

Dealing with the Spearin Doctrine: Drafting Disclaimers

Disclaimer language should be incorporated into the contract with the Architect: **Require a Warranty and Indemnification**

- Most contracts with the Architect utilize the AIA B101-2007 (Standard Form of Agreement Between Architect and Owner).
- Demand inclusion of the following two provisions.
 - Under Article 2.4 (Design Services):
 - Warranty of Constructability: Architect hereby warrants that the Construction Documents, including necessary Drawings and Specifications, shall be free from defects or error, and that construction of the Project pursuant to the Construction Documents is viable, feasible, and otherwise constructible, taking into account the conditions of the site, the budget for the Cost of the Work, all applicable federal, state, and local laws, and any other conditions to which the Project is subject.
 - Under Article 12 (Special Terms and Conditions)
 - Architect shall indemnify, defend, and hold harmless Owner, its Board of Education, Officers, Directors, Partners, Agents, Consultants, Insurers, Employees and Sub-Contractors of each and any of them from and against all claims, costs, damages, losses and expenses (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals in all courts or arbitration or other dispute resolution costs) arising out of or relating to breach of the Warranty of Constructability set forth in Article 2.4.____, by Architect, of any subcontractor, or of anyone directly or indirectly employed by Architect or by any subcontractor, or of anyone for whose acts the Architect or its subcontractor may be liable, in connection with providing these services.



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- As always, a general indemnification provision should still be included:
 - To the fullest extent permitted by law, Architect shall indemnify, defend, and hold harmless Owner, its Board of Education, Officers, Directors, Partners, Agents, Consultants, Insurers, Employees and Sub-Contractors of each and any of them from and against all claims, costs, damages, losses and expenses (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals in all courts or arbitration or other dispute resolution costs) arising out of or relating to the performance of Architect and Architect's subcontractors (meaning anyone, including but not limited to consultants having a contract with Architect or a subcontractor for a part of the services) under this Agreement, provided that any such claim, cost, loss, damage or expense is attributable to any act or failure to act, negligent or otherwise, of Architect, of any subcontractor, or of anyone directly or indirectly employed by Architect or by any subcontractor, or of anyone for whose acts the Architect or its subcontractor may be liable, in connection with providing these services. Architect acknowledges that Owner cannot and will not indemnify, hold harmless or otherwise defend Architect from claims, costs, damages, losses and expenses.

Disclaimer language should be incorporated into Article 3, Contractor portion of the AIA Document A201-2007 "General Conditions of the Contract"

- Example (most critical language in bold):
 - The Contractor makes the following representations: Contractor has examined and carefully studied the Contract Documents and any other related data identified in the Contract Documents; Contractor is familiar with and is satisfied as to all federal, state, and local laws and regulations that may affect cost, progress, and performance of the Work;
 - Contractor does not consider that any further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the agreed upon price, within the Contract Documents times, and in accordance with the other terms and conditions of the Contract Documents;
 - Contractor is aware of the general nature of the work to be performed by Owner and others at the site that relates to the Work as indicated in the Contract Documents; Contractor has correlated the information known to Contractor, information and observations obtained from visits to the site, reports and drawings identified in the Contract Documents, and all additional examinations, investigations, explorations, tests, studies, and data with the Contract Documents; the Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work;
 - **Owner does not warrant that the Contract documents or Plans will be free from defect or error and Contractor is responsible for verifying viability of any Plans; and Contractor warrants and guarantees to Owner that all Work will be in accordance with the Contract Documents and will not be defective.**
 - Contractor's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute.

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