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Risk Management Tools for the Design Professional



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Construction Phase Services: Considerations for a Successful Outcome

by Colleen M. Palmer, Esq.

The construction phase is a dynamic time of a project and a design professional's involvement is significant from a risk management perspective since it allows the design professional the opportunity to provide input during the construction of the project. Since no designs are perfect (and, moreover, are not expected to be perfect to still meet the standard of professional skill and care), all designs require some level of interpretation that is best done by the design professional who created them. During construction, the design professional can visit the jobsite to determine if construction is proceeding in general accordance with the plans and specifications and clarify the design intent when necessary. This article addresses issues design professionals should consider if they provide services during this phase.

Do you have the resources?

The firm must have sufficient staff to devote to this important phase of the project. The services during this phase require experienced professionals who know how to handle themselves on the jobsite and how to successfully complete tasks in the office. If junior professionals perform construction phase services, the firm must ensure senior professionals are available to (and actually do) mentor the junior staff. A successful mentoring program requires regular and meaningful communication between junior and senior staff who need to be proactive to nurture the mentoring relationship. Mentoring is a two-way street: it will not be effective if busy senior professionals do not devote time to advance junior professionals' development and junior staff must take the initiative to seek out senior staff for guidance.

What does your contract say?

Industry standard documents have relatively balanced language regarding the construction phase. However, design professionals are often faced with a client-

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proposed document that may not include appropriate language for the design professional's involvement in the construction phase.

Scope of services:

As with all phases of the project, the scope of services must be sufficiently detailed and defined so the parties fully understand what the design professional will, and will not, do during the construction phase. A well-drafted scope of services is a proactive way to manage the client's expectations and avoid disappointments with respect to what the client can anticipate from the design professional during the project.

- The scope should not include ambiguous language.
- It should explicitly define the limits of the design professional's basic services.
- Avoid drafting a scope of services that only lists the services that the design professional will not perform since it is impossible to list everything that falls into that category.
- Ensure it clearly defines, both by inclusion and exclusion (to the extent known), the services the design professional will provide.

Jobsite visits:

How often?

Performing jobsite visits is an important task during the construction phase and the parameters of the visits must be well-defined in the agreement. Clients often propose open-ended language stating the design professional will visit the site "upon client's reasonable request" or "as needed" which is problematic because the design professional has no way of knowing how often the client may request a visit and the parties' definition of "reasonable" or "as needed" likely do not coincide. We recommend deleting ambiguous language and clearly stating either how many jobsite visits are required or how often (weekly, every other week, monthly, etc.) the design professional is expected to be on the jobsite to avoid confusion regarding how many site visits are included as basic services.

"Observation" vs. "Inspection":

The design professional's role on the jobsite is to generally "observe" the progress of the contractor's work and communicate its observations to the client. The design professional should monitor client-proposed contracts and delete language requiring the design professional to "supervise" or "inspect" the contractor's work since such language suggests a higher level of involvement and could be interpreted as establishing a responsibility to guarantee the performance of the contractor. Contract language suggesting the design professional will "inspect" or "supervise" is a red flag that the client either does not understand the design professional's role during site visits or expects the design professional to assume liability that goes beyond the

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typical observation role. Either way, the design professional should have a frank discussion with the client to ensure the client understands (and the contract reflects) that the design professional will generally observe the work, but not inspect it.

Construction means & methods and jobsite safety:

The design professional should not assume any contractual responsibility for jobsite safety. The contractor is in charge of the project jobsite and has actual control of the site and those on the site; therefore, the contractor should be solely responsible for jobsite safety. It is absolutely essential that the design professional include language explicitly disclaiming responsibility for the contractor's means, methods, sequences, and safety procedures, such as the following:

"The Design Professional shall not supervise, direct, or have control over Contractor's work. The Design Professional shall not have authority over or responsibility for the construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the work of the Contractor. The Design Professional does not guarantee the performance of the construction contract by the Contractor and does not assume responsibility for the Contractor's failure to furnish and perform its work in accordance with the Contract Documents."

But what if you see a really dangerous situation?

The industry accepts the proposition that a design professional should not have a legal duty regarding jobsite safety. However, a design professional arguably does have an ethical duty to respond if she observes a condition that constitutes an imminently dangerous condition. A design professional should not actively look for safety issues while on the jobsite; however, if she sees an obvious and dangerous condition that threatens life safety, she should immediately alert the person in charge of jobsite safety of the condition. This notification should stick to the objective facts and not include any recommendations regarding remedying the condition.

The design professional should then follow up the jobsite notification with a written communication to the party responsible for site safety and project owner reporting the observation. As with the verbal notification at the jobsite, this letter should be brief and include objective observations, not recommendations or advice. We recommend the letter reiterate the language in the contract that the design professional does not supervise, direct, or have control over the contractor's work and does not have authority over or responsibility for the construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the work of the contractor.

Finally, the design professional should not make a special trip back to the jobsite to check whether the safety issue has been corrected. Well-drafted contract language

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disclaiming liability for jobsite safety can be undercut if a design professional takes on extra-contractual duties that are not included in the design professional's scope of services. This is an important point: even if a design professional's agreement includes appropriate language disclaiming responsibility for jobsite safety, if the design professional performs jobsite safety tasks (such as attending regular contractor safety meetings, making recommendations regarding safety, or following up to check on a safety condition observed during construction phase services) those actions could be construed as evidence that the design professional had an integral role in, and responsibility for, jobsite safety which would undermine the contract language.

Submittals and requests for information:

The contract (and the design professional's stamp) should reflect that the design professional's review of submittals is conducted solely for the limited purpose of checking for general conformance with information given and the design concept and is not conducted to determine the accuracy of details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems. The design professional's review does not relieve the contractor of its responsibility for construction means, methods and safety programs and precautions.

Most claims involving the submittal process are about the timeliness of responses and not the substance of responses. Therefore, design professionals should pay close attention to contract language establishing deadlines to review submittals and provide responses to requests for information, **and meet those deadlines**. Clients often request extremely short windows for review, so the design professional must ensure the contractual timeframe is acceptable and that the firm can comply with the review schedule.

What if the client opts out of construction phase services?

In an effort to cut costs and avoid paying the design professional's fee for the construction phase, the client sometimes decides not to retain the design professional to provide construction phase services. The client may believe it can hire another firm to perform the construction phase services for a lower fee. However, this decision is short-sighted. A firm that did not prepare the designs cannot provide clarification regarding the intent of such designs as well as the actual designer. The client may think it is saving money, but in the long run, having the design professional on site during the construction phase may be more cost effective because the design professional can provide the necessary interpretation of the designs.

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If the client refuses to retain the design professional for the construction phase, we recommend negotiating indemnity language in the design professional's favor, such as the following:

"The Design Professional's scope of services does not include any construction phase services. The Client assumes all responsibility for issues arising out of the construction phase, including without limitation, the interpretation of the contract documents and construction observation. The Client waives any and all claims against the Design Professional and shall defend, indemnify and hold the Design Professional harmless from any and all claims, liabilities, damages, demands or costs, including reasonably attorney's fees, arising out of or in any way connected with the performance of construction phase services by any other firm."

Conclusion:

The design professional's involvement in the construction phase is an important part of achieving a successful project. With careful contract negotiation and the right staff devoted to the services, this phase of the project can be an integral part of a firm's robust risk management program.

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