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RISK ALLOCATION CLAUSES

Indemnity

Indemnification provisions allocate risk or liability between parties. In a contract between a client and design professional, the client might want indemnification from the design professional for liability or risk resulting from the negligence or other wrongdoing of the design professional. Design professionals, in turn, may want indemnification from clients for liabilities or risks arising from matters under the clients' control or responsibility, including responsibility for consultants retained by the client, thus protecting design professionals from risks beyond their control.

In basic terms, design professionals should not accept 'unfair' risk—risk that is not under their control. As with other terms that may appear in contracts, a basic test is whether the design professional's professional liability insurance will cover the risk. That said, it might well be appropriate for the design professional to seek indemnification provisions in agreements signed with its own consultants. Because the prime design professional is vicariously liable for the actions of interprofessional consultants, an indemnification provision can assist the design professional in recovering from a negligent subconsultant.

Warranties and guarantees

As mentioned under '*Purchase Orders*,' contract clauses that ask the design professional for warranties and guarantees should be examined carefully and, in most cases, avoided. Warranties and guarantees are appropriate for manufactured products and contracted work, but not for design professionals, who are governed by the 'professional standard of care,' requiring general conformity with the level of expertise of the specific profession.

Certification

By issuing certificates, design professionals can raise unrealistic expectations, create unexpected and unwanted legal relationships with other parties and preclude coverage under their professional liability insurance. To avoid these problems, the design professional should make it clear to the client through the contract language that what is being provided is professional recommendations and not absolute results.

Certifications should be based on the contractual scope of services and identified as to purpose. Also, it is reasonable that a certification should be for a specific time and entity, and limited either to facts directly known or clearly identified as an expression of professional opinion, including a statement that the certification is based on knowledge, information and belief.

When a financial institution or other party requests a certification, the design professional should be sure that the terms of the certification are consistent with the contract, do not create warranties or guarantees, or bring uninsurable liability exposure.

Instruments of service

Clients hire design professionals to perform services that are expressed through 'instruments of service,' such as drawings, plans and specifications. Those documents are not products or 'works for hire,' and the client does not normally buy or own such documents. Under standard contract forms, the design professional retains the design,

the copyright of the documents and the right to use the information contained in the instruments of service. The client usually has the right to retain copies for information and reference in connection with the use and occupancy of the project, but it is clearly stated that the documents are not intended to be suitable for reuse by the client or others for modifications to the project or any other project.

If the instruments of service are transferred, the design professional should insert a provision that disclaims any responsibility that might exist for any use beyond what is intended. The provision should also commit the client to take sole responsibility for any future use of the documents and indemnify the design professional for any claims, costs, losses or damages resulting from any future use or modification of the instruments of service.

Waiver of subrogation

As an example, subrogation means that an insurer, having paid a claim on behalf of a design professional, can then sue a third party that is really responsible to recover that money. Waivers of subrogation are often included in agreements between clients and design professionals. Waivers preclude the insurer from seeking recovery from the responsible party. While it is rare that a recovery from a design professional is based on the negligence of a client, the right to subrogation may provide an opportunity for the design professional to recover some costs. There should not be waivers between members of the design team. Each should take responsibility for its own actions.

Reports to third parties

The distribution of reports written by the design professional for a client to third parties could lead to third party claims against the design professional for negligent misrepresentation. If that third party relied on inaccurate information or statements in the report, and that reliance was reasonable, the third party has a valid cause of action. For that reason, the design professional should not only try to control the distribution of reports, but include appropriate qualifications and limitations on the opinions and information those reports express. (See '*Disclaimer of Responsibility to Third Parties*' under '*Design Practice*.')

Assignments

To the design professional, most of the risks associated with a client assigning its contractual rights to a lender are business and professional in nature, but there are some professional liability concerns. There are two basic questions: Is the design professional extending its liability through its statements to the lender? Could the instruments of service be used in a situation beyond the design professional's control?

The design professional's contract might be silent about the issue, allowing the negotiation of favorable terms, or it may specifically prohibit assignment. The decision to accept an assignment contingent on a loan default does not require the design professional to extend its risk by providing a certification to the assignee or extending rights to the lender beyond those already in the contract.