

BLOG

Design Delegation: Who Bears the Risk?

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All too frequently, design firms incur significant liability not because they did something wrong, but because they failed to carefully scrutinize their contracts and left too much room for ambiguity. Contractual certainty, and documentation of communications, becomes increasingly important when it comes to design delegation.

Together with growing pressure to shorten project schedules and decrease costs, there is a general acknowledgment that specialty subcontractors often have their own approach to fabrication and installation of project components such as curtain wall systems, fire suppression systems and the like. It is therefore becoming increasingly common for architects and engineers to delegate aspects of the project's design to the general contractor and its subs. Almost all such delegation is done pursuant to performance specifications provided by the architect or engineer of record, but if the contract and/or project documentation is ambiguous, the design professional may look back and wish that it had provided detailed design of every connection, nut and bolt itself.



More Designers, More Exposure

Although the AIA A201-2017 provides a framework for the process of design delegation and the apportionment of fault between project participants, it provides little detail. The complexities introduced are numerous, and should be acknowledged in the contract(s) and in project documentation:

- The ability to legally delegate certain design elements varies by jurisdiction; licensure requirements also vary by state. Care must be taken to ensure that the process by which design is delegated to a contractor is compliant with local regulations.
- There is no question but that the architect or engineer of record is responsible for the adequacy and accuracy of the performance and design criteria. But with the contractor to whom the design is delegated having to procure another properly licensed design professional to sign and seal the drawings, specifications and other submittals, what level of review is appropriate by the engineer of record to ensure a lack of conflict with the larger design? Such considerations, if not dealt with on the front end, could cause delays and misunderstandings that can lead to disputes.

- What happens, and who is responsible, if the delegated aspect of the project doesn't properly interface with other project components? Will that depend upon the level of review cited above and/or the wording of the stamp that was used to suggest "approved as noted" or something to that effect? Such issues should be addressed on the front end.
- Note the differing standards of care that typically trigger the liability of a design professional as compared to a constructor. With the contractor(s) taking on responsibility for some portion of the design, will they get the benefit of a "negligence" standard of care for that portion of the project, or simply be required to substantially perform all of its contractual obligations? If the contract doesn't address the issue, the resulting ambiguity can make litigation more likely.
- Most contractors' commercial general liability policies expressly exclude coverage for design services. Does the contract require the contractor to have professional liability coverage?

Owners' reasonable expectations for efficiency, together with new technologies and an acknowledgment that constructors are the installation experts, suggest that design delegation will continue to expand. But the blending of roles and responsibilities gives rise to complexities that need to be dealt with on the front end. The parties' perspectives and expectations will vary, and the only assumption that *should* be made is that something will go wrong. If and when it does, contract certainty and detailed project documentation will hopefully keep small problems from becoming litigable issues.

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