

A crash course in design pro agreements

Because construction projects are complex and present unique issues, contracts must address these issues to avoid misunderstandings and provide risk allocation if problems develop. The design professional agreement establishes the relationship between the owner, the design professional and others on the project.

The issues to address in the design professional agreement depend on the project, but several key points should generally be addressed.

Scope of services

The definition of the scope of services to be performed by the design professional is critical.

Misunderstandings relating to scope can result in payment problems and liability issues. It's easier to address scope issues at the outset rather than later in the project, after a problem has arisen that may affect the schedule or budget.

Warranties

Usually, design professionals agree to make certain commitments in connection with services. These commitments come in many forms and may constitute warranties. Provisions that may constitute warranties involve language such as "certify" or "ensure" or references to "100 percent" documents.

Design professionals are insured only for negligence and not for breach of contract. As a result, any language in the agreement requiring the design professional to undertake responsibilities that would result in liability for anything other than negligence has important ramifications.

First, the design professional's liability would not be insured under a typical design professional liability policy.

Second, such language could result in a lack of coverage generally. For example, if there is a design professional warranty in a contract, and the owner can bring a claim under a



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negligence theory and a breach-of-contract theory, the owner may choose the breach-of-contract theory because it is easier to establish. If this happens, the insurer may decline coverage for the specific breach-of-contract allegation – even though the insurer might have covered a negligence claim.

Finally, in some instances, warranties can result in virtual strict liability for the design professional.

Submittal review

Owners and design professionals increasingly are exposed to liability for not only the content of the plans and specifications but also for construction administration – often related to shop drawings submitted for review by contractors and subcontractors.

Traditionally, design professionals and owners have attempted to limit liability in this regard by stamping shop drawings with a disclaimer. These stamps typically state that the design professional has reviewed the shop drawings only for their general conformity with the overall plans and specifications.

Court decisions, however, have begun to require disclaimer language for submittal review in the design professional agreement and the construction agreement, not just in the stamp.

Three courses of action will help

minimize the liability of design professional and owner in this area.

First, the stamped disclaimers should continue to be used. They add evidentiary strength to any case that goes to litigation.

Second, the same disclaimer of liability on the stamp should be incorporated in the design professional's agreement with the owner. This will make it clear that the design professional is not contractually assuming responsibility for the content of shop drawings.

Finally, the construction contract should also contain the same disclaimer – especially since this is the only contract to which the contractor is a party.

Thus, responsibility for the content of shop drawings is placed with the party that prepares the shop drawings and is responsible for the construction.

Ownership of documents

Another area of contention is the right to ownership of the design professional's plans, specifications and related documents.

Generally, both owners and design professionals want to own the plans and specifications.

This can be resolved if the parties agree that the design professional can use on other projects generic parts of the plans and specifications and any parts of the plans and specifications that were not prepared exclusively for the owner. The design professional has no risk in the event the plans and specifications are changed by others or used on other projects and the owner has the right to use the plans and specifications in connection with the project for which they were designed.

Use of technology

The use of technology on con-

struction projects is burgeoning. Construction technology includes computer-aided drawing tools, project Web sites, online submittal review services, object-oriented design and computer models that, in effect, design projects.

However, most agreements do not address these technologies. There is little, if any, contractual allocation of the risks that arise from the use of technology on projects.

Standard of care

Design professionals want to make sure they do not undertake any obligations that are outside standard industry practice or are not insured.

The standard of care is, in the first instance, determined by contract. Design professionals are usually insured only for negligent acts or omissions – not for simple breaches of contract.

In determining whether a claim is in negligence, which is insured, or in contract, which is not, the courts look to the contract to determine whether the essence of the services is the industry standard or some other, higher standard expressed in the contract.

The issues to be addressed in the design professional agreement will be, to a large extent, driven by the unique aspects of the project and the parties involved. However, the factors discussed herein, among others, should provide a general overview of the issues that should be addressed in most projects to minimize misunderstanding and costly disputes.

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