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The Designer's Pre-bid Standard Of Care In A Design-Build Project

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The Design-build continues to grow in popularity as a project delivery vehicle. Yet this popularity brings its own challenges. Design-build alters the traditional division of duties between designers, builders, and owners. Among the most obvious of these alterations is the transfer of the designer's obligations from the owner to the design-builder. Though it seems simple on the surface, this transfer creates new questions regarding the allocation of risk among the parties.

One such question arises when a design-builder prepares its bid for a project. The design-builder virtually always bases its bid on a preliminary design, which is itself based on the owner's request for proposals (RFP). All parties recognize that the preliminary design will change over the course of the project. But while some design change is expected, the design-builder must be able to draw a reasonably accurate bid from this preliminary design. In doing so, the design-builder relies upon the designer's professional skill and experience. If the designer fails to exercise the requisite skill, it can cause the design-builder to significantly under-bid the project. In such a case, the design-builder can lose a substantial amount of money.

To mitigate this risk, the law holds designers liable for a failure to exercise the reasonable care typically expected of similar professionals in similar circumstances. But this standard is malleable, and courts have had difficulty assessing what care is "reasonable" in the pre-bid context. As such, those undertaking a design-build contract should be aware of the risk of design change and should strive to distribute it appropriately in their contracts.

What is the designer's duty of care in a design-build contract?

Outside of the design-build context, the allocation of risk between the designer, builder, and owner relating to the design stage of a project is fairly well-established, though each state's law may vary. Generally, in preparing its drawings for the owner, the designer must exercise the care, skill, and diligence reasonably expected of members of its profession under similar circumstances (often referred to as "reasonable care"). The owner then warrants to the builder that the drawings, if complied with, will create a product acceptable to the owner. The builder typically returns this warranty with its own: that it will construct the project according to the drawings in a reasonably workmanlike manner. The owner can thus rely on the builder to build according to the drawings in a workmanlike manner, while the builder need not second-guess the drawings provided to it by the owner. And the designer can be comfortable that its exercise of reasonable care in preparing the drawings insulates it from a claim by the owner.

In the relatively recent world of design-build, though, this allocation is less clear. The designer now owes its duties to the design-builder instead of the owner. This fundamentally alters the relationship

between the designer and its principal. While owners usually rely heavily upon designers to act as their representatives and oversee a design-bid-build project, the opposite occurs in a design-build project. The design-builder oversees the designer instead.

Yet despite this, the design-builder still relies heavily on the designer to exercise its particular technical skill in preparing drawings for the project. In fact, designers are often sought out specifically because they possess specialized technical knowledge that the design-builder lacks. Most courts to address a designer's duty to a design-builder recognize as much. In the absence of specific contractual language, then, designers must generally discharge their duties with the same reasonable care that would be required were the designer employed by an owner.

How does this duty of care apply in the pre-bid context?

Nowhere is a design-builder's reliance on its designer more pronounced than in the pre-bid stage of a project. The design-builder must make quantity, cost, and schedule assumptions based upon drawings from the designer in order to bid a project. This bid is typically prepared with strict time and monetary limitations. Hence a designer will prepare pre-bid drawings that are often only around 30% complete. But, even though the design-builder is using incomplete drawings, the drawings are intended to permit a reasonably accurate bid. Unsurprisingly, this situation creates controversy.

The fact that designers must exercise reasonable care does little to solve the problem. The question of what constitutes "reasonable care" is difficult to analyze in the simplest of construction contracts. Here, that same question arises in the novel context of a design-build contract. And it appears at a stage in that contract in which the design—as though drawn by Schrödinger himself—is expected to be simultaneously incomplete and yet complete enough to permit a reasonably accurate bid. The parties can be forgiven for disagreeing upon what level of care is "reasonable" under these circumstances.

Courts too have difficulty making this distinction. For example, the recent Massachusetts case of *Middlesex Corporation v. Fay, Spofford, & Thorndike, Inc.*, SUCA201502592BLS1 (Mass. Super. June 28, 2019), had the court parsing particular specifications to determine whether design changes were due to initial design deficiencies or anticipated design development. The court ultimately appeared to draw a line between two groups of design changes. The design-builder could recover for those design changes that were the product of miscalculations or misinterpretations of the RFP. But the design-builder could not recover when the design failed to show a level of detail beyond that generally expected in pre-bid drawings.

How can the parties avoid these disputes?

Middlesex Corporation shows that it can be difficult to determine when a designer exercises reasonable care in the pre-bid context. And having a factfinder make that determination after the expense of litigation likely involves costs and risks unpalatable to both designers and design-builders. To that end, the most efficient way to handle liability for design development is to apportion the parties' risk through a pre-bid design subcontract. Below are a few types of contractual provisions that may prove useful in doing so.

Performance Requirements

Parties to a design subcontract are generally free to agree that a design will achieve a specific result. Of course, designers will usually be loathe to guarantee that the end product will perform in a certain way. But a designer may be willing to guarantee that its drawings will comply with the RFP or with particular engineering or architectural principles. Indeed, design-builders may be hesitant to contract with a designer who is unwilling to guarantee that its preliminary design will meet the RFP.

Cost Overrun Provisions

Several reported cases contain examples of how design-builders share risk for cost overruns with designers. For instance, in *CRS Sirrine, Inc. v. Dravo Corp*., 445 S.E.2d 782 (1994), the designer would not be liable for the first $750,000 of cost overruns on the project. Past that point, the designer was liable for cost overruns resulting from its own errors and omissions. A similar provision was at issue in *Walsh/Granite JV v. HDR Engineering, Inc.*, Civ. A. No. 17-558 (W.D. Pa. Mar. 7, 2019). There, the parties agreed to a quantity matrix for materials. If the materials exceeded that matrix, the design-builder was to establish a contingency amount of $1,000,000 to absorb those overruns. Only once that fund was empty could the designer be held liable for quantity overruns for materials listed in the matrix.

Limitations on Liability

Finally, designers and design-builders can elect to cap the damages due under a design-build contract. Often this takes the form of a waiver of a specific form of damages, such as consequential or indirect damages. It may also appear in a numerical waiver, though—usually some multiple of the amount due in the design subcontract. Such waivers are often undesirable for the design-builder, however, as it is more exposed than the designer to substantial losses resulting from defective pre-bid drawings.

Conclusion

Even in the absence of a contractual provision, a designer owes a duty to a design-builder to perform its professional services with reasonable care. Should a designer fail to exercise this reasonable care, the design-builder can typically recover for its resultant costs. But the vagaries of what care is “reasonable” inject significant risk and uncertainty into this analysis. As such, all parties to the design-build process should strive to define the parties’ respective responsibilities for cost and quantity increases as thoroughly as possible through a pre-bid design contract.