

Five Hot Button Issues in Design Agreements

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Far too often, project owners and design professionals embark upon construction projects without the benefit of definitive written agreements, relying instead on a handshake or the countersigned proposal of the professional. In both instances the parties are not well served, for there are many elements of a design services agreement which should not be left to an oral or incomplete written agreement.

A well drafted agreement will lay out key business terms, the responsibilities of each party, and will manage expectations and risks. Before they can reach that agreement, project owners and design professionals may need to navigate various hot button issues in design agreements. Here, we have selected five for discussion.

#1: Ownership of the Instruments of Service

Project owners frequently seek ownership of drawings prepared by the design professionals, which they want the right to use on the project, without additional

compensation or a release or indemnity to the design professional for such use. Some design professionals, however, will not agree to give up ownership or copyrights in their designs, but will instead grant the project owner a license to use the drawings for the project subject to payment for services performed and an appropriate release and indemnity for any use of the drawings.

Design professionals also prefer to complete the project and do not want project owners to take their designs and complete the project with other design professionals. In instances where design professionals agree to give up ownership and copyrights, any design element in the drawings (even those previously developed) can become the property of the project owner unless the parties include language that expressly retains the design professional's ownership of its standard design elements or their ability to re-use standard details on other projects.

#2: Representations & Warranties

Project agreements should not include provisions that treat design professionals like contractors.



Kenneth Block, left, and Melissa Billig, partners at Tannenbaum Helpert Syracuse & Hirschtritt.

For example, when design professionals agree to “warrant” or “represent” that their services are error-free or to correct errors or omissions in their services, design professionals may be agreeing to be contractually liable for breach of warranty claims even in instances where the services at issue were not negligently performed. Because professional liability insurers refuse to provide coverage where there is a heightened standard of care or express warranties, including this language in project agreements will, in reality, not serve either party.

#3: Indemnity

No one likes discussing indemnity provisions, not even lawyers. These provisions are often tedious

and filled with (unnecessary) legalese. Indemnity provisions are, however, necessary and must protect parties from third-party claims without risking insurability. Project owners desire a defense and as broad an indemnity as possible. Design professionals desire an indemnity that does not void available insurance or subject them to unlimited liability.

In the case of professional liability insurance, design professionals and their professional liability insurers will not provide a defense to project owners or pay defense costs up front. These insurers typically determine coverage for defense costs *after* a court determines that the design professional was negligent. Commercial general liability insurers may afford a defense on certain types of claims not covered by professional liability insurance such a work place bodily injury to an employee of the design professional.

Understandably, design professionals resist defense and broad indemnity obligations as they may be potentially uninsurable and can expose them to significant out-of-pocket costs. In addition, if project owners insist on including overly broad indemnities or defense obligations, these burdensome obligations could result in significant fee increases to balance the risks.

#4: Limitations of Liability

Design professionals maintain professional liability insurance to cover any damages caused by negligent errors and omissions in their services and typically seek

limitations of liability. The rationale for capping damages is that the fee paid to the design professional may not justify the firm's assumption of risks. Project owners often consider limitations of liability when professional liability insurance is sufficient or project specific. Project owners can, however, be reluctant to limit liability to available insurance because coverage limits can be eroded by claims on other projects and defense costs, including legal fees.

Project owners, alternatively, consider capping liability to agreed upon dollar amounts (for example, the amount of insurance coverage limits required in the contract), which affords protection against eroding policy limits. Limitations of liability are the hottest of "hot button" issues for design professionals and should be considered by project owners when appropriate. Limitations of liability should be carefully examined to make sure the limits are reasonable for project size and complexity.

#5: Redesign Obligations

Project owners often try to impose redesign obligations, as a basic service, through the construction documents phase, including when cost estimates and/or bids exceed the project budget, sometimes without any limitation on the number of redesigns. Design professionals, however, are resistant to these (potentially unlimited) obligations as they have no control over construction costs, market conditions or bids submitted by potential contractors.

In addition, design professionals desire additional services compensation for redesign services after the design development documents are completed, except when redesign is required due to their negligent errors or omissions. Project owners should consider the ramifications of broad redesign obligations, which can include under-designed projects (ensuring that bids come in under budget), which may not fully meet project needs. In addition, design professionals may bump up basic services fees to account for anticipated redesign services to ensure a profitable project.

It is critical to balance what may be achievable with what is reasonable under the circumstances and, importantly, what hot button issues may derail contract negotiations. The contracting parties would be best served by first discussing the business terms of their deal and any hot button issues *before* drafting the agreement. This will facilitate meaningful discussions between contract partners and avoid protracted negotiations (and hefty legal bills).

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