

# EC RISK REVIEW

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## CADD Part 2: Contractual and Ownership Protection

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

As covered in Part 1 of this two-part report, many environmental consultants use computer-aided drafting and design (CADD) on their projects. Yet despite its advantages, the growth of CADD has been a mixed blessing for environmental firms. While CADD increases productivity and enables firms to provide a wider range of services, it also poses new challenges – and liabilities.

Part 1 addressed the major areas of liabilities associated with CADD and provided procedural remedies for minimizing the risks (see checklist on page 3). In this issue, we will cover protections you can build into your contracts that further limit liabilities and protect your rights of ownership of your designs.

### Contractual Protection

There are several places in your standard service contracts where you can address CADD related issues. For example, you can address CADD in the “Scope of Services” or “Ownership of Instruments or Services” provisions. Better yet, you can add a specific CADD clause to your client contracts.

Following are a list of recommendations for inclusion in a CADD clause in your client contract. As always, work with your attorney when drafting the specific language needed to fit your unique circumstances:

- Have the client agree that any CADD file you deliver is an “instrument of service,” and that you remain the author and retain all legal rights, including copyrights, to the work.
- Have the client agree that the delivery of the CADD file does not constitute a sale of the file as a product. This helps limit your product liability exposure, which is not covered by your professional liability policy. State that

you are making no warranties of merchantability or fitness for any particular purpose.

- Require that the client agree not to reuse your electronic files, in whole or in part, for any purpose not related to this specific project.
- Prohibit the client from transferring the file to any other party without your written consent.
- Require that the client waive all claims against you for any unauthorized changes to or use of your CADD files. Also have the client indemnify you against all damages and costs, including indirect or consequential damages, arising from any unauthorized changes made to the CADD document.
- Have the client commit to conforming to any software and hardware specifications that you have mutually agreed to. These specifications should be listed as an addendum to the contract.
- Have the client agree to an “acceptance period” (e.g., up to 30 days after delivery of the CADD file) during which the CADD file can be reviewed and tested for performance. You should agree to correct any errors or omissions within the acceptance period without charge. The client should agree to compensate you for any additional work required to make changes to the CADD file after the acceptance period has expired.
- Have the client acknowledge that if there are any discrepancies between the CADD files and the final printed construction documents, the construction documents prevail and govern.

### Transferring Ownership

Some clients may demand that they receive ownership of the electronic CADD files. In such cases, discover why the client wants ownership of the documents. If the client is concerned about proprietary issues, perhaps a confidentiality agreement would suffice instead. If the client wants ownership of the file for maintenance purposes, suggest that an as-built document would be a better option. Or you could grant them a license to use your copyrighted design for a specific purpose.

When all else fails, you can agree to this ownership transfer as long as you put extra protections in place within your contract. For example:

- Require that the files be transferred only upon full and final payment of your fees.
- Prohibit the client from reusing or making any modifications to the drawings and specifications without your written authorization.
- Again, refer to the files as “instruments of service.” This will help protect against potential product defect claims.
- Remove all of your electronic seals, signatures, logos, or other identifying marks from the files.

### Providing Files to Contractors

If you should be required to provide your electronic files directly to contractors for their use in preparing shop drawings, protect yourself with a letter of agreement. In light of the added risk, you should also demand an appropriate fee for providing this service.

When working with your attorney to draft a letter of agreement for the contractor, consider these terms and conditions:

- State that the files are instruments of service and cannot be used for any purpose other than when preparing shop drawings for the referenced project.
- Note that you make no representation as to the compatibility of the CADD files with the contractor’s software and hardware beyond any compatibility requirements specified in your agreement with your client.
- Require that the contractor hold you harmless and make no claims against you from any damages that are the result of any unauthorized use or reuse of the CADD files.
- Note to the contractor that the CADD files are not construction documents and that you make no representation as to their accuracy or completeness. State that if there are any discrepancies between the CADD files and the signed or sealed construction documents, the construction documents shall govern.
- Note that providing the CADD files does not relieve the contractor from its duty to fully comply with the contract documents and carry out all necessary checks and measures required to meet full compliance.
- Reserve your right to remove all indicia of ownership and/or involvement from each electronic display.
- Note that delivery of the CADD files shall not be deemed a sale and that you make no warranties of merchantability or fitness for any particular purpose.
- Note that you shall not be liable for any loss of profit or any consequential damages as the result of the contractor’s use or reuse of the files.

### Copyright Basics

Prior to 1990, design and environmental consultants had only limited protection under copyright laws. Basic copyright law defines "architectural work" as the design of a building as expressed in plans or drawings. The owner of a copyright to an architectural work has the exclusive right to reproduce the plans and drawings, to make derivative works from them, to grant

licenses to others to use the work or to sell the work outright. In general these rights last 50 years beyond the life of the owner.

The 1990 Architectural Works Copyright Protection Act extended ownership rights for consultants. The Act specifically prohibits unauthorized construction of buildings depicted in copyrighted drawings created on or after December 1, 1990. However, it only applies to architectural works intended for human use or occupancy. Thus, while residential or commercial buildings are covered, structures such as roads, bridges and dams are not.

These copyrights come into effect as soon as plans and drawings are created. However, it is advisable to state your intentions of retaining ownership of these rights in your contracts.

### Closing Out Liabilities

Once a project is closed out, take the necessary steps to remove unnecessary versions of CADD files from your computer system. This can go a long way to limiting liabilities. It’s also a good idea to clean up unnecessary emails containing outdated versions of the designs.

Maintain at least two copies of the final CADD files. Keep one at the office and one offsite in a secure location. If you must provide a copy for your client or the contractor, be sure to spell out the rights of all parties. Specify who owns the files and who has the right to use, reuse or modify the files. Finally, identify any signed and sealed construction documents that may supersede the CADD files.

### Can We Be of Assistance?

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*

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Sidebar:

**CADD Liability Checklist**

*Electronic Risks:*

- Software Defects
- Incompatible Hardware/Software
- Transmission Errors
- Viruses
- Limited Life of Software

*Human Risks:*

- Programming/Inputting Errors
- Unauthorized Changes
- Unauthorized Reuse
- Misuse of Files

**CADD Policy Checklist**

- Set Specifications
- Identify Deliverables
- Determine Uses
- Limit Distribution
- Establish Transmission Policy
- Train Staff
- Verify Accuracy
- Make Corrections
- Refuse Seals/Signatures
- Document Delivery

(See Part I of this report for details.)