

Risk Management Advisory

ARCHITECTS AND ENGINEERS
PROFESSIONAL LIABILITY INSURANCE

Protecting yourself against claims for delays or extras

Contractors and clients frequently make claims against design consultants for damages resulting from construction delays, including claims for extra compensation allegedly arising from changes in the work caused by errors or omissions in the plans and specifications. Long delays on complex projects can result in massive claims because of the impact that they have on both a contractor's planned productivity and the resulting delay of multiple and often concurrent activities that affect the job schedule. Some delays may be the responsibility of the client, some the responsibility of the contractor, and others the responsibility of one or more members of the design team. Compounding the problem—and increasing the cost—is the fact that the impact of multiple delay events may be experienced concurrently. The defence of these claims often involves an expensive team of experts and lawyers, plus substantial disruption to the practice of the design consultant.

Factors that may lead to litigation

Many factors beyond the control of the design consultant influence the decision of the client or contractor to initiate litigation. These factors include underbidding of the project, unusually inclement weather, poor management of the construction contract by the client or contractor, unforeseen site conditions and the decision by clients to make changes during construction.

There are certain strategies the design consultant can employ to maximize protection in such situations. The suggestions listed below are not an exhaustive list, but they have been found to be helpful in the more frequently recurring cases such as: (a) incomplete and conflicting design information resulting in excessive Requests for Information (RFI); (b) large number of Change Orders and excessive design changes; (c) design interferences and improper co-ordination; and (d) delayed or inadequate review of shop drawing submittals.



Risk management tips

1. Design with adequate details and clear specifications.

Lack of clarity, ambiguity and even insignificant errors and omissions provide a fruitful source of complaints by contractors and clients. Therefore, the highest priority should be given to quality control at all levels, with processes that include internal peer reviews when developing detailed plans and specifications.

2. Insist on a pre-award conference between the client and contractor prior to signing the contract.

Whether jobs are competitively bid or negotiated, it is always helpful to have a pre-award conference, conducted by the design consultant, with both the client and contractor. Before problems develop on the project, the design consultant should have a colleague familiar with the project present to record minutes of the meeting to be circulated to all parties for correction. At the meeting, the roles of the design consultant, client and contractor should be discussed in detail. Special attention should be given to discussing the roles to be played by design inspectors and the design consultant in reviewing the contractor's work. Although the full scope of the pre-award conference will depend upon the circumstances of each project, certain procedures should be discussed in detail to avoid misunderstanding. For example:

- The contractor should be asked whether they are aware of any inaccuracies, errors or uncertainties in either the plans or specifications. The contractor should be clearly warned to call any such problems to the immediate attention of the design consultant as soon as they are discovered. The person to whom these problems will be reported should be clearly identified.
- The contractor and client should be given every opportunity to raise as many questions as they wish about the intent of the plans and specifications.
- Procedures for reviewing shop drawings, change orders, inspections or job visits by the design consultant should be

reviewed in detail. The extent and limitations of the design consultant's authority must be made known. Any element of procedure that appears to involve barriers should be discussed and, if possible, eliminated.

3. Establish in the design consultant/client contract a clear and precise understanding of exactly what performance is expected of the design consultant during construction.

When the design consultant has a general or periodic review mandate, language such as "supervision" or "ensure" should be avoided. Use current, industry-consensus standard forms that match the scope of services being provided wherever possible. On major projects, consider discussing with legal counsel the possibility of spelling out exactly the frequency and timing of design consultant's appearances on the jobsite for routine visits or observations. Frequently, general language commonly found in client/design consultant agreements is a source of different expectations between the client and design consultant.

4. Choose carefully the personnel who will work with the contractor and client.

Claims frequently arise from communication issues between the design consultant's personnel and the contractor's personnel. When a project encounters trouble, personality differences often can lead to an aggravated situation. When

faced with trouble on the job, the design consultant's representative must remain calm, and be both fair and firm. Daily field work is often assigned to an inexperienced or unqualified person because of economics. The cost of defending this practice greatly exceeds the savings in salary.

5. Keep detailed records of all jobsite contacts.

It is very helpful for the purpose of defending a claim to keep photographic date stamped records of the construction as it progresses and records of the time and date, weather conditions, work being performed by the general contractor and subcontractors, oral conversations, contractor's equipment on the jobsite and other pertinent job data. Whenever oral conversations occur with the contractor or subcontractors, you should note the date, time, place and persons present. All unusual conditions or events should be documented and photographed.

These documents are invaluable in determining what occurred during the course of construction. Often, recollections fade, witnesses die or move away, or the credibility of a witness may be doubtful. Documentary proof of this type is very persuasive and helpful to the design consultant's defence team.

6. Develop effective and efficient procedures for handling shop drawings and submittals.

Avoid delays in processing shop drawings or making unreasonable rejection and resubmittal requirements. Require the contractor to submit a schedule at the beginning of the project. Keep

a log showing the date and time that a shop drawing or submittal is received, the identity of all persons who process the submittal, the date the submittal is transmitted back to the contractor or client, and any relevant comments. When a submittal is incomplete or inadequate, try to adopt a helpful attitude in explaining what information or changes are required, but do not “correct” the submittal. If the contractor submits an overwhelming number of RFI’s, request that they prioritize them with reference to their critical path schedule, so that the more pressing ones may be addressed first.

7. Give special care to the handling of job correspondence.

Care should be given to make sure that the content and style of job correspondence, including emails, is clear and businesslike. Important telephone discussions should be documented either by job correspondence or internal memoranda. The same rules of clarity of expression and businesslike tone apply to internal memoranda, including emails, as to job correspondence.

The project manager must have an effective and efficient system of responding to inquiries by the contractor and client in a timely manner. Delay in response is often capitalized upon by opposing counsel as proof of inefficient management of the job by the design consultant.

8. Pay special attention to job schedules.

It is common for specification provisions to require the contractor to submit job schedules to the design consultant. It is easy to simply fold these away and pay little attention to them. However, the job schedule should be constantly reviewed for comparison of actual performance against planned performance. The design consultant should be looking for areas where the contractor is losing time. This may help head off lost time and will assist to minimize the prospect of a claim.

What to do when trouble comes

The most serious problem design consultants can face is when an error, omission, or inadequacy in the plans or specifications results in a stoppage of work or a prolonged slowdown. The attitude and manner of the design consultant’s response to such a problem is just as important as the technical solution.

Whenever an error has been made (or even suspected of being made), immediately notify your insurance provider. Avoid responding to allegations that the contractor or other project members may advance, just as the design consultant should avoid making admissions of their own responsibility without consultation with their insurance provider or independent counsel. Adopt a calm and patient attitude, but work

speedily and effectively towards a solution that allows the job to progress efficiently.

A common symptom of future trouble is a job that is moving slowly and behind schedule. Whenever this occurs for reasons that do not appear to be related to problems with the plans and specifications, it is a good rule of thumb to assume the contractor may look for a way out. An indicator that this may happen is if the design consultant begins to see a flood of emails or letters from the contractor trying to “set up” the design consultant for future claims. When this happens, be sure to respond as promptly as possible in light of the principles discussed above. Likewise, consult with counsel to plan responses to critical items. Keep the tone of correspondence as fair and firm as possible.

Conclusion

Although it is difficult to avoid being involved in a claim when a project is significantly delayed and extra costs are incurred, the design consultant’s knowledge of the plans and specifications and the ability to carry out the role of the client’s representative in a competent and careful manner can mitigate the risk of the design consultant being held responsible for delays and extras.

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