KEY CONTRACT CLAUSES FOR ROOF CONSULTANTS

By Michael Taylor, J.D.

I. Introduction

Roof consultants provide a wide range of services for building owners and property managers, ranging from pure consulting services to observation of roof construction and repair, failure analysis, and roof engineering and design. Roof consultants are often an integral part of a much larger project, and in this role, interact not just with building owners or property managers, but also with general contractors, roofing subcontractors, architects, engineers, and material suppliers.

Almost all of these other project participants have established trade associations that provide them with form contracts for entering into agreements with the other project participants. Owners and property managers, for example, can obtain form agreements from BOMA (Building Owners and Managers Association), contractors and subcontractors from AGC (Associated General Contractors of America), architects from AIA (American Institute of Architects), and engineers from EJCDC (Engineers Joint Contract Documents Committee). Material suppliers, especially the large roofing supply companies, usually have available their own form contracts or purchase orders, which may have been individually developed by each supplier, but which also (and not surprisingly) are very similar to one another. All of these form contracts contain provisions that are biased, to some extent, in favor of the entity whose association created the form, and all shift significant legal and business risks from the entity providing the contract form onto the entity being asked to sign it.

By contrast with these other project participants, roof consultants often operate, at least on the smaller jobs, with no written contract at all, relying instead on only a simple handshake or telephone agreement. When roof consultants do enter into a written contract, it is very often based on a form document prepared by someone else. It is strongly recommended that roof consultants provide all of their services pursuant to a written contract, and that they carefully review and negotiate any contract they sign. This article identifies and briefly discusses several key contract clauses that warrant special attention before any contract is signed, including clauses dealing with: 1) Scope of Work, 2) Payment, 3) Standard of Care, 4) Indemnification, 5) Limitation of Liability, 6) Dispute Resolution, and 7) Insurance.

II. Key Contract Clauses

A. Scope of Work

A properly drafted scope of work clause should clearly and precisely identify each and every service being provided by the roof consultant. Ambiguities in a scope of work clause hardly ever work to the roof consultant's advantage.

For example, a scope of work clause that requires the roof consultant to "observe the roof contractor's work" may mean, in the owner's mind, that the roof consultant will be physically present on the roof at all times during the roofing project, that the roof consultant is closely supervising the means and methods of the roofing contractor's performance, that the roof consultant will report any problems to the owner, and that accordingly, the roof consultant can be held responsible if there are any defects in the materials or workmanship. This interpretation essentially makes the roof consultant the guarantor of the entire roofing project.

The roof consultant, on the other hand, may interpret the obligation to "observe the roof contractor's work" to mean simply that the consultant visit the project site a few times during the roofing with no implied supervision, reporting, or guarantee obligations. It is far better for the roof consultant to work through the issue of service level expectations with the owner or property manager at the beginning of a project and draft a properly detailed scope of work clause than it is to resolve work scope ambiguities through an expensive and time consuming lawsuit or arbitration at the end of the project.

B. Payment

From the roof consultant's perspective, a contract's payment provisions should not only identify the amount to be paid for the services, but should also address the number and timing of payments, whether interest is to be paid on any overdue amounts, and if so, at what rate.

The roof consultant should also review the contract to determine if any limitations are being placed on his right to pursue the owner or property manager for payment if the contract amount is not paid in full. For example, many owners' contracts include a provision requiring that the party providing the work or services waive its right to file a mechanic's lien in the event of non-payment. The roof consultant should make all efforts to strike such a clause from his or her contract.

Finally, if there are any stipulations precedent to receiving payment, they should be conditions within the roof consultant's control. For example, payment being resultant upon the owner receiving the roof consultant's report may be acceptable, but payment being conditioned upon the owner receiving project financing from a bank would not be acceptable.

C. Standard of Care

If a roof consultant breaches his contract with the owner or property manager, the law provides that he can be sued for that breach of contract. If the contract simply identifies the services to be provided and is silent as to the standard of care pursuant to which the roof consultant is to provide the services, then the standard of care implied by the law will be a negligence-based standard. The court will ask whether the roof consultant performed his services using reasonable care, which is likely to be measured by the care, skill, and diligence a typical roof consultant would ordinarily use in similar circumstances. Sometimes, however, the owner's or the property manager's contract contains an elevated standard of care. For example, the contract may require that the roof consultant use "best efforts" or "the highest level of diligence and care" in performing his services. Some contracts may even require that the roof consultant guarantee that his services will result in a leak-free roof. These provisions can appear anywhere in the contract, so it is important to review the entire contract for them.

The roof consultant should in all cases reject these provisions for two very important reasons. First, it is more likely that the roof consultant will be found to have failed to satisfy the elevated standard, increasing his liability exposure. Second, in the case where the roof consultant does design or engineering work and has procured professional liability insurance coverage, most professional liability insurance policies provide coverage only for negligence and do not cover "contractual liability" for any higher standard of care.

D. Indemnification

A typical indemnity clause requires one party (the "indemnitor") to reimburse another (the "indemnitee") for any loss or damage arising (1) from an act or omission by the indemnitor (or some other person), or (2) from the claim or demand of a third person.

Many states have "anti-indemnification" statutes which dictate that indemnity clauses in construction-related contracts are unenforceable if they require a party to indemnify another party for that other party's own negligence or fault. In these states, no matter what the contract language says, a party is permitted to indemnify someone only for his own negligence or the negligence of his agents or employees.

If at all possible, the roof consultant should not give the owner or property manager any express indemnity at all. The roof consultant should simply tell the owner or property manager that he is perfectly willing to accept responsibility for his own professional services but that he is not willing to include an express indemnity clause in the contract that would require that the roof consultant be responsible for someone else's negligence.

If the owner or property manager persists, there is a tolerable fall-back position: the roof consultant could agree to a clause that really does not significantly extend his liability beyond that which the law would otherwise impose. The following clause, patterned on the clause that the AIA recommends architects use, would be acceptable:

> *"To the fullest extent permitted by law, the roof consultant shall indemnify and hold harmless the owner from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including loss of use resulting therefrom, but only to the extent such claims, damages, losses, or expenses are caused by negligent acts or omissions of the roof consultant, the roof consultant's subconsultants, or anyone directly or indirectly employed by either."*

This language protects the roof consultant in three important ways:

1. It does not make the roof consultant responsible for the owner's or the property manager's own negligence or that of any other party's negligence;
2. If the roof consultant's negligence combines with someone else's to cause a problem, it is responsible only for its own share of the fault; and
3. The standard of care for which the roof consultant is responsible is simple negligence, not some higher standard.

E. Limitation of Liability

There is a growing trend for roof consultants to attempt to limit their liability to the owner or property manager, perhaps to the amount of the fee or the amount of liability insurance available. The trend is understandable. A roof consultant's fees are normally relatively quite small in relation to the owner's or the property manager's actual damages in the event something goes wrong. The following is a typical limitation of liability clause found in many contracts:

> *"The liability of the roof consultant, its agents and employees under this contract shall be limited to $_____, or to the amount of the fee, whichever is less."*

Limitation of liability clauses can be a useful risk management tool. However, roof consultants should be aware that they are far from foolproof,

because courts around the country have been divided on whether, and to what extent, to enforce these clauses. In many states, the law regarding the enforceability of limitations of liability clauses is in flux. A roof consultant can increase the likelihood that the limitation of liability clause will be enforced by making sure it is obvious within the text of the contract and by providing some evidence that it has been specially negotiated. If, for example, it appears that the clause is "buried in the fine print," a court may not enforce it. It is a good idea instead to put such clauses in bold or large print, and to require that the parties each place their initials next to the clause. The roof consultant should also discuss the clause with the owner or property manager and consider allowing the owner or property manager to remove the limitation for an additional fee.

Finally, even with an enforceable limitation of liability clause in its contract with the owner or property manager, the roof consultant should not expect protection from claims by third parties. No matter what the owner or property manager agrees to, a limitation of liability clause normally will not apply to any party that has not itself signed the contract. For example, a limitation of liability clause in a contract with the owner will not apply to claims against the roof consultant by the owner's tenants or by any third party physically injured if something connected to the roof consultant's services goes wrong.

F. Dispute Resolution

Many construction related contracts, including the AIA forms used frequently by owners, architects, and some contractors, require that the parties submit all disputes to arbitration in accordance with American Arbitration Association Construction Industry Rules. The latest versions of the most frequently used AIA documents also include mediation as a prerequisite to arbitration. The Association of General Contractors (AGC) has also made mediation, then arbitration, mandatory in its standard documents.

Although litigation is often more costly, complex, and time consuming than arbitration, the latter also has its drawbacks. For example, the arbitration procedure as outlined in many form contracts, including that used in the widely available AIA documents, precludes consolidation or joinder of other entities or persons who are not direct parties to the contract. Anti-consolidation clauses are not always good for the roof consultant, particularly when a dispute arising from the roof consultant's services may also involve the roofing contractor or other parties who cannot be joined to a single proceeding. In addition, many arbitration clauses do not allow for discovery, which means that neither side has automatic access to the other side's documents or witnesses before the actual hearing. Further, parties to an arbitration typically have little or no right to appeal from a decision they do not like and that they believe is wrong.

Any well drafted dispute resolution clause, whether requiring arbitration or not, should also address the issue of where the dispute will be resolved and what law will apply. Owners and property managers frequently insert into their agreements a requirement that all disputes be arbitrated in the home state of their principal business or where the project is located. This can put a roof consultant at a significant disadvantage if he has to incur the time and expense of travel to resolve a dispute.

For all these reasons, dispute resolution clauses require careful consideration and negotiation.

G. Insurance

The roof consultant should carefully review all contracts to determine the insurance requirements. Contracts drafted by owners and property managers are often very complicated with respect to insurance requirements, and often contain detailed obligations for the roof consultant to obtain coverage of a particular type and amount, with specific deductibles, coverage periods, subrogation requirements, and additional insured requirements.

The best advice is for the roof consultant to always consult with his or her broker before agreeing to accept a contract containing any project-specific insurance requirements. If the coverages cannot be obtained, or can only be obtained at additional cost, the roof consultant needs to communicate this to the owner or property manager and either remove the requirements from the contract or negotiate additional payment for including them. If a contract is signed and the required insurance not procured, then the roof consultant's business and personal assets may be at risk in the event of a claim.

III. Conclusion

Roof consultants should always insist on entering into signed contracts before they provide their services. Roof consultants should carefully review all contract terms and conditions proposed by the other party and pay special attention to the key contract clauses discussed above. ■

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Michael G. Taylor, J.D., is chairman of the Construction Law Group for Leonard Street & Deinard, Minneapolis, MN, and a member of its insurance coverage group. He graduated *cum laude* from the University of Michigan Law School in 1984 and is active in the litigation construction insurance sections of the American Bar Association. He has written and lectured extensively on various construction, litigation, and insurance issues, and he is active in numerous trade associations, including the American Institute of Architects, Roof Consultants Institute, Association of General Contractors, and Associated Builders and Contractors. He has extensive experience negotiating engineering, design, construction management, construction, and design/build contracts, and has represented architectural, engineering, construction manager, developer, owner, and contractor clients in construction-related litigations, arbitrations, and mediations throughout the country.