

**CONTRACT DRAFTING:
GETTING IT RIGHT IN THE FIRST PLACE**

**PRACTICE MANAGEMENT FOR
ARCHITECTS AND ENGINEERS IN TEXAS**

**Lorman Educational Services
Austin, Texas
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Contract Drafting: Getting it Right in the First Place

An architectural contract can create enforceable obligations between the parties to it. It need not be written, much less be either precise or complete to make it binding. If it is written, the written terms may determine the parties' obligations, unless the terms run afoul of the law, or are unclear, or are internally inconsistent, or are induced by fraud, or are patently unfair, or are subsequently modified, or are overtaken by events. In the event a dispute arises out of the contractual undertaking, additional contract terms may be supplied by the law, or by the parties' memories, or by the correspondence leading up to the contract, or by other contracts between other parties, or even by the way other architects and owners view similar contractual undertakings. The resolution of these issues can be left to juries who are selected from panels from whom anyone knowledgeable about either design or construction has been excluded.

A well-drafted contract can, however, be a very useful tool in the construction process. By clearly informing the parties of their respective obligations, ensuring that the obligations are logical and fair, the contract can reduce the number of possible disputes and can provide a mechanism to resolve them, if they do arise. The AIA has drafted several different forms of architectural contracts in an attempt to achieve these goals, with some success. As one might expect from documents written by committees of lawyers working with the Practice and Prosperity initiative of the AIA, these contracts are fairly legalistic, and some have accused them of being architect-oriented. Moreover, they do not necessarily reflect Texas law and, unless all of the other contracts on the project

are on similar forms, can create inconsistent contractual undertakings between the members of the construction team.

Attached to this paper is an architectural contract, in the form of a letter agreement, which addresses several of the sources of architectural disputes with an unsophisticated owner, and attempts to deal with them in an even-handed manner. Reasonable minds can differ about how effectively it does so, and in any event, it is not designed to anticipate every possible source of friction, but rather only those which I see on a regular basis. [Insert 1 – ?]

This letter form is not copyrighted , and you are welcome to use it, or to modify it, as you please. I make no representations about its validity or completeness, other than it may be a useful point of departure for your own efforts, or your lawyer's.

Pretty Good Architects, Inc.
Austin, Texas

June 25, 2004

Dear _____:

This Letter Agreement sets forth the terms of the Agreement between you and our firm, Pretty Good Architects, Inc., for the architectural services we are providing in connection with the design and construction of your home, and to memorialize some of the assumptions under which both of us are undertaking our responsibilities under this Agreement.

The Project

You are seeking to build an approximately _____ square foot custom home on a lot owned by you at _____, the legal description of which is _____ . Your overall budget for the Project, including our fee, is \$ _____. You hope to include a swimming pool, landscaping (including decks, outdoor lighting and fencing) within this budget, but both of us recognize that the budget is preliminary, and that it will be affected by the decisions you make regarding the style and quality of construction, and of course the extent of the landscaping and the size of the pool. You have indicated that you can secure financing for the Project and can assemble funds to pay for overruns, if necessary.

You anticipate hiring a Contractor to construct the Project [manage the construction of the Project] and that his compensation will be based upon the cost of the work, plus a fee [with a guaranteed maximum price]. We anticipate your selecting the

Contractor early in the design process, so that he can provide both of us with input as to construction costs during the design phase.

We believe that the design phase of this Project will last about _____ months, and that construction of the house likely will take approximately _____ months. Because this is a custom home, time necessary for both design and construction can vary considerably, particularly if we pursue alternative design concepts, or you select unusual or unique construction details. Of even more importance is timely decision-making, which you have agreed to do, and to communicate to us through _____, who will act as the “Owner’s Representative.”

The Scope of Our Services

Evaluation of Budget

When the Project requirements have been sufficiently identified, we will make a preliminary estimate of the cost of the work, which we will update as our design progresses. As we have discussed, however, our estimates are estimates only, and are subject to fluctuations in the cost of labor, materials and market and negotiating conditions. Therefore, we cannot warrant or represent that the construction cost will not vary from your budget. If at any time our estimate or the Contractor’s proposal [guaranteed maximum price] exceeds your budget, we will make recommendations to adjust the Project’s size, quality or budget, and you agree to cooperate with us in making those adjustments. We cannot, however, assume any liability for exceeding the budget. [If you choose not to modify your budget, we will modify the design—without

compensation—to bring it within budget. Such modifications will be the limit of our responsibility for exceeding the budget, however.]

Design Services

We will provide structural, mechanical [civil], [geotechnical] and electrical engineering services, either by ourselves or by hiring consulting engineers to assist us. You will hire a surveyor to furnish surveys, including topographical surveys, which will identify all the legal information necessary for our design. You will also hire a geotechnical engineer to investigate the subsoil conditions, and to make appropriate recommendations to be included in our design.

During the Design Phase, we will perform the following tasks:

1. Describe the Project requirements for the Owner's approval;
2. Develop a design solution based on the approved Project requirements;
3. Upon the Owner's approval of the design solution, prepare Construction Documents indicating requirements for construction of the Project;
4. Assist the Owner in filing documents required for the approval of governmental authorities; and
5. Assist the Owner in obtaining proposals and award contracts for construction.

Construction Phase Services

During the Construction Phase, we will act as the Owner's representative and provide administration of the Contract between the Owner and Contractor [construction manager]. These services will include visiting the site, reviewing and certifying

payments, reviewing the Contractor's submittals, rejecting nonconforming work, and interpreting the contract documents. The Contractor, however, is the person responsible for building the Project, and is responsible for the manner, method and means of construction. We are not inspectors or supervisors of his work, and cannot be liable to you if he fails to do the work in accordance with the plans and specifications.

Additional Services

Our fee is based upon providing the Basic Services outlined, above. In the event we provide additional and unanticipated services, such as providing construction phase services for more than _____ months, or after the issuance of the final payment to the Contractor, providing services required because of significant changes in the Project which were not caused by us, providing services made necessary by the default of the Contractor, or because of major deficiencies in his work, we will be entitled to additional compensation on an hourly basis for such work. We will, of course, discuss the necessity of such additional compensation with you before we bill you for the work.

Compensation and Payment

Our fee for our basic services will be _____% of the construction cost, which is the total cost to you of the Project, exclusive of our fees [and any construction costs specifically excluded, such as pool and landscaping]. You have agreed to make an initial payment of \$_____, and we will then bill you on a monthly basis for the balance of our fees, _____% of which will be due at the completion of the design phase. You have agreed to pay us within 10 days of the receipt of our monthly bills, and not to withhold payment for any reason unless we have been adjudged liable to you.

To the extent we perform any Additional Services, we will bill them in accordance with the following schedule:

Use of Our Documents

Our drawings and specifications are instruments of service for use solely on this Project, and we retain all common law and statutory rights, including the copyright.

Miscellaneous Provisions

Standard of Care

We are an experienced architectural firm, and have designed a number of homes similar in size and complexity to the one we are designing for you. Neither we nor any other architect has, however, ever produced a perfect design, or one which could not be improved upon with additional redrafting. Consequently, we cannot warrant that our drawings are perfect, and indeed it is not unlikely that they will contain mistakes, or at least elements that can and should be clarified. If so, we will make any necessary changes in our drawings, at our cost.

Limitation of Liability

We will maintain professional liability insurance during the design and construction of the Project to cover us for professional errors and omissions, in the

amount of \$_____. You have agreed to limit our liability for any claims arising out of this Project to the amount of our insurance.

Waiver of Consequential Damages

Both of us waive consequential damages for claims, disputes or other matters on questions arising out of this Agreement, or its termination.

Property Insurance

You will purchase property insurance on an “All Risks” basis to cover the house during construction, and both you and we waive all rights against each other and the Contractor for damages to the extent any damages are covered by insurance. The purpose of this clause is to eliminate any disputes between the construction team, in the event that the house is damaged or destroyed during construction, leaving your sole recourse against the property insurer.

Statutes of Limitations

Causes of action between us, pertaining to acts or failures to act shall be deemed to have accrued and all applicable statutes of limitations shall commence to run not later than the date when our services are substantially completed. The purpose of this clause is intended to prevent either of us from using a “discovery” rule to extend the statute of limitations on any claims we might have against each other.

No Third-Party Beneficiaries

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either of us.

Anti-Assignment

Neither of us shall assign either this agreement or any causes of action arising under it to anyone without each of us giving written consent (except that you may assign this Agreement to your lender, if they insist upon it, so long as they step into your obligations under this Agreement).

Termination

Our firm can terminate this Agreement if you do not pay us for our services on a timely basis, and we give you a week's notice that you are behind. You can terminate this Agreement at any time. In the event the Agreement is terminated, you agree to pay us for our fees earned to the date of the termination, based upon the percentage of completion of our work times the estimated construction cost (so if we're terminated before the Project is finished and paid for, we will still be paid for the portion of the design we have completed).

Dispute Resolution

If we ever get into a dispute and our lawyers cannot sort it out, we agree to resolve any claim dispute or other matter in question arising out of or related to this Agreement through arbitration. Prior to arbitration, we will try to resolve disputes by mediation.

If these terms are acceptable to you, please sign and date our Agreement in the space, below.

We look forward to working with you on this Project!

Agreed:

Client

TBAE Notice