

CONTRACT REVIEW CHECKLIST

Contract Provision	Comments	Y/N
Recitals		
1) Does it use the company's full, legal entity name?		
<p>What is the company's full legal entity name? Does the company have any dba's? The company is also able to use their dba's (Doing Business As). When using the dba entity name in the contract document, it must be preceded by, <u>Company Name, Inc.</u> For example, <u>Company Name, Inc.</u> dba Company Name Group.</p>		
Professional Services Point of View		
<p>Why have a written agreement?</p> <ul style="list-style-type: none"> • Mutual understanding, establish your own rules (dispute resolution, mediation, arbitration, litigation) • Size up your client • Identify and allocate risks and plan accordingly • Use your attorney, insurance broker and/or insurance company for contract review and uninsurable clauses 		
Contract Documents		
2) Does it incorporate other contracts or documents not attached?		
<p>If other documents that address contract language or scope issues are referenced, they need to be included and attached to determine whether the entire referenced agreement is in everyone's best interests. Please attach all documents listed. This includes any references to the "Main Contract". In most cases, the "Main Contract" will be the contract between the owner and the general contractor.</p>		
3) Are your rights and duties tied into other contracts or documents?		
<p>If other contracts or documents are referenced and rights are tied to them, the other documents need to be included in the review. If those documents are not present, those documents need to be requested. This is sometimes called a "flow down" clause. Items and clauses from the "Main Contract" are carried down to and may become part of the contractor's responsibilities.</p>		
Professional Services Point of View		
<ul style="list-style-type: none"> • Professional services use agreements with the contract documents being what we develop for the contractors • Like with contract documents for construction, for your agreements, you also need to obtain and read all referenced codes and standards. You are assuming a legal obligation of all of the referenced material • If possible, delete unilateral right to assign your contract and never without your written permission, look for requirements for any and all codes and standards, use the term "applicable," and pay special attention to guarantees or warranties of compliance 		
Scope of Work		
4) Is the scope limited to the bid proposal and nothing more?		
<p>The Scope of Work needs to clearly and precisely match the bid proposal. There needs to be as little room for interpretation as possible.</p>		
5) Must the Work be furnished according to a "satisfaction" standard?		
<p>If a "satisfaction" standard is stated in the contract, the preference is that the standard is upheld by an authority that understands the workmanship of the contractor.</p>		
6) Who is responsible for any engineering or design of the Work?		
<p>Is this a design build project? Who is required to find any insufficient design issues? Does this match the proposal?</p>		
7) Who obtains and pays for permits for the Work?		
<p>If so, and if the cost of the permit was included, this item needs to be addressed.</p>		
8) Who obtains and pays for payment and performance bonds for the Work?		
<p>Does this match the proposal?</p>		

9) Is it a requirement to enroll in and pay for a default insurance program?		
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Please ensure that this was known at bid time, that OCIP or CCIP is going to be credited.

10) Is the job a design build?		
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The PM needs to know who is responsible for the design and cost associated, whether the design is done in house or by an outside engineering firm.

Professional Services Point of View

- Define estimates of construction cost versus total project cost and identify responsibility for cost overruns and redraw
- Secure indemnity from clients for hazardous materials and refuse liability for unknown site conditions
- Do not use the word “inspection” – you are only insured for observation
- Do not agree to job site safety, the contractors are responsibility for safety and when you are on site, follow their safety protocols
- Do not agree to lender requirements if it adds additional services or is uninsurable
- Define your services during the construction phase for general compliance with only the design
- You are not insured for and should therefore refuse responsibility for construction means and methods
- Make sure that the right to reject or stop work is the responsibility of the owner – you advise the owner
- As important as it is to state what services you are providing, it is equally important to state what services you are not providing and what services you expect from others under the owner’s control
- Standard of care – define properly, delete language that alters or elevates the standard of care. You want it to state ordinary skill and judgment, avoid superlatives (like the highest standard of care)

Warranty

11) Is the warranty period longer than one (1) year?		
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Does the warranty period in the contract match the Bid Proposal and/or the Bid Documents and Specifications?

12) Does the warranty period begin upon substantial completion of the Work (and not the Project as a whole)?		
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When does the warranty period start? The preference would be that the warranty period starts when the scope of work reaches substantial completion. A phased approach is preferable.

13) Does warranty work need to be performed when the Work was damaged by others?		
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Best practice would be to exclude from warranty work any trade damage.

14) Does notice of the deficient work of other/preceding trades need to be given?		
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Is there a contract clause that states the customer must be notified of deficient work? What is the timing required, if any? In order to recoup expenses for the delay or rework being caused, the contractor will have to ensure the process is followed as defined in the contract.

15) Who has the risk of loss of the Work?		
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Is there a contract clause that states if the warranty is not taken care of, punchlist or work that does not meet the satisfaction requirements, the customer give that work to another contractor and back charge? Best practice is to ensure that the open items are taken care of within the time frame of the contract.

16) Is there a Warranty Clause included?		
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If there is a manufacturer extended warranty those need to be provided to the end user. After the typical 1 year warranty period the contractor is not responsible for extended manufacturer warranties. Those belong to the owner. This needs to be clear in the contract or close out documents.

17) If yes, is the warranty separately priced?		
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If the warranty period is longer than 1 year those additional costs should be addressed with the customer.

Professional Services Point of View

- Delete or state that in your professional opinion

Plans & Specifications		
18) Does the accuracy or completeness of the plans need to be verified?		
<i>Is there a clause that makes the trades responsible for any or all errors included in the project plans? If so was the cost included in the proposal, if not, that needs to be addressed in this clause.</i>		
19) Must you notify anyone of ambiguities, discrepancies in the plans?		
<i>Is there a clause that requires someone to communicate these deficiencies in a certain time frame or by a certain process? This will need to be followed during construction or lose the opportunity to collect changes. If there is no such clause, best practice is to still document the deficiencies for your own records.</i>		
20) Are you liable for failing to provide such notice?		
<i>If you fail to follow the contract, are you still responsible for creating a workable system?</i>		
Professional Services Point of View		
<ul style="list-style-type: none"> • The contract documents for the contractors that the design team develops • Define as your ownership of instruments of service • Limited to final permitted documents • Retain ownership of documents, especially proprietary details • Limit and prohibit use for other projects • Secure indemnity if documents are reused without your permission • Report to the AHJ and the State Board of Architectural Examiners if you are not providing construction observation services on a project you have stamped • Limit your duty to assisting in obtaining permits and approvals • Avoid the term "as-built" • Define sources of information for record documents • For shop drawing review, define the scope of the contractor's liability • Your responsibility in reviewing shop drawings is for general conformance only 		
Schedule & Performance		
21) Do you have the right to discuss and agree on the Work schedule?		
<i>Is the schedule included in the contract? Does it match the bid schedule? Is there a process required in the contract for reviewing and changing the schedule?</i>		
22) Does anyone have the right to set, modify, amend, re-sequence or accelerate the Work schedule? If yes, see next question.		
<i>Who can change the schedule? Is it required to receive notices on these changes? Is there a contract clause allowing the receipt of a change order?</i>		
22 a) If yes, must they give notice? Are you entitled to payment for a change event?		
23) Does anyone have the right to decide (in their sole discretion) that you are delaying the project and to require you to use overtime or otherwise accelerate at your own expense?		
<i>If a clause addresses this issue, preference would be to strike the clause.</i>		
24) Are you required to guarantee a completion date for the Work?		
<i>You cannot control the schedule of the entire contract and it is best to strike this clause.</i>		
25) Must you pay liquidated damages for delayed completion? If yes, see question 25a.		
<i>If liquidated damages are included, the plan for managing schedule and documenting changes needs to address the completion date. Was this known and addressed at bid time?</i>		

25a) If so, is the amount reasonable?		
26) Is the Work schedule Monday through Friday, 8 hours per day?		

Are working hours consistent with what was included in the bid proposal?

27) Do you have the right to a change event for overtime if it is required to work on weekends or over 8 hours per day?		
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Often a contract will include a “No Overtime Clause”. This needs to be addressed for circumstances that may require work or extra work to be completed during extended work hours.

28) Is there a Termination Clause included?		
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If yes see #29

29) If yes, is the customer obligated to pay for completed work?		
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There should be language in the contract that allows you to recoup costs for work completed. If not, this will have to be addressed in the contract.

Professional Services Point of View

- *Delete time is of the essence*
- *Include reasonable time to perform*
- *Verify timing for shop drawing and submittal reviews*
- *Allow for delays due to force majeure*
- *Delete liquidated damages*

Change Events

30) Do all change events need to be documented in writing in order to be paid?		
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This needs to be noted and communicated to the field leader. All change events are to be recorded in writing even if there is not an explicit requirement to do so. (example: accelerated schedule, decelerated schedule, whether work is aligned with master schedule).

31) Do you waive your right to payment for not having a pre-approved, written change order?		
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This needs to be noted and communicated to the field leader. You should have a forced work document signed by a GC representative that has the authority to do so.

32) Are you entitled to damages from delays/accelerations as change events?		
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Trade needs the opportunity to receive payment for any costs incurred due to project delays. For example if the project is delayed for 2 months and then starts back up, trade should be entitled to additional general expense costs. Your bid and the contract should align with the master schedule and you should refer back to the master schedule for cost impacts.

33) Is the mark up for labor and material on change orders identified and acceptable?		
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For example, your overhead markup will likely not be the same as the GC.

Contract Price & Payment Schedule

34) Is there a pay-when-paid or pay-if-paid clause?		
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A “pay-if-paid” clause means that you are only entitled to payment if your customer receives payment from their customer. These clauses are not acceptable and must be struck. A “pay-when-paid” clause means that you are entitled to payment only after our customer receives payment from their customer. While this clause does give you recourse to receive payment, it does not help you maintain your cash flow. This clause is not preferred.

35) Is the progress payment retention percentage reasonable?		
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Is the retainage less than 10%? Do you think a lower retainage rate can be negotiated? Are you able to get a clause that would release a portion of retainage at 50% complete?

36) Does anyone have the right to withhold payments for any reason?		
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If there are any clauses that allows payment to be withheld, this needs to be noted and reviewed to determine if it is a fair clause. Often these clauses are with the “satisfaction” clauses.

37) Are you subject to unilateral discounting, back charges or set-offs under this or any other contract?		
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Is this contract solely for the work described in the scope of work or are other projects allowed to impact payment on this project? Discounts can be regarding a certain volume of work. Do you have to be notified of back charges before they are added to our contract? Set-offs can occur if you owe money to our customer on a different project. If set-offs are allowed your customer can reduce the payment amount by the dollars owed on another contract.

38) In the event the contract is terminated, are you entitled to payment for Work furnished and a percentage of lost profits?		
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It is preferred a termination clause allows for billing for your work to date plus all lost profits.

39) Is there a requirement to waive or subordinate any of our statutory, common-law or contractual rights?		
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Are there any clauses that are included in the contract but not supported by law? This would depend on the location of the project. There are several items that may be included in contract language but not supported by statutory law. If the agreement is signed, even though those clauses do not match current statutes, the agreement would prevail until it was decided to file a claim.

40) Are the waiver and release forms that you must provide to get paid limited to the extent of actual payment received?		
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Waiver forms need to be limited such that you only waive your rights to the extent that you have been. Unconditional waivers are only acceptable after you have been paid in full.

41) Do you have a duty to remove or bond around any liens recorded even if you have not been paid for such work?		
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Such a clause is acceptable only where you are required and agree to pay downstream suppliers and subcontractors before you are paid.

Professional Services Point of View

- Include specific payment terms
- Try to allow for interest and collection costs
- Provide for suspension and termination
- Allow both parties to terminate, list expenses if termination by client, provide for right to suspend then terminate if client is in default

Insurance & Indemnity

42) Are you required to indemnify anyone for their own acts or omissions?		
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Often owners and general contractors will try to shift the risk of liability for damage claims and lawsuits to you even if the claim is resulting from owner or GC negligence. These claims are often not covered by a subcontractor's insurance. Best practice is to limit indemnification to your own negligence. If this limited indemnification clause is not acceptable, best practice is to limit the indemnification of personal injury and/or property damage rather than all risks associated with the work.

43) Is your liability limited to recovery under applicable insurance policies?		
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Do the liability requirements match what your liability insurance covers? (Example: airport runway)

44) Must you designate anyone other than the contracting party as an additional insured on our insurance policies?		
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Let your insurance agent know if the Certificate of Insurance needs to list anyone beyond yourself.

45) If the project is covered by wrap-up insurance, have you reviewed the actual policy or merely a summary?		
<i>Wrap-up insurance is another term for Contractor/Owner Provided Insurance Programs (OCIP or CCIP).</i>		
Professional Services Point of View		
<ul style="list-style-type: none"> • Ensure consistency with your current coverage • Remove clauses that are uninsurable • Always review your contracts with your attorney and insurance broker or insurance company. It is better to have them review the contract up front before a problem develops than later when the problem occurs • Limit your liability to a reasonable amount – limit to your fee, the limit of your insurance coverage • Highlight the limit in your contract • Delete provisions for liquidated and/or consequential damages • Be aware of statute of limitations of the project depending upon the state the project is located in 		
Dispute Resolution		
46) Does the contract choose the law of the state where the project is located?		
<i>Ensure that the state where the project is located is the state where disputes will be governed.</i>		
47) Are you entitled to mediation and/or binding arbitration?		
<i>Mediation is preferred.</i>		
Notices		
48) Are there any notice provisions of less than three (3) days?		
<i>It is unreasonable to ask you to submit delay or cost notices in less than 3 days. This needs to be revised if less than 3 days.</i>		
General Provisions		
49) Does anyone have the right to assign the contract without our prior, written consent?		
<i>Best practice is that if the contractor would like to assign the work elsewhere due to satisfaction requirements, schedule delays, etc. that you are given at least 72 hours notice. This will allow sufficient time to improve the situation.</i>		
50) Is there a requirement to sign any other contracts or documents, such as lender consents?		
<i>Best practice is that you do not have to sign other documents to perform the work.</i>		
51) Is the contract subject to an automatic assignment to anyone?		
<i>Is there any language that automatically assigns either subcontract work or general contract work elsewhere without notice? A 72 hour notice is preferred.</i>		