

Professional Liability Risk for the Contractor – Does Assisting with Design Cross the Line?

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Contractors accept many risks inherent in physical construction of their projects. Owners, construction management firms, and design professionals expect contractors to participate to one degree or another in the design process. Does this increase a contractor's risk? To what extent is the contractor qualified to participate in design of a project? Will the contractor's insurance cover liability if the contractor negligently performs design assistance services? When does a contractor "cross the line"?

Building information modeling (also called "BIM") is increasingly popular for its use of three-dimensional, real-time, dynamic building modeling software to manage design input from all parties on the project, including the contractor. The BIM Model is a virtual model of the project used to evaluate and manage design development, within project constraints, including the schedule, the cost, compatibility and availability of various building materials and component, and spatial relationships. Project delivery methods, such as the construction manager-at-risk and design-build methods, often require the contractor and key subcontractors to interface with the architectural and engineering design team during the preconstruction phase to do what has become known as "design assist". Design assist can require or lead to the contractor contributing to the BIM model, analyzing and suggesting alternative and innovative design concepts, and even developing certain design details. This may go well beyond a "constructability review" in which the contractor merely questions observed errors in a proposed design and comments on difficulties that may be associated with procurement of materials and the execution of the construction as contemplated. The contract should be careful to describe the design assist function so as not to require the construction contractor to actually perform professional services without qualified personnel.

Owners and contractors should especially be careful to observe Texas' licensing laws. Anyone engaging in the "practice" of engineering or architecture must be duly licensed to do so. A contract for professional design or architectural services by one who is not licensed is void and unenforceable. The consequence of this can be severe. Parties to a contract requiring professional design services to be performed by one who has no license may be surprised to find the contract is void, leaving them with no rights to

enforce contract completion or to recover payment for the services. To be valid and enforceable, the contract should include an express requirement that the contractor engage a licensed professional to perform any professional service for which a license may be required.

A contracting firm must be licensed as a business entity under the Texas Board of Professional Engineers and/or Architectural Examiners to be qualified to provide design services or the firm must subcontract the design services to a licensed design professional or firm. Texas courts have found that, in the design-build context, so long as a licensed design professional actually provides the professional services, there is no violation of the laws regulating the practice of engineering and architecture. Some states are not so lenient, however, and will consider a firm improperly engaged in the unauthorized practice of engineering or architecture even if it hires or subcontracts a licensed design professional to perform the professional design services. Therefore, when performing design assist services for projects outside of Texas, a contractor must be even more cautious to check the licensing requirements.

Typically, owners require, and owners and contractors rely upon, commercial general liability insurance policies to insure against liability arising out of a contractor's construction work. Such policies, however, expressly exclude coverage for professional services. So, the parties to a contract for design assist services should verify that the specified insurance policies will cover the contractor's negligence in performing such services. Contractors can purchase Contractors Protective Professional Indemnity (CPPI) insurance to protect them from the risk of liability associated with design assist activities. Insurers now routinely write CPPI insurance policies at reasonable cost to insure contractors for this risk. A contractor should consult its insurance broker before agreeing to provide design assist services.

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