Contracts: Limiting Design Professional Liability through the Contract Review Process

A design professional's liability exposure is largely dependent upon the quality of the contracts used by the project parties. Unfortunately, the contracting process is typically treated as a pro forma project requirement and receives little consideration by the design professional, owner and contractor. As a consequence, the project often suffers, and the design professional’s liability exposure is needlessly increased.

Potential liability exposure can be controlled significantly by a well-defined contract drafting and review process. This process, at a minimum, should include a complete review of all proposed contract documents, coordinating the project contracts, and tailoring the contracts to the construction project. Then, it is equally important not to file the contract away, but rather to ensure that it is used and referred to throughout the project by your design team and the other project parties. By devoting the appropriate level of attention to the contracts before any bid is received, you greatly increase the chances of limiting your liability exposure.

REVIEW YOUR CONTRACTS

Most design professionals and contractors will tell you they review each contract before execution. When pressed to describe their review process, you will often learn that it is haphazard. The process usually involves checking the contract to verify that the traditionally important contract provisions exist. In other words, they will look to see if the contract carries provisions like the “hold harmless and indemnification” and “periodic site observation.” They do not read those provisions in detail, or any other part of the contract, unless the “key” provisions are missing or obviously have been altered.

Unfortunately, even minor changes to a contract provision can completely alter its meaning and the liability exposure of the design professional. Moreover, owners are not obligated to point out changes made to proposed contracts. Simply “x’ing” out a word or attaching supplemental conditions that “delete” a provision or word, changes the ramifications of the provision and contract. For example, striking the word “negligent” from the “hold harmless and indemnification” provision of a contract greatly expands a design professional’s liability exposure under the contract. No longer is the design professional’s liability limited to negligent acts. Design professionals must carefully review proposed contracts for modifications; otherwise, they may be surprised to discover their rights and responsibilities have been significantly altered.

Therefore, it is critical that the proposed contract and all supporting documents be reviewed from cover to cover, provision for provision, and word for word. Though a tedious process, the payoff can be as rewarding as any project design award.

COORDINATE ALL PROJECT CONTRACTS

A design professional’s liability exposure also can be adversely affected by uncoordinated contracts. Uncoordinated contract situations often arise where the owner is assembling the project contracts. The owner may cobble together contracts it has used before or that have been recommended as “good” by others. This can result in significant differences in the design professional’s duties and responsibilities from contract to contract. For example, early forms of the AIA B141 gave the design professional the responsibility for directing and supervising project work. This responsibility is specifically eliminated in the later versions of the B141. Similarly, the owner-design professional contract may call for the design professional to review contractor pay applications and certify that the amounts requested reflect the project “has progressed to the point indicated.” In the contractor’s contract, the certification may mean that the design professional is confirming that the work billed has been properly completed and contains no defects. Obviously, liability exposure to the design professional is widely divergent in the above situations. Controlling that exposure is directly dependent upon the design professional reviewing all contracts and ensuring that all duties,
responsibilities and references are consistent throughout the project contracts.

The design professional must also take care to ensure that the contracts it prepares for projects are coordinated. Often standard form contracts are used by design professionals. The duties and responsibilities of project parties can vary among the various editions of standard form agreements. Care must be taken to ensure that the contents of an older version of a form contract are compatible with newer versions, if different contract editions are being used. Again, time spent coordinating documents can make a world of difference at the end of the day.

**TAILOR THE CONTRACTS TO THE PROJECT**

The statement that “each construction project is different” is a truism that transcends all projects. A cookie cutter shopping mall project will always have something that makes it different than the previous shopping mall project. Therefore, a cookie cutter contract should not be used. Each contract should be tailored to address that project’s special nuances and risks.

Similarly, if you know of any “nuances” of an intended contractor, those should also be addressed in the contract. In public works projects, specific contractor nuances cannot be addressed since the contract form is set prior to bid; however, there is nothing wrong with approaching this issue in the private sector.

**USE THE CONTRACT**

After you have expended the time to ensure that the contract documents are best suited for the project and your performance of duties, do not file it away. Too frequently when problems arise on the project, the parties do not know how the contract addresses the issue, or even where the contract is located. Moreover, it is often discovered that the actions of the parties have been contrary to the contract requirements. As a result of the parties’ acceptance of the contrary acts, the contract provision may be deemed to have been waived or nullified. If that provision limited the liability of the design professional, that protection may have been lost.

It is important that each project team should have a copy of the project contracts and continually measure the performance of service against the contract. It can also be beneficial for the project team if a checklist of important clauses, requirements and deadlines is developed from the contract. A checklist of important contract requirements can become a useful quick reference guide to contract responsibilities. The design team should consider the contract as the “strategic plan” for the successful execution of their work and the project.

Time spent on the project contracts prior to the start of the project generates tangible benefits that are priceless. Taking the above steps will not eliminate claims, but rather will help to effectively control and limit them. As a result, your liability exposure will be controlled and reduced.