



CONTRACT PROVISIONS: PROTECTIVE AND PROACTIVE

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By now we are all well aware that the coronavirus (COVID-19) pandemic is creating a lot of stress and chaos—physically, mentally, and financially. There are so many aspects of this situation that we cannot address them all in a short advisory about professional services contracts.

Therefore, this paper is focused on how the COVID-19 pandemic may be affecting current projects for landscape architects working under existing contracts with clients. Such contracts might take many forms, but this paper only addresses the **2020 ASLA Standard Form Contract for Professional Services between Landscape Architect and Client**. If a particular project is under contract based on previous editions (2016-2019 editions) of the Standard Form, essentially everything said here should be directly relevant.

Contracts written before the onset of the COVID-19 pandemic probably did not contemplate the present circumstances and uncertainties. Although delays occur on *many* projects, the present pandemic is affecting nearly *every* project to one degree or another. Factors that may be causing such delays include governmental actions and orders, supply chain disruptions, material shortages, and labor shortages among others. Many of these circumstances lead to delays as well as cost escalation and potential budget overruns. Construction contractors might well be affected more immediately and more directly than landscape architects.

Nevertheless, Landscape architects would do well to review and understand the provisions in the 2020 ASLA Standard Form Contract if that edition (or the 2016-2019 editions) were used on a project. Some provisions provide full or partial relief from impracticable/impossible-to-meet obligations/ liability, while others are more proactive and could help the landscape architect make a valid claim for additional compensation for additional services.

The following provisions might be considered “protective” in that they may provide relief or avoidance of liability when pandemic circumstances make performance impracticable or impossible.



Schedule of Services

This makes reference to a schedule for the performance of Services, as provided in an attached Exhibit D. This should be carefully reviewed since it was probably prepared at a time when no one was contemplating the present COVID-19 circumstances. The format established for Exhibit D requires that all time periods for performance of Services in a given phase are to be triggered by the date on which that phase was authorized to begin. In other words, it does not contemplate a schedule with an overall start and finish date with milestones or interim completion dates along the way. Nevertheless, the time originally allocated to perform Services in each phase may no longer be realistic and may need to be amended by agreement of the parties.

See “Section 4.4 Extended Services” and “Section 8.1 Force Majeure” which are both directly related.

Section 1.1 Standard of Care

The Landscape Architectural Services shall be performed with care and diligence in accordance with the professional standards applicable at the time and in the location of the Project and appropriate for a project of the nature and scope of this Project.

This is an important provision because it makes explicit that the standard of care with which the Landscape Architect must comply is a *negligence* standard. There are no warranties or guarantee implied by law and none are offered here. Thus, claims against the Landscape Architect, if any, should be predicated on allegations and proof of negligence to be valid. The elements of the tort of negligence are: 1) a duty, 2) substandard performance of that duty, 3) damages, and 4) proximate cause (“but for” the substandard performance, there would have been no damages).

Section 1.7 Opinions of Probable Construction Costs

Opinions of probable construction costs provided by the Landscape Architect are based on the Landscape Architect’s familiarity with the landscape construction industry and are provided only to assist the Client’s budget planning; such opinions shall not be construed to provide a guarantee or warranty that the actual construction costs will be within the Project budget parameters at the time construction bids are solicited or construction contracts negotiated. Unless expressly agreed in writing and signed by the parties, no fixed limit of construction costs is established as a condition of this Agreement by the furnishing of opinions of probable construction costs.



Although the language here is clear that opinions of probable construction costs are not guaranteed or warranted to be accurate, they are still important elements in the Client's planning. The current COVID-19-related circumstances have made supply chains uncertain and the supply of labor equally uncertain. Costs could rise unpredictably and dramatically. The Landscape Architect should review such opinions carefully with the Client and be clear that no one presently knows how the future will develop.

Section 1.9 Construction Safety

The presence of the Landscape Architect, its employees, or consultants at the Project site shall not be deemed an assumption by the Landscape Architect of any obligations, duties, or responsibilities for safety, including but not limited to construction means, methods, sequences, techniques, or procedures necessary for performing, superintending, or coordinating the work of the Project in accordance with the Construction Documents or regulatory health or safety requirements, if any. The Landscape Architect, its employees, and consultants have no authority to exercise any control over any construction contractor, its employees, or subcontractors in connection with their work or health and safety programs and procedures.

Construction site safety is generally the Contractor's responsibility and NOT that of the Landscape Architect. Nothing here says otherwise. In fact, this says that the Landscape Architect is not responsible for complying with "regulatory health or safety requirements" (except with respect to its own employees). That sounds pretty clear, but there are many unknowns about the "safety" of having employees even visit a site where workers may have been exposed to the coronavirus or where contaminated surfaces or equipment may be present. Consider consulting legal counsel before sending employees to a construction site.

Section 5.2.2 Indemnification

Since it would be unfair for the Landscape Architect to be exposed to liability for its failure to perform a service that the Client has either refused to authorize or has instructed the Landscape Architect not to perform, the Client hereby waives all claims against the Landscape Architect and agrees to defend, indemnify and hold the Landscape Architect harmless from claims or liability for injury or loss allegedly arising from the Landscape Architect's failure to perform a service that the Client has either refused to authorize or has instructed the Landscape Architect not to perform.

This is a fairly innocuous provision that simply says that the Landscape Architect can't be held responsible for the consequences when a Client directs that a specific service not be performed. This rarely happens but, in the current



environment, a Client may instruct the Landscape Architect not to perform a specific service, for one reason or another, and the Landscape Architect can have some confidence that such action will not produce adverse consequences or claims against the Landscape Architect.

Section 5.3 Consequential Damages

The Landscape Architect and the Client waive consequential damages for claims, disputes, or other matters in question which arise out of or are related to this Agreement, including but not limited to consequential damages due to the termination of this Agreement by either party in accordance with the provisions of Article 7 hereof.

Consequential damages are those damages that are not the predictable and foreseeable result of an action. For example, if a Project is delayed, it may be predictable and expected that the Client would incur additional costs of financing and administration. It may not be predictable or foreseeable that the Client would lose other business opportunities or lose profits. If so, those may be considered “consequential damages.” Such damages can run to very large numbers. This is more a risk management matter than an insurability question. This waiver of consequential damages is industry standard.

Section 5.6 Hazardous Materials Waiver

Unless otherwise provided in the Agreement, the Landscape Architect and the Landscape Architect’s consultants shall have no responsibility for the discovery, presence, handling, removal or disposal of or exposure of persons to hazardous materials in any form at the Project site, including but not limited to asbestos, asbestos products, polychlorinated biphenyl (PCB) or other toxic substances.

On the face of it, this would not necessarily be relevant to the COVID-19 crises. However, who is to say that a virus-contaminated surface would not be a “hazardous material?” This is something about which a Landscape Architect should be alert.

Section 8.1 Force Majeure

Either party, as applicable, shall be relieved of its obligations hereunder in the event and to the extent that performance hereunder is delayed or prevented by any cause beyond its control and not caused by the party claiming relief hereunder, including, without limitation, acts of God, public enemies, war, insurrection, acts or orders of governmental authorities, fire, flood, explosion, or the recovery from such cause (“Force Majeure”). The parties agree to make all reasonable efforts to mitigate the delays and damages of Force Majeure.



This defines the term “*force majeure*.” If a force majeure event occurs, it excuses failure of performance by a party. This definition specifically mentions “acts or orders of government,” presumably “stay-at-home” orders and orders to stop construction or close specific businesses.

This type of clause is typically of much more importance to construction contractors who would be in breach of contract if they did not complete their work by the end of the allowed time. A force majeure event would extend that time and mitigate or eliminate damages that would otherwise accrue.

Unless there is a clause in the contract that says that “time is of the essence in this contract” (no such clause is in the ASLA contract forms), professionals like Landscape Architects are not generally subject to breach of contract damages for late performance unless they were negligent.

See “Schedule of Services,” above, “Section 1.1 Standard of Care,” above and “Section 4.4 Extended Services,” above.

The following provisions might be considered “proactive” in that they may help the Landscape Architect to make a valid claim for additional compensation of delay or additional services due to pandemic conditions.

Section 1.6 Approval of Services/Changes to Approved Services

The Landscape Architect shall proceed with a phase or design package of the Landscape Architectural Services only after receiving the Client’s written approval of the Services and deliverables provided in the previous phase and written authorization to proceed with the next phase. Revisions to drawings or other documents shall constitute Supplemental Services when made necessary because of Client-requested changes to previously approved drawings or other documents, or because of Client changes to previous Project budget parameters or Program requirements.

This requires the Client’s approval to begin Services in the next phase. Such approval would trigger the applicable time period intended for completion (as mentioned above). Without such approval, the “clock” would not be running.

Further, this makes clear that Services made necessary by Client-requested changes will entitle the Landscape Architect to submit a claim(s) for additional compensation for performance of such Supplemental Services.



Section 4.4 Extended Services

If through no fault of the Landscape Architect the Scope Services described in section 1.4 of Exhibit “B” have not been completed within the term indicated in the Schedule of Services provided in Exhibit “D,” the compensation for services rendered after that time period shall be renegotiated or shall be on the basis of the hourly rates provided in Exhibit “C.”

This Section provides that if a time period for performing Services, as stated in Exhibit D, is exceeded, through no fault of the Landscape Architect, the Landscape Architect “shall” be entitled to compensation for Services rendered after the planned time period.

See “Schedule of Services,” above, and “Section 8.1, Force Majeure,” below.

Sections 7.2 to 7.6 Suspension/Termination

The Client’s failure to make payments to the Landscape Architect in accordance with the provisions of this Agreement shall be deemed a substantial failure to perform and a cause for termination; however, in this circumstance the Landscape Architect, at its option, may elect to suspend its services on seven (7) days’ written notice to the Client. The Landscape Architect shall have no liability to the Client for any delays caused by a suspension under this provision.

These provisions discuss what happens if the Landscape Architect suspends performance under the Agreement or if the Agreement is terminated for causes NOT due to the fault of the Landscape Architect. This might happen if the Client is not making payments when due or if the Project is terminated for reasons related to COVID-19 or otherwise. They also discuss what compensation and schedule adjustments to which the Landscape Architect might be entitled if the Project resumes.



Remember that contract provisions can always be changed IF both parties are willing and agree to the changes in writing.

In all respects, communication is the key. Keep accurate and detailed project records that contain facts and few or no opinions or speculation. The Landscape Architect should share information with the Client and other design and construction team members on a Project. Transparency, a positive attitude, and good will can overcome many obstacles.

Proposed Contracts

Contracts that are presently under negotiation should attempt to take the COVID-19 pandemic into account as much as possible. Even in normal times, change seems inevitable. However, change can only be measured against a baseline.

Therefore, contracts should document the “initial assumptions” on which the parties are proceeding. This could be done in Exhibit A of the 2020 ASLA Standard Form Contract. If the parties are transparent about their assumptions they will have a basis for assessing whether or not circumstances have changed such that, for example, time schedules must be modified, or additional services approved.

Further, the terms of the applicable “force majeure” provisions (Section 8.1 of the 2020 ASLA Standard Form Contract) might be modified to include, explicitly, “effects of pandemic conditions” (consult legal counsel about specific language).

Although this advisory paper has focused on contract provisions, there are also potentially serious insurance implications that should be reviewed with legal and insurance counsel.

ASLA has provided this advisory for general information only. Nothing contained herein should be considered to be a legal opinion or legal advice and no attorney-client relationship of any kind. Further, this advisory is not intended to provide specific guidance about specific contracts or about how to resolve contract disputes. Such guidance and advice should be obtained from legal counsel, insurance counsel and others, if necessary, based on all relevant factors.