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Jonathan C. Shoemaker is a founding member of Lee/Shoemaker PLLC, a law firm devoted to the representation of design professionals in DC, Virginia, and Maryland. The content of this article was prepared to educate related to potential risks, but is not intended to be a substitute for professional legal advice.



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But I Never Saw That Document: The Perils of Incorporation by Reference Provisions

By Jonathan C. Shoemaker, Lee/Shoemaker PLLC

Before entering into a new contract, the prudent design professional should always review the proposed terms and conditions to understand the required scope of services and the risks associated with a project. Often, a proposed contract includes an “incorporation by reference” provision, referencing other documents.

When a contract incorporates by reference another document, good risk management requires obtaining and reviewing those referenced documents. Why? Because courts across the country will assume that – by signing a contract with an incorporation by reference provision – the design professional agreed to be bound by those referenced documents, even if those referenced documents were not provided to the design professional at the time of contracting! This article discusses how to reduce the risks associated with incorporation by reference provisions.

Incorporation by Reference Provisions

Many design agreements incorporate by reference other documents. For example, Section 13.2 of the AIA Document B101-2017 leaves “blanks” to be filled in to identify documents to be incorporated by reference into the contract, including (i) a Building Information Modeling and Digital Data Exhibit, (ii) exhibits, and (iii) other documents. Most government contracts incorporate numerous clauses by reference, and the Federal Acquisition Regulation (FAR 52.107) directs contracting officers to insert specific FAR provisions into solicitations and contracts to incorporate those provisions by reference into the parties’ contract.

Referencing extrinsic documents in a contract allows the contracting parties to expand the terms of the contract beyond the four corners of the contract. A common type of incorporation by reference provision is the “flow down” clause, under which the requirements of the prime contract are “flowed down” to the subcontract. For example, a prime contract on a hospitality project may “incorporate by reference” a hotel brand’s design standards and a subcontract on that project may “incorporate by reference” the terms and conditions of the prime contract (and the hotel brand’s design standards referenced in the prime contract). Understanding the scope of services to be performed, and the risk management provisions included through a “flow through” provision, requires reviewing all of the documents incorporated by reference.

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Incorporation by Reference Provisions May Bind You to Unanticipated Obligations

Most jurisdictions consider the parties to construction industry contracts to be sophisticated parties. As such, courts are unlikely to excuse a party for failing to review the documents referenced in a contract. A party's failure to read a contract, or failure to review an incorporated document, generally does not affect its binding force, as courts presume that the parties have read and understood the terms of the contract. The prudent design professional should assume that the provisions contained in the design agreement and the provisions from extrinsic documents that are incorporated into the design agreement will be enforced by a court of law.

Mitigate the Risk

The first (and best) way to mitigate risk is to understand the obligations being assumed under a contract, including any documents incorporated by reference. To mitigate the risk associated with the binding effects of incorporation by reference provisions, the prudent design professional should implement the following process:

- Obtain a copy and review all of the documents referenced in the design agreement that include industry standards and legal terms.
- Modify the language incorporating documents by reference to avoid a broad application of the terms contained in the extrinsic document unrelated to the services being performed.
- Consider clauses that provide an order of precedence between the terms of the agreement and the terms of a document incorporated by reference to avoid inconsistencies.
- When holding the prime contract, ensure that the provisions in your subconsultant agreement are consistent with those provisions contained in the prime contract.

Not only will this process help to mitigate risk, it may also allow you to leverage an incorporated document to your benefit (e.g., incorporating your proposal along with the favorable terms and conditions you may have developed when working with your own lawyer).

Conclusion

Before entering into a design agreement, it is critical to review and understand the contract provisions that are incorporated by reference into the design agreement to avoid waiver of favorable contract terms and otherwise legal rights. If you fail to consider documents incorporated by reference, you may find yourself facing unanticipated (but avoidable) exposure to claims not accounted for in your fee.