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ROLES THE DESIGNER CAN ASSUME

Design professional as design-builder

The design professional that assumes the prime contractual relationship with the client has frontline responsibility for both design and construction. The design professional may subcontract the build or construction part of its contractual responsibility to a construction contractor.

Business risk is not insurable, and that includes statutory fines and penalties, subcontractor defaults and payments problems, liquidated damages imposed due to late project completion and some unanticipated costs.

Contractor as design-builder

In this method, the construction contractor has the prime contractual relationship with the client, and frontline responsibility for both design and construction. The contractor may retain a design professional to provide traditional design and certain construction administration phase services. This method does not represent any different insurance risks to design professionals than they assume under traditional design-bid-build arrangements, even though the client has changed. However, because there is no longer a direct relationship between the client and consultant, effective communication is very important.

Design professionals should make contractors aware of the economic value of their services in controlling project costs, both in the design and construction phases. Because there may be conflicts between the design professional's responsibility to meet code requirements and the contractor's budget considerations, there should be a contractual mechanism to resolve technical conflicts. That contractual mechanism should include subcontractors. Design professionals should also define their authority so that their ability to carry out professional duties during design and construction review is not compromised.

As well as liability under the traditional professional standard of care, the design professional may, among other things, also be subject to liability for the warranty, guarantee and indemnification obligations of a builder, and strict liability, product laws and increased exposure under pollution and safety legislation.

Design professional in joint venture with contractor

The joint venture method of delivery brings the same kind of additional liability risk and exposure, as well as the risk of being 'jointly and severally' liable with the contractor. That means both the design professional and contractor are each liable to the client for the entire obligation. If one party cannot pay, even though it may be partly or completely responsible for the loss, the other party in the joint venture must make up the full amount. In most situations where a design firm and contractor form the prime entity, a limited liability company is formed.

Design professional as advocate consultant

Although the contract only recognizes one consultant, the one engaged by the design-builder, this does not preclude the client from retaining a consultant as its representative. The client should ensure that it has adequate professional advice to interact appropriately with the design-builder. In particular, the client should retain a consultant to represent its interests in the following areas:

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- ✓ Preparation of the project parameters and a statement of requirements
- ✓ Evaluation of the design-build proposals—design solution, schedule and commercial proposal
- ✓ Review of the detailed design as it progresses
- ✓ Coordination of the design with the client's design requirement
- ✓ Review of supporting documentation regarding certificates for payment and substantial performance

As the client's advocate increases its level of involvement in the project, risk can be shifted from the design-builder to the consultant.

Contract considerations

Penalty and liquidated damage clauses that seek to impose financial or equivalent penalties for late completion or inadequate performance should be avoided whenever possible. As with guarantees, coverage will not be afforded for claims that are based upon penalty clauses in the contract.

Limitation of liability

Unless provided for in a contract, the design professional has historically faced unlimited liability for errors in design and professional services. The design-build agreement should, whenever possible, include a reasonable limitation of liability in terms of time and money that applies to both design and construction deficiencies.

Termination of services

The contract should also include clauses that allow the design professional to terminate services in case of non-payment, without being in breach of contract.