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Risk Management Tools for the Design Professional

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Review of the Owner/Design Professional Agreement from The Design Professional's Perspective

By Frank L. Pohl, Esq. and James C. Washburn, Esq.

This article reviews some of the issues addressed in a standard Owner/Design Professional Agreement, outlines concerns from the Design Professional's perspective, and discusses how the Design Professional can reduce liability on a project and ensure equitable adjustments to the contract price and schedule for changed or additional design services. The agreement contemplated by this article is one to be used as part of a traditional design-bid-build approach.

Standard of Care

When trying to hold a Design Professional liable for negligence, one of the first legal considerations is the standard of care owed. Absent an express contractual warranty, the law does not require the Design Professional to guarantee that the design will be perfect. Rather, the standard of care that the courts will typically apply is that degree of care which a reasonably careful architect/ engineer would use under like circumstances. However, nothing prevents an Owner from seeking contractual language that increases the typical standard of care owed by the Design Professional to the level of an express warranty of the design; in fact, Owners frequently attempt to do so in their proposed agreements – and courts will enforce such language. This is a danger to the Design Professional, as it is possible that the increased standard of care could go beyond professional liability insurance coverage available to the Design Professional. Thus, the Design Professional should insist on the deletion of any such guarantee as unreasonable.

Similarly, a Design Professional should insist on the deletion of any proposed language that attempts to establish a fiduciary duty between the Design Professional and the Owner, as such language also results in an increased standard of care owed on the Project.



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Owner's Project Criteria

Before commencing with design services, the Design Professional should insist upon a well-defined project criteria from the Owner, upon which it may rely for establishing the overall parameters of the project. The agreement should expressly state that the project criteria furnished by the Owner describes all of its program requirements and objectives for the project, including use, space, budget, time, site, maintenance requirements, and expandability requirements, as well as submittal requirements and other requirements governing the Design Professional's performance of the work on the project. Ideally, the Owner's project criteria includes conceptual documents, design criteria, performance requirements and all other Project-specific technical materials and requirements needed by the Design Professional to commence work without further information gathering after the contract is executed.

Any language that requires the design documents to reflect the Owner's "intent" or other such wording should be deleted (as mind reading should not be a contractual requirement). The Design Professional should insist on express contractual language that states that if the Owner seeks to supplement or change the project criteria after the contract price is established or after the Design Professional commences work, then the Design Professional is entitled to an equitable adjustment to the contract price and schedule as a condition precedent to performing any such additional work.

Similarly, to the extent that the Owner changes the project budget, there should be contract language entitling the Design Professional to an equitable adjustment in the contract price and schedule, to be reflected in an executed change order, for all resulting value-engineering needed to reach the revised budget. However, if value engineering is needed because the bids from all contractors exceed the project criteria's budget (possibly resulting from inaccurate pricing estimates by the Design Professional), then the contract should include language that states whether a Design Professional must perform that value engineering work without additional compensation. Perhaps the contract states that the Design Professional is only required to do so if the lowest responsive and responsible bid exceeds the budget by some threshold percentage. Regardless, the Design Professional should expressly limit any liability for any claims or damages sought by the Owner arising from the cost of the work exceeding the project criteria's budget.

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Equitable Schedule of Values

Owners may seek to establish a draw schedule that withholds most of the contract price until after the construction documents are 100% complete and approved and permitted by the governing building authorities, i.e. when the Owner has a work product in hand that would allow construction to commence. However, the Design Professional should insist on a payment draw schedule that equitably reflects the value and time required at all preliminary stages: schematic phase, design development phase, the staged percentage completion milestones of the construction documents, negotiation/bid review phase and contract administration. Moreover, the contract should define the work product required at each such stage, as applicable, that would trigger entitlement to each successive draw payment.

Construction Contract Administration

While the standard AIA Documents for construction contemplate intensive contract administration services to be performed by the Architect during the construction phase, oftentimes a companion AIA design agreement is not used on the same project. Indeed, even if a percentage of the Design Professional's contract price is dedicated to contract administration, often the design agreement does not define well the Design Professional's contract administration duties (or may not address them at all). This disconnect creates fertile ground for conflict. It is difficult, if not impossible, to predict the amount of involvement required by the Design Professional during the construction phase for some contract administration duties, such as RFIs. Accordingly, the Owner and Design Professional should attempt to define the Design Professional's scope of contract administration services to be performed during the construction phase and break-out and identify certain contract administration services to be performed on an hourly fee basis (with a rate schedule agreed to and incorporated into the agreement).

Additional Services

The agreement should expressly state that the Design Professional is entitled to an equitable adjustment in the contract price and schedule for the following items:

- As previously discussed, any change in the project criteria;
- Change in the instructions or approvals given by the Owner that necessitate revisions in the design documents;
- Enactment or revision of codes, laws or regulations or official interpretations which necessitate changes to previously prepared design documents;

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- Decisions of the Owner not rendered in a timely manner;
- Failure of performance on the part of the Owner or its agents;
- Preparation for an attendance at a any deposition, dispute resolution proceeding or other legal proceeding

Reimbursable Expenses

Briefly, as the amount of Reimbursable Expenses will necessarily remain an unknown contingency, they should not be limited to a Reimbursable Expense Allowance (as is sometimes requested by the Owner), but rather should be additional compensation over and above the contract price.

Insurance

The Design Professional is strongly advised to consult with its insurance broker to review the contract's insurance requirements to determine whether its current policies comply and whether additional coverage is required. If so, the Design Professional will need to ensure that any additional premium to be paid is included in the contract price or otherwise covered as a reimbursable expense.

Limitation of Liability

As it relates to the Owner, the Design Professional should seek to limit its total liability for any and all claims or injuries arising from the project to the amount paid on behalf of or to the Design Professional by its insurer in settlement or satisfaction of such claims. If no such insurance coverage is provided with respect to the Owner's claims, then the Design Professional's total liability to the Owner for any and all such uninsured Owner claims should nonetheless be capped at some dollar amount, such as some percentage of the contract price that reflects the Design Professional's profit on the Project. Such limitation of liability provisions are generally enforceable (although the Design Professional should confirm with an attorney licensed in the state whose laws govern the contract).

Instruments of Service

The contract should expressly state that all drawings, specifications and other documents and electronic data furnished by the Design Professional per that same contract are deemed to be instruments of service, and that Design Professional shall retain the ownership and property interests in them, including the copyrights. Only upon the Owner's payment in full for all amounts due under the agreement should the Owner be granted a limited license to use the Instruments of Service in connection with the Owner's occupancy or use of the project.

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The contract must also address what happens if the design contract is terminated at any point prior to completion of the design documents. What rights, if any, does the owner have to the Design Professional's work product under that scenario? Since the Design Professional is no longer involved in the design, if the Owner is granted license to still use the work product to complete the project, then the Owner should be required to indemnify and defend the Design Professional as a result of any claims arising from such use.

The issues outlined herein are not intended to be exhaustive. Design Professionals are strongly advised to have each design agreement separately reviewed by their construction attorney and insurance broker.

BROKER'S NOTES