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For Design Professionals

Newsflash! Construction-Led Design Build: Understanding the Risks Faced by New York Design Professionals

By Matthew Gumaer

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Contractor led design-build has become increasingly popular nationwide — particularly in New York, despite the legal uncertainties involved. Organizations supporting design professionals have taken a cautious view of this type of project delivery, particularly for vertical construction.

For example, The New York State Society of Professional Engineers continues to take the position that "design-build services in New York can only be provided when the project owner, contractor, and design professional sign a three-way contract" and "a design professional who provides professional services while under contract with the contractor could be charged with professional misconduct for aiding and abetting the offering of professional services by a party … not authorized to do so."

The New York state chapter of the American Institute of Architects prefers the "construction manager as contractor" (construction manager at-risk) to the design-build system. This is due, in part, to the fact that the "construction manager as contractor" model allows for early involvement of the construction manager to enhance communication among the project team and conduct an early review of

constructability issues, while allowing for a clearly defined and well-accepted role for the project architect spelled out in its contract with the owner.

Despite established industry standards and potential liability, many design firms face economic pressure to accept design-build projects. However, accepting these projects often involves a design professional effectively becoming a subcontractor to the design-build contractor, relinquishing its role as a loyal and trusted advisor to the owner.

Potential Downfalls of Subcontractor Status

One might expect that having the contractor positioned between the design professional and the owner would offer the design professional some insulation from owner claims. Indeed, there are arguments to be made that the absence of privity (a direct contractual relationship) between the owner and design professional eliminates, or at least limits, the owner's ability to assert contract claims against the design professional.

However, in New York, there is precedent supporting an owner's ability to directly sue design professionals for economic loss in the absence of privity. In 1989, New York's highest court, in Ossining v. Anderson, allowed the plaintiff school district to pursue direct claims against engineering consultants with whom it had not contracted. In that case, the district alleged that the engineering consultants had improperly concluded that certain school facilities were structurally unsound, that the district relied on these inaccurate assertions, and that it had unnecessarily expended funds as a result. The court concluded that, because the engineering consultants knew that the district would rely on their findings, the consultants could be held directly liable to the district for their alleged negligent misrepresentations.

Of course, in the context of design-build, the design professional always arguably views itself as designing a project for the owner's benefit and is therefore well aware that the owner will be relying on the adequacy of its professional services. This may go a long way toward establishing a sufficient relationship between owner and design professional to allow for potential liability for negligent misrepresentations, particularly where there is significant direct contact between the design professional and owner.

"So what," you may wonder? Design professionals are normally subject to potential liability to owners in the context of design-bid-build projects so, this is nothing new. You may argue that design professionals have gone to great lengths to develop contracts to fairly define, allocate, and limit their risk to ensure their prospective liability is both foreseeable and reasonable in scope. Design professionals have any number of helpful contract clauses at their disposal including limitations of liability, waivers of subrogation, waivers of consequential damages, choice venue and applicable law, statute of limitations, and many others.

However, in the context of contractor led design-build, all of these favorable clauses are included in the design professional's contract with the contractor and not the owner with whom it has no direct contractual relationship. Therefore, at best, the absence of privity with the owner may be a double-edged sword. You may be left to argue that the absence of privity with

the owner precludes an owner's claim understanding that, should the claim survive that challenge, there is likely no contractual "rulebook" controlling that claim.

The Impact of Uncertainty

One impact of New York state's lack of clarity on the subject of design-build is that it trickles down, creating continuing uncertainty about the precise legal relationship and obligations between the design professional and project owner. Traditionally, the parties carefully define and allocate risk in their contract but, in the absence of a direct agreement or a clear set of legal obligations and expectations, uncertainty abounds.

If you're a design professional doing design-build work, or are thinking about pursuing that work, you may need to retool your approach to risk management — understanding that favorable terms in your agreement with the design-build contractor may do nothing to limit owner claims. Careful attention must be paid to not only the traditional, normally insurable risk for failure to meet the standard of care, but also to the risk of scrutiny by state agencies, and uninsurable risks for construction and joint venture obligations as well as warranty obligations that will likely be uncovered.

Matthew Gumaer is a Partner at Goldberg Segalla. Mr. Gumaer has over two decades of business and commercial experience including representing clients in contract negotiations and disputes, managing difficult on-going construction projects, and handling insurance and intellectual property matters. He has defended architects, surveyors, attorneys, accountants, and other professionals across a broad range of matters including construction, claims coverage, professional liability, and wrongful death litigation. Over the past 20 years, he has managed all aspects of construction-related matters handling issues from contract negotiation through project closeout, as well as worksite injury claims. He also has experience overseeing a variety of complex and catastrophic claims involving products liability, toxic torts, and commercial litigation.

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