Avoiding Unintended Liability for Design

A recent trend in design-build contracting, especially on large projects, is for the owner to incorporate a heightened standard of care for the design aspects of the building. Creeping into contracts is language requiring the project to perform according to unspecified expectations, such as “fit for owner’s use” or “suitable for the use intended”. This heightened, ambiguous standard of care conflicts with the traditional designer’s standard of care—the ordinary care expected of reasonably competent designers—leaving a gap between the performance that may be required from the design team and the performance expected by the owner. This gap may result in uninsurable exposure to the design builder. This article explores that gap and how to prevent or handle it.

Traditional Design-Bid-Build Projects

In a traditional design-bid-build project, the owner hires the design team, and the contractor builds the design provided to it by the owner. The design team is typically liable to the owner for any failure to meet the standard of care resulting in design deficiencies. The owner would absorb any loss related to failure of the building to perform according to the owner’s expectations that did not result from a breach of the standard of care. Anecdotally, studies have shown that these losses have ranged between 3-4% of a project’s hard costs.

The contractor who builds according to the plans and specifications under the design-bid-build model should not be liable for any failure by the building to perform according to the owner’s expectations. The contractor makes no promise that the building will perform to any particular standard. To the contrary, under the Spearin doctrine—named after the United States Supreme Court case Spearin vs. United States, 248 U.S. 132 (1918)—construction contracts include an implied warranty by the owner that the plans are accurate and suitable for the owner’s intended purposes. Thus, if the plans and specifications are not accurate or not suitable, the owner cannot recover from the general contractor for damages related to building performance deficiencies. Moreover, an owner who breaches the Spearin warranty may be liable to the contractor for damages, including actual costs and delays incurred in rectifying deficiencies so that the building may be built.

Heightened Design-Build Requirements - An Emerging Trend

When the owner contracts for a design-build project, the responsibility for design shifts to the contractor, and there is no implied warranty of the plans from the owner to the contractor.

Recently, design-build contracts, especially those found in large infrastructure projects and P3 projects, are incorporating elevated expectations for sufficiency of designs. These creep into contracts in at least three ways: Elevated warranties, standards of care, and indemnity requirements.

When these elevated contract requirements call for results that may not be met by the design team’s exercise of ordinary care, any
damage resulting from failure to meet such requirements generally would not be covered by the design team’s professional liability policy because such policies cover only damage resulting from a breach of the ordinary standard of care. Additionally, the contractor’s own general liability policy would not cover such damage for a multitude of reasons, such as the absence of an “occurrence” and the “your work” exclusions. Thus, under these new contract requirements the contractor faces real exposure to an uninsurable loss.

Elevated Warranty

Most prevalently, we are seeing owners extracting warranties from design-build contractors to the effect that the building will be “fit for the intended use” or “suitable for the intended use”. Sample language includes:

The Work shall be free of Deficiencies, shall be fit for use for the intended function and shall meet all of the requirements of the Contract, including, without limitation, any performance standards.

Unfortunately, whether a building is fit for its intended use, like beauty, may be in the eye of the beholder. The building may be judged according to the owner’s unstated, subjective standards. For example, consider:

- Power line towers that vibrate under certain wind conditions – the design may not be negligent because the wind conditions might not be foreseeable yet may increase maintenance costs—How much extra cost is too much? Subjective standard;
- Tunnels that leak, but not significantly – How much water is too much? Subjective standard;
- Windows and other exterior systems that keep out moisture and insulate, but admit noise – How much noise is too much? Subjective standard;
- Interior lighting that is adequate, but less than ideal – How much light is enough? Again, subjective standard.

One project for an electrical and utility vault included this language:

Contractor absolutely and unconditionally warrants the Relay and Substation Enclosure at the Substation (“Substation Enclosure”) as provided in this Section 11.7 for the period and with the consequences set forth herein. Contractor absolutely and unconditionally warrants that the Substation Enclosure shall be completely weather-tight (as defined herein) in all weather conditions for a period of ten (10) years from the date of Final Acceptance. “Weather-tight” shall mean that no water, rain or other moisture shall leak, seep or otherwise pass through the roofs, walls, doors or accessory equipment of the Substation Enclosure.

Imagine the contractor’s exposure under such language—having to keep out any moisture whatsoever, such as moist air entering the vault through the ventilation system and condensing on the wall of the vault. Technically that would be a breach of this warranty. Would the contractor be required to retrofit the system to include moisture-scrubbing air handling equipment, even though the
condensation on the vault wall causes no physical damage or injury to any equipment therein?

**Elevated Standard of Care**

Additionally, such contracts may include expressly elevated standards of care, such as:

Contractor holds sole responsibility, *regardless of the ordinary standard of care*, for providing, the design and construction of the Project free from all defects which meet the requirements of the Contract, including any portions thereof provided by Contractor’s Subconsultants, Subcontractors and Suppliers.

Under such a clause the design-build contractor may have to absorb any liability for designs not meeting owner’s heightened expectations, because ordinary care by the design team may not anticipate such heightened expectations and thus the designs may comport with the standard of care.

**Elevated Indemnity**

And finally, indemnity clauses may themselves import the elevated standard of care. Sample language includes:

18.1.1 Subject to section 18.1.2, DB Contractor shall release, protect, defend, indemnify and hold harmless the indemnified parties from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands, and losses, in each case if asserted or incurred by or awarded to any third party, arising out of, relating to or resulting from:

(M) Errors, inconsistencies, or other defects in the design or construction of the project.

Again, the contractor may absorb liability for injury to others caused by non-negligent designs, since that liability may not be passed on to the design team.

**A Word to the Wise**

Design-build contractors are cautioned to review carefully contract clauses that might otherwise escape close scrutiny. Contracts should be reviewed for language that implicates a heightened standard of care. Particularly, any warranty, standard of care, and indemnity language should be reviewed and modified, if possible.

To avoid the risk of subjective standards creeping into a contract and creating liability for the contractor, any performance requirements should be identified and be carefully specified. For example, “suitable lighting” should not be left undefined. The lighting contractor should require the owner to specify in industry terms the expected square footage of coverage, how bright the light should be in lumens, and what color the light should be in degrees Kelvin. Similarly, air conditioning performance should be specific in terms of degrees Fahrenheit to be maintained per square foot of area for defined durations.
To counter a “fitness for use” or similar warranty requirement, the contractor should consider adding language that grants the contractor the affirmative defense that non-negligent designs were “state of the art” at the time provided to the owner. Additionally, the contractor will want to ensure that the contract carefully defines the intended purpose and end use of the project and voids the warranty obligations if the owner changes the purpose or end use.