Using this Risk Management Tool

This Terms and Conditions Review Guide provides CNA policyholders with a comparison of acceptable language to assist them in reviewing language provided by a prospective client. The contractual provisions of the guide also serve as model provisions for policyholders that would like to incorporate clear, unambiguous language into their professional services agreements.

The Terms and Conditions Review Guide is not a model contract. The commentary and model provisions are based on Schinnerer's experience in loss prevention and on the general scope of insurance coverage offered under the CNA policy. The information is offered for professional liability risk management guidance. It is designed to inform design professionals about some of the terms and conditions issues to be considered when reviewing or negotiating professional service agreements; it is not intended as legal or insurance advice applicable to specific circumstances.

These model provisions do not replace the need for you to rely on local counsel for a legal review of the terms and conditions of contracts that you negotiate with your prospective clients. The independent insurance broker who represents you can also provide advice on the applicability of professional liability insurance to the exposures you negotiate when crafting a professional services agreement.

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1. Standard of Care

According to common law, a professional is required to act as competently as could reasonably be expected of other professionals practicing under substantially similar circumstances. The law does not require perfection, merely reasonable skill and care.

**Sample provision:** The standard of care for all professional services performed or furnished by Consultant under this Agreement will be the skill and care used by members of Consultant's profession practicing under similar circumstances at the same time and in the same locality. Consultant makes no warranties, express or implied, under this Agreement or otherwise, in connection with Consultant's services.

2. Compensation

A schedule of compensation due the design professional should always be expressly addressed to avoid potential disputes.

**Sample provision:** For the scope of services stated in Attachment ____, Client agrees to pay Consultant the compensation stated in Attachment ____ to this Agreement. Consultant agrees to submit invoices monthly for services rendered in the manner and format stated in Attachment ____.
3. **Indemnification**

Indemnification provisions allocate risk and liability among parties. Typically, that allocation is designed to shift liability to the party who is thought to be more actively involved in activities or events giving rise to liability. In the context of professional service agreements, each party should be willing to be responsible for losses and claims arising out of its negligence.

**Sample provision:** To the fullest extent permitted by law, Consultant shall indemnify Client, its officers, directors, partners, employees, and representatives, from and against losses, damages, and judgments arising from claims by third parties, including reasonable attorneys’ fees and expenses recoverable under applicable law, but only to the extent they are found to be caused by a negligent act, error, or omission of Consultant or Consultant’s officers, directors, members, partners, agents, employees, or subconsultants in the performance of services under this Agreement.

When a firm reviews a contractual indemnity provision it should consider making the obligation reciprocal. Mutual indemnity provisions are often viewed by design professionals as more reasonable than a unilateral indemnity provision in favor of the client (or in favor of the prime professional under a subcontract). A sample mutual indemnity provision consistent with common law principles follows:

**Sample provision:** To the fullest extent permitted by law, Client and Consultant each agree to indemnify the other party and the other party’s officers, directors, partners, employees, and representatives, from and against losses, damages, and judgments arising from claims by third parties, including reasonable attorneys’ fees and expenses recoverable under applicable law, but only to the extent they are found to be caused by a negligent act, error, or omission of the indemnifying party or any of the indemnifying party’s officers, directors, members, partners, agents, employees, or subconsultants in the performance of services under this Agreement. If claims, losses, damages, and judgments are found to be caused by the joint or concurrent negligence of Client and Consultant, they shall be borne by each party in proportion to its negligence.

4. **Force Majeure**

Circumstances or events may occur that are outside the control of either party. This provision states that neither party shall be liable for loss arising from any cause beyond its reasonable control.

**Sample provision:** Neither party shall be deemed in default of this Agreement to the extent that any delay or failure in the performance of its obligations results from any cause beyond its reasonable control and without its negligence.

5. **Dispute Resolution**

Clients and design professionals should anticipate the possibility of disputes or claims and include in their agreements some provision for dispute resolution. Alternative dispute resolution through mediation is a non-binding process in which an impartial mediator actively assists the parties in identifying and clarifying issues in dispute, and in designing and agreeing to solutions.

**Sample provision:** Client and Consultant agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement to mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association, effective as of the date of this agreement.
6. **Termination of Contract**
The rights and obligations of the parties should be clearly expressed, including the right to terminate the contract.

**Sample provision:** Client may terminate this Agreement with seven days prior written notice to Consultant for convenience or cause. Consultant may terminate this Agreement for cause with seven days prior written notice to Client. Failure of Client to make payments when due shall be cause for suspension of services or, ultimately, termination, unless and until Consultant has been paid in full all amounts due for services, expenses and other related charges.

7. **Hazardous Environmental Conditions**
If the design professional is not being engaged to perform services related to hazardous environmental conditions, affirmative language should be included in the contract to exclude such services and exposures.

**Sample provision:** It is acknowledged by both parties that Consultant’s scope of services does not include any services related to the presence at the site of asbestos, PCBs, petroleum, hazardous waste or radioactive materials. Client acknowledges that Consultant is performing professional services for Client and Consultant is not and shall not be required to become an “arranger,” “operator,” “generator” or “transporter” of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA).

8. **Ownership of Documents**
Drawings, specifications, reports and other documents produced by design professionals are instruments of their professional service, not products. Sometimes a client may insist on owning or having an unlimited license to use the instruments of service. If the design professional can identify the client’s specific needs for the instruments of service (e.g., construction, occupancy and maintenance), a limited license can be granted by the design professional to satisfy those needs. However, if the client insists on owning or having an unlimited license, and the design professional is willing to acquiesce to this demand, the client should be required to hold harmless and indemnify the design professional for all liability, cost, and expenses incurred as a result of any modification or use of the instruments of service without the design professional’s written authorization.

**Sample provision:** All documents prepared or furnished by Consultant pursuant to this Agreement are instruments of Consultant’s professional service, and Consultant shall retain an ownership and property interest therein. Consultant grants Client a license to use instruments of Consultant’s professional service for the purpose of constructing, occupying and maintaining the Project. Reuse or modification of any such documents by Client, without Consultant’s written permission, shall be at Client’s sole risk, and Client agrees to indemnify and hold Consultant harmless from all claims, damages and expenses, including attorneys’ fees, arising out of such reuse by Client or by others acting through Client.
9. Use of Electronic Media
Transferring information by electronic media is inherently risky. One way to reduce this risk is to state that a hard copy has control over any variances or changes that might be introduced.

Sample provision: Copies of documents that may be relied upon by Client are limited to the printed copies (also known as hard copies) that are signed or sealed by Consultant. Files in electronic media format or text, data, graphic or other types that are furnished by Consultant to Client are only for convenience of Client. Any conclusion or information obtained or derived from such electronic files will be at the user’s sole risk. When transferring documents in electronic media format, Consultant makes no representations as to long-term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems or computer hardware differing from those in use by Consultant at the beginning of this assignment.

10. Construction Phase Services
If the agreement provides for any construction phase services by the design professional, the agreement should include express language that the contractor is solely responsible for the construction site and construction means, methods, techniques, sequences, and procedures that it uses to perform the work.

Sample provision: If this Agreement provides for any construction phase services by Consultant, it is understood that the Contractor, not Consultant, is responsible for the construction of the project, and that Consultant is not responsible for the acts or omissions of any contractor, subcontractor or material supplier; for safety precautions, programs or enforcement; or for construction means, methods, techniques, sequences and procedures employed by the Contractor.

11. Opinions of Cost
It’s important to qualify the design professional’s opinions or estimates of cost as being based on experience and qualifications that represent the design professional’s best judgment, not a guarantee.

Sample provision: When included in Consultant’s scope of services, opinions or estimates of probable construction cost are prepared on the basis of Consultant’s experience and qualifications and represent Consultant’s judgment as a professional generally familiar with the industry. However, since Consultant has no control over the cost of labor, materials, equipment or services furnished by others, over contractor’s methods of determining prices, or over competitive bidding or market conditions, Consultant cannot and does not guarantee that proposals, bids, or actual construction cost will not vary from Consultant’s opinions or estimates of probable construction cost.