportunity)
- Employees subject to an employment agreement
  - If considering a termination of employment, review agreement first.
  - Agreement will tell you what you can do and how to do it.
  - Provisions in agreement can determine if a termination is feasible and the notice requirements under each circumstance.
  - Notice can be required in writing.
  - May have “For Cause” provision.
  - May have notice period (e.g. even up to 180 days).

# Termination-Agreement

- Consider Severance Agreement
  - 2 Categories (older or younger than 40) (21 days to review; 7 to revoke if 20 or more employees) (ADEA)
  - Consideration (more than what entitled to), non-admission of liability, confidentiality/non-disparagement, reference
  - Need dispute for confidentiality
  - NLRB Considerations
    - If the employee is not a supervisor under the NLRA, be mindful of non-disparagement and confidentiality
    - Also ensure no waiver of NLRA Claims



# How To Terminate

- General Matters to Consider Before Termination Meeting
  - Involved those who need to made decision?
  - Consider date/time (not Friday?)
  - Warriors on employees' side?
  - Need security? EPA?
  - IT issues-need to disable access? Back up tapes?



# How To Terminate

- Communicating the decision
  - Fairly and with respect
  - If prior notice of issues, far easier
  - More than 1 person in room
  - Need to record?
- Give reason? Specific or general?
- Consider opportunity to resign if appropriate
- Do NOT give mixed messages



## Post Termination Issues

- Property return-Company's and Personal
- Get Passwords
- Termination Letter
  - Not required, but best practice
- COBRA Notice
  - Make sure administrator told



# Post Termination Issues

## Non-Compete and Non-Solicitation Reminder

- These provisions can be in an employment agreement
- In employer's best interest to ensure they are valid following separation of employment and enforced.
- If provision triggered by separation of employment, remind employee of obligation to honor the terms.
  - If they do not, take steps to enforce the employer rights so that this employee and others with restrictive covenants will know that the company takes them seriously



# 55

## Post Termination Issues

- Unemployment (Re-employment)
  - Consistent reason given
- Messaging Other Employees
  - Limit details to those who need to know





# 5 6

## Post Termination Issues

### Exit interview-Conduct one or not?

- May provide insight as to company “brand” and how employer comes across to employees
- Can help to decrease employee turnover
- Reduce likelihood employee will sue organization
- Learn about opportunities for improvement
- HOWEVER, may create issues where employee was involuntarily terminated

SAVE documents/personnel file



# Handling Terminations and Layoffs – CONT'D

## Termination: mistakes to avoid

- a. Not conducting a proper or thorough investigation into alleged wrongdoing by employee
- b. Not considering an employee's file and documentation
- c. Terminating an employee too quickly or impulsively
- d. Not providing a sufficient reason or explanation for termination
- e. Terminating an employee close in time to a complaint
- f. Not following handbook, collective bargaining agreement, policy or procedure, applicable statute
- g. Not being prepared for termination meeting or mismanaging logistics of the separation of employment

Thank you!!  
Any Questions?





*James M. Wiederrich, Shareholder, Woods Fuller*

*Jim joined Woods Fuller law firm in 1980, concentrating in business and corporate law such as agribusiness, construction, real estate, and mergers and acquisitions.*

*He has put his agricultural background to use in organizing, capitalizing, and representing dozens of companies that produce and/or process agricultural commodities ranging from ethanol to soybeans to livestock and more. With his extensive legal experience and unwavering dedication to his clients, Jim has established himself as a trusted advocate in the community.*

*Jim has received numerous accolades for his work, including "The Best Lawyers in America," "America's Leading Lawyers," and "Super Lawyers" recognition. He is very community conscious, previously serving as the Chairman of the Business Leadership Council of the Sioux Empire Chamber of Commerce, Chairman of the Sioux Empire United Way, and as Chairman of the Avera McKennan Board of Trustees. Appointed by the Mayor of Sioux Falls to serve on the Sioux Falls Housing and Redevelopment Commission, Jim was recently elected to serve as Chairman of the organization.*

**CONSTRUCTION CONTRACT CLAUSE PITFALLS:  
CONTRACTOR WARRANTIES, INSURANCE, INDEMNITY, CONSEQUENTIAL AND  
LIQUIDATED DAMAGES, AND DISPUTE RESOLUTION PROCESS**

**THURSDAY, JUNE 22, 2023**  
9:00 A.M.

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## **Disclaimer**

The information in this PowerPoint presentation is intended to be an overview of the topics covered. As legal counsel for a contractor or Owner, you must review for consistency and risk analysis the entire construction contract, the insurance policies and endorsements, and statutory and other authority in the state where the project is located. Always consult with the insurance agents providing the insurance coverages. The terms of a construction contract will be greatly dependent upon the negotiation position and leverage of the parties. The information provided is not legal advice for any specific contract arrangement and cannot be used without investigation of the facts and circumstances of the construction project.

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## **Construction Contract Forms**

### **I. Types of projects.**

There are a number of associations which provide a multitude of construction contract forms. The forms are developed for different types of construction projects. Examples include:

A. There are specific forms for large vertical projects (buildings, warehouses, wind towers, communications towers, etc.) and small vertical projects (medical clinics, storage sheds, homes, etc.).

B. There are specific forms for non-vertical types of construction projects (roads, streets, water and sanitary sewer infrastructure, parking lots, bridges, etc.).

C. Vertical build projects and non-vertical build projects may have different forms for fixed bid projects, cost plus a fee projects, design-build projects, construction manager agent projects, and construction manager at risk (with or without a guaranteed maximum price) projects.

### **II. Publishers of Forms.**

The major publishers of construction forms most used include the following:

A. The American Institute of Architects publishes what are commonly called AIA Documents®. These forms are the most widely used forms.

B. The ConsensusDocs® Coalition publishes what are commonly called ConsensusDocs® documents. This Coalition includes approximately 40 construction related associations. The Coalition strives to balance the rights of the owners, contractors, architects, and engineers.

C. The Engineers Joint Contract Documents Committee (“EJCDC®”) includes the American Council of Engineering Companies, the American Society of Civil Engineers, and the National Society of Professional Engineers. These EJCDC® contract documents are generally used for non-vertical construction projects.

### **III. Use of Forms Requires a License.**

A. A license is required to use any of the publishers’ forms. An annual license may be obtained for a fee.

B. Once a license is obtained revisions may be made to the forms to fit the needs of the parties and the requirements of the project. NEVER UTILIZE ANY FORM WITHOUT REVISING IT TO FIT YOUR PROJECT!



C. There are a multitude of issues to be addressed when revising form construction documents. Those revisions could address: pricing inclusions and exclusions; retainage; materials; equipment; approval processes for schematic design documents, design development documents, and construction documents; approval of pay applications; change orders; contingency allowances; substantial completion; final completion; punch list requirements; force majeure events; mechanics' liens; bid, performance, payment, and warranty bonds; termination rights; liquidated damages; and much more.

#### IV. Construction Contract Warranty Provisions.

A. What is the warranty period?

1. Many contractors and owners assume the warranty period is one year. Unless the contract language explicitly limits the warranty period, it almost always extends well beyond one year.

B. AIA Construction Contracts.

1. Almost all AIA construction contracts incorporate by reference the warranty provisions as set forth in AIA <sup>TM</sup> Document A201-2017 ("AIA A201").

1.1 General Warranty Provisions (Used With Permission):

1.1.1. AIA A201 § 3.5 **Warranty**. The Contractor warrants to the Owner and Architect that **materials and equipment furnished under the Contract will be of good quality and new** unless the Contract Documents require or permit otherwise. The Contractor further warrants that **the Work will conform to the requirements of the Contract Documents and will be free from defects**, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. [Emphasis Added].

1.1.2. AIA A201 § 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and **insurance**, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. **Warranties required by the Contract Documents shall commence on the date of Substantial**

**Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion**  
[Emphasis Added].

1.1.3. AIA A201 § 9.8.1 **Substantial Completion** is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. [Emphasis Added].

1.1.4. AIA A201 § 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, **within one year after the date of Substantial Completion of the Work** or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, **the Contractor shall correct it promptly after receipt of written notice from the Owner to do so** unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. **During the one-year period for correction of Work**, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4. [Emphasis Added].

2. All ConsensusDocs® construction contracts include within the body of the construction contract all general conditions. Thus, there is no separate document containing general conditions which must be incorporated into the construction contract. Each form construction contract has its own section numbers for the warranty provisions, but the warranty provisions read the same.

2.1 General Warranty Provisions (Used With Permission):

ConsensusDocs® 500 § 3.10.1 Construction Manager warrants that all **materials and equipment furnished under the Construction Phase of this Agreement will be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials.** At Owner's request, Construction Manager shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. Construction Manager further warrants that the Work shall be free from material defects not intrinsic in the design or materials required in the Contract Documents. Construction Manager's

warranty does not include remedies for defects or damages caused by normal wear and tear during normal usage, use for a purpose for which the project was not intended, improper or insufficient maintenance, modifications performed by Owner or others, or abuse. **Construction Manager's warranty shall commence on the Date of Substantial Completion of the Work, or of a designated portion** [Emphasis Added].

ConsensusDocs® 500 § 3.10.2 With respect to any portion of Work first performed after Substantial Completion, Construction Manager's warranty obligation shall be extended by the period of time between Substantial Completion and the actual performance of the later Work.

ConsensusDocs® 500 § 3.10.3 To the extent products, equipment, systems, or materials incorporated in the Work are specified and purchased by Owner, they shall be covered exclusively by the warranty of the manufacturer. There are no warranties which extend beyond the description on the face of any such warranty. For such incorporated items, **ALL OTHER WARRANTIES EXPRESSED OR IMPLIED INCLUDING THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.**

ConsensusDocs® 500 § 3.10.4 Construction Manager shall obtain from its **Subcontractors and Suppliers** any special or extended warranties required by the Contract Documents. **Construction Manager's liability for such warranties shall be limited to the one-year correction period referred to in the section immediately below.** After that period Construction Manager shall provide reasonable assistance to Owner in enforcing the obligations of Subcontractors or Suppliers for such extended warranties [Emphasis Added].

ConsensusDocs® 500 § 3.11.1 If before Substantial Completion or **within one year after the date of Substantial Completion of the Work** any Defective Work is found, Owner shall promptly notify Construction Manager in writing. Unless Owner provides written acceptance of the condition, Construction Manager shall promptly correct the Defective Work at its own cost and time and bear the expense of additional services required for correction of any Defective Work for which it is responsible. **If within the one-year correction period** Owner discovers and does not promptly notify Construction Manager or give Construction Manager an opportunity to test or correct Defective Work as reasonably requested by Construction Manager, Owner waives Construction Manager's obligation to correct that Defective Work as well as Owner's right to claim a breach of the warranty with respect to that Defective Work [Emphasis Added].

ConsensusDocs® 500 § 2.5.24 “**Substantial Completion**” of the Work, or of a designated portion, occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that Owner may occupy or utilize the Work, or a designated portion, for the use for which it is intended, without unapproved disruption. The issuance of a certificate of occupancy is not a prerequisite for Substantial Completion if the certificate of occupancy cannot be obtained due to factors beyond Construction Manager's control. This date shall be confirmed by a certificate of Substantial Completion signed by the Parties. [Emphasis Added].

C. Interpretation of Warranty Contract Provisions.

1. How long does the warranty period last?

1.1 **One Year Correction Period.** There are included in the construction contracts published by The American Institute of Architects and ConsensusDocs® requirements the contractor correct work within one year of the date of Substantial Completion when the Work is not in conformance with the requirements of the Contract Documents. Within that one-year period, the contractor not only must honor the warranty, but must return to correct the work that is not in conformance with the requirements of the Contract Documents. However, the one-year correction period is not a limitation on the warranty period, except for the Contractor’s warranties of subcontractors’ and suppliers’ warranty obligations under the ConsensusDocs®. You may want to revise that if you represent the owner.

1.2 **Six Year Statute of Limitations.** Note there is no language in the general warranty provisions which establishes any sort of limitation period. South Dakota law establishes the limitations period. All contracts under South Dakota law are subject to a six-year statute of limitations within which a plaintiff may bring a civil action for breach of contract. A statute of limitations is “[a] law that bars claims after a specified period.” Statute of limitations, Black’s Law Dictionary (11<sup>th</sup> ed. 2019). More generally, “[a] statute of limitations extinguishes the right to prosecute an accrued cause of action after a period of time. It cuts off the remedy.” Clark County v. Sioux Equip. Corp., 753 N.W.2d 406, 414 (S.D. 2008) (citing Burlington N. & Santa Fe Ry. Co. v. Poole Chemical Co., Inc., 419 F.3<sup>rd</sup> 355, 363 (5<sup>th</sup> Cir. 2005)). The owner of the project is entitled to bring a civil action for breach of contract, e.g., a breach of warranty, within that six-year period. The statute of limitations for contracts is found in SDCL § 15-2-13, which reads in relevant part as follows:

SDCL § 15-2-13. Contract Obligation or Liability—Statutory Liability—Trespass—Personal—Property—Injury to Noncontract Rights—Fraud—Setting Aside Corporate Instrument. Except where, in special cases, a different limitation is prescribed by statute, the following

civil action other than for recover of real property can be commenced only **within six years after the cause of actions shall have accrued:**

- (a) An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in § 15-2-6 to 15-2-8, inclusive, and subdivisions 15-2-15(3) and (4);...[Emphasis Added]

Unlike the One Year Corrections Period and the Statute of Repose, South Dakota's six-year statute of limitations time begins running "[w]hen the plaintiff has actual or constructive notice of a cause of action." An individual is considered to have received constructive notice when defective circumstances are "[s]ufficient to put a prudent person on inquiry about 'a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.'" *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 852 N.W.2d 434, 438 (S.D. 2014)

Let me give you an example of when a cause of action might accrue in a construction project. Assume the project was substantially completed on January 1, 2020. On April 1, 2022, the Owner discovers the roof leaks and the reason the roof leaks is because the roof was not constructed in accordance with the plans and specifications which were part of the Contract Documents. The Owner has, as of April 11, 2022, been put on notice of a breach of warranty claim. The Owner would have six years from April 11, 2022, within which to file a lawsuit against the Contractor. The deadline for filing the lawsuit would be March 31, 2028. The statute of limitations for bringing the breach of warranty claim runs from the date of discovery of the breach of warranty claim rather than the date of Substantial Completion.

**1.3 Statute of Repose.** In all cases, claims for the recovery of damages from injury to real or personal property, or personal injury or death arising out of any deficiency in construction, must be brought within 10 years from the date of Substantial Completion. This is called the statute of repose.

A statute of repose "[c]reates a substantive right to be free from liability after a legislatively determined period." *Clark County v. Sioux Equip. Corp.*, 753 N.W. 2d 406, 416 (S.D. 2008) (citation omitted). In other words, it "[e]stablishes, a 'right not to be sued,' rather than a 'right to sue.'" *Id.* At 416. The cause of action may be abolished even if the cause of action has not yet occurred. *Id.* At 414. "Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *Pitt-Hart v. Sanford USD Medical Center*, 878 N.W.2d 406, 414 (S.D. 2016) (citation omitted).

The statute of repose is found in SDCL § 15-2A-3, which reads as follows:

15-2A-3. Time for bringing action--Date of Substantial Completion. No action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection, and observation of construction, or construction, of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of such an improvement more than ten years after substantial completion of such construction. The date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the use it was intended.

The statute of repose and the statute of limitations work together. Depending upon when the "cause of action accrues" under the statute of limitations, the six-year statute of limitations may actually be shortened, because the statute of repose requires all actions be brought within 10 years from the date of substantial completion.

Let me give you an example of when the statute of limitations may be shortened. Assume the date of substantial completion for the roof is January 1, 2020. Then, assume the Owner becomes aware of a breach of warranty claim 5 years and 2 months later, i.e., March 1, 2025. Now, the statute of limitations is reduced from 6 years to 4 years and 10 months, i.e., from March 1, 2031, to January 1, 2030. The statute of repose requires the civil action be filed within 10 years of the date of substantial completion. Thus, the 6 year statute of limitations has been reduced by the 10 year deadline under the statute of repose.

## **V. Construction Contract Insurance Provisions.**

### **A. Types of Insurance Required.**

#### **1. Builder's Risk Insurance.**

1.1 Builder's risk insurance is a form of property insurance that protects buildings, structures, materials, supplies, machinery and equipment that will become part of the project, foundations, underground piping, and site preparation (excavations, backfilling, and grading) while the project is under construction or remodel. An unendorsed builder's risk policy does not usually insure an existing building. The builder's risk policy normally provides coverage for Property in Transit and at a Temporary Storage location.

1.2 The AIA® construction contracts provide the owner will obtain the builder's risk insurance, unless the owner instructs the contractor to do so, or the owner fails to obtain the coverage.

1.3 The ConsensusDocs® construction contracts provide the contractor will obtain the builder's risk insurance. However, the owner may elect to purchase the builder's risk insurance.

1.4 The policy amount needs to cover the full cost of replacing the project at the time of the loss. When in an inflationary environment, the policy should include an inflation coverage provision increasing the face amount of the policy to cover projected cost increases.

1.5 Builder's risk policy forms are very individualized so there are no standard policy forms.

1.6 The builder's risk policy must provide coverage for the contractor, subcontractors, sub-subcontractors, architects, engineers, and the owner pursuant to the policy terms or by endorsement.

1.7 Contractors often use a blanket form of builder's risk insurance to insure multiple more common projects of short duration. A project specific policy is used by owners and contractors when the project value exceeds the blanket limit or the project duration is greater than one year.

1.8 The policy should cover and not exclude fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. There are another 20-30 additional coverages which need to be considered for each particular project. Many of the coverages will have sub-limits and specified deductibles. **I recommend you obtain a proforma copy of the policy before the construction contract is signed, and then incorporate into the construction contract all of the coverages, sublimits, and deductible requirements.** Here is an example I use:

Cause of Loss	Sub-Limit
"Earthquake"	\$ GMP (Contract Sum)
"Flood"	\$ GMP (Contract Sum)
"Named Storm"	\$ GMP (Contract Sum)

Deductibles:		
Builder's Risk Property"		
The following deductibles apply in any one "occurrence."		
\$_____	Physical loss of or damage to Covered Property, unless otherwise shown below.	



\$_____	As respects “water damage”;
\$_____	“Earthquake”;
\$_____	“Flood”;
\$_____	“Named storm”;

Coverage	Sub-Limit
Policy Limit of Liability	(GMP/Contract Price) per “occurrence”
Builder’s Risk Property Limits of Liability	
Project Site	\$ Contract Price per “occurrence”
Escalation Clause – Insured project	___% Minimum [Note: Limited Percentage is Problem in an inflationary environment.]
Transit	\$_____ Per Conveyance
“Temporary Offsite Location”	\$_____ Per Location
“Water Damage”	(GMP/Contract Price) per “occurrence”
Delay in Completion Aggregate Limit of Liability, Loss of use, Business Interruption	\$_____ Aggregate

Limits of Liability		
Claim Preparation Expenses		\$_____
Construction Documentation and Records		\$_____
Construction Trailers		\$_____
Contract Penalties		\$_____
Contractor and Owner Additional Expenses		\$_____
Contractor Expenses		\$_____
“Owner’s Extra Expense”		\$_____
Crane Re-Erection Expense		\$_____
Damage to Existing Real Property Due to Construction Activities		\$_____
Debris Removal		\$_____
Design Professional Fees		\$_____
Emergency Property Protection Expense – Annual Aggregate		\$_____
Fire projective Equipment Refills		\$_____
Off Premises Service Interruption – Additional Expenses		\$_____
Ordinance or Law – Demolition and Increase Cost of Construction		\$_____
Ordinance or Law – Undamaged Portion of the Insured project		Included in project Site Limit of Liability
Pollution Clean-Up and Decontamination – Policy Aggregate		\$_____
Prevention of Access – Ingress or Egress		\$_____

Protection Service Charges		\$ _____
Reward Payments		\$ _____
Spare construction Materials		\$ _____

Expediting Cost	\$ _____	
Extra Expense	\$ _____	
Civil Authority	\$ _____	
Soft Costs	\$ _____	
Other Coverages	\$ _____	

### 1.9 Negotiate the amount of the deductible.

1.10 The soft cost coverage is for the owner's benefit. It is critical the owner evaluate its soft cost coverage requirements. Soft cost coverages may include construction loan interest, loan extension or renewal expenses for the project, debt service payments, bond interest payments, advertising and promotional expenses, founder's fees, refunds of tenant deposits, commissions, rental costs for alternate rental space, lost rental income if not set forth as a separate coverage profits (Note: consequential damages will likely be waived so this is critical coverage), realtors', attorneys' and accountants' fees, administrative expenses, storage costs, building permit fees, building inspection fees, architectural/engineering/consulting fees, real estate taxes, loss of tax credits, expediting fees, and additional insurance premiums.

1.11 Negotiate whether the contractor or the owner will adjust the loss with the insurance carrier.

1.12 At what point in time should the builder's risk insurance be terminated, and the owner's property insurance be made effective? Generally, upon Substantial Completion. See AIA A201 § 9.8.4 recited above. Most builder's risk policies will terminate when the entire project is accepted by the owner as complete, i.e. upon substantial completion allowing for occupancy. Depending on the project and its complexity, the builder's risk insurance could be maintained through the one-year correction period following substantial completion. There will be an added cost to the owner. ConsensusDocs® has a similar provision. **Read the builder's risk policy and the owner's property policy that will replace the builder's risk policy to make sure there are no gaps in coverage.**

1.13 The builder's risk policy should be amended as change orders are executed. There is usually a percentage change in the project cost that will be covered without paying an additional premium.

1.14 The builder's risk policy must include a waiver of subrogation clause within the policy or by endorsement.

1.15 Who will be responsible for the deductible amount upon the occurrence of a loss? The AIA A201 provides the owner will be responsible for losses not covered due to the deductibles. The ConsensusDocs® provide the party who causes the loss will be responsible for losses not covered due to the deductibles. Whomever is responsible for the losses due to the deductibles must either have the net worth to cover the deductibles or must carry commercial general liability insurance and/or excess liability/umbrella insurance sufficient to cover the losses due to the deductibles if the loss was caused by the person responsible for the deductible amount.

## 2. Commercial General Liability Insurance.

2.1 Contractor general liability insurance protects against damages and losses involving bodily injury, sickness, disease, or death of persons, property damage, personal injury, advertising injury, and bodily injury and property damage arising out of completed operations that result from a contractor's products, services, and operations. These claims arise out of the contractor's negligence. Coverage is usually \$1,000,000 to \$5,000,000, depending on the size of the project and the contractor's annual revenues and net worth.

2.2 Coverage limits should be set forth in the construction contract separately for various types of damages and losses:

- General Aggregate Limit \$
- Products/Completed Operations Limit \$
- Personal and Advertising Injury Limit \$
- Each Occurrence Limit \$
- Medical Expense Limit – Any One Person \$

If the owner requires coverage limits higher than those carried by the contractor, the contractor should include the additional premium charges in the project price. While uncommon, be aware of any exclusion for work done by subcontractors. Be aware of exclusions for residential work, for EIFS (External Insulation Finishing Systems), and pollution liability (which may require a separate pollution liability policy if the exposure exists).

2.3 How many claims are pending against the contractor? How can the owner protect its project in the event the contractor has to pay claims on other projects? Require the policy be endorsed to apply only to the owner's project for the full amount of the coverage.

2.4 How long should the coverage remain in place?

2.4.1 Coverage should remain in place through final completion.

2.4.2 The completed operations coverage should remain in place through the statute of repose (10 years) if the contractor will agree. Sometimes the owner will allow a shorter period of coverage by negotiation (3-5 years).

2.5 The owner must be added to the contractor's commercial general liability policy as an additional insured. The additional insured provision should include Operations and Completed Operations. Most insurance companies have their own forms of additional insured endorsements, ISO Standards – edition dates include the following (paired) editions:

2.5.1.1 CG 20 10 1219 – Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization – Operations.

2.5.1.2 CG 20 37 1219 – Additional Insured – Owners Lessees or Contractors – Scheduled Person or Organization – Completed Operations.

2.5.2.1 CG 20 38 1219 – Additional Insured - Owners, Lessees or Contractors Automatic When Required in Written Contract – Operations.

2.5.2.2 CG 20 39 1219 – Additional Insured – Owners, Lessees or Contractors Automatic When Required in Written Contract – Completed Operations.

2.5.3.1 CG 20 33 1219 – Additional Insured – Owners, Lessees or Contractors Automatic When Required in Written Contract 0 Operations (this requires a direct contractual obligation between both parties – not as good as CG 20 38).

2.5.3.2 CG 20 34 1219 – Additional Insured - Owners, Lessees or Contractors Automatic When Required in Written Contract – Completed Operations (this requires a direct contractual obligation between both parties – not as good as CG 20 39).

2.6 Additional Required Commercial General Liability Provisions:

2.6.1 Per project General Aggregate Endorsement. The Construction Manager's commercial general liability insurance carrier must issue an endorsement (ISO CG 25 06 05 09, or its coverage equivalent) providing the general aggregate limit applies separately to this project.

2.6.2 Per Location General Aggregate Endorsement. The Construction Manager's commercial general liability insurance carrier

must issue an endorsement (ISO CG 25 04 05 09, or its equivalent) providing the general aggregate limit applies separately to each location.

2.6.3 Limited Contractual Liability Coverage for Personal and Advertising Injury Endorsement. The commercial liability policy must by endorsement (ISO CG 22 74 10 01, or its coverage equivalent) include limited contractual liability coverage for personal and advertising injury.

2.6.4 No Exclusion for Contractual Liability. The commercial general liability insurance policy may not contain an exclusion for contractual liability and if there is a contractual liability limitation on the form or by endorsement it will be subject to Owner's approval.

2.6.5 Explosion, Collapse and Underground. The commercial general liability insurance carrier must provide coverage for explosion, collapse, and underground occurrences.

2.6.6 Pollutants Brought On Site. The commercial general liability insurance carrier must provide coverage for bodily injury, personal injury, and property damage claims that arise out of pollutants brought on site.

2.6.7 Products-Completed Operations Coverage. In addition to procuring and maintaining commercial general liability insurance for the duration of Construction Manager's Work, Construction Manager agrees to continue to procure and maintain products-completed operations liability insurance coverage for the applicable period of the longer of the statute of limitations or statute of repose for the State of South Dakota. All required terms and conditions of coverage must be maintained during the completed operations period, including the minimum required coverage limits and the requirement Construction Manager provide additional insured coverage for completed operations.

### 3. Worker's Compensation Insurance.

3.1 Coverage required for the contractor's employees.

3.2 The insurance covers all compensation and other benefits required by law. Coverage applies to any work-related accident occurring while the contractor's employee is working for the contractor, regardless of the contractor's negligence as an employer.

3.3 The contractor's worker's compensation insurance will avoid the contractor's employee from bringing a claim against the owner for maintaining an unsafe workplace.

3.4 The owner cannot be added to the contractor's worker's compensation insurance as an additional insured.

3.5 Additional Required Worker's Compensation Provisions:

3.5.1 Coverage Required for Proprietors, Partners and Others. Contractor will provide, by endorsement, workers' compensation coverage for proprietors, partners, or others for whom Contractor is not statutorily required to maintain workers' compensation insurance. Alternatively, Contractor will provide proof of health insurance coverage, subject to Owner's approval. In states where an "opt out" for workers' compensation coverage is available, all proprietors, partners, and other employees must all be participants in the workers' compensation coverage and may not "opt out."

3.6 SDCL §§ 62-1-19 and 20 allow an independent subcontractor who is not an employer to waive worker's compensation insurance. General contractors hiring uninured independent subcontractors need to secure an Affidavit of Exempt Status to avoid uninsured situations and unexpected audits from the general contractor's workers' compensation insurance carrier.

4. Employer's Liability Insurance.

4.1 Coverage required for contractor's employees.

4.2 The insurance provides coverage that helps pay the contractor's costs related to lawsuits resulting from employee work related injuries or illnesses, claims for redundancy, unlawful deduction of wages, unfair, wrongful, or constructive dismissal, compensation claims, etc.

4.3 Consider limits of \$1,000,000 per accident, \$1,000,000 per policy, and \$1,000,000 per employee.

4.4 The owner must be added to the contractor's employer's liability policy as an additional insured.

5. Business Automobile Insurance.

5.1 Coverage required for the contractor.

5.2 Business auto insurance is a policy that applies to autos, trucks, and other vehicles owned, leased, or hired by the contractor that protects the contractor against liability for damages caused by accidents involving the contractor's vehicles and provides certain compensation to occupants of the vehicles injured in the accidents.

5.3 Typically request a \$1,000,000 policy limit.

5.4 The owner must be added to the contractor's business auto policy as an additional insured.

5.5 Additional required business auto liability provisions:

5.5.1 Automobile Coverage. The automobile liability policy must contain terms no less broad than the ISO Business Auto Coverage Occurrence form (CA 00 01 1990 edition or equivalent).

5.5.2 Broadened Pollution Liability Coverage. The automobile liability carrier, or a separate insurance carrier providing pollution coverage, must confirm by endorsement (CA 99 48 10 13 or its equivalent) or policy confirming coverage for discharges of pollutants that are in or upon, being transported or towed by, being loaded onto, or being unloaded from an automobile.

5.5.3 MCS 90 Endorsement. If required by law, the automobile liability insurance carrier will issue to Owner an MCS 90 endorsement confirming compliance with the minimum financial responsibility requirements under the Motor Carrier Act and the rules and regulations of the Federal Motor Carrier Safety Administration.

6. Errors and Omissions / Professional Liability Insurance.

6.1 Coverage required for the contractor when providing professional design and related services.

6.1.1 Errors and omissions insurance provides coverage for damage to completed work which is otherwise excluded under the contractor's commercial general liability policy.

6.1.2 Professional liability insurance provides coverage for damage arising out of the contractor's design work, but not damage to the work itself.

6.2 If the contractor provides engineering, architecture, design, or other professional services, the contractor must carry errors and omissions or professional liability insurance.

6.3 Typically request a \$2,000,000 policy limit.

6.4 Contractors may request their design liability be capped at the policy limit. That is what architects will request. Whether to cap the liability is up to negotiation.



6.5 The owner cannot be added to the contractor's errors and omissions or professional liability policy as an additional insured.

7. Inland Marine Insurance.

7.1 This is an umbrella term that contemplates a number of specific coverages, such as builder's risk, installation floater, and cargo and contractor equipment.

7.2 Coverage for the contractor that covers products, materials, and equipment while they are being transported on land, such as by truck or train. For instance, the builder's risk policy would include property in transit and property at temporary sites. Whereas, the installation floater is a sister policy to the builder's risk policy used by artisan contractors to insure their work when there is no builder's risk policy (remodel projects).

7.3 Coverage will depend on the value of products, materials, and equipment in transit.

7.4 The owner must be added to the contractor's inland marine policy as an additional insured.

8. Commercial Property Insurance/Business Personal Property Insurance.

8.1 Coverage for the contractor's owned or rented tools, equipment, and other personal property that are not incorporated into the project.

8.2 Coverage will depend on the value of the tools, equipment, and other personal property owned by the contractor.

8.3 The owner will not be added to the contractor's commercial property insurance/business personal property policy as an additional insured.

9. Pollution Liability Insurance.

9.1 Coverage for bodily injury and property damage caused by hazardous waste or materials released into the environment by the contractor's work or operations. Whether coverage is required will depend on the type of work the contractor will perform.

9.2 Sometimes this coverage may be added to the contractor's commercial general liability policy, but most of the time, it is a standalone policy.

9.3 The owner must be added to the pollution liability policy as an additional insured.

## 10. Subcontractor Default Insurance.

10.1 Coverage for the contractor in the event one of the contractor's subcontractors fails to perform according to the subcontract agreement. Contractor can purchase this coverage as an alternative to a performance bond. It operates more like a surety bond approach than as insurance. Surety is a 3-party contract that requires the contractor indemnify the surety in the event of payment under the bond.

10.2 Coverage will be dependent upon the size of the project.

10.3 The owner must be added to the subcontractor default insurance as an additional insured.

## 11. Cyber Liability Insurance.

11.1 Coverage for the contractor's liability for a data breach involving sensitive information contained in the owner's computer system.

11.2 The risk arises as construction documents are exchanged electronically.

11.3 The owner will not be added to the cyber liability policy as an additional insured.

## 12. Wrap Insurance (OCIP/CCIP).

12.1 Wrap insurance covers the owner, contractor, and listed subcontractors from worker's compensation claims and third-party general liability claims.

12.2 The insurance comes in two forms. One form is the Owner-Controlled Insurance Program (OCIP). The other form is the Contractor Controlled Insurance Program (CCIP)

12.3 The cost starts at 1% of the project construction.

12.4 Most commercial general liability policies exclude coverage for projects insured under wrap insurance. However, the commercial general liability policy may be modified to allow excess coverage over the wrap insurance limit.

12.5 Generally, used on large projects with numerous subcontractors. There are usually cost savings for the owner when using wrap insurance as compared to the owner being charged for the contractor's and subcontractors'

insurance costs as part of the general conditions charges included in the project contract sum.

### 13. Rigger's Liability Insurance.

13.1 Coverage for a contractor (most often a subcontractor) arising out of the moving of property and equipment that belongs to others, such as lifting by crane, materials, and equipment at the jobsite. This coverage is made necessary by the exclusion in the commercial general liability policy for damage to property in your care, custody, or control.

13.2 Coverage includes bodily injury, damage to other's property, personal injury, and false and misleading advertising. The amount of coverage should be no less than the value of the material being lifted.

13.3 The owner, and contractor if the subcontractor is providing crane services, must be added to the rigger's liability policy as an additional insured.

#### 13.4 Sample clause:

13.4.1 Other Insurance. (List below any other insurance coverage to be provided by *the Construction Manager and any applicable limits.*)

Rigger's Liability for Crane Service Coverage. Should the Work include providing crane services, then Construction Manager's commercial general liability insurance must be amended to apply with minimum limits of liability to insure against bodily injury and property damage arising from the crane operations. The policy must include coverage for Rigger's Liability and must not exclude coverage for damage to property being lifted. The rigger's liability policy must be provided with the following minimum policy limits:

\$5,000,000 Each Occurrence Bodily Injury and Property Damage  
\$5,000,000 Personal and Advertising Injury  
\$5,000,000 Aggregate for Products – Completed Operations  
\$5,000,000 General Aggregate

13.4.2 Alternative Crane Service Endorsement to Commercial General Liability Policy. If Construction Manager's Work is not primarily providing crane services, Construction Manager's commercial general liability policy may be endorsed to include an installation floater to insure against bodily injury and property damage arising from such crane operation. The policy must include coverage for the hoisting and rigging exposure and must not exclude coverage for damage to property being lifted. Rigger's Liability must be on an "all risk" form with limits not less than the maximum value of property lifted at any time. Construction

Manager's coverage for crane services may be provided either by Construction Manager's own policies, or by the policies of a lower tier subcontractor providing crane services for Construction Manager.

14. Excess / Umbrella Liability Insurance.

14.1 Coverage extends limits for commercial general liability insurance, employer's liability insurance, business automobile insurance, inland marine insurance, pollution liability insurance, and riggers liability insurance.

14.1.1 "Follow Form" subject to the same terms as the underlying policy. (Note: Always specify "follow form" for the coverage in the contractor's contract.)

14.1.2 A self-contained policy subject to its terms only. (Note: Require as broad of coverage as the commercial general liability policy.)

14.1.3 A combination of the two above.

14.3 Coverages can be from \$2,000,000 to \$50,000,000, depending on the project size and complexity.

14.4 The owner must be added to the contractor's excess liability or umbrella liability policy as an additional insured.

14.5 The excess or umbrella policies normally do not provide coverage over a rigger's policy.

14.6 The excess or umbrella liability policies normally do not provide coverage over a pollution liability policy, unless the pollution liability coverage is provided by the commercial general liability carrier (the excess or umbrella liability policy must list the pollution coverage on the Underlying Scheduled Policy).

B. Waivers of Subrogation Rights.

1. What is subrogation? Subrogation is the process by which you obtain someone else's rights. For example, if an electrician is installing a new oven in your home, and the electrician negligently installs the wiring, and your home burns to the ground, then your home insurance carrier will pay you for the loss and will subrogate to your rights to recover from the electrician the insurance proceeds paid to you.

2. What is a waiver of subrogation rights? The waiver means your insurance carrier will not have the right to recover the insurance proceeds from your electrician.

3. Why would the insurance carriers allow the insured to waive subrogation rights? If there is no waiver of subrogation rights, then the contractor and every subcontractor would have to purchase commercial general liability insurance in an amount to cover the full replacement cost of the project. This would be an incredible duplication of coverages and premium costs.

4. The American Institute of Architect's provision reads as follows (Used With Permission):

**AIA A201 §11.3.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. **The policies shall provide such waivers of subrogation by endorsement or otherwise.** A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. [Emphasis Added].

5. The ConsensusDocs® provision reads as follows [Used With Permission]:

ConsensusDocs® 505 § 11.3.4 The parties each waive all rights against each other and their respective employees, agents, contractors, subcontractors, suppliers, sub-subcontractors, and design professionals for damages caused by risks covered by the property insurance provided under §11.3.1, except such rights as they may have to the proceeds of the insurance. To the extent of the limits of Construction Manager's Commercial General Liability Insurance specified in §11.2.1 or [\_\_\_\_\_] dollars (\$[\_\_\_\_\_] ), whichever is more, Construction Manager shall indemnify and hold harmless Owner against any and all liability, claims, demands, damages, losses, and expenses, including attorneys' fees, in connection with or arising out of any damage or alleged damage to any of

Owner's existing adjacent property that may arise from the performance of the Work, to the extent caused by the negligent or intentionally wrongful acts or omissions of Construction Manager, Subcontractor, Supplier, Subsubcontractor, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

6. Some owners save insurance premium dollars by agreeing with their insurance carriers they will not waive subrogation rights. Some owners self-insure; thus, not wanting to lose the ability to seek recovery against a negligent contractor and/or subcontractor. Examples include:

6.1 The State of South Dakota.

6.2 Large national scope companies such as manufacturers and meat packers.

7. Refusals to waive subrogation rights are not critical when the project is a stand-alone building, unless the owner is performing some of the work or installing expensive equipment, which items were not covered by the builder's risk policy. Remember the owner, contractors, and subcontractors are all insureds under the policy; thus, there are no subrogation issues.

8. Refusals to waive subrogation rights are critical when remodeling current buildings or adding additions to further existing buildings. If the property insurance carrier and the building owner won't waive subrogation rights, then the contractor could consider the following options:

8.1 Obtain a commercial general liability policy and excess/umbrella policy for the full value of the existing building. The contractor could try to include the cost in the bid amount if the contractor was aware of this issue before bidding.

8.2 Take the risk of going out of business if the contractor or a subcontractor was at fault.

8.3 Take precautions in construction work to lessen the risk, such as utilizing firewalls when adding an addition to a currently existing building.

8.4 Not taking on the project.

#### C. Insurance Clauses That Need To Be Added To The Construction Contract.

1. **Proof of Insurance.** Proof of insurance for all policies will be deposited with the Owner upon the execution of this Agreement by providing to the Owner certificates of insurance, copies of declaration pages, the schedule of forms and values,

and all endorsements issued by the Contractor's insurance carriers. At least 45 days prior to the expiration of any policy, the Contractor will provide the Owner with proof of renewal of each insurance policy, a copy of the declarations page, and copies of all endorsements providing additional coverages. At the Owner's request, the Contractor will provide to the Owner copies of all insurance policies.

2. **Occurrence and Claims Made Policy Forms.** All policies must provide coverage on an occurrence basis, and must not be issued under a "claims made" policy form or a "modified occurrence" policy form. If coverage is made on a claims made form:

2.1 **Retroactive Rate.** The retroactive date must be shown and must be before the date of the Agreement or the beginning of the Work.

2.2 **Post Completion Insurance Period.** The insurance must be maintained, and evidence of insurance must be provided for at least ten years from the Date of Substantial Completion. [Note: The ten years coincides with the South Dakota statute of repose. The contractor may try to negotiate this requirement to a shorter timeframe.]

3. **Acceptance by Owner.** The required insurance coverages and limits will be subject to Owner's approval. Such insurance must be maintained under forms of policies and from companies satisfactory to Owner. Each insurance company must have a financial rating of at least A-VII as defined by A.M. Best Company and must be authorized to transact business in the state where Construction Manager's Work is being performed.

4. **Additional Insured Requirements.** Contractor agrees to name Owner, including Owner's [For private owners: officers, directors, shareholder, agents, and employees] [For public owners: elected and appointed officials, officers, agents, and employees] as additional insureds under the Contractor's liability insurance policies (except for the professional liability policy) with respect to liability arising out of activities, "operations" or services" performed by or on behalf of Contractor, and completed operations through the statute of repose in South Dakota (10 years from the date of Substantial Completion). The additional insured coverage may not be limited to the named insured's sole negligence or the additional insured's vicarious or imputed liability. The additional insured coverage must include cross-suits, i.e. there must be an exclusion for suits between or among insureds. The additional insured coverage must include coverage for the parties identified above without the need for privity of contract and must include a waiver of subrogation rights by the insurer.

5. **Primary Insurance Endorsement.** All of Contractor's liability insurance carriers must, by endorsement, confirm Contractor's liability insurance policies will apply as primary and not contributory. Any other liability insurance carried by Owner will be excess only and will not contribute with Contractor's liability insurance.



6. **Deductibles/Self Insured Retentions.** Any self-insured retention or deductible of the Contractor exceeding \$\_\_\_\_\_ must be declared and is subject to Owner's approval. Funding of self-insured retentions or deductibles maintained by Contractor will be Contractor's responsibility, including any self-insured retentions or deductibles applicable to coverage afforded to Owner or other required additional insureds.

7. **Insurance Requirements for Subcontractors.** Contractor must ensure its subcontractors of any tier will procure and maintain insurance that complies with the requirements set forth in this [Agreement/Exhibit \_\_\_\_], except the excess liability minimum amount will be \$\_\_\_\_\_. Copies of the certificates and endorsements must be provided prior to the subcontractors entering the project site. Owner reserves the right to prohibit subcontractors from entering the project site, to remove subcontractors from the project site and to withhold payment to Contractor until evidence of coverages is provided. [Note: Different types of subcontract work will be subject to different risk factors. For instance, a painter will have fewer risk factors than an electrician. Thus, there may be different requirements for subcontractor trades.]

8. **Insurance Indemnification Obligations Separate.** Contractor's duty to provide the insurance coverages set forth in this [Agreement/Exhibit \_\_\_\_] is severable from its indemnification obligations under this Agreement. Nothing in these insurance requirements may be deemed to limit Contractor's liability under the Agreement. The insurance requirements are set forth as minimum amounts and may not be construed to relieve Contractor of liability exceeding such coverages, nor will it preclude Owner from taking such actions as are available to Owner under any other provisions of the Agreement.

9. **Breach for Failure to Maintain Insurance.** Failure of Contractor to maintain the required insurance coverages, limits, and endorsements will constitute a material breach entitling Owner to terminate the Agreement for default, prohibit access to the project site, withhold payment, or purchase the required insurance at Contractor's expense. Any delays in the completion of Contractor's Work due to Contractor's failure to obtain or maintain insurance will be treated as delay due to Contractor's breach of contract. Contractor agrees to defend, indemnify, and hold harmless Owner, including its [for private owners: officers, directors, shareholders, agents, and employees] [for public owners: elected and appointed officials, officers, agents, and employees], and others identified in the Agreement for any damages, losses, expenses, including, but not limited to, attorneys' fees, incurred as a result of Contractor's or its subcontractors of any tiers' failure to maintain the insurance coverages, limits, and endorsements required under this [Agreement/Exhibit \_\_\_\_].

10. **Agreement Insurance Requirements.** In the event of a conflict, inconsistency, or ambiguity between the provisions of this Exhibit \_\_\_\_ and the Agreement, the more stringent, greater, and/or broader insurance requirements, limits, and coverages will govern.

11. **Mandatory Insurance Coverages.** Contractor must, at its own expense, maintain in effect at all times during the performance of the Work under the Agreement not less than the coverages and limits of insurance set forth in this [Agreement/Exhibit \_\_\_\_]. The coverages and limits set forth below are the minimum acceptable to Owner. In specifying minimum Contractor insurance requirements, Owner does not represent the coverages and limits are adequate to protect Contractor from loss, damage, or liability arising from Contractor's Work. Contractor is solely responsible to inform itself of types and amounts of insurance it may need beyond these requirements to protect Contractor and its subcontractors and suppliers and their respective employees and agents. Notwithstanding anything to the contrary in the Contract Documents or in this [Agreement/Exhibit \_\_\_\_], if Contractor has procured any insurance coverage or limit (either primary or on an excess basis) that exceeds the minimum acceptable coverage or limit set forth in this [Agreement/Exhibit \_\_\_\_], the broadest coverage and highest limit actually afforded under the applicable policy of insurance will be considered the coverages and limits that are required and such coverages and limits must be provided in full to the additional insureds and indemnified parties under the Agreement. Owner and Contractor expressly intend the provisions set forth in this [Agreement/Exhibit \_\_\_\_] and in the Contract Documents be construed as broadly as permitted to be construed under applicable law to afford the maximum insurance coverages and limits available under Contractor's insurance policies.

12. **Higher Limits.** If the Contractor carries insurance coverages with higher than the limits required in this Agreement, the full amount of the insurance coverages actually carried by the Contractor will be available to respond to a covered loss or occurrence, and the coverage afforded to the additional insureds under the policies will not be limited by the minimum coverage limits specified in this Agreement, but will be deemed increased to the amounts actually carried by the Contractor Manager.

13. **Attorneys' Fees of Additional Insured.** The Contractor agrees to pay all reasonable attorneys' fees and necessary litigation expenses incurred by or for the additional insureds for any claim, demand, or action covered by the Contractor's insurance policies.

14. **Cancellation/Non-Renewal Notices.** All of Contractor's insurance policies must not be subject to cancellation or non-renewal, except after at least 30 days' prior written notice by the insurance carriers to the Owner. If the insurance carriers are unable or unwilling to provide such notices to the Owner, then the Contractor must provide such notices prior to the cancellation or non-renewal of any of the Contractor's policies and insurance required by this Agreement. If the insurance carriers are willing to provide notice of cancellation or non-renewal, proof of compliance with this requirement must be provided by endorsements issued by the Contractor's insurance carrier. In addition, the Contractor will provide to the Owner within 10 days of the effective date or any modification to the term of a policy a notice of modification of any of the policies required of the Contractor herein.

D. Depending on the project, Consider Additional Insurance Coverages for the Contractor, or Specific Contractors.

1. Environmental Services Liability Insurance.
2. Watercraft Liability Insurance.
3. Aircraft Liability Insurance.
4. Drone Liability Insurance (Operator of Drone; sometimes utilized to provide photos of construction progress).
5. Railroad Protective Liability Insurance (Work is performed within 50 feet of a railroad).
6. Jones Act and Longshore Harbor Worker's Compensation.
  - 6.1 Jones Act covers seamen.
  - 6.2 Longshoreman's covers land based maritime workers.

E. Subcontractor's Insurance Responsibilities.

1. The types of coverages should be nearly identical but will depend on the specific services rendered for insurance policies such as pollution liability insurance or riggers' liability insurance.
2. The dollar amount of coverages will depend on the type of subcontractor service to be performed.
  - 2.1 Many times the excess/umbrella liability policies will have different dollar coverages. For instance:
    - 2.1.1 HVAC, electrical, structural steel, and other high risk subcontractor services may require higher limits such as \$5,000,000 or more.
    - 2.1.2 Paint, dry wall, and other lower risk subcontractor services may require lower limits such as \$1,000,000 or more.
3. The contractor's construction contract should clearly identify all subcontractor insurance requirements.

F. Remodel or New Addition projects.

1. The construction contract must require the owner maintain property insurance on the replacement value of the existing building at least through Substantial Completion of the project.

2. See the discussion of waivers of subrogation set forth above.

## **VI. Construction Contract Indemnification Provisions.**

A. The owners and contractors should agree to indemnify each other for their respective negligent or intentional wrongful acts and omissions.

1. Indemnification should be afforded for the following:

- a. Bodily injury to and death of persons.
- b. Damage to Property.
- c. Attorneys' fees, costs, and expenses.

B. The American Institute of Architects' provisions read as follows (Used With Permission):

AIA A201 § 3.18 Indemnification

§ 3.18.1 To the fullest extent permitted by law the **Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them** from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), **but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable**, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18. [Emphasis Added].

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

**Note: The AIA Form does not, but should, include an obligation to defend. Revise to read “...Contractor shall defend, indemnify and hold harmless...”**

Note: Many times the contractor will try to delete any indemnification obligation for the architect or design professional. The architect or design professional will resist being excluded from the indemnification obligation. Generally, try to keep in tact the indemnification obligation.

Note: The AIA Forms do not include an owner indemnification.

- C. The ConsensusDocs® provisions read as follows (Used With Permission):

#### 11.1 Indemnity

ConsensusDocs® 500 § 11.1.1 To the fullest extent permitted by law, **Contractor shall indemnify and hold harmless Owner, Owner’s officers, directors, members, consultants, agents, and employees, Design Professional, and Others (the “Indemnitees”)** from all claims for bodily injury and property damage, other than to the Work itself and other property insured, including reasonable attorneys’ fees, costs, and expenses, that arise from the performance of the Work, **but only to the extent caused by the negligent or intentionally wrongful acts or omissions of Contractor, Subcontractors, Suppliers, Subcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.** Contractor shall be entitled to reimbursement of any defense costs paid above the Contractor’s percentage of liability for the underlying claim to the extent provided by §11.1.2. [Emphasis Added].

ConsensusDocs® 500 § 11.1.2 To the fullest extent permitted by law, **Owner shall indemnify and hold harmless Contractor, its officers, directors, members, consultants, agents, and employees, Subcontractors, Suppliers, or anyone employed directly or indirectly by any of them or anyone for whose acts any of them liable** from all claims for bodily injury and property damage, other than property insured including reasonable attorneys’ fees, costs and expenses, that may arise from the performance of work by Owner, Design Professional, or Others, **but only to the extent caused by the negligent or intentionally wrongful acts or omissions by Owner, Design Professional, or Others.** Owner shall be entitled to reimbursement of any defense costs paid above Owner’s percentage of liability for the underlying claim to the extent provided by §11.1.1. [Emphasis Added].

ConsensusDocs® 500 § 11.1.3 **NO LIMITATION FOR LIABILITY.** In any and all Claims against the indemnitees by any employee of Contractor, anyone directly or indirectly employed by Contractor, or anyone for whose acts Contractor may be liable, the indemnification obligation shall not be limited in

any way by any limitation on the amount of type of damages, compensation, or benefits payable by or for Contractor under workers' compensation acts, disability benefit acts or other employment benefit acts.

**Note: The ConsensusDocs® form does not, but should, include an obligation to defend. Revise to read "...Construction Manager shall defend, indemnify, and hold harmless..."**

Note: Many times, the construction manager will try to delete any indemnification obligation for the "Design Professional" i.e., the architect. The Design Professional will resist being excluded from the indemnification obligation. Generally, try to keep intact the indemnification obligation.

Note: The ConsensusDocs® forms do include an owner's indemnification obligation.

D. If you are representing the owner, you may add the following provisions which gives the owner some input and ability to choose different legal counsel, choose its own counsel, and take over the defense of the claims if the contractor is failing to adequately defend:

The Contractor must promptly advise the Owner in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply, and the Contractor, at the Contractor's expense, must assume on behalf of the Owner and conduct with due diligence and in good faith the defense thereof with counsel satisfactory to the Owner; provided, the Owner will have the right to be represented therein by advisory counsel of its own selection and at its own expenses; and provided further, if the defendants in any such action include both the Contractor and the Owner, and the Owner has reasonably concluded there may be legal defenses available to it which are different from or additional to, or inconsistent with, those available to the Contractor, the Owner will have the right to select separate counsel to participate in the defense of such action on its own behalf at the Contractor's expense. In the event of failure by the Contractor to fully perform in accordance with this Section \_\_\_\_\_, the Owner, at its option, and without relieving the Contractor of its obligations hereunder, may so perform, but all costs and expenses so incurred by the Owner in that event must be reimbursed by the Contractor to the Owner, together with interest on the same from the date any such expense was paid by the Owner until reimbursed by the Contractor, at the rate of interest provided in the Contract. The obligations of the Contractor under this Section will survive the expiration of the Contract and specifically will survive the limitations contained in Section \_\_\_\_\_.

E. When representing the owner, include a provision requiring the contractor to indemnify the owner against mechanic's liens and encumbrances, so long as the owner has paid the contractor for amounts secured by the mechanic's liens and encumbrances:

To the fullest extent permitted by law and without limiting any other indemnification obligations of the Contractor, except only to the extent caused by the uncured failure of the Owner to make payment when required by the Contract Documents, the Contractor will defend, indemnify, and hold harmless the Owner, its officers, directors, assigns, tenants, lenders, agents, and employees from any Claims, liens, charges or encumbrances (including but not limited to statutory liens, mechanic's and materialmen's liens, or bond Claims) arising out of or in connection with the performance of the Work. The Owner will be entitled to recover from the Contractor all costs and expenses incurred in enforcing this Agreement including attorneys' fees. The Contractor will promptly release, or cause the release of: (a) all liens and notices of intent to lien recorded against any portion of the project site or Contract proceeds by its agents, employees, laborers, Subcontractors, Sub-subcontractors, or material or equipment suppliers of any tier, whether during or after the term of the Contract, so long as the Contractor has been paid by the Owner for the portion of the Work furnished or performed pursuant to the Contract by the claimant who recorded any such lien or notice; and (b) Claims for nonpayment or *lis pendens* made or filed by its agents, employees, laborers, Subcontractors, Sub-subcontractors or material or equipment suppliers of any tier, whether during or after the term of the Contract, so long as the Contractor has been paid by the Owner for the portion of the Work furnished or performed pursuant to the Contract by any such claimant. In the case of liens or recorded notices relating to liens, the Contractor will, at the Contractor's cost and expense, accomplish such removal by recording a release of the lien, properly executed by the lien claimant, or by filing with a court of competent jurisdiction a properly executed bond (provided that such bond and the surety issuing it will be acceptable to such court) in the minimum amount of one and one-half times the amount of such recorded lien or such greater amount as may be prescribed by statute in the State of South Dakota or by the court; provided, however, such bonding procedure must operate to fully remove the lien as an encumbrance against both actual and recorded title and against the Contract proceeds. If the Contractor fails to comply with the foregoing, the Owner is authorized by the Contractor to remove or satisfy any such liens, and the Contractor will pay to the Owner all costs and damages incurred by the Owner to do so, including attorneys' fees, together with interest on the same from the date any costs were paid by the Owner until reimbursed by the Contractor at the rate of interest provided in the Contract. This provision will survive termination or expiration of this Agreement.

## **VII. Consequential and Liquidated Damages.**

A. Consequential damages are indirect losses or damages arising from a breach of contract by one of the parties.

1. Examples include lost profits or income by the owner or the contractor, increased financing costs for the owner, and loss of business opportunities by the contractor.



2. Consequential damages are hard to prove and difficult to quantify. Consequential damages can far exceed the cost of the project. In most construction contracts, the parties mutually waive consequential damages.

B. The American Institute of Architects provisions read as follows (Used With Permission):

AIA A201 § 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. The mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for losses of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude any award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

C. The ConsensusDocs® provisions read as follows (Used With Permission):

ConsensusDocs® 500 § 6.7 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES. Except for damages mutually agreed upon by the Parties as liquidated damages in §6.6 and excluding losses covered by insurance required by the Contract Documents, the Parties agree to waive all claims against each other for any consequential damages that may arise out of or relate to this Agreement, except for those specific items of damages excluded from this waiver as mutually agreed upon by the Parties and identified below. Owner agrees to waive damages including but not limited to Owner's loss of use of the project, any rental expenses incurred, loss of income, profit, or financing related to the project, as well as the loss of business, loss of financing, loss of profits not related to this project, loss of reputation, or insolvency. Contractor agrees to waive damages including but not limited to loss of business, loss of financing, loss of profits not related to this project, loss of bonding capacity, loss of reputation, or insolvency. The provisions of this section shall also apply to the

termination of this Agreement and shall survive such termination. The following are excluded from this mutual waiver: [\_\_\_\_\_].

ConsensusDocs® 6.7.1 The parties shall each require similar waivers in contracts with Subcontractors and Others retained for the project.

**D. Because the parties are likely to waive consequential damages, the soft cost coverages for the owner under the builder's risk insurance are critical for the owner to cover the owner's consequential damages.**

E. Liquidated Damages:

1. Because the owner will very likely incur some damages due to the contractor's failure to timely achieve Substantial Completion, the parties are more likely to quantify those damages in the form of liquidated damages. Liquidated damages are typically quantified as a certain number of dollars (on a per day delayed basis) owed by the contractor to the owner for the contractor's failure to deliver to the owner the project on time. An owner should never recover both consequential and liquidated damages. That would be a duplication of recovery of damages, i.e. double dipping.

2. Liquidated damages provisions will usually address the following:

2.1 A dollar amount owed on a per-day basis.

2.2 A limitation on the number of days or dollars of liquidated damages.

2.3 Contractors will try to limit the liquidated damages to a percentage of their expected profit. This limit could be anywhere from 10% to 100% of the expected profit.

2.4 What's the process for assessing liquidated damages? Consider adding the following provisions:

2.4.1. If you represent the owner, include a provision whereby the liquidated damages may be withheld from future payments to the contractor.

2.4.2 If you represent either party, include a provision whereby the liquidated damages may be subject to the dispute resolution process.

3. The American Institute of Architects includes in the construction contract a liquidated damages provision which is completely up to the parties to draft.

4. The ConsensusDocs® provisions read as follows (Used With Permission):

ConsensusDocs® 500 § 6.6.1 SUBSTANTIAL COMPLETION  
Liquidated damages based on the Substantial Completion date [\_\_\_\_\_] shall/ [\_\_\_\_\_] shall not apply.

6.6.1.1 Owner will suffer damages which are difficult to determine and accurately specify if the Substantial Completion date, which may be amended by Change Order, is not attained. Contractor shall pay Owner [\_\_\_\_\_] dollars (\$[\_\_\_\_\_] ) as liquidated damages and not as a penalty for each Day that Substantial Completion extends beyond the Substantial Completion date. These liquidated damages are in lieu of all liability for all extra costs, losses, expenses, claims, penalties, and any other damages of any nature incurred by Owner resulting from not attaining the Substantial Completion date.

ConsensusDocs® 500 § 6.6.2 FINAL COMPLETION.  
Liquidated damages based on the Final Completion date [\_\_\_\_\_] shall/[\_\_\_\_\_] shall not apply.

6.6.2.1 Owner will suffer damages which are difficult to determine and accurately specify if the Final Completion date, as may be amended by subsequent Change Order, is not attained. Contractor shall pay Owner [\_\_\_\_\_] dollars (\$[\_\_\_\_\_] ) as liquidated damages and not as a penalty for each Day that Final Completion extends beyond the Final Completion date. These liquidated damages are in lieu of all liability for any extra costs, losses, expenses, claims, penalties, and any other damages of any nature incurred by Owner resulting from not attaining Final Completion date.

ConsensusDocs® 500 § 6.6.3 Other applicable liquidated damages shall be included as Agreement exhibit.

5. If representing the Contractor avoid inclusion of liquidated damages based on both Substantial Completion or Final Completion. Choose one or the other.

6. When drafting a force majeure provision in a construction contract always preclude the owner from collecting liquidated damages for delays beyond the contractor's control.

7. Force majeure causes are beyond the contractor's control, so no liquidated damages should be assessed.

## **VIII. Dispute Resolution Process.**

A. Variety of Dispute Resolution Processes.

1. There are numerous dispute resolution processes which are available when resolving disputes between the owner and the contractor. The American Institute of Architects and ConsensusDocs® give the parties optional dispute resolution processes through a “check the box” approach. Here are some options available.

1.1 Senior management level officers of the owner and the contractor must first meet within a specified number of days in an attempt to resolve the dispute.

1.2 A dispute resolution board of industry personnel will be assembled to make non-binding findings.

1.3 Mediation with the parties utilizing a mediator provided by the American Arbitration Association.

1.4 Mediation with the parties utilizing a mediator with construction mediation experience in the state where the project is located.

1.5 An initial decision maker (the architect) will render a non-binding decision before going to the dispute resolution process. Contractors note who employs the architect for the project, i.e. the owner.

1.6 Binding arbitration with the American Arbitration Association.

Note: It is difficult to add additional parties.

Note: No appeal rights.

1.7 Binding arbitration utilizing the state arbitrator process where the project is located.

1.8 Litigation in the state where the project is located.

1.9 Litigation in the state of the owner’s office or contractor’s office.

2. Always identify the governing law in the construction contract. Consider the following:

2.1 The default language in most construction contracts provides the law of the state when the project is located will govern contract and other disputes.

2.2 Many states have a statute which requires the parties to utilize the laws of the state where the project is located. Research the state laws.

2.3 Many states require construction disputes be resolved in their state by arbitration or litigation, if the project is located in their state. Note: South Dakota does not have such a law.

2.4 Large companies will often ignore state governing law requirements specifying the method and location where disputes will be resolved. Instead, they require the governing laws and dispute resolution processes be where they are headquartered. Note: Courts in other states sometimes refuse to honor the laws of the state where the project is located. Then, it becomes a “race to the courthouse.”

2.5 Always include in the construction contract a provision whereby the prevailing party will recover its costs, expenses, and attorneys’ fees. Most form contracts fail to address this requirement.

B. My “go to” dispute resolution process reads as follows, which is based, in small part, on The American Institute of Architects’ provision found in the AIA A201. Note: all provisions in the standard form providing the architect is the “initial decision maker” need to be deleted when using the provisions set forth below:

1. Claims shall be referred to management level representatives of the parties with authority to bind their respective parties. The parties’ representatives will meet in person within 5 days of the giving of notice of the Claim and attempt to resolve the Claim. If the Claim is not resolved within the 5-day period, the party asserting the Claim may demand mediation.
2. Either party may, within 30 days from the date of receipt of a notice of Claim not resolved by management level representatives (the “Mediation Confirmation Notice”), demand in writing the other party participate in mediation. The party receiving the demand for mediation must confirm to the party demanding mediation the party receiving the demand for mediation will participate in mediation as set forth in Section [\_\_\_\_]. If such a demand is made and the party receiving the demand fails to confirm in writing within 30 days after receipt thereof its willingness to participate in mediation, then the party receiving the demand waives its rights with respect to the Claim. In this event, the party making the demand may within 60 days of the date the receiving party received the notice of request for mediation file a lawsuit to resolve the Claim, but the receiving party will have waived its rights with respect to the Claim. If the party making the demand fails to timely file the lawsuit, then both parties waive their rights to litigate the Claim.
3. In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor’s default, the

Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the Claim.

4. If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

## **5. Mediation**

5.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections [final payment represents waiver of certain claims] and [waiver of consequential damages] shall be subject to mediation as a condition precedent to binding dispute resolution.

5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by an attorney licensed to practice law in the state where the project is located. The mediator must have significant experience in the mediation of commercial disputes. A request for mediation shall be made in writing, delivered to the other party to the Contract, and include the identification of the proposed mediator. The other party may approve or reject the use of the proposed mediator. If the proposed mediator is rejected by the other party, the parties will attempt to agree upon an acceptable mediator. If the parties are not able to agree upon a mediator, the parties will petition a court where the litigation will be filed if mediation is not successful, and the court will select the mediator. The mediation will take place within 30 days of the receipt of notice of confirmation by the party receiving the demand for mediation when the proposed mediator is acceptable, the date the parties agree upon the mediator, or the date the court appoints the mediator, as applicable. The request may be made concurrently with the filing of litigation but, in such event, mediation shall proceed in advance of litigation proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

5.3 Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute, file a lawsuit to resolve the Claim. If neither party timely files a lawsuit, then both parties waive their rights to litigate the Claim. If one of the parties fails to participate in the mediation, even though said party originally agreed to participate in the mediation, the said party will have waived its rights as to the Claim. In this event, the party which was willing to mediate may, within 90 days of the date of receipt by either party of the Mediation Confirmation Notice, file a lawsuit to resolve the Claim, but the party which failed to participate in the mediation will have waived its rights with respect to the Claim. If the party willing to participate in the mediation fails to timely file a lawsuit, then both parties waive their rights to litigate the Claim.

5.4 The parties shall share, equally, the mediator's fee and any filing fees. The mediation shall be held in the place where the project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

5.5 In the event of a dispute between the parties arising under the Contract, the party prevailing in such dispute shall be entitled to collect such party's costs from the other party, including without limitation court costs and reasonable attorneys' fees.





# CONSTRUCTION CONTRACT CLAUSE PITFALLS: CONTRACTOR WARRANTIES, INSURANCE, INDEMNITY, CONSEQUENTIAL AND LIQUIDATED DAMAGES, AND DISPUTE RESOLUTION PROCESS

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SHAREHOLDER

# Disclaimer

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The information in this PowerPoint presentation is intended to be an overview of the topics covered. As legal counsel for a contractor or Owner, you must review for consistency and risk analysis the entire construction contract, the insurance policies and endorsements, and statutory and other authority in the state where the project is located. Always consult with the insurance agents providing the insurance coverages. The terms of a construction contract will be greatly dependent upon the negotiation position and leverage of the parties. The information provided is not legal advice for any specific contract arrangement and cannot be used without investigation of the facts and circumstances of the construction project.

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# Other forms available

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The Engineers Joint Contract Documents Committee of the American Council of Engineering Companies, the American Society of Civil Engineers, and the National Society of Professional Engineers publish the EJCDC® series of Documents. The EJCDC® Documents are generally used for road and bridge projects. The EJCDC® Documents may not be utilized or reproduced without a license generated by the Engineers Joint Contract Documents Committee. The EJCDC® Documents are not included in this presentation.



# Construction contract forms



# I. Types of projects

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There are a number of associations which provide a multitude of construction contract forms. The forms are developed for different types of construction projects. Examples include:

- A. There are specific forms for **large vertical projects** (buildings, warehouses, wind towers, communications towers, etc.) and small vertical projects (medical clinics, storage sheds, homes, etc.).
- B. There are specific forms for **non-vertical types** of construction projects (roads, streets, water and sanitary sewer infrastructure, parking lots, bridges, etc.).
- C. Vertical build projects and non-vertical build projects may have different forms for fixed bid projects, cost plus a fee projects, design-build projects, construction manager agent projects, and construction manager at risk (with or without a guaranteed maximum price) projects.



## II. Publishers of Forms

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The major publishers of construction forms most used include the following:

- A. The American Institute of Architects publishes what are commonly called AIA Documents®. These forms are the most widely used forms.
- B. The ConsensusDocs® Coalition publishes what are commonly called ConsensusDocs® documents. This Coalition includes approximately 40 construction related associations. The Coalition strives to balance the rights of the owners, contractors, architects, and engineers.
- C. The Engineers Joint Contract Documents Committee (“EJCDC®”) includes the American Council of Engineering Companies, the American Society of Civil Engineers, and the National Society of Professional Engineers. These EJCDC® contract documents are generally used for non-vehicle construction projects.





# III. Use of Forms Requires a License

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A. A license is required to use any of the publishers' forms. An annual license may be obtained for a fee.

B. Once a license is obtained revisions may be made to the forms to fit the needs of the parties and the requirements of the project. **NEVER UTILIZE ANY FORM WITHOUT REVISING IT TO FIT YOUR PROJECT!**

C. There are a multitude of issues to be addressed when revising form construction documents. Those revisions could address: pricing inclusions and exclusions; retainage; materials; equipment; approval processes for schematic design documents, design development documents, and construction documents; approval of pay applications; change orders; contingency allowances; substantial completion; final completion; punch list requirements; force majeure events; mechanics' liens; bid, performance, payment, and warranty bonds; termination rights; liquidated damages; and much more.



# IV. Construction Contract Warranty Provisions

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## A. What is the warranty period?

1. Many contractors and owners assume the warranty period is one year. Unless the contract language explicitly limits the warranty period, it almost always extends well beyond one year.

## B. AIA Construction Contracts.

1. Almost all AIA construction contracts incorporate by reference the warranty provisions as set forth in AIA™ Document A201-2017 (“AIA A201”).

### 1.1 General Warranty Provisions (Used With Permission):

- ☐ AIA A201 § 3.5 Warranty
- ☐ AIA A201 § 9.8.4 Certificate of Substantial
- ☐ AIA A201 § 9.8.1 Substantial Completion
- ☐ AIA A201 § 12.2.2.1



## IV. Construction Contract Warranty Provisions

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2. All ConsensusDocs® construction contracts include within the body of the construction contract all general conditions. Thus, there is no separate document containing general conditions which must be incorporated into the construction contract. Each form construction contract has its own section numbers for the warranty provisions, but the warranty provisions read the same.

### 2.1 General Warranty Provisions (Used With Permission):

- ☐ ConsensusDocs® 500 § 3.10.1
- ☐ ConsensusDocs® 500 § 3.10.2
- ☐ ConsensusDocs® 500 § 3.10.3
- ☐ ConsensusDocs® 500 § 3.10.4
- ☐ ConsensusDocs® 500 § 3.11.1
- ☐ ConsensusDocs® 500 § 2.5.24



# IV. Construction Contract Warranty Provisions

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## C. Interpretation of Warranty Contract Provisions.

### 1. How long does the warranty period last?

**1.1 One Year Correction Period.** There are included in the construction contracts published by The American Institute of Architects and ConsensusDocs® requirements the contractor correct work within one year of the date of Substantial Completion when the Work is not in conformance with the requirements of the Contract Documents. Within that one-year period, the contractor not only must honor the warranty, but must return to correct the work that is not in conformance with the requirements of the Contract Documents. However, the one-year correction period is not a limitation on the warranty period, except for the Contractor's warranties of subcontractors' and suppliers' warranty obligations under the ConsensusDocs®. You may want to revise that if you represent the owner.



# IV. Construction Contract Warranty Provisions

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**1.2 Six Year Statute of Limitations.** Note there is no language in the general warranty provisions which establishes any sort of limitation period. South Dakota law establishes the limitations period. All contracts under South Dakota law are subject to a six-year statute of limitations within which a plaintiff may bring a civil action for breach of contract.

- ☐ SDCL § 15-2-13
- ☐ Unlike the One Year Corrections Period and the Statute of Repose, South Dakota's six-year statute of limitations time begins running "[w]hen the plaintiff has actual or constructive notice of a cause of action."
- ☐ Example

**1.3 Statute of Repose.** In all cases, claims for the recovery of damages from injury to real or personal property, or personal injury or death arising out of any deficiency in construction, must be brought within 10 years from the date of Substantial Completion. This is called the statute of repose.

- ☐ Creates substantive right to be free from liability after legislatively determined period
- ☐ Establishes a right not to be sued rather than a right to sue
- ☐ Found in SDCL § 15-2A-3



## IV. Construction Contract Warranty Provisions

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The statute of repose and the statute of limitations work together. Depending upon when the “cause of action accrues” under the statute of limitations, the six-year statute of limitations may actually be shortened, because the statute of repose requires all actions be brought within 10 years from the date of substantial completion.

- ❑ Example of when statute of limitations may be shortened



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required

### 1. Builder's Risk Insurance

1.1 Builder's risk insurance is a form of property insurance that protects buildings, structures, materials, supplies, machinery and equipment that will become part of the project, foundations, underground piping, and site preparation (excavations, backfilling, and grading) while under construction or remodel.

An unendorsed builder's risk policy does not usually insure an existing building. The builder's risk policy normally provides coverage for property in transit and at a temporary storage location.

1.2 The AIA® construction contracts provide the owner will obtain the builder's risk insurance, unless the Owner instructs the contractor to do so, or the owner fails to obtain the coverage.

1.3 The ConsensusDocs® construction contracts provide the contractor will obtain the builder's risk insurance. However, the owner may elect to purchase the builder's risk insurance.

1.4 The policy amount needs to cover the full cost of replacing the project at the time of the loss. When in an inflationary environment, the policy should include an inflation coverage provision increasing the face amount of the policy to cover projected cost increases.

1.5 Builder's risk policy forms are very individualized so there are no standard policy forms.



# V. Construction Contract Insurance Provisions

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1.6 The builder's risk policy must provide coverage for the contractor, subcontractors, sub-subcontractors, architects, engineers, and the owner pursuant to the policy terms or by endorsement.

1.7 Contractors often use a blanket form of builder's risk insurance to insure multiple more common projects of short duration. A project specific policy is used by owners and contractors when the project value exceeds the blanket limit or the project duration is greater than one year.

1.8 The policy should cover and not exclude fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. There are another 20-30 additional coverages which need to be considered for each particular project. Many of the coverages will have sub-limits and specified deductibles.

- ☐ I recommend you obtain a proforma copy of the policy before the construction contract is signed, and then incorporate into the construction contract all of the coverages, sublimits, and deductible requirements
- ☐ See example in handout

1.9 Negotiate the amount of the deductible.

1.10 The soft cost coverage is for the owner's benefit. It is critical the owner evaluate its soft cost coverage requirements.

- ☐ See the handout for a list of typical coverages





# V. Construction Contract Insurance Provisions

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1.11 Negotiate whether the contractor or the owner will adjust the loss with the insurance carrier

1.12 At what point in time should the builder's risk insurance be terminated, and the owner's property insurance be made effective?

Most builder's risk policies will terminate when the entire project is accepted by the owner as complete, ie upon substantial completion, allowing for occupancy. Consider extending through the one-year warranty correction period.

1.13 The builder's risk policy should be amended as change orders are executed. There is usually a percentage change in the project cost that will be covered without paying an additional premium.

1.14 The builder's risk policy must include a waiver of subrogation clause within the policy or by endorsement.

1.15 Who will be responsible for the deductible amount upon the occurrence of a loss? The AIA A201 provides the owner will be responsible for losses not covered due to the deductibles. The ConsensusDocs® provide the party who causes the loss will be responsible for losses not covered due to the deductibles.



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 2. Commercial General Liability Insurance

2.1 Contractor general liability insurance protects against damages and losses involving bodily injury, sickness, disease, or death of persons, property damage, personal injury, advertising injury, and bodily injury and property damage arising out of completed operations that result from a contractor's products, services, and operations. These claims arise out of the contractor's negligence. Coverage is usually \$1,000,000 to \$5,000,000, depending on the size of the project and the contractor's annual revenues and net worth.

2.2 Coverage limits should be set forth in the construction contract for various types of damages and losses. See the handout for the categories of coverage.

2.3 How many claims are pending against the contractor? How can the owner protect its project in the event the contractor has to pay claims on other projects? Require the policy be endorsed to apply only to the owner's project for the full amount of the coverage.

2.4 How long should the coverage remain in place?

- ☐ Coverage should remain in place through final completion.
- ☐ The completed operations coverage should remain in place through the statute of repose (10 years) if the contractor will agree. Sometimes the owner will allow a shorter period of coverage by negotiation (3-5 years).



# V. Construction Contract Insurance Provisions

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2.5 The owner must be added to the contractor's commercial general liability policy as an additional insured.

The additional insured provision should include operations and completed operations. Most insurance companies have their own forms of additional insured endorsements. The ISO coverage forms are set forth in the handout.

2.6 Additional Required Commercial General Liability Provisions:

- ☐ Per project General Aggregate Endorsement
- ☐ Per Location General Aggregate Endorsement
- ☐ Limited Contractual Liability Coverage for Personal and Advertising Injury Endorsement
- ☐ No Exclusion for Contractual Liability
- ☐ Explosion, Collapse and Underground
- ☐ Pollutants Brought On Site
- ☐ Products-Completed Operations Coverage

## 3. Worker's Compensation Insurance

3.1 Coverage required for the contractor's employees.

3.2 The insurance covers all compensation and other benefits required by law. Coverage applies to any work-related accident occurring while the contractor's employee is working for the contractor, regardless of the contractor's negligence as an employer.

3.3 The contractor's worker's compensation insurance will avoid the contractor's employee from bringing a claim against the owner for maintaining an unsafe workplace.



# V. Construction Contract Insurance Provisions

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3.4 The owner cannot be added to the contractor's worker's compensation insurance as an additional insured.

3.5 Additional Required Worker's Compensation Provisions

☐ Coverage Required for Proprietors, Partners and Others.

3.6 SDCL § §62-01-19 and 20 allow an independent subcontractor to waive worker's compensations insurance

General contractors hiring uninsured independent subcontractors need to secure an affidavit of exempt status to avoid uninsured situations and unexpected audits from the general contractor's worker's compensation insurance carrier.

## 4. Employer's Liability Insurance

4.1 Coverage required for contractor's employees.

4.2 The insurance provides coverage that helps pay the contractor's costs related to lawsuits resulting from employee work related injuries or illnesses, claims for redundancy, unlawful deduction of wages, unfair, wrongful, or constructive dismissal, compensation claims, etc.

4.3 Consider limits of \$1,000,000 per accident, \$1,000,000 per policy, and \$1,000,000 per employee.

4.4 The owner must be added to the contractor's employer's liability policy as an additional insured.



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 4. Employer's Liability Insurance (continued)

4.4 The owner must be added to the contractor's employer's liability policy as an additional insured.

### 5. Business Automobile Insurance

5.1 Coverage required for the contractor.

5.2 Business auto insurance is a policy that applies to autos, trucks, and other vehicles owned, leased, or hired by the contractor that protects the contractor against liability for damages caused by accidents involving the contractor's vehicles and provides certain compensation to occupants of the vehicles injured in the accidents.

5.3 Typically request a \$1,000,000 policy limit.

5.4 The owner must be added to the contractor's business auto policy as an additional insured.

5.5 Additional required business auto liability provisions:

- ☐ 5.5.1 Automobile Coverage.
- ☐ 5.5.2 Broadened Pollution Liability Coverage.
- ☐ 5.5.3 MCS 90 Endorsement



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 6. Errors and Omissions / Professional Liability Insurance

6.1 Coverage required for the contractor when providing professional design and related services.

- ☐ 6.1.1 Errors and omissions insurance provides coverage for damage to completed work which is otherwise excluded under the commercial general liability policy.
- ☐ 6.1.2 Professional liability insurance provide coverage for damage arising out of the contractor's design work, but not damage to the work itself.

6.2 If the contractor provides engineering, architecture, design, or other professional services, the contractor must carry errors and omissions or professional liability insurance.

6.3 Typically request a \$2,000,000 policy limit.

6.4 Contractors may request their design liability be capped at the policy limit. That is what architects will request. Whether to cap the liability is up to negotiation.

6.5 The owner cannot be added to the contractor's errors and omissions or professional liability policy as an additional insured.



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 7. Inland Marine Insurance

7.1 Umbrella term that contemplates a number of specific coverages, such as builder's risk, installation floater, and cargo and contractor equipment

7.2 Coverage for the contractor that covers products, materials, and equipment while they are being transported on land, such as by truck or train.

☐ For instance, the builder's risk policy would include property in transit and property at temporary site. Whereas, the installation floater is a sister policy to the builder's risk policy used by artisan contractors to insure their work when there is no builder's risk policy (remodel projects).

7.3 Coverage will depend on the value of products, materials, and equipment in transit.

7.4 The owner must be added to the contractor's inland marine policy as an additional insured.

### 8. Commercial Property Insurance/Business Personal Property Insurance

8.1 Coverage for the contractor's owned or rented tools, equipment, and other personal property that are not incorporated into the project.

8.2 Coverage will depend on the value of the tools, equipment, and other personal property owned by the contractor.



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 8. Commercial Property Insurance/Business Personal Property Insurance (continued)

8.3 The owner will not be added to the contractor's commercial property insurance/business personal property policy as an additional insured.

### 9. Pollution Liability Insurance

9.1 Coverage for bodily injury and property damage caused by hazardous waste or materials released into the environment by the contractor's work or operations. Whether coverage is required will depend on the type of work the contractor will perform.

9.2 Sometimes this coverage may be added to the contractor's commercial general liability policy, but most of the time, it is a standalone policy.

9.3 The owner must be added to the pollution liability policy as an additional insured.





# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 10. Subcontractor Default Insurance

10.1 Coverage for the contractor in the event one of the contractor's subcontractors fails to perform according to the subcontract agreement.

Contractor can purchase this coverage as an alternative to a performance bond. Operates more like a surety bond approach than as insurance. Surety is a three-party contract which requires the contractor indemnify the surety in the event of payment under the bond.

10.2 Coverage will be dependent upon the size of the project.

10.3 The owner must be added to the subcontractor default insurance as an additional insured

### 11. Cyber Liability Insurance

11.1 Coverage for the contractor's liability for a data breach involving sensitive information contained in the owner's computer system.

11.2 The risk arises as construction documents are exchanged electronically.

11.3 The owner will not be added to the cyber liability policy as an additional insured.



# V. Construction Contract Insurance Provisions

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## 12. Wrap Insurance (OCIP/CCIP).

12.1 Wrap insurance covers the owner, contractor, and listed subcontractors from worker's compensation claims and third-party general liability claims.

12.2 The insurance comes in two forms. One form is the Owner-Controlled Insurance Program (OCIP). The other form is the Contractor Controlled Insurance Program (CCIP)

12.3 The cost starts at 1% of the project construction.

12.4 Most commercial general liability policies exclude coverage for projects insured under wrap insurance. However, the commercial general liability policy may be modified to allow excess coverage over the wrap insurance limit.

12.5 Generally, used on large projects with numerous subcontractors. There are usually cost savings for the owner when using wrap insurance as compared to the owner being charged for the contractor's and subcontractors' insurance costs as part of the general conditions charges included in the project contract sum.



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 13. Rigger's Liability Insurance

13.1 Coverage for a contractor (most often a subcontractor) arising out of the moving of property and equipment that belongs to others, such as lifting by crane, materials, and equipment at the jobsite.

- ❑ This coverage is made necessary by the exclusion in the commercial general liability policy under the exclusion for damage to property in your care, custody, or control.

13.2 Coverage includes bodily injury, damage to other's property, personal injury, and false and misleading advertising.

The amount of coverage should be no less than the value of the material being lifted.

13.3 The owner, and contractor if the subcontractor is providing crane services, must be added to the rigger's liability policy as an additional insured.

13.4 Sample clauses – See handout.



# V. Construction Contract Insurance Provisions

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## A. Types of Insurance Required (continued)

### 14. Excess / Umbrella Liability Insurance.

14.1 Coverage extends limits for commercial general liability insurance, employer's liability insurance, business automobile insurance, inland marine insurance, pollution liability insurance, and riggers liability insurance.

- ☐ 14.1.1 "Follow Form" subject to the same terms as the underlying policy. (Note: Always specify "follow form" for the coverage in the contractor's contract.)
- ☐ 14.1.2 A self-contained policy subject to its terms only. (Note: Require as broad of coverage as the commercial general liability policy.)
- ☐ 14.1.3 A combination of the two above.

14.3 Coverages can be from \$2,000,000 to \$50,000,000, depending on the project size and complexity.

14.4 The owner must be added to the contractor's excess liability or umbrella liability policy as an additional insured.

14.5 The excess or umbrella policies normally do not provide coverage over a rigger's policy.

14.6 The excess or umbrella policies normally do not provide coverage over a pollution liability policy, unless the pollution liability coverage is provided by the commercial general liability carrier. (Must list in the excess or umbrella liability policy the pollution coverage is an Underlying Scheduled Policy.)



# V. Construction Contract Insurance Provisions

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## B. Waivers of Subrogation Rights

### 1. What is subrogation?

*Subrogation is the process by which you obtain someone else's rights. For example, if an electrician is installing a new oven in your home, and the electrician negligently installs the wiring, and your home burns to the ground, then your home insurance carrier will pay you for the loss and will subrogate to your rights to recover from the electrician the insurance proceeds paid to you.*

### 2. What is a waiver of subrogation rights?

*The waiver means your insurance carrier will not have the right to recover the insurance proceeds from your electrician.*

### 3. Why would the insurance carriers allow the insured to waive subrogation rights?

*If there is no waiver of subrogation rights, then the contractor and every subcontractor would have to purchase commercial general liability insurance in an amount to cover the full replacement cost of the project. This would be an incredible duplication of coverages and premium costs.*



# V. Construction Contract Insurance Provisions

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## B. Waivers of Subrogation Rights (continued)

### 4. The American Institute of Architect's provision reads as follows:

AIA A201 §11.3.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

### 5. The ConsensusDocs® provision reads as follows:

ConsensusDocs® 505 § 11.3.4 The parties each waive all rights against each other and their respective employees, agents, contractors, subcontractors, suppliers, sub-subcontractors, and design professionals for damages caused by risks covered by the property insurance provided under §11.3.1, except such rights as they may have to the proceeds of the insurance. To the extent of the limits of Construction Manager's Commercial General Liability Insurance specified in §11.2.1 or [\_\_\_\_\_] dollars (\$[\_\_\_\_\_] ), whichever is more, Construction Manager shall indemnify and hold harmless Owner against any and all liability, claims, demands, damages, losses, and expenses, including attorneys' fees, in connection with or arising out of any damage or alleged damage to any of Owner's existing adjacent property that may arise from the performance of the Work, to the extent caused by the negligent or intentionally wrongful acts or omissions of Construction Manager, Subcontractor, Supplier, Subsubcontractor, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.



# V. Construction Contract Insurance Provisions

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## B. Waivers of Subrogation Rights (continued)

6. Some owners save insurance premium dollars by agreeing with their insurance carriers they will not waive subrogation rights. Some owners self-insure; thus, not wanting to lose the ability to seek recovery against a negligent contractor and/or subcontractor. Examples include:

6.1 The State of South Dakota.

6.2 Large national scope companies such as manufacturers and meat packers.

7. Refusals to waive subrogation rights are not critical when the project is a stand-alone building, unless the owner is performing some of the work or installing expensive equipment, which items were not covered by the builder's risk policy. Remember the owner, contractors, and subcontractors are all insureds under the policy; thus, there are no subrogation issues.



# V. Construction Contract Insurance Provisions

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## B. Waivers of Subrogation Rights (continued)

8. Refusals to waive subrogation rights are critical when remodeling current buildings or adding additions to further existing buildings. If the property insurance carrier and the building owner won't waive subrogation rights, then the contractor could consider the following options:

- 8.1 Obtain a commercial general liability policy and excess/umbrella policy for the full value of the existing building. The contractor could try to include the cost in the bid amount if the contractor was aware of this issue before bidding.
- 8.2 Take the risk of going out of business if the contractor or a subcontractor was at fault.
- 8.3 Take precautions in construction work to lessen the risk, such as utilizing firewalls when adding an addition to a currently existing building.
- 8.4 Not taking on the project.





# V. Construction Contract Insurance Provisions

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## C. Insurance Clauses that Need to be Added to the Construction Contract.

### 1. Proof of Insurance.

Proof of insurance for all policies will be deposited with the Owner upon the execution of this Agreement by providing to the Owner certificates of insurance, copies of declaration pages, the schedule of forms and values, and all endorsements issued by the Contractor's insurance carriers. At least 45 days prior to the expiration of any policy, the Contractor will provide the Owner with proof of renewal of each insurance policy, a copy of the declarations page, and copies of all endorsements providing additional coverages. At the Owner's request, the Contractor will provide to the Owner copies of all insurance policies.

### 2. Occurrence and Claims Made Policy Forms.

All policies must provide coverage on an occurrence basis, and must not be issued under a "claims made" policy form or a "modified occurrence" policy form. If coverage is made on a claims made form:

2.1 **Retroactive Rate.** The retroactive date must be shown and must be before the date of the Agreement or the beginning of the Work.

2.2 **Post Completion Insurance Period.** The insurance must be maintained, and evidence of insurance must be provided for at least ten years from the Date of Substantial Completion. [Note: The ten years coincides with the South Dakota statute of repose. The contractor may try to negotiate this requirement to a shorter timeframe.]

### 3. Acceptance by Owner.

The required insurance coverages and limits will be subject to Owner's approval. Such insurance must be maintained under forms of policies and from companies satisfactory to Owner. Each insurance company must have a financial rating of at least A-VII as defined by A.M. Best Company and must be authorized to transact business in the state where Construction Manager's Work is being performed.



# V. Construction Contract Insurance Provisions

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## C. Insurance Clauses that Need to be Added to the Construction Contract (continued)

### 4. Additional Insured Requirements.

Contractor agrees to name Owner, including Owner's [For private owners: officers, directors, shareholder, agents, and employees] [For public owners: elected and appointed officials, officers, agents, and employees] as additional insureds under the Contractor's liability insurance policies (except for the professional liability policy) with respect to liability arising out of activities, "operations" or services" performed by or on behalf of Contractor, and completed operations through the statute of repose in South Dakota (10 years from the date of Substantial Completion). The additional insured coverage may not be limited to the named insured's sole negligence or the additional insured's vicarious or imputed liability. The additional insured coverage must include cross-suits, i.e. there must be an exclusion for suits between or among insureds. The additional insured coverage must include coverage for the parties identified above without the need for privity of contract and must include a waiver of subrogation rights by the insurer.

### 5. Primary Insurance Endorsement.

All of Contractor's liability insurance carriers must, by endorsement, confirm Contractor's liability insurance policies will apply as primary and not contributory. Any other liability insurance carried by Owner will be excess only and will not contribute with Contractor's liability insurance.

### 6. Deductibles/Self Insured Retentions.

Any self-insured retention or deductible of the Contractor exceeding \$\_\_\_\_\_ must be declared and is subject to Owner's approval. Funding of self-insured retentions or deductibles maintained by Contractor will be Contractor's responsibility, including any self-insured retentions or deductibles applicable to coverage afforded to Owner or other required additional insureds.



# V. Construction Contract Insurance Provisions

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## C. Insurance Clauses that Need to be Added to the Construction Contract (continued)

### 7. Insurance Requirements for Subcontractors.

Contractor must ensure its subcontractors of any tier will procure and maintain insurance that complies with the requirements set forth in this [Agreement/Exhibit \_\_], except the excess liability minimum amount will be \$\_\_\_\_\_. Copies of the certificates and endorsements must be provided prior to the subcontractors entering the project site. Owner reserves the right to prohibit subcontractors from entering the project site, to remove subcontractors from the project site and to withhold payment to Contractor until evidence of coverages is provided. [Note: Different types of subcontract work will be subject to different risk factors. For instance, a painter will have fewer risk factors than an electrician. Thus, there may be different requirements for subcontractor trades.]

### 8. Insurance Indemnification Obligations Separate.

Contractor's duty to provide the insurance coverages set forth in this [Agreement/Exhibit \_\_] is severable from its indemnification obligations under this Agreement. Nothing in these insurance requirements may be deemed to limit Contractor's liability under the Agreement. The insurance requirements are set forth as minimum amounts and may not be construed to relieve Contractor of liability exceeding such coverages, nor will it preclude Owner from taking such actions as are available to Owner under any other provisions of the Agreement.



## V. Construction Contract Insurance Provisions

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- 9. Breach for Failure to Maintain Insurance.** Failure of Contractor to maintain the required insurance coverages, limits, and endorsements will constitute a material breach entitling Owner to terminate the Agreement for default, prohibit access to the project site, withhold payment, or purchase the required insurance at Contractor's expense. Any delays in the completion of Contractor's Work due to Contractor's failure to obtain or maintain insurance will be treated as delay due to Contractor's breach of contract. Contractor agrees to defend, indemnify, and hold harmless Owner, including its [for private owners: officers, directors, shareholders, agents, and employees] [for public owners: elected and appointed officials, officers, agents, and employees], and others identified in the Agreement for any damages, losses, expenses, including, but not limited to, attorneys' fees, incurred as a result of Contractor's or its subcontractors of any tiers' failure to maintain the insurance coverages, limits, and endorsements required under this [Agreement/Exhibit \_\_]
- 10. Agreement Insurance Requirements.** In the event of a conflict, inconsistency, or ambiguity between the provisions of this Exhibit \_\_ and the Agreement, the more stringent, greater, and/or broader insurance requirements, limits, and coverages will govern.
- 11. Higher Limits.** If the Contractor carries insurance coverages with higher than the limits required in this Agreement, the full amount of the insurance coverages actually carried by the Contractor will be available to respond to a covered loss or occurrence, and the coverage afforded to the additional insureds under the policies will not be limited by the minimum coverage limits specified in this Agreement, but will be deemed increased to the amounts actually carried by the Contractor Manager.
- 12. Attorneys' Fees of Additional Insured.** The Contractor agrees to pay all reasonable attorneys' fees and necessary litigation expenses incurred by or for the additional insureds for any claim, demand, or action covered by the Contractor's insurance policies.



# V. Construction Contract Insurance Provisions

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## 13. Mandatory Insurance Coverages.

Contractor must, at its own expense, maintain in effect at all times during the performance of the Work under the Agreement not less than the coverages and limits of insurance set forth in this [Agreement/Exhibit \_\_]. The coverages and limits set forth below are the minimum acceptable to Owner. In specifying minimum Contractor insurance requirements, Owner does not represent the coverages and limits are adequate to protect Contractor from loss, damage, or liability arising from Contractor's Work. Contractor is solely responsible to inform itself of types and amounts of insurance it may need beyond these requirements to protect Contractor and its subcontractors and suppliers and their respective employees and agents. Notwithstanding anything to the contrary in the Contract Documents or in this [Agreement/Exhibit \_\_], if Contractor has procured any insurance coverage or limit (either primary or on an excess basis) that exceeds the minimum acceptable coverage or limit set forth in this [Agreement/Exhibit \_\_], the broadest coverage and highest limit actually afforded under the applicable policy of insurance will be considered the coverages and limits that are required and such coverages and limits must be provided in full to the additional insureds and indemnified parties under the Agreement. Owner and Contractor expressly intend the provisions set forth in this [Agreement/Exhibit \_\_] and in the Contract Documents be construed as broadly as permitted to be construed under applicable law to afford the maximum insurance coverages and limits available under Contractor's insurance policies.

## 14. Cancellation/Non-Renewal Notices.

All of Contractor's insurance policies must not be subject to cancellation or non-renewal, except after at least 30 days' prior written notice by the insurance carriers to the Owner. If the insurance carriers are unable or unwilling to provide such notices to the Owner, then the Contractor must provide such notices prior to the cancellation or non-renewal of any of the Contractor's policies and insurance required by this Agreement. If the insurance carriers are willing to provide notice of cancellation or non-renewal, proof of compliance with this requirement must be provided by endorsements issued by the Contractor's insurance carrier. In addition, the Contractor will provide to the Owner within 10 days of the effective date or any modification to the term of a policy a notice of modification of any of the policies required of the Contractor herein.



# V. Construction Contract Insurance Provisions

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## D. Consider Additional Insurance Coverages for the Contractor, or Specific Contractors.

1. Environmental Services Liability Insurance.
2. Watercraft Liability Insurance.
3. Aircraft Liability Insurance.
4. Drone Liability Insurance (Operator of Drone; sometimes utilized to provide photos of construction progress).
5. Railroad Protective Liability Insurance (Work is performed within 50 feet of a railroad).
6. Jones Act and Longshore Harbor Worker's Compensation.
  - 6.1 Jones Act covers seamen.
  - 6.2 Longshoreman's covers land based maritime workers.



# V. Construction Contract Insurance Provisions

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## E. Subcontractor's Insurance Responsibilities

1. The types of coverages should be nearly identical but will depend on the specific services rendered for insurance policies such as pollution liability insurance or rigger's liability insurance.
2. The dollar amount of coverages will depend on the type of subcontractor service to be performed.
  - 2.1 Many times the excess/umbrella liability policies will have different dollar coverages. For instance:
    - ☐ HVAC, electrical, structural steel, and other high risk subcontractor services may require higher limits such as \$5,000,000 or more.
    - ☐ Paint, dry wall, and other lower risk subcontractor services may require lower limits such as \$1,000,000 or more.
3. The contractor's construction contract should clearly identify all subcontractor insurance requirements.

## F. Remodel or New Addition projects.

1. The construction contract must require the owner maintain property insurance on the replacement value of the existing building at least through Substantial Completion of the project.
2. See the discussion of waivers of subrogation set forth above.



## VI. Construction Contract Indemnification Provisions

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A. The owners and contractors should agree to indemnify each other for their respective negligent or intentional wrongful acts and omissions.

1. Indemnification should be afforded for the following:

- a. Bodily injury to and death of persons.
- b. Damage to Property.
- c. Attorneys' fees, costs, and expenses.

B. The American Institute of Architects' provisions read as follows (Used With Permission):

AIA A201 § 3.18 Indemnification:

§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18. [Emphasis Added].





## VI. Construction Contract Indemnification Provisions

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### B. The American Institute of Architects' provisions read as follows (continued)

#### AIA A201 § 3.18 Indemnification:

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

Note: The AIA Form does not, but should, include an obligation to defend. Revise to read "...Contractor shall defend, indemnify and hold harmless..."

Note: Many times the contractor will try to delete any indemnification obligation for the architect or design professional. The architect or design professional will resist being excluded from the indemnification obligation. Generally, try to keep intact the indemnification obligation.

Note: The AIA Forms do not include an owner indemnification.



## VI. Construction Contract Indemnification Provisions

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### C. The ConsensusDocs® provisions read as follows (Used With Permission):

#### 11.1 Indemnity

ConsensusDocs® 500 § 11.1.1 To the fullest extent permitted by law, Contractor shall indemnify and hold harmless Owner, Owner's officers, directors, members, consultants, agents, and employees, Design Professional, and Others (the "Indemnitees") from all claims for bodily injury and property damage, other than to the Work itself and other property insured, including reasonable attorneys' fees, costs, and expenses, that arise from the performance of the Work, but only to the extent caused by the negligent or intentionally wrongful acts or omissions of Contractor, Subcontractors, Suppliers, Subcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. Contractor shall be entitled to reimbursement of any defense costs paid above the Contractor's percentage of liability for the underlying claim to the extent provided by §11.1.2. [Emphasis Added].

ConsensusDocs® 500 § 11.1.2 To the fullest extent permitted by law, Owner shall indemnify and hold harmless Contractor, its officers, directors, members, consultants, agents, and employees, Subcontractors, Suppliers, or anyone employed directly or indirectly by any of them or anyone for whose acts any of them liable from all claims for bodily injury and property damage, other than property insured including reasonable attorneys' fees, costs and expenses, that may arise from the performance of work by Owner, Design Professional, or Others, but only to the extent caused by the negligent or intentionally wrongful acts or omissions by Owner, Design Professional, or Others. Owner shall be entitled to reimbursement of any defense costs paid above Owner's percentage of liability for the underlying claim to the extent provided by §11.1.1. [Emphasis Added].

ConsensusDocs® 500 § 11.1.3 NO LIMITATION FOR LIABILITY. In any and all Claims against the indemnitees by any employee of Contractor, anyone directly or indirectly employed by Contractor, or anyone for whose acts Contractor may be liable, the indemnification obligation shall not be limited in any way by any limitation on the amount of type of damages, compensation, or benefits payable by or for Contractor under workers' compensation acts, disability benefit acts or other employment benefit acts.



## VI. Construction Contract Indemnification Provisions

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### C. The ConsensusDocs® provisions read as follows (continued): 11.1 Indemnity

Note: The ConsensusDocs® form does not, but should, include an obligation to defend. Revise to read “...Construction Manager shall defend, indemnify, and hold harmless...”

Note: Many times, the construction manager will try to delete any indemnification obligation for the “Design Professional” i.e., the architect. The Design Professional will resist being excluded from the indemnification obligation. Generally, try to keep intact the indemnification obligation.

Note: The ConsensusDocs® forms do include an owner’s indemnification obligation.



## VI. Construction Contract Indemnification Provisions

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- D. If you are representing the owner, you may add the following provisions which gives the owner some input and ability to choose different legal counsel, choose its own counsel, and take over the defense of the claims if the contractor is failing to adequately defend:

The Contractor must promptly advise the Owner in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply, and the Contractor, at the Contractor's expense, must assume on behalf of the Owner and conduct with due diligence and in good faith the defense thereof with counsel satisfactory to the Owner; provided, the Owner will have the right to be represented therein by advisory counsel of its own selection and at its own expenses; and provided further, if the defendants in any such action include both the Contractor and the Owner, and the Owner has reasonably concluded there may be legal defenses available to it which are different from or additional to, or inconsistent with, those available to the Contractor, the Owner will have the right to select separate counsel to participate in the defense of such action on its own behalf at the Contractor's expense. In the event of failure by the Contractor to fully perform in accordance with this Section \_\_\_\_\_, the Owner, at its option, and without relieving the Contractor of its obligations hereunder, may so perform, but all costs and expenses so incurred by the Owner in that event must be reimbursed by the Contractor to the Owner, together with interest on the same from the date any such expense was paid by the Owner until reimbursed by the Contractor, at the rate of interest provided in the Contract. The obligations of the Contractor under this Section will survive the expiration of the Contract and specifically will survive the limitations contained in Section \_\_\_\_\_.



## VI. Construction Contract Indemnification Provisions

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- E. When representing the owner, include a provision requiring the contractor to indemnify the owner against mechanic's liens and encumbrances, so long as the owner has paid the contractor for amounts secured by the mechanic's liens and encumbrances:

To the fullest extent permitted by law and without limiting any other indemnification obligations of the Contractor, except only to the extent caused by the uncured failure of the Owner to make payment when required by the Contract Documents, the Contractor will defend, indemnify, and hold harmless the Owner, its officers, directors, assigns, tenants, lenders, agents, and employees from any Claims, liens, charges or encumbrances (including but not limited to statutory liens, mechanic's and materialmen's liens, or bond Claims) arising out of or in connection with the performance of the Work. The Owner will be entitled to recover from the Contractor all costs and expenses incurred in enforcing this Agreement including attorneys' fees. The Contractor will promptly release, or cause the release of: (a) all liens and notices of intent to lien recorded against any portion of the project site or Contract proceeds by its agents, employees, laborers, Subcontractors, Sub-subcontractors, or material or equipment suppliers of any tier, whether during or after the term of the Contract, so long as the Contractor has been paid by the Owner for the portion of the Work furnished or performed pursuant to the Contract by the claimant who recorded any such lien or notice; and (b) Claims for nonpayment or lis pendens made or filed by its agents, employees, laborers, Subcontractors, Sub-subcontractors or material or equipment suppliers of any tier, whether during or after the term of the Contract, so long as the Contractor has been paid by the Owner for the portion of the Work furnished or performed pursuant to the Contract by any such claimant. In the case of liens or recorded notices relating to liens, the Contractor will, at the Contractor's cost and expense, accomplish such removal by recording a release of the lien, properly executed by the lien claimant, or by filing with a court of competent jurisdiction a properly executed bond (provided that such bond and the surety issuing it will be acceptable to such court) in the minimum amount of one and one-half times the amount of such recorded lien or such greater amount as may be prescribed by statute in the State of South Dakota or by the court; provided, however, such bonding procedure must operate to fully remove the lien as an encumbrance against both actual and recorded title and against the Contract proceeds. If the Contractor fails to comply with the foregoing, the Owner is authorized by the Contractor to remove or satisfy any such liens, and the Contractor will pay to the Owner all costs and damages incurred by the Owner to do so, including attorneys' fees, together with interest on the same from the date any costs were paid by the Owner until reimbursed by the Contractor at the rate of interest provided in the Contract. This provision will survive termination or expiration of this Agreement.



# VII. Consequential and Liquidated Damages

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- A. Consequential damages are indirect losses or damages arising from a breach of contract by one of the parties.
1. Examples include lost profits or income by the owner or the contractor, increased financing costs for the owner, and loss of business opportunities by the contractor.
  2. Consequential damages are hard to prove and difficult to quantify. Consequential damages can far exceed the cost of the project. In most construction contracts, the parties mutually waive consequential damages.

- B. The American Institute of Architects provisions read as follows (Used With Permission):  
AIA A201 § 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. The mutual waiver includes

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for losses of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude any award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.



# VII. Consequential and Liquidated Damages

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## C. The ConsensusDocs® provisions read as follows (Used With Permission):

### ConsensusDocs® 500 § 6.7 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES.

Except for damages mutually agreed upon by the Parties as liquidated damages in §6.6 and excluding losses covered by insurance required by the Contract Documents, the Parties agree to waive all claims against each other for any consequential damages that may arise out of or relate to this Agreement, except for those specific items of damages excluded from this waiver as mutually agreed upon by the Parties and identified below. Owner agrees to waive damages including but not limited to Owner's loss of use of the project, any rental expenses incurred, loss of income, profit, or financing related to the project, as well as the loss of business, loss of financing, loss of profits not related to this project, loss of reputation, or insolvency. Contractor agrees to waive damages including but not limited to loss of business, loss of financing, loss of profits not related to this project, loss of bonding capacity, loss of reputation, or insolvency. The provisions of this section shall also apply to the termination of this Agreement and shall survive such termination. The following are excluded from this mutual waiver: [\_\_\_\_\_].

### ConsensusDocs® 6.7.1

The parties shall each require similar waivers in contracts with Subcontractors and Others retained for the project.

## D. **Because the parties are likely to waive consequential damages, the soft cost coverages for the owner under the builder's risk insurance are critical for the owner to cover the owner's consequential damages.**



# VII. Consequential and Liquidated Damages

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## E. Liquidated Damages:

1. Because the owner will very likely incur some damages due to the contractor's failure to timely achieve Substantial Completion, the parties are more likely to quantify those damages in the form of liquidated damages. Liquidated damages are typically quantified as a certain number of dollars (on a per day delayed basis) owed by the contractor to the owner for the contractor's failure to deliver to the owner the project on time. An owner should never recover both consequential and liquidated damages. That would be a duplication of recovery of damages, i.e. double dipping.
2. Liquidated damages provisions will usually address the following:
  - 2.1 A dollar amount owed on a per-day basis.
  - 2.2 A limitation on the number of days or dollars of liquidated damages.
  - 2.3 Contractors will try to limit the liquidated damages to a percentage of their expected profit. This limit could be anywhere from 10% to 100% of the expected profit.
  - 2.4 What's the process for assessing liquidated damages? Consider adding the following provisions:
    - ☐ If you represent the owner, include a provision whereby the liquidated damages may be withheld from future payments to the contractor.
    - ☐ If you represent either party, include a provision whereby the liquidated damages may be subject to the dispute resolution process.





# VII. Consequential and Liquidated Damages

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## E. Liquidated Damages (continued):

3. The American Institute of Architects includes in the construction contract a liquidated damages provision which is completely up to the parties to draft.
4. The ConsensusDocs® provisions read as follows (Used With Permission):  
*Please reference handouts*
5. If representing the Contractor avoid inclusion of liquidated damages based on both Substantial Completion or Final Completion. Choose one or the other.
6. When drafting a force majeure provision in a construction contract always preclude the owner from collecting liquidated damages for delays beyond the contractor's control.
7. Force majeure causes are beyond the contractor's control, so no liquidated damages should be assessed.



# VIII. Dispute Resolution Process

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## A. Variety of Dispute Resolution Process

1. There are numerous dispute resolution processes which are available when resolving disputes between the owner and the contractor. The American Institute of Architects and ConsensusDocs® give the parties optional dispute resolution processes through a “check the box” approach.
  - 1.1 Senior management level officers of the owner and the contractor must first meet within a specified number of days in an attempt to resolve the dispute.
  - 1.2 A dispute resolution board of industry personnel will be assembled to make non-binding findings.
  - 1.3 Mediation with the parties utilizing a mediator provided by the American Arbitration Association.
  - 1.4 Mediation with the parties utilizing a mediator with construction mediation experience in the state where the project is located.
  - 1.5 An initial decision maker (the architect) will render a non-binding decision before going to the dispute resolution process. Contractors note who employs the architect for the project, i.e. the owner.
  - 1.6 Binding arbitration with the American Arbitration Association.  
Note: It is difficult to add additional parties.  
Note: No appeal rights.
  - 1.7 Binding arbitration utilizing the state arbitrator process where the project is located.
  - 1.8 Litigation in the state where the project is located.
  - 1.9 Litigation in the state of the owner’s office or contractor’s office.



# VIII. Dispute Resolution Process

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## A. Variety of Dispute Resolution Process (continued)

### 2. Always identify the governing law in the construction contract. Consider the following:

2.1 The default language in most construction contracts provides the law of the state when the project is located will govern contract and other disputes.

2.2 Many states have a statute which requires the parties to utilize the laws of the state where the project is located. Research the state laws.

2.3 Many states require construction disputes be resolved in their state by arbitration or litigation, if the project is located in their state. Note: South Dakota does not have such a law.

2.4 Large companies will often ignore state governing law requirements specifying the method and location where disputes will be resolved. Instead, they require the governing laws and dispute resolution processes be where they are headquartered. Note: Courts in other states sometimes refuse to honor the laws of the state where the project is located. Then, it becomes a “race to the courthouse.”

2.5 Always include in the construction contract a provision whereby the prevailing party will recover its costs, expenses, and attorneys’ fees. Most form contracts fail to address this requirement.



# VIII. Dispute Resolution Process

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B. My “go to” dispute resolution process reads as follows, which is based, in small part, on The American Institute of Architects’ provision found in the AIA A201. Note: all provisions in the standard form providing the architect is the “initial decision maker” need to be deleted when using the provisions set forth below:

1. Claims shall be referred to management level representatives of the parties with authority to bind their respective parties. The parties’ representatives will meet in person within 5 days of the giving of notice of the Claim and attempt to resolve the Claim. If the Claim is not resolved within the 5-day period, the party asserting the Claim may demand mediation.
2. Either party may, within 30 days from the date of receipt of a notice of Claim not resolved by management level representatives (the “Mediation Confirmation Notice”), demand in writing the other party participate in mediation. The party receiving the demand for mediation must confirm to the party demanding mediation the party receiving the demand for mediation will participate in mediation as set forth in Section [\_\_\_]. If such a demand is made and the party receiving the demand fails to confirm in writing within 30 days after receipt thereof its willingness to participate in mediation, then the party receiving the demand waives its rights with respect to the Claim. In this event, the party making the demand may within 60 days of the date the receiving party received the notice of request for mediation file a lawsuit to resolve the Claim, but the receiving party will have waived its rights with respect to the Claim. If the party making the demand fails to timely file the lawsuit, then both parties waive their rights to litigate the Claim.
3. In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor’s default, the Owner may, but is not obligated to, notify the surety and request the surety’s assistance in resolving the Claim.



# VIII. Dispute Resolution Process

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4. If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.
5. Mediation
  - 5.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections [final payment represents waiver of certain claims] and [waiver of consequential damages] shall be subject to mediation as a condition precedent to binding dispute resolution.
  - 5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by an attorney licensed to practice law in the state where the project is located. The mediator must have significant experience in the mediation of commercial disputes. A request for mediation shall be made in writing, delivered to the other party to the Contract, and include the identification of the proposed mediator. The other party may approve or reject the use of the proposed mediator. If the proposed mediator is rejected by the other party, the parties will attempt to agree upon an acceptable mediator. If the parties are not able to agree upon a mediator, the parties will petition a court where the litigation will be filed if mediation is not successful, and the court will select the mediator. The mediation will take place within 30 days of the receipt of notice of confirmation by the party receiving the demand for mediation when the proposed mediator is acceptable, the date the parties agree upon the mediator, or the date the court appoints the mediator, as applicable. The request may be made concurrently with the filing of litigation but, in such event, mediation shall proceed in advance of litigation proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.



# Questions?



# Contact Us

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# Tips & Tricks in Construction Law Negotiating

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Shawna Hanson & Jennifer Clites – Daktronics

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Broker Associate  
Lloyd Companies

Dan has a BSBA with an emphasis on Accounting from the University of Nebraska-Lincoln ('05), as well as a JD and MBA from the University of South Dakota ('08). While in law school, he was involved with the ADR Board and the Volunteer Income Tax Assistance program. He began his legal career at the Cutler Law Firm, first as an intern in the summers of '06 and '07, then as an associate in '08, making partner in 2013. While at the Firm, his areas of practice were focused on business organizations and transactions, telecommunications, banking and finance, real estate development and construction. In early 2021, Dan joined Lloyd Companies as General Counsel. Lloyd Companies is a full-service real estate firm headquartered in Sioux Falls, providing development, construction, property management, hospitality, asset management and investment offerings throughout the region. At Lloyd, he advises senior management and manages the legal function, handling complex business transactions, negotiating critical contracts and managing litigation by overseeing the work of outside counsel.

Dan is actively involved in the community, currently serving on the boards of directors for the Washington Pavilion, St. Francis House and Ronald McDonald House. In addition, he has served on the boards of the Greater Sioux Falls Chamber of Commerce (Past Chair), Sioux Empire United Way, Siouxland Chapter of the Construction Financial Management Association, Young Professionals Network (Past Chair), Sioux Falls Food Coop (Past Chair), Sioux Falls Arts Council and was a member of the Citizens Advisory Committee for the 2025 Downtown Plan. Dan is a graduate of Leadership Sioux Falls 25.



## **Amy L. Arndt**

### *Partner*

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arndta@ballardspahr.com

## **Services**

Business and Transactions | Mergers and Acquisitions | Outside General Counsel | Transactional Finance

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Amy Arndt is the Managing Partner of Ballard Spahr's Sioux Falls office, a member of the firm's Elected Board, and is the Practice Leader of the firm's Owner-Managed and Closely Held Businesses Group. Known for her strategic and client service-oriented approach, Amy assists business owners with operational issues, management succession, financing options for growth, and restructuring. Her practice emphasizes advising privately held companies on private offerings/placements and finance, corporate governance, disclosure matters, mergers and acquisition transactions, and asset acquisitions and divestitures. She acts as outside general counsel to clients advising on various matters including formation, shareholder agreements, and internal corporate structuring.

## **Professional Highlights**

### **Professional Activities**

American Bar Association, Real Property, Probate and Trust Division, Member

South Dakota State Bar Association, Business Law Committee, Chair (2012-Present)

Second Judicial Bar Association, Member

### **Recognition & Accomplishments**

*Chambers USA*, corporate/commercial (South Dakota), 2016-2023, Tier 1

*The Legal 500 M&A Private Practice Powerlist* - 2023

*The Best Lawyers in America*, mergers and acquisitions law, 2013-2023; Lawyer of the Year, 2022

American College of Mortgage Attorneys (ACMA), Fellow, 2017 to present

EmBe 50 Women Leaders in Sioux Falls, 2014

## Related Insights

"Ballard Spahr Represents Aristotle Capital Management in Acquisition of Pacific Asset Management," Press Release, April 18, 2023

"Ballard Spahr Represents Cimarron Label and Western Printing in Acquisition by Inovar Packaging Group," Press Release, February 09, 2023

"Ballard Spahr Advises Aristotle Capital Management on Acquisition of Pacific Asset Management," Press Release, October 28, 2022

"2022 South Dakota Manufacturing Summit," Speaking Engagement, September 08, 2022

"Ballard Spahr Helps ClimeCo Establish Collaborative Effort to Accelerate Decarbonization in Shipping," Press Release, July 21, 2022

"Finalizing Forgiveness: Fighting SBA Decisions and Pursuing Borrower Claims," Legal Alert, February 02, 2022

"Ballard Spahr Attorneys Set Firm Record With Nearly 53,000 Pro Bono Hours Donated in 2020," Awards and Rankings, December 15, 2021

"The Few Who Didn't Shut Down: Managing a Law Firm During COVID-19," Media Coverage, June 24, 2020

"Owner-Managed Business/Closely Held Business – Three-Part Webinar Series Part Three," Event, May 15, 2020

"Owner-Managed Business/Closely Held Business -- Three-Part Webinar Series Part Two," Event, May 08, 2020

"Ballard Spahr Represents RESPEC in Acquisition of PDC Engineers," Press Release, May 08, 2020

"Owner-Managed Business/Closely Held Business – Three-Part Webinar Series Part One," Event, May 01, 2020

"*Chambers USA* Names Ballard Spahr Leading Lawyers and Practices for 2020," Awards and Rankings, April 23, 2020

"Morning Symposium: The Evolution of Family Offices," Event, February 26, 2020

"State Bar of South Dakota Names Jordan Veurink Young Lawyer of the Year for 2018," Press Release, June 21, 2018

"Amy Arndt Named Managing Partner of Ballard Spahr's Sioux Falls Office," Press Release, March 27, 2018

## Credentials

### Education

University of Nebraska College of Law (J.D., 1996)

Augustana College (B.S. with honors, 1993)

## **Admissions**

South Dakota

U.S. District Court for the District of South Dakota