

# Be wary of the documents behind the construction contract

Contract exhibits can be longer and more complicated than the actual contract. Exhibits commonly contain drawings and specifications, scope of work descriptions, insurance requirements, schedules, confidentiality agreements, licensing agreements, and other important documents. Yet, in far too many cases, exhibits are ignored in the drafting and negotiating process. This can be a costly mistake. Legal disputes routinely arise because the contract exhibits either conflict with the contract terms, or introduce requirements unknown to one or more of the contracting parties at the time of contract execution. To avoid such disputes, owners, contractors, and designers should follow these five tips.

## Tip 1: Review Exhibits To Ensure They Are Consistent with the Contract.

Developing a consistent construction contract is no easy task, particularly for large projects. For one thing, the parties that develop contract exhibits are commonly absent when the contract terms are negotiated. For another, project requirements commonly change and evolve between design development, bid advertisement, and execution of the contract, making the goal of consistency a moving target. It's no surprise that exhibits often conflict with the contract itself. Therefore, before you sign a contract, spend the time to review all exhibits to ensure consistency with the contract itself.

## Tip 2: Draft a contract clause establishing an order of preference for contract interpretation.

It's not always possible to catch all inconsistencies in a contract, especially in light of the time pressures of the contracting process. To help resolve issues related to contract inconsistencies, draft a provision that establishes a pecking order for the contract documents. That way, if a contract provision does conflict with an exhibit requirement, the contract will clearly dictate which requirement prevails. Generally, these so-called "order of preference" provisions provide that the most recent modification of the contract governs first, followed by the contract, the general conditions of the contract, addenda, drawings, specifications, and other exhibits.

## Tip 3: Remove any unnecessary exhibits from construction and design contracts

During the contract negotiation process, parties commonly attempt to attach documents that are not necessary or consistent with the negotiated contract. Bid documents, for example, are sometimes included as exhibits even though the documents contain terms that were eliminated during contract negotiations. Likewise, parties often attempt to include their initial proposals in the contract even though the terms of the proposal directly conflict with the negotiated contract. Don't



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include these exhibits in your contract unless it's absolutely necessary.

## Tip 4: Set forth a list of documents that have been reviewed by the contracting parties prior to contract execution

Include a contract clause establishing the documents each party reviewed prior to contract execution. This will prevent disagreements about what information was shared by the contracting parties before contract execution, and perhaps more importantly, whether that information was adequate.

## Tip 5: Remove assumptions or clarifications from the construction and design contract.

Contractors, designers, and owners commonly attempt to include clarifications and assumptions in the their contracts. Such requests do a disservice to

all parties. The contract and design documents should clearly reveal the scope of work for all parties. Permitting the inclusion of clarifications and assumptions in the contract can lead to inconsistencies, which leads to disputes.

The best approach is to resolve the questions raised in clarifications and assumptions before the contract is signed. For example, all technical questions should be submitted to the designer. The designer, in turn, should adjust the design to resolve unknown issues before contract execution. This task will ensure that potential issues are highlighted up front. In addition, it will make for a better design.

Owners, contractors, and designers often wish they had reviewed each part of the contract with more care before execution. As you review your contracts, pay special attention to the exhibits. They carry significant weight in construction disputes, and can make or break your legal position in the event of a dispute.

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