

PREFACE

This document was written by the Structural Committee and has been peer reviewed by the Foundation Performance Association (FPA). This document is published as FPA-SC-09 Revision 0 (i.e., FPA-SC-09-0) and is made available at www.foundationperformance.org. To ensure this document remains as current as possible, it may be periodically updated under the same document number but with higher revision numbers such as 1, 2, etc.

The Structural Committee is a standing committee of the Foundation Performance Association (FPA). At the time of writing this document, Ron Kelm chaired the Structural Committee and 25 to 55 members were active on the committee. To write this document, the committee sanctioned this subcommittee October 2006 when it was partitioned from the FPA-SC-15 subcommittee, whose scope was then limited to Design Notes chaired by Karl Breckon. The subcommittee for the writing of this document then appointed David Dorr¹ as chair. The subcommittee's chair and members are listed on the cover sheet of this document and are considered this document's co-authors.

Suggestions for improvement of this document shall be directed to the current chair of the Structural Committee. If sufficient comments are received to warrant a revision, the committee may form a new subcommittee to revise this document. If the revised document successfully passes FPA peer review, it will be published on the FPA website, superseding the previous revision.

The intended audiences for the use of this document are consultants, contractors, engineers, builders, owners, attorneys, and others that may be involved in entering into an agreement for consulting Services in the State of Texas. The FPA provides this document free to its members.

This document was created with generously donated time in an effort to advance the knowledge, performance, and standards of engineering, construction, and repairs related to foundations, soils, and structures. The Foundation Performance Association and its members make no warranty regarding the accuracy of the information contained herein and will not be liable for any damages, including consequential damages, resulting from the use of this document. Each project should be investigated for its individual characteristics to permit appropriate application of the material contained herein. Please refer to the FPA's website at www.foundationperformance.org for other information pertaining to this publication and other FPA publications.

¹ Licensed attorney, State Bar of Texas.

TABLE OF CONTENTS

1.0 INTRODUCTION 4

2.0 METHOD OF CONSTRUCTING THE CONTRACT 4

3.0 SCOPE OF WORK..... 6

4.0 FEES 7

5.0 EXPENSES 10

6.0 TERM 11

7.0 ALLOCATION OF RISK 12

8.0 REMEDIES..... 14

9.0 STANDARD CLAUSES 15

10.0 LATEST TRENDS..... 17

**11.0 EXAMPLE A: STRUCTURAL DESIGN AGREEMENT FOR NEW
CONSTRUCTION (WITH CONSTRUCTION REVIEW) 18**

12.0 EXAMPLE B: FORENSIC ENGAGEMENT 21

1.0 INTRODUCTION

A contract is a legally enforceable instrument that forms the backbone of all business transactions. In simplest terms, a contract is an offer or promise, coupled with acceptance, and supported by consideration. Consideration can be defined as some benefit or inducement for entering into the contract. The document allocates the rights and responsibilities of each party and allocates any risk associated with the transaction. Most importantly, it is enforceable in court when a party fails to meet its terms. Having encountered a variety of standardized contracts, the subcommittee saw value in offering language that could be tailored to the individual needs of Foundation Performance Association (FPA) members.

In this document, the subcommittee identifies the typical sections of a contract and provides examples of such language for common scenarios. When selecting appropriate language for a particular business transaction, a reader can develop a contract applicable to the particular need. This document does not address any issues required to establish a lien due to the complexity of Texas law. To learn more about lien rights in Texas, seek competent legal counsel.

This document is intended to assist a user to develop a contract for use with typical consulting projects. The goal of this document is to offer example clauses so that a consultant can develop a standardized agreement for such projects. **This document is not a substitute for the advice of an attorney. The subcommittee recommends that an attorney review each contract.**

2.0 METHOD OF CONSTRUCTING THE CONTRACT

For purposes of this document, a contract is between the Consultant (professional) and the Client. In essence, the contract is the law between the parties. A private contract should be clear, concise, and enforceable. In its simplest form, the contract includes a series of several sections, each with a specific purpose and intent. While each contract is generally unique, all contracts should contain certain standard sections. The language in each section should be tailored to the specific requirements of that particular project. This document includes the following standard sections:

Scope of Work: The Scope of Work section declares the Services, as discussed later, to be done by the Consultant. Experience suggests that the Scope of Work should be well defined. In addition, the Consultant should identify the Deliverables, so that both the Client and the Consultant have the same expectations.

Fees: The Fees section declares how much and when the Consultant is to be paid.

Expenses: The particular project may require third party and reimbursable expenses. The Expenses section declares who pays for such expenses and the terms for any surcharge relating to such expenses.

Term: The Term section declares the beginning and the end of the contract.

Allocation of Risk: Risk is the possibility of unforeseen expenses associated with the agreement (the “Agreement”). The Allocation of Risk section includes language that attempts to shift this risk between the parties.

Remedies: The Remedies section declares the rights and penalties upon the failure of either party to meet the other’s obligations.

Standard Clauses: The clauses in this section include language that, while necessary, is not categorized in other sections.

Latest Trends: Provisions that address several recent changes in Texas law.

While some oral contracts are enforceable in Texas, the Statute of Frauds requires certain types of contracts to be in writing signed by the party to be charged with its enforcement. Good practice directs that all agreements between parties be reduced to a written instrument executed by the parties.

The subcommittee collected examples of language from contracts and legal manuals. The subcommittee then developed language for common situations. Specific examples of clauses in this document are presented because the language was easy to understand and tailor to specific situations. While impossible to address every possible situation, a good contract should at least address those that are foreseen.

The language of an engineering Services contract is sometimes difficult to interpret. To simplify interpretation, writers define a term by capitalizing all references to it. For example, a contract may reference the project located at 1001 Main Street as the “Project.” Thereafter, all references to 1001 Main Street are called simply, the “Project.” This method is intended to make the language of the document easier to write, read and interpret.

Typically, the Consultant will have language for use in general circumstances. The subcommittee encourages members, with counsel, to develop their own language for general use. Using word processors, this language can then be easily tailored to meet a particular need or requirement.

Finally, the subcommittee included two sample contracts for common scenarios. The following examples illustrate how to assemble these standard sections and clauses into a simple agreement:

- **Example A:** Structural Design Agreement for New Construction (With Construction Review)
- **Example B:** Forensic Engagement.

Part of the subcommittee’s goal was to provide contracts having language on three pages or less.

3.0 SCOPE OF WORK

The Scope of Work identifies the professional Services to be provided. The language should clearly identify what Services will be provided, so that each party has a clear understanding of expectations. The Scope of Work may also include limitations or exclusions, which are those items that are specifically excluded from the Services provided. Each Scope of Work section will be different depending on the Client's specific requirements, and more than one clause may be required for a particular project.

Design engagements are common for consulting professionals. Typically, a design involves the use of calculations to determine member sizes, which are incorporated into drawings. The Deliverables are typically construction drawings. An example of a Scope of Work clause for a structural design engagement is as follows:

The Consultant shall provide structural engineering and drawings for the Project (the "Services"). The Consultant shall provide documents bearing the seal of a licensed professional engineer (the "Deliverables").

Also common, a construction review engagement occurs when a Consultant examines actual construction conditions during different phases. This type of assignment relates to quality control of the Project. The Consultant will examine the construction documents, and determine whether the construction of the Project substantially conforms to the construction documents. Generally, calculations are not performed. This type of engagement may be in addition to a design engagement:

The Consultant shall provide construction reviews (the "Services") at the phases indicated below (Client shall initial all that apply):

 Prior to construction, the Client shall provide shop drawings prepared by a third-party, such as, but not limited to, foundation reinforcing steel, trusses, fabricated structural steel, and post-tension cables. The Consultant shall examine the shop drawings for general conformance to the design documents.

 Prior to the placement of any concrete, the Consultant shall examine the Project for conformance to the construction documents; and/or

 During construction, the Consultant shall examine the Project for conformance to the construction documents.

Another engagement common for consulting professionals is the forensic engagement. This type of engagement requires a professional to provide an opinion as to a particular condition. It may include the performance of certain diagnostic tests or the use of analytical methods. The Deliverable is typically a written report that outlines any findings. This report may also provide conclusions, opinions, recommendations, and repairs. A forensic engagement may also include testimony. An example of a Scope of Work clause for the forensic engagement is as follows:

The Consultant shall provide a professional opinion related to the Project (the “Services”). These Services may include, as required: site reviews, calculations, testing, and consultations. Where requested, the Consultant shall provide a written report. When required, the Consultant shall provide an opinion by deposition or trial testimony.

The Consultant may include other provisions to further clarify the Scope of Work and minimize the potential for misunderstandings between the parties. Examples of such provisions may include the following (one or more may be applicable):

The Consultant shall solely determine the manner in which the Services are to be performed.

The Consultant shall solely allocate hours to be worked and tools to be utilized.

At no time shall the Consultant have authority or responsibility to control the means, method or manner of construction.

The Consultant may utilize representatives under the Consultants direct supervision.

In providing these Services, the Consultant shall use the architectural drawings prepared by [the Architect] dated [date].

The Client must provide timely notice, no less than 24 hours, prior to the construction review. Consultant shall charge time and one half where requests are provided with less than 24-hour notice, or on weekends or holidays. Failure of the Client to provide timely notice, or provide access, that impairs the ability of the Consultant to examine the Project shall relieve Consultant from providing this service.

4.0 FEES

The Fee clause is the consideration portion of the contract. The intent of the Fee clause is to specify how the professional will be compensated. The contract should clarify exactly how much the Client will pay to the Consultant and when payment is due. The following clause should be in all agreements:

Upon completion, the Client shall pay a Fee (the “Fee”) to the Consultant for Services rendered under this Agreement.

In some cases, the parties will know exactly how much will be paid, otherwise known as a “lump sum” agreement. This manner of charging fees is used where there is a known task. Therefore, the clause should be clear with respect to how to handle situations where the task is not completed, for whatever reason. Lump sum clauses can be structured per project, per square foot, or per sheet. Examples of such clauses are below:

The Fee for Services rendered shall be fixed as a lump sum of \$_____.

Other examples of a lump sum terms depend on the nature of the Fee, as follows:

The Fee for Services rendered shall be a lump sum of \$_____ per sheet.

The Fee for Services rendered shall be \$_____ per total covered square foot, as determined by the Consultant.

In other cases, the parties may not know the exact amount; rather, the contract provides a method of calculating it. Where Services are provided on an hourly basis, the Fee clause should identify the hourly rate. The Contract should also contain a provision to identify the manner of calculating time. Examples of specific language are as follows:

The Consultant shall charge for Services on an hourly basis at its standard hourly rates, which may change from time to time with _____ day written notice. The Consultant shall record its time spent on Services on a periodic basis and will account for that time in increments of _____ of an hour.

Another example of an Hourly Fee clause would be as follows:

The Consultant shall charge for Services on an hourly basis at its standard hourly rates, which will increase [three] percent per calendar year. The Consultant shall record its time spent on Services on a periodic basis and will account for that time in increments of _____ of an hour.

Yet another example of an Hourly Fee clause would be as follows:

The Consultant shall charge for Services on an hourly basis at its standard hourly rates, as indicated on the attached Standard Fee Schedule. After the initial calendar year, the Client agrees to pay the then-current hourly rates. The Consultant shall record its time spent on Services on a periodic basis and will account for that time in increments of _____ of an hour.

Occasionally, the Consultant may want to charge a fee upfront before any work is actually provided. This type of arrangement, commonly referred to as a retainer, can be further characterized as either fully earned or chargeable. Examples are as follow:

The Client shall pay a retainer in the amount of \$_____ to the Consultant as an advance on fees to be charged. The Consultant shall credit the amount of the retainer against each invoice. Upon completion of the Project, any unused retainer shall be refunded to the Client within ___ days. The retainer shall not accumulate interest.

The retainer shall be fully earned and nonrefundable.

In some circumstances, the Consultant is asked to provide an estimate on the Fee. The subcommittee urges caution in providing estimates as it can lead to conflict where actual fees are more than estimated. Where offered, the clause should clearly indicate that such a number is only an estimate, as follows:

The Consultant's estimated Fee to perform the Services described above, subject to change, is \$ _____.

Problems arise where work is performed and the Project is cancelled prior to the completion of the task. Where possible, the contract should anticipate these contingencies, or 'what if' situations, relating to fees. Examples of such contingencies include the following:

If the Agreement is terminated prior to completion for any reason the Fee shall be apportioned pro rata.

If the Client terminates this Agreement for any reason prior to commencement, the Fee shall be \$ _____.

If this Agreement is terminated prior to completion for any reason the Fee shall be apportioned pro rata, not less than \$ _____ [____ percent of the Fee].

Any retainer shall be fully earned and nonrefundable if the Client terminates this Agreement for any reason.

Experience suggests that the contract should indicate when payment is due. Examples include the following:

Unless otherwise noted herein, this Fee shall be due and payable net ____ days after project completion.

The Fee shall be due and payable as follows: ____ percent upon execution of this Agreement, and the balance upon invoicing.

The Consultant shall invoice the Client its Fee for Services and Expenses and payment shall be due net ____ days

The Fee is due and payable upon receipt, and is considered late ____ days thereafter.

Where a Client may be slow to pay, the following clause can help:

In the event that fees become more than ____ days past due, the Consultant may suspend all work until paid in full.

Experience also suggests that an "interest clause" should be included. This clause is particularly helpful where forced to enforce the Agreement in court. (A court may not award interest on past-due amounts unless an interest clause is included). Typically, court intervention can take

months or years, and the interest clause provides reimbursement for such delay. An example would be as follows:

Interest on any past due amounts shall accrue thereafter. Interest on any amounts past due (prejudgment and post judgment) shall accrue at the monthly rate ___% per month, or the highest amount permitted by Texas law, whichever is less.

The Consultant may want to include a clause associated with late fees. This clause is intended to shift the risk of late or delayed payment to the Client, as follows:

The Client agrees to pay an additional late charge, not as a penalty, of ___ PERCENT (___%) of the amount past due, or ___ AND NO/100 DOLLARS (US\$ ___), whichever is larger.

The Client agrees to pay an additional late charge, not as a penalty, of \$ ___ per (day or month) until the Client pays all amounts due and payable in full.

Other provisions to include with the Fee clause include items related to ancillary Services, expedited fees, and penalties. Examples of such provisions are as follows:

Client has specifically requested, and the Consultant has agreed, that the Consultant render Services expeditiously. As a result, the Client agrees to pay an Expedited Fee of \$ _____, which is in addition to the Fee described above.

In summary, the Fee clause declares the amount of payment for the Services provided by the Consultant. The clause should also contain language that ensures prompt payment. An example of a Fee clause is as follows:

The Client shall pay a Fee to the Consultant for Services rendered under this Agreement as follows: The Consultant shall charge on an hourly basis at its standard hourly rates, as indicated on the attached Standard Fee Schedule. After the initial calendar year, the Client agrees to pay the scheduled hourly rates. The Consultant shall record its time spent on a periodic basis and will account for that time in increments of _____ of an hour. The Consultant shall invoice for Services and Expenses and payment shall be due net ___ days. Interest on any past due amounts shall accrue thereafter. Interest on any amounts past due (prejudgment and post judgment) shall accrue at the monthly rate of ___% per month, or the highest amount permitted by Texas law, whichever is lower.

5.0 EXPENSES

Engagements may include Expenses. These Expenses typically include mileage and copies, and may also include professional fees of third parties. The Expense clause should include terms relating to Expenses incurred during the course of the Services. It is not uncommon to include a surcharge, or markup, for the management associated with incurring project fees. Good practice suggests declaring that certain Expenses are in addition to the Fee, such as the following:

In this Agreement, the term “Expenses” shall include, without limitation, travel, lodging, mileage, airfare, meals, printing, drafting fees and expenses, delivery charges, phone, rental vehicles, rental equipment, copies, third-party fees, and any other cost or expense specifically incurred incidental to performance of the Services.

Once the definition of Expenses is defined, the contract should declare who pays and when. Examples are as follows:

The Client shall advance all Expenses for the completion of the Services, as follows: In addition to the Fee outlined herein, the Client shall pay to the Consultant for any Expenses, at the standard rates or at direct expense, plus _____ percent, that Consultant has advanced in rendering Services.

In addition to the Fee outlined herein, the Client shall reimburse the Consultant for any Expenses incurred relating to additional fees for any subcontractor, specialty consultant, or service provider required to complete the service plus _____ percent. The Consultant agrees to directly pay the subcontractor, specialty consultant, or service provider.

6.0 TERM

The Term clause is the “when” of the Agreement. Usually, the clause indicates the date the Agreement begins and ends. Wherever possible, be specific as possible and indicate actual dates. An example provision would be as follows:

This Agreement shall commence upon execution of this Agreement and shall terminate when the Consultant provides final Deliverables on or about _____.

The subcommittee urges caution in declaring a delivery date. Failure to meet a deadline could jeopardize enforcement of the entire contract. Changing schedules and project requirements, sometimes beyond the Consultants control, can make meeting deadlines difficult or impossible. Rather than risk providing work and not getting paid, the Consultant may want to use less definitive words to provide some flexibility in difficult situations. The term “reasonable” is commonly used, and an example is as follow:

The Consultant shall provide final Deliverables within a reasonable time thereafter.

The Term clause can also be used as a method to minimize risk. Suppose some event occurs that makes further work pointless, or raises payment concerns for work performed. Consider the following language:

This Agreement shall terminate upon any one of the following: (a) the Client specifically requests in writing that the Consultant cease all work, in which case Client shall pay the Consultant for Services rendered through the date of termination under this section, unless a payment advance is considered fully earned and nonrefundable; (b) Consultant

determines, at its sole discretion, that it has completed all Services and the Client has paid the Consultant in full; (c) the Consultant terminates this Agreement by providing written notice of termination to Client at least _____ days prior to termination; or (d) the Consultant terminates the Agreement for default by the Client.

7.0 ALLOCATION OF RISK

Contracts typically include clauses that attempt to shift risk from one party to another. Such clauses are generally enforceable, as courts usually conclude that the parties are free to contract among themselves; however, some types of clauses may be void as to public policy. Such a discussion is beyond the scope of this document. The subcommittee urges caution in that some of these clauses may or may not be enforceable. Where in doubt, seek competent legal counsel. This section provides examples of clauses for different scenarios.

Contractually limiting damages is complicated, and the subcommittee urges caution without conferring with legal counsel. The following clauses are intended to limit the amount of, or cap, any economic damages the Client could claim. This clause shifts the risk of economic loss from the Consultant to the Client, even if the Consultant caused or contributed to the economic loss:

The total liability of Consultant to the Client shall not exceed \$_____, or the total Fee paid on behalf of or to Consultant by Client for this Project, whichever is less.

To the fullest extent permitted by law, and notwithstanding any other provision in the Agreement, Consultant and Consultant's officers, directors, partners, employees, agents, and consultants, or any of them, shall not be liable to Client or anyone claiming by, through, or under Client for any special, incidental, indirect, or consequential damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to any such damages caused by the negligence, professional errors or omissions, strict liability, breach of contract, or warranties, express or implied, of Consultant or Consultant's officers, directors, partners, employees, agents, or consultants, or any of them.

The following clause is a notice clause intended to provide an opportunity to cure any problems before remedies get costly. Certain sections of Texas law also require such notice prior to seeking remedies. This clause shifts the responsibility for detecting problems from the Consultant to the Client:

The Client shall promptly report to Consultant any defects or suspected defects in the Services provided of which the Client becomes aware, so that Consultant may take measures to minimize the consequences thereof. The Client agrees to impose a similar notification requirement to all contractors providing Services in the construction of the above referenced structure. Failure by the Client and the Client's contractors or subcontractors to notify Consultant shall relieve Consultant of any costs of remedying the defects above the sum such remedy

would have cost had prompt notification been given when such defects were first discovered.

The following is an example of a notice clause that shifts responsibility from the Consultant to the Client in the context of construction review:

Construction review Services by the Consultant are available prior to concrete placement, during the concrete placement and during and subsequent to the stressing of the post-tensioning strands, if applicable. The Client shall provide at least 24 hours notice prior to any construction reviews. If the Consultant does not perform these construction reviews, then the Consultant accepts no responsibility for improper implementation of the plans and specifications.

Sometimes, the parties do not want to require a written notice of default. The issue being additional delays resulting from attempts to cure. A clause intended to waive notice is as follows. This clause shifts the burden of policing the contract to the party incurring the obligation:

As a courtesy only, Consultant may provide written notice to the Client of default under this Agreement, as the Client specifically waives any right to notice of any default under this Agreement.

A significant risk is the cost associated with seeking remedies in the event that either party breaches the Agreement. The biggest expense is usually attorney fees associated with enforcement. A clause to shift this risk is as follows:

Should either party be forced to retain an attorney to enforce any material terms of this Agreement, the prevailing party shall be entitled to recover its third-party collection agency fees, personnel time and expenses at normal rates, reasonable and necessary attorney fees, expenses, and costs of court incurred.

A sensitive area for concern is jobsite safety. The Consultant, where not in charge of the jobsite safety, should shift this risk to the Client. The following clause is an example:

The Consultant shall not be responsible for jobsite safety. The Consultant shall not have authority or responsibility to issue any stop work order, or the like, nor any obligation under this contract to observe, notice and/or report any such activities.

Economic damages, or additional expenses, can occur when others make changes, or have errors or other defects, to their work. Consider the situation where an architect makes changes to a building layout, which affects the structural design. The following clause shifts this type of risk from the Consultant to the Client:

Should the work product of a third-party affect the work product of the Consultant, Client agrees to reimburse Consultant for all time (at the normal scheduled rates) and expenses incurred by Consultant for revision, if any, of work product.

Economic damages can also occur where a party requests a product substitution. Consider the situation where an engineer specifies a particular product. A Client may desire a suitable alternative, yet cheaper, product. Such an evaluation may require additional time by the Consultant. The following clause shifts this type of risk from the Consultant to the Client:

Should the Client or third-party request a product substitution, the Client agrees to reimburse the Consultant for all time (at the normal scheduled rates), and expenses, incurred by the Consultant in evaluating said product substitution. No product substitutions are permitted without written approval by Consultant.

The Consultant often uses a clause that shifts the significant risk of cost overruns to the Client, as follows:

Consultant makes no warranty, expressed or implied, as to the final construction cost.

Another significant risk is unforeseen circumstances. When entering into negotiations, both sides make certain assumptions based on their experience with similar projects. When unforeseen circumstances arise, a party may incur significant economic damages. The following clause shifts this risk from the Consultant to the Client for a remodeling project:

The Client acknowledges and agrees that there may be unforeseen circumstances that affect the final design where remodeling and/or rehabilitating an existing structure. The Consultant shall make reasonable design assumptions based on experience and professional judgment. In the event that actual conditions vary from the design assumptions, the Client agrees to bear such additional costs, losses and expenses, including the cost of Consultant's additional Services.

8.0 REMEDIES

The Remedies clause outlines each party's rights in the event that the other defaults and incurs economic damages. Under Texas law, a court may require specific performance, where requested. In other words, a court may order a party to do as contracted, such as finish a project. In most cases, however, a court will only award money damages. Therefore, the Remedies should provide clear instructions on the method of calculations for economic damages in the event of such default.

From the Client's perspective, the most common default is failure to provide a final product. The Agreement should declare when a default occurs and what remedies the Client has, as follows:

Should the Consultant fail to provide the Services under this Agreement, the Consultant shall be in default.

As with an Allocation of Risk clause, the Consultant may seek to limit the Client's remedies, or cap damages. Such an example would be as follows:

Upon default by Consultant, the Client may recover its economic damages, not to exceed any previously paid fees to the Consultant.

From the Consultant's perspective, the most common default is the failure to pay for Services when required. In this situation, the parties should declare when a default occurs and what remedies the Consultant has. An example is as follows:

Should the Client fail to pay any portion of the Fee under this Agreement when due, the Client shall be in default.

Remedies clauses, from the Consultant's perspective, should provide a method for calculating damages. Typically, damages would include all costs incurred, plus fees and expenses for collection. An example would be as follows:

Upon default by Client, the Consultant shall be entitled to recover, without limitation, economic damages, pre- and post-judgment interest at the highest rate authorized at law, costs of collection, reasonable and necessary attorney fees and court costs, and all fees and expenses incurred.

Upon default by Client, any work product shall remain the property of the Consultant.

As illustrated above, Remedies clauses are often used in conjunction with the Allocation of Risk clauses to minimize potential exposure.

9.0 STANDARD CLAUSES

Standard Clauses are those other clauses that govern the contract. In most cases, these clauses should be included as "form language" or "boilerplate," because the language stays the same for most contracts. Examples of Standard Clauses are listed below. These clauses may require slight modification depending upon the particular transaction:

The Consultant is an independent contractor with respect to Client. Nothing in this Agreement shall be construed to form an employment relationship, partnership, joint venture, or otherwise, between them.

All notices under this Agreement shall be in writing and shall be deemed delivered when delivered in person, email, by private courier, or deposited in the United States mail, postage prepaid, by certified and regular mail.

This Agreement contains the entire agreement of the parties and there are no other promises or conditions whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.

This Agreement may be modified or amended if the amendment is made in writing and is signed by both parties.

Any work product remains the intellectual property of the Consultant until payment has been received in full.

The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.

In the event that any of the provisions, or portions thereof, of this Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the validity and enforceability of the remaining provisions, or portions thereof, will not be affected, and in lieu of such unenforceable provision there shall be added automatically as part of this Agreement a provision as similar in terms as may be valid and enforceable.

Each party agrees to perform all further acts and to execute and deliver all further documents, which may be reasonably necessary to carry out the provisions of this Agreement.

The Client hereby represents and expressly warrants that it is the owner's agent, trustee, or receiver in connection with the actual or proposed design, construction, or repair of improvements on any real property. The Client hereby grants authorization to the Consultant to access the real property for purposes of completing said Project.

The Client's obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without the prior written consent of Consultant.

This Agreement has been executed in and shall be governed by the laws of The State of Texas. The parties further agree that any legal action arising from or incidental to this Agreement shall only be brought in _____ County, Texas.

The section headings contained in this Agreement are for convenience only and shall in no manner be construed as part of this Agreement.

This Agreement may be executed in several counterparts, each of which will be deemed an original, but together they shall constitute one and the same instrument.

This Agreement is hereby agreed and executed, and shall be effective as of the latest date indicated below.

10.0 LATEST TRENDS

There is a trend to include provisions that address several recent changes in Texas law. As an example, in 2003, the Texas legislature adopted Section 150 of the Civil Practice and Remedies Code. This section requires a “certificate of merit” when filing negligence claims against design professionals. Under the statute, a plaintiff must provide an affidavit from a peer, essentially a design professional who is practicing in the same area of practice as the Consultant. The design professional must identify at least one negligent act, error or omission claimed to exist and the factual basis for each such claim. Engineers have seized on this statute supplementing certain additional requirements:

Prior to any claims against the Consultant, the Client shall first provide to Consultant written affidavits, executed by at least two independent engineers licensed and routinely providing engineering Services in the Project jurisdiction, who, after reviewing the scope of Services in this Agreement, shall specify each act or violation of the standard of care expected by an engineer. The engineers must have similar knowledge, skill, experience, education, training and practice as the engineer. Such certifications shall be provided to Consultant at least _____ days prior to the presentation of any claim or counterclaim. Failure to strictly comply with this section shall abate all legal proceedings.

Another trend in contracts is to limit applicable statutes. Such an example relates to the Statute of Repose. This statute, adopted in 1985, sets an absolute deadline to file claims against the design professional, irrespective of when the work was performed. For licensed architects, engineers, interior designers, and landscape architects, Section 16.008 of the Civil Practice and Remedies Code limits the time for asserting legal claims beginning the date of substantial completion. The statute of limitations limits the time for claims beginning the date where the cause of action accrues (or when the claim is, or should have been, discovered). An example of such a clause that limits time frames is as follows:

The Client and Consultant agree that any claims against the other shall not be initiated more than _____ year(s) from the date on which Consultant completes work.

The Consultant should be aware that a clause that limits the statute of limitation affects both parties. Claims for collection would be subject to the same time limitations.

Another trend in contracts is to declare the applicable standard of care for performing professional Services. The standard of care can vary widely depending on the assigned task and Client’s expectations. Declaring the applicable standard of care by contract reduces issues where conflicts arise. An example follows:

The standard of care in providing our Services will be that degree of care that other similarly educated, licensed, and experienced professionals of ordinary prudence would ordinarily provide under the same circumstances experience by the Consultant while executing the Scope of Work.

11.0 EXAMPLE A: STRUCTURAL DESIGN AGREEMENT FOR NEW CONSTRUCTION (WITH CONSTRUCTION REVIEW)

Project: New residence located at 1001 Main Street, Houston, Texas.

Consultant: ABC Engineering LLC

Client: Property Owner

Section 1: Scope of Work:

The Consultant shall provide structural engineering and drawings for the Project (the “Services”). The Consultant shall provide documents bearing the seal of a licensed professional engineer (the “Deliverables”).

The Consultant shall provide construction reviews (the “Services”) at the phases indicated below (Client shall initial all that apply):

- _____ Prior to construction, the Client shall provide shop drawings prepared by a third-party, such as, but not limited to, foundation reinforcing steel, trusses, fabricated structural steel, and post-tension cables. The Consultant shall examine the shop drawings for general conformance to the design documents.
- _____ Prior to the placement of any concrete, the Consultant shall examine the Project for conformance to the construction documents; and/or
- _____ During construction, the Consultant shall examine the Project for conformance to the construction documents.

- The Consultant shall solely determine the manner in which the Services are to be performed.
- The Consultant shall solely allocate hours to be worked and tools to be utilized.
- At no time shall the Consultant have authority or responsibility to control the means, method or manner of construction.
- The Consultant may utilize representatives under the Consultant’s direct supervision.
- In providing these Services, the Consultant shall use the architectural drawings prepared by [the Architect] dated [date].
- The Client must provide timely notice and no less than 24-hour prior to construction review. Consultant shall charge time and one-half where requests are provided with less than 24-hour notice, or on weekends or holidays. **If the Consultant does not perform these construction reviews, then the Consultant accepts no responsibility for improper implementation of the plans and specifications.**

Section 2: Fees. Upon completion, the Client shall pay a Fee (the “Fee”) to the Consultant for Services rendered under this Agreement. The Fee for Services rendered shall be \$ _____ per total covered square foot, as determined by the Consultant. If the Agreement is terminated

prior to completion for any reason this Fee shall be apportioned pro rata. For construction reviews, the Consultant shall charge for Services on an hourly basis at its standard hourly rates, which may change from time to time with _____ day written notice. The Consultant shall record its time spent on Services on a periodic basis and will account for that time in increments of _____ of an hour. The Consultant shall invoice the Client its Fee for Services and Expenses and payment shall be due net ___ days.

Section 3: Expenses. In this Agreement, the term “Expenses” shall include, without limitation, travel, lodging, mileage, airfare, meals, printing, drafting fees and expenses, delivery charges, phone, rental vehicles, rental equipment, copies, third-party fees, and any other cost or expense specifically incurred incidental to performance of the Services. In addition to the Fee outlined herein, the Client shall pay to the Consultant for any Expenses at the standard rates or at direct expense, plus _____ percent, that Consultant has advanced in rendering Services.

Section 4: Term. This Agreement shall commence upon execution of this Agreement and shall terminate when the Consultant completes the Scope of Work.

Section 5: Allocation of Risk.

- As a courtesy only, Consultant may provide written notice to the Client of default under this Agreement, as the Client specifically waives any right to notice of any default by Client.
- Should either party be forced to retain an attorney to enforce any material terms of this Agreement, **the prevailing party** shall be entitled to recover its third-party collection agency fees, personnel time and expenses at normal rates, reasonable and necessary attorney fees, expenses, and costs of court incurred.
- The total liability of Consultant to the Client shall not exceed the total Fee paid on behalf of or to Consultant by Client for this Project.
- The Consultant shall not be responsible for jobsite safety. The Consultant shall not have authority or responsibility to issue any stop work order, or the like.
- Should the work product of a third-party affect the work product of the Consultant, Client agrees to reimburse Consultant for all time (at the normal scheduled rates) and expenses incurred by Consultant for revision, if any, of work product.
- Should the Client or third-party request a product substitution, the Client agrees to reimburse the Consultant for all time (at the normal scheduled rates), and expenses, incurred by the Consultant in evaluating said product substitution. No product substitutions are permitted without written approval by Consultant.
- The Client acknowledges and agrees that there may be unforeseen circumstances that affect the final design where remodeling and/or rehabilitating an existing structure. The Consultant shall make reasonable design assumptions based on experience and professional judgment. In the event that actual conditions vary from the design assumptions, the Client agrees to bear such additional costs, losses and expenses, including the cost of Consultant’s additional Services.

Section 6: Remedies. Should the Client fail to pay any portion of the Fee under this Agreement when due, the Client shall be in default. Upon default by Client, the Consultant shall be entitled to recover, without limitation, economic damages, pre- and post-judgment interest at the highest rate authorized at law, costs of collection, reasonable and necessary attorney fees and court costs,

and all fees and expenses incurred. Upon default by Client, any work product shall remain the property of the Consultant.

Section 7: Standard Clauses.

- The Consultant is an independent contractor with respect to Client. Nothing in this Agreement shall be construed to form an employment relationship, partnership, joint venture, or otherwise, between them.
- All notices under this Agreement shall be in writing and shall be deemed delivered when delivered in person, email, by private courier, or deposited in the United States mail, postage prepaid, by certified and regular mail.
- This Agreement contains the entire agreement of the parties and there are no other promises or conditions whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.
- This Agreement may be modified or amended if the amendment is made in writing and is signed by both parties.
- Any work product remains the intellectual property of the Consultant until payment has been received in full.
- The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.
- In the event that any of the provisions, or portions thereof, of this Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the validity and enforceability of the remaining provisions, or portions thereof, will not be affected, and in lieu of such unenforceable provision there shall be added automatically as part of this Agreement a provision as similar in terms as may be valid and enforceable.
- Each party agrees to perform all further acts and to execute and deliver all further documents, which may be reasonably necessary to carry out the provisions of this Agreement.
- The Client hereby represents and expressly warrants that it is the owner's agent, trustee, or receiver in connection with the actual or proposed design, construction, or repair of improvements on any real property. The Client hereby grants authorization to the Consultant to access the real property for purposes of completing said Project.
- The Client's obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without the prior written consent of Consultant.
- This Agreement has been executed in and shall be governed by the laws of The State of Texas. The parties further agree that any legal action arising from or incidental to this Agreement shall only be brought in _____ County, Texas.
- The section headings contained in this Agreement are for convenience only and shall in no manner be construed as part of this Agreement.
- This Agreement may be executed in several counterparts, each of which will be deemed an original, but together they shall constitute one and the same instrument.

This Agreement is hereby agreed and executed, and shall be effective as of the latest date indicated below.

Client Date Consultant Date

12.0 EXAMPLE B: FORENSIC ENGAGEMENT

Project: Forensic evaluation of building located at 123 Main Street, Houston, Texas.

Section 1: Services. The Consultant shall provide a professional opinion related to the Project (the “Services”). These Services may include, as required: site reviews, calculations, testing, and consultations. Where requested, the Consultant shall provide a written report bearing the seal of a licensed professional consultant. When required, the Consultant shall provide an opinion by deposition or trial testimony.

Section 2: Fee. The Client shall pay a Fee (the “Fee”) to the Consultant for Services rendered under this Agreement. The Consultant shall charge for Services on an hourly basis at its standard hourly rates, which may change from time to time with _____ day written notice. The Consultant shall record its time spent on Services on a periodic basis and will account for that time in increments of _____ of an hour.

Section 3: Expenses. In this Agreement, the term “Expenses” shall include, without limitation, travel, lodging, mileage, airfare, meals, printing, drafting fees and expenses, delivery charges, phone, rental vehicles, rental equipment, copies, third-party fees, and any other cost or expense specifically incurred incidental to performance of the Services. The Client shall advance all Expenses for the completion of the Services, as follows: In addition to the Fee outlined herein, the Client shall pay to the Consultant for any Expenses at the standard rates or at direct expense, plus _____ percent, that Consultant has advanced in rendering Services.

Section 4: Term. This Agreement shall terminate upon any one of the following conditions: (a) the Client specifically requests in writing that the Consultant cease all work, in which case Client shall pay the Consultant for Services rendered through the date of termination under this section; (b) Consultant determines, at its sole discretion, that it has completed all Services and the Client has paid the Consultant in full; (c) the Consultant terminates this Agreement by providing written notice of termination to Client at least _____ days prior to termination; or (d) the Consultant terminates the Agreement for default by the Client.

Section 5: Allocation of Risk.

- As a courtesy only, Consultant may provide written notice to the Client of default under this Agreement, as the Client specifically waives any right to notice of any Default by Client.
- Should either party be forced to retain an attorney to enforce any material terms of this Agreement, **the prevailing party** shall be entitled to recover its third-party collection agency fees, personnel time and expenses at normal rates, reasonable and necessary attorney fees, expenses, and costs of court incurred.
- The total liability of Consultant to the Client shall not exceed the total Fee paid on behalf of or to Consultant by Client for this Project.
- The Consultant shall not be responsible for jobsite safety. The Consultant shall not have authority or responsibility to issue any stop work order, or the like.

Section 6: Remedies. Should the Client fail to pay any portion of the Fee under this Agreement when due, the Client shall be in default. Upon default by Client, the Consultant shall be entitled to recover, without limitation, economic damages, pre- and post-judgment interest at the highest rate authorized at law, costs of collection, reasonable and necessary attorney fees and court costs, and all Fees and Expenses incurred. Upon default by Client, any work product shall remain the property of the Consultant.

Section 7: Standard Clauses.

- The Consultant is an independent contractor with respect to Client. Nothing in this Agreement shall be construed to form an employment relationship, partnership, joint venture, or otherwise, between them.
- All notices under this Agreement shall be in writing and shall be deemed delivered when delivered in person, email, by private courier, or deposited in the United States mail, postage prepaid, by certified and regular mail.
- This Agreement contains the entire agreement of the parties and there are no other promises or conditions whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.
- This Agreement may be modified or amended if the amendment is made in writing and is signed by both parties.
- Any work product remains the intellectual property of the Consultant until payment has been received in full.
- The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.
- In the event that any of the provisions, or portions thereof, of this Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the validity and enforceability of the remaining provisions, or portions thereof, will not be affected, and in lieu of such unenforceable provision there shall be added automatically as part of this Agreement a provision as similar in terms as may be valid and enforceable.
- Each party agrees to perform all further acts and to execute and deliver all further documents, which may be reasonably necessary to carry out the provisions of this Agreement.
- The Client hereby represents and expressly warrants that it is the owner's agent, trustee, or receiver in connection with the actual or proposed design, construction, or repair of improvements on any real property. The Client hereby grants authorization to the Consultant to access the real property for purposes of completing said Project.
- The Client's obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without the prior written consent of Consultant.
- This Agreement has been executed in and shall be governed by the laws of The State of Texas. The parties further agree that any legal action arising from or incidental to this Agreement shall only be brought in _____ County, Texas.
- The section headings contained in this Agreement are for convenience only and shall in no manner be construed as part of this Agreement.
- This Agreement may be executed in several counterparts, each of which will be deemed an original, but together they shall constitute one and the same instrument.

This Agreement is hereby agreed and executed, and shall be effective as of the latest date indicated below.

Client	Date	Consultant	Date
--------	------	------------	------