

Words have power

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Misuse of terms in agreements and other construction industry documents include referring to a design professional as a “Contractor,” and misusing the word “all” when it has the effect of expanding the subject in a sentence.

Your client is requiring that your design firm sign their version of an Owner-A/E agreement. The Owner’s agreement states your firm will be referred throughout the document as the “Contractor.” Why does this happen, and does it matter?

Many clients have engaged construction contractors for property improvements in the past, and in order to expedite your project, they simply want to use their standard form agreement that refers to the other party as the “Contractor.” When a business routinely uses a purchase order, it’s possible they will refer to the other party as the “Contractor,” or your client simply found a random form of agreement to use as a “one-size-fit-all” contract.

If your firm is designated a “Contractor,” laypeople may view your professional services as construction methods or supplying labor and materials. They may also view your scope of services to include jobsite safety. In addition, if a dispute arises and a nonprofessional is determining fault of the parties, you could be at a real disadvantage. Make it clear to your client that the word “Contractor” should be reserved for construction contractors and not your professional design firm. The two project team members are distinct, but with regard to the design-build delivery method, where the lines may become blurred, that is a separate discussion apart from this article.

Thus, where your client calls your firm a “Contractor,” push back. Change it to what you are – the “Architect,” “Engineer” or even “Consultant.” While it is true that the agreement may state in one place that your firm is actually a design professional, misapplied terms may stick in the minds of laypeople, such as a jury that will decide your fate.

The word “all” means everything

The word “all” is an extreme word. Merriam-Webster’s Dictionary defines “all” as the whole amount, quantity, or extent of. The English Oxford Dictionary defines “all” as the greatest possible amount, everything.

What you probably meant to say is that you will provide everything that you intended, but not more. Unfortunately, your client or others may interpret the word “all” differently (and in the way that best suits them).

If you agree to, or you utilize this extreme word in documents that you create, it may be difficult for you to establish the extent of your basic services for your fee. Moreover, how will you know when you have finished providing your services, since it is an open-ended scope? Does the word “all” negate the possibility of “additional services” for your projects in situations such as concealed or unknown conditions? This word is not needed in order to make the point in a sentence, and when used in client-driven agreements they attempt to elevate your standard of care.

Standard care is defined as what an A/E will perform under their agreement utilizing the skill and care used by members of their profession, practicing under similar circumstances at the same time and in the same locality. A/Es make no warranties, express or implied, in connection with their services.

The standard of care does not include services that are the whole amount, quantity, or the extent or greatest possible amount of everything. A clear understanding of your client’s view of the project can go a long way to help close any expectation gaps.

Misuse of these two terms in agreements and other construction industry documents

In summary, be on guard for the casual use of certain words in written documents. They may be in your proposals for new work, agreements with your clients and consultants, and other documents prepared in the course of providing your professional services.

Therefore, be wary of the use of the word contractor in inappropriate circumstances. For example:

This AGREEMENT BETWEEN OWNER AND CONTRACTOR (“Agreement”) is made and entered into as of the 1st day of November 2018, between XYZ Developers (the “Owner”), and ABC Architects & Engineers (the “Contractor”).

Even worse, with regard to a design-bid-build project (where means and methods of construction may be implied within your scope of services), do not agree to the following contractual provision:

The Contractor will provide architectural and engineering services in accordance with the attached Exhibit “A.”

In addition, be very cautious of the use of the word all, if your client’s agreement states that:

A/E will provide all professional services necessary for a complete project.

Just as bad, in an overzealous attempt to secure a potential project, your proposal to your client states that:

A/E will provide all site visits to satisfy the lender’s requirements to comply with all codes.

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