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Design Professionals: Next Wave of Claims in 2018 and Beyond

I. Owner/Architect Agreement

The Owner/Architect Agreement will govern the relationship between the design professional and its client. Careful drafting of your agreement can reduce risk and exposure for claims in the future. Unfortunately, a poorly drafted contract will cause and compound problems in the event that a project gets off track. A contract should always be signed by both parties, or the agreement may be disputed. If the design professional experiences a delay in obtaining the client's signature, yet forced to begin working on the project, the design professional should communicate with the client in writing that services are being provided in accordance with the design professional's latest draft agreement sent to the client.

A. Reducing liability and exposure to claims

1. Narrowly define scope of work

Each design professional's role -- whether architect, engineer, surveyor, or other consultant -- should be clearly identified. This should include the basic services under the contract as well as any additional services. When the contract fails to limit the designer's role and responsibilities to the owner, it is easy for the owner to later argue, "I hired an architect to advise me about that issue or cost." For example, if the Architect is to provide Construction Administration, that should be specified in the contract, along with the costs of those services. If Construction Administration is included, the number of site visits should be specified. On the other hand, if the professional seeks to exclude a particular service, that needs to be set out and agreed to in the contract. Failure to manage these basic expectations in the governing document can cause problems when construction is ongoing or when the projects is over, problems arise, and the Owner or Contractor is looking for someone else to blame.

However, it should be noted that a design professional is subject to something commonly referred to as "scope creep," that is the design professional's scope of work could exceed that stated in the contract if the design professional takes on a larger role during the project.

In other words, if the contract says the design professional is not responsible for setting the elevation, but the design professional does it anyway (or even just helps), the design professional could inadvertently extend its scope of work and potential liability.

2. Identify any subconsultants and their role

The prime Owner/Architect Agreement should identify what other professional engineers, architects, and consultants are being retained, their scope of work, and who is hiring each. Failure to include the entire design team and its responsibilities in the prime contract is a lost opportunity to manage expectations. Later disputes about who was hired to perform what role can be avoided by including this in the prime agreement.

3. Indemnity provisions

Indemnity provisions can help to minimize design professional's liability. The design professional should not enter into indemnity agreements that would require responsibility for work other that its own. Any liability of subconsultants, for instance, should be their own. Some owners, such as governmental entities, are unwilling to provide indemnity in favor of the design professional even in limited circumstances. Design professionals should understand the risks of undertaking a contract with limited or no indemnity. Parallel indemnity provisions should be included in the prime contract and in contracts with subconsultants.

4. Limitations of liability

In many jurisdictions, limitations of liability are effective, provided they meet certain requirements. In Texas, for instance, such agreements must be conspicuous. Limitations of liability can be used to reduce the design professional's risk to the amount of insurance or the amount of the fee or any other agreed upon amount. In cases where the amount of potential exposure vastly exceeds the limitation, matters are quickly resolved if there is an enforceable limitation of liability, especially if liability is certain or will be difficult or expensive to contest.

However, 2018 could see an influx of challenges to limitations of liability clauses in Texas. Some construction attorneys have taken the position that Texas Insurance Code Chapter 151 (also known as the Anti-Indemnity Statute) invalidates certain limitation of liability clauses. Another standard objection to limitation of liability clauses is ambiguity in the drafting, or the clause renders another provision of the contract meaningless. In order to help mitigate such challenges, the design professional should limit its liability to the amount of the fee. Alternatively, some owners will only agree to a broader limitation to the amount of "available insurance."

5. Litigation v. arbitration

Arbitration is often a standard provision in AIA contracts for architects and is increasingly included in contracts of other design professionals. As with the jury trial system, there are pros and cons to arbitration. Arbitration has been touted as a quicker, less expensive alternative to the jury system. While that can be true, it is not necessarily so.

The primary differences between binding arbitration and litigation:

(a) An arbitrator's award or ruling is generally not appealable or subject to further review by the Courts, other than to confirm an award.

(b) An arbitrator, or a panel of arbitrators, will be the finder of fact, instead of a jury. The arbitrator also serves as the judge, determining the application of the law to the facts.

(c) Discovery *may* be more limited in scope, which could speed up the resolution and reduce the expense as compared to litigation.

Whether to pursue arbitration instead of litigation often depends on a number of factors, such as the opposing party, the county where the lawsuit would be heard (venue), the potential pool of jurors, and the complexity of the facts and legal issues. This is something to be considered when signing the contract documents – at the beginning of the project. By the time issues develop, the course for litigation or arbitration is likely set by whatever agreements were made early on between the parties.

Common mistakes in arbitration provisions include: (1) failing to specify where the arbitration will be held, (2) failing to address what other parties will can be joined, (3) failing to limit or specify the amount of discovery or rules to be utilized in the arbitration, and (4) failing to specify whether one arbitrator or a panel of three will decide the dispute. Additionally, in many cases we have seen the contract between the Owner and Architect requires arbitration, whereas the contract with the Owner and the Contractor requires litigation. The common sense approach would be to align all of the contract documents so that any disputes on the same project would be determined by the same process, whether litigation or arbitration. Sometimes the Owner and Architect select arbitration for their disputes, but the Architect fails to obtain agreement from its subconsultants to also participate and be bound by arbitration. This may create problems for all involved and require two separate dispute proceedings.

B. The Project Budget

With a rising economy we have seen more disputes related to the Architect's failure to design the project within the Owner's budget. More Owners are seeking to hold Architects accountable for failure to deliver the project on budget by including this provision in the Owner/Architect Agreement. Unfortunately, Architects can have a somewhat *laissez faire* attitude about costs. Most design professionals see costs as within the purview and knowledge of the contractor, but not their responsibility. Inexperienced Owners may hold unrealistic expectations about the cost, size, and scale of a project. This can become a "perfect storm" for a budget-busting project, resulting in claims against everyone involved.

Architects and engineers routinely participate in "value engineering" on projects, whether in the schematic phase, design development, or construction documents. Value engineering can identify less costly materials and delivery methods for the Owner and may help to meet the budget goals. Any changes to the original drawings and specifications should be well documented in change orders or meeting minutes. If costs continue to escalate over the owner's budget, in spite of value engineering efforts, the Architect must warn the Owner of these issues and comply with contractual requirements related to the budget.

Architects must be careful when approving deviations from the plans and specifications, especially if the substitute products or materials are new or unproven. If materials or products later fail, that can serve as a basis for a claim against the design professional. The Owner is relying upon its professionals for recommendations on whether substitutions should be made.

Architects and engineers should be extremely reluctant to guarantee delivery of a project within a certain budget. If such a provision is included in the contract, special care must be used to make sure that the budget is met. If the budget is not met, the contract should have an escape clause if the reason is due to the Contractor or Owner, changing market conditions, or factors beyond the designer's control.

C. Timeline for Completion of the Project

1. Completion of documents/phases

Generally, an architect or engineer can provide a reasonable timetable for when the plans and specifications will be delivered. This is something typically requested by the owner.

2. Completion of construction

The completion of construction is generally beyond the control of the design professional and something the Contractor controls. Means and methods of construction are the tools and procedures that are required of the contractor to execute its own plan for procuring and completing the work. The design professionals should not have the authority to decide the means and methods of construction. The Contractor may be liable for liquidated damages, if provided by the contract with the Owner.

3. Who is responsible for delays?

a. Decision-maker for additional days/time

The architect is not responsible for preparing or maintaining the construction schedule. However, the AIA General Conditions identify the Architect as the Initial Decision Maker under the contract. When a claim is presented, for additional time or costs, the Architect reviews the documentation and decides.

II. Construction Administration: Pitfalls for Design Professionals

A. Careful What You Say

Architects and engineers performing construction administration often perform site visits to make determinations about the progress of the work and compliance with the construction documents. While these are routine services, they can serve as the basis for additional claims against the design professional.

1. On-Site Observations/reports

On-site observations and associated reports can serve as fodder for claims against the design professional. If the observations miss a defect by the contractor, that might be the basis for alleged liability. Additionally, failure to provide complete and accurate reports of the contracted services is another pitfall.

The AIA documents only require two inspections of the architect during construction: at substantial completion and at final completion. If the design professional's contract uses the term "inspection," the design professional's duty could arguably be increased over the normal standard of care. During the site observation, the design professional should note non-conforming work observed, as only the owner has the contracted right to accept nonconforming work. Any owner-accepted non-conforming work should be listed as exception to the architect's Certificate of Substantial Completion.

2. Pay Applications

The standard AIA Pay Application form makes certain representations that could serve as the basis for a claim. Pay applications often state that they are based on on-site observation, which may or may not be true. Pay applications have a signature line for the "architect." Sometimes they are signed by an engineer or other consultant. The form is just that – it should be modified when necessary. The design professional should strike through any statements that are not accurate.

Unfortunately, all too often pay applications are merely signed without making any changes to the recitations. A pay application signed by someone who is not the "Architect" without an interlineation or explanation may serve as the basis for a Deceptive Trade Practice Act claim, fraud, or misrepresentation by the signor. The same complaints will be made when the pay application was signed but the professional never set foot on the job site and did nothing to verify the work was being done, nor that it was in accordance with the contract documents.

If the work included in the pay application falls completely into the wheelhouse of one design professional, why not let that professional conduct the site visit and sign the pay application? Architects signing pay applications to certify the foundation work or the HVAC work should consider having their subconsultants take on this responsibility during construction. The structural engineer can best verify placement of the foundation, while the MEP engineer can best confirm the HVAC work has been done per the plans.

Pursuant to the AIA documents, an architect certifies the contractor's application for payment. However, the normal standard of care does not require the architect to certify the contractor's work – an important distinction. The AIA Owner-Architect agreement requires the architect to "determine in general if the Work observed… when fully completed, will be in accordance with the Contract Documents."

3. Letters of Conformance/Compliance

The final letters of conformance (commonly referred to a Certificate of Substantial Completion) given to the local municipality have also been used as the basis for claims against design professionals.

Careful consideration should be given to the wording of such letters. If there were noted construction deviations that have been addressed, the letter should indicate that the construction meets the applicable codes, without any representation that the construction is in compliance with the plans and specifications (since that is always untrue).

III. Houston, We Have a Problem: Troubleshooting Construction Cases

A. Construction Delays

Reasons for delay in construction vary from weather, materials shortages, labor shortages, delays in construction drawings, slow permit approvals, or lack of financing. During a project, the Contractor will present a claim when more time or more money is needed beyond the original scope of work or contract price. In these situations, the Architect will serve as the Initial Decision Maker.

B. Budget Overages

Generally, budget overages will be allotted between the Owner or Contractor pursuant to the agreement between those parties. The Architect's involvement will be limited to decisions in which the Contractor is asking for more costs or time. Additionally, the Architect is typically involved in the value engineering process to attempt to get the project back within the Owner's budget. In the event the design profession is involved in value engineering, care should be taken to document all discussions and any resolutions of discrepancies.

C. Design Mistakes

1. Resolving design misses during construction

When design mistakes are made on a project, the design professional will bear responsibility not only for fixing those mistakes, but also for delays that flow from the mistakes. The best course may be to directly offer to cover those costs to the Owner, in an effort to keep the project moving. Depending on the severity of the design "misses," a third party review or evaluation may need to be performed in order to satisfy the Owner that the mistakes were not systemic.

2. Understanding Design Documents

There is no such thing as "100% complete design documents" in the AIA standard documents. The design drawings are conceptual, meant to guide the contractor in selecting its means and methods of construction. As such, design professions should avoid affixing "100 Percent Complete Documents" on the drawings and in any contract terms or deliverables. Rather, descriptive notations such as "Issued for Construction" or "Issued for Permit" should be used. The general conditions in the standard AIA owner-contractor agreement no longer require the architect's signature on change orders. The RFI is a method of documenting a request for an answer to question. The design professional can also send an RFI to the contractor.

Shop drawings or submittals are provided by the contractor, and specifically details the dimensions and conditions of precise physical conformance with the drawings. Shop drawings and submittals may or may not be considered contract documents. Each state has its own rules governing the sealing of documents, which may come into play if submittals are to be stamped or sealed. If the submittal or shop drawings are prepared by others, arguably the design professional should decline to stamp them. Instead, comments are generally provided after review by the appropriate member(s) of the design team.

The following is an example cover letter for a design professional to sign when returning a submittal from the contractor:
Project:

Project No.:

Submittal No.:

__ NO EXCEPTIONS NOTED
__ EXCEPTIONS AS NOTED
__ REJECTED-RESUBMIT

Reviewed only for general conformance with design concept of project and general compliance with the Contract Documents. Not reviewed for strict compliance with Contract Documents, including specifications or standards referenced therein, or for completeness of submittal and/or shop drawings. Any deviation from the contract documents not clearly noted by the contractor has not been reviewed. Contractor is responsible for verifying and correlating dimensions at job site; for information which pertains to fabrication processes or construction techniques; and for coordination of work of all trades. Review and/or approval of submittal(s) shall not relieve Contractor, any Subcontractor, and/or Material Supplier of responsibility for deviation from requirements or obligations of Contract Documents nor for errors or omissions to submittal(s), including shop drawings.