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Designers v. Contractors:

Common Project Disagreements and Legal Battlegrounds

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A. Introduction

These days, it is a rarity for projects to be completed on schedule, within the owner's budget, or without some personnel strife. When projects get off track, it is common for designers and contractors to find themselves at odds with each other. This panel will discuss the typical problems that arise between design and construction teams during projects and how those contentious issues develop into legal battles. Particular topics include: design delegation issues; uncoordinated and vague contract documents; RFIs and change orders; Design-Build; Initial Decision Maker quandaries; personnel changeover; delays; assignment of liability; standard of care v. workmanship; and impacts to the owner.

B. Design Phase Battlegrounds

A) Design Delegation / Contractor Led Design

The AIA describes "delegated design" as a form of "collaboration between a design professional and contractor where the contractor assumes responsibility for an element or portion of a project's design." Thus, only a specific portion of the design is allocated away from the design professional to the contractor. The common rationale behind carving out a discrete element of design is, typically, the contractor (or a specialty subcontractor/manufacturer) has specific expertise or specialized knowledge in a particular field that allows it to achieve a more reliable design or more efficient construction.

Procedurally, the designer (of record) will provide performance criteria for which the delegated portion must meet. Next, since the contractor is not a licensed design professional, the contractor will employ a licensed specialty designer to generate the plans to comply with the performance criteria.

Of course, when a certain, distinct scope is assigned to a party who does not typically undertake that role in a project, issues can arise:

1. Clarity and Alignment: The parties must ensure the contract documents (general conditions, design drawings, specifications) clearly and explicitly identify which elements are to be designed by the contractor and avoid conflict amongst them as to what party is obligated to provide the design.

2. Supervision and Oversight: Who has the ultimate responsibility for supervision and oversight? Does the Owner's Construction Administration manager/representative have any responsibility?

3. Liability: Is a failure of the delegated portion a design failure? Defective workmanship? Incomplete or inaccurate performance criteria? The delegation exacerbates typical finger pointing.

4. Insurance: Does the delegation require procurement of professional liability coverage by the contractor? If not, the contractor must be aware of design requirements and ensure its specialty designer has coverage in place.

B) Contract Documents: Complete? Vague? Conflicting?

Designers will routinely remind contractors (and owners): there's no such thing as a perfect design and flawless set of contract documents! This is why the standard of care is not one of perfection, but rather to perform

its services consistent with the degree of care and skill ordinarily exercised by the members of the profession under similar circumstances.

Of course, the contract documents are what contractors rely upon to properly bid and build the project. So, naturally, incomplete, vague or conflicting contract documents cause headaches and confusion amongst the parties. The common goal should be that the contract documents properly articulate the same message when read together. However, if disputes arise at the outset of the project, the parties are off to a terrible start. Routine arguments and disputes center on:

1. Designer Arguments: Designs and specifications are complicated and, thus, it should be expected that some conflicts might exist across the contract documents. Moreover, the contract documents are complementary to each other and what is required by one shall be binding as if required by all. Thus, where an element is apparent in one drawing, but omitted in another, the contractor is obligated to read all documents together to determine the exact scope of work.

2. Contactor Arguments: The design team developed and prepared the contract documents and had extensive time and intimate knowledge in doing so. As the drafter, any conflict or ambiguity should be held against the designer. Thus, when bidding the project, the contractor should not be expected to locate and uncover all conflicts or ambiguities. Where open and obvious ("patent") ambiguities exist, the Contractor has a duty to seek clarifications or submit RFIs to determine the intent of the documents. However, where conflicts or ambiguities are less obvious or do not uncover themselves until later in the project, the designer should be held liable for the error or omission.

3. Avoidable Problems: Avoid vague or non-specific language when definite or explicit language can be utilized in its place. Catch-all phrases like "best practices", "prevailing custom", "reasonable", or "everything required to achieve intended results" are generally inserted to protect against something that may be missed, but rarely provide clarity to the contractor as to what is exactly required.

4. Project Delivery: Do the parties even understand the goals, timeframes, and project schedule?

C) Design Build Projects

Design-Build project delivery creates unique challenges that are important for contractors and designers to understand on the front end in order to avoid disputes during and after construction. In a Design-Build scenario, the contractor assumes responsibility for the entire project's design, and will typically subcontract this obligation to a lead designer and, therefore, will look to flow any design-related liability down to the designer. However, a contractor's risk profile differs greatly from that of a designer and, therefore, the liability a designer will be willing to assume in its design agreement is usually more limited than what a contractor typically agrees to with an Owner. This dichotomy creates unique challenges as the designer and contractor seek to "partner" with each other to deliver a successful project. The following examples are provided for illustration:

1. Quantity Risk: Due to the nature of Design-Build projects, the design is not 100% complete when bid prices are developed and submitted by a contractor to compete for the project. Normally, the design will be no more than 30% developed before a contractor must submit its competitive bid proposal. Because the project's price is not based on a complete design, it should be expected that quantities of materials and manufactured products will change as the design is further refined. A contractor should rely on its own expertise in estimating when developing its competitive bid price. Designers should be careful not to agree to be responsible for quantity risk and should be especially wary when a contractor

requests a quantity takeoff of preliminary plans. If the parties have not agreed up front to the division of responsibility for quantity risk, then the designer should expect the contractor to make a claim for quantity growth.

2. Delays in Design Development: Contractors typically require a Designer to agree to a schedule that defines the progression of design development through certain milestones. When designers fail to meet these milestones, they risk opening themselves to delay damages asserted by the contractor in the form of pass-through of liquidated damages, acceleration costs, and inflationary costs, among others. Designers will argue that contractors are in control of the construction schedule and are in the best position to manage through any unforeseen issues that affect the design schedule. However, contractors are accustomed to pushing on their subcontractors in a way that designers often do not experience.

3. Owner Caused Delays: Public projects often require periodic design reviews by the owner at various stages of design development. This practice is similar to what occurs during a typical design-bid-build project where the Owner has more authority over the design. In some instances, the owner may create unforeseen design delays through their own review process through excessive questions or requiring more detailed design at various stages that may not otherwise be required. Contractors will default to pushing potential delay liability down to the designer with whom it delegated all design responsibility. Designers should be prepared to provide the contractor notice of owner-caused delays, something designers are not accustomed to.

C. Construction Phase Battlegrounds

A) Requests for Information

In its most basic form, a Request for Information ("RFI") is an inquiry from the contractor to the design team for a clarification of the plans, drawings, or specifications to help explain what the contractor believes to be a conflict or ambiguity. RFIs are expected and part of every construction project as even the most detailed contract documents are still subject to human subjectivity/interpretation. So, contractors will inevitably have questions or request confirmation that they have interpreted the documents correctly. Of course, it should be anticipated that larger and more complex projects should result in more RFIs.

Where "common practice" turns into potential trouble depends on many things, but a few exacerbating factors include: 1) the frequency in which they are employed; 2) the number of requests; and 3) whether (in the eye of the beholder) the requests seem legitimate. During the course of the project, RFIs can quickly turn into frustration, suspicions of ulterior motives, and/or personal conflicts.

Naturally, contractors cannot proceed with certain work until the design team responds to the RFI. It is the designer's obligation to timely respond and keep up with responses to keep the project on track. The longer the contractor has to wait on responses, the more likely that the frustrations boil over and the project schedule is jeopardized. Beyond immediate delay in work, RFIs are typically the catalysts to change order requests for alterations in the scope of work, or potentially, claims for delay damages owed to the contractor.

Ultimately, when the project goes awry and litigation looms, contractors inevitably contend that a significant volume of RFIs is uncontroverted evidence that the project was uncoordinated and defective in its design. In other words, the contractor argues… "look how many questions we had! How could a properly designed project require all of these clarifications?!?!"

Designers, on the other hand, become skeptical of the contractor's intentions as RFIs begin to mount. Designers may initially be annoyed at the number of questions. While some questions can be answered quickly, others might require some time to formulate responses – particularly, if the architect has to confer with its subconsultants for answers. So, time invested in answering RFIs could boil into frustration. Those frustrations may cause the design team to think the contractor is merely being lazy.

However, the design team's annoyance may elevate into "suspicion" when RFIs become constant and relentless. When this occurs the design team begins to ponder whether the RFIs are part of a strategy to have the designer "delay" the project or recoup additional funds through change orders. Moreover, the designers become concerned about their own potential lost compensation for the amount of time expended on the RFIs. This later could develop into a claim for additional fees to be paid by the owner.

B) Change Order Requests

Similar to RFIs, Change Order Requests are common and should be anticipated by the parties. It would be unreasonable to expect a contractor to be liable for expenses incurred from unforeseeable, hidden, or unavoidable events for which the contractor has no control (i.e., COVID!!!). As a result, all contracts contain express provisions for the execution of change orders to ensure the contractor may increase its contract sum or extend the project schedule. These provisions directly address the merit/basis for the request; the required timeframe for submission; calculation of the costs; and, most importantly, the need for the owner's express (written) approval of the change order requested by the contractor.

If every change order request had merit and was granted, then there would be no disputes caused by these requests. Unfortunately, change orders are one of the most regularly disputed issues between contractors and architects. Common battlegrounds are as follows:

1. Simple Disputes: The merit of the change order is uncontested. All parties agree that the contractor is entitled to extra funds or additional time. Yet, the parties cannot agree on the amount of increased contract value and/or amount of time. Typically, these disputes are regularly resolved without much disruption to the project.

2. Extra Work or Original Scope: Like designers, contractors make mistakes. It is not uncommon for contractors to underbid, miscalculate quantities, or interpret the contract requirements incorrectly. Thus, when a contractor submits a change order request, the designer must make a good faith assessment to determine whether the request requires extra work by the contractor or is encompassed in the contractor's original scope of work. To this end, the designer has to self-evaluate the contract documents and determine whether they clearly outline (or omitted) what was required of the contractor.

3. Directly Adverse: Can the contractor build it as designed? Or was the design flawed? When the change order request pins the designer against the contractor, the natural reaction is for both sides to become immediately defensive. Neither party likes their work to be called into question. Detailed review of the plans, specifications, and drawings typically follow – with neither side agreeing they are incorrect. If the architect is the initial decision maker (see below), the only chance that the change order will be granted is for the architect to admit that its (or its subconsultant's) design was flawed.

4. Excessiveness: The submission of routine change orders requests can quickly lead into suspicions of whether the contractor intentionally underbid the project to ensure it was awarded the contract and strategized a plan to submit excessive change orders to generate a larger profit. Even if not pre-planned, some contractors who realize that they are losing money during the project employ a change order strategy as an attempt to recoup as much income as possible. The basic concept: the more CO's, the more chances to recoup additional funds.

5. Owner Directives: Sometimes owners go outside the "chain of command" and instruct the contractor to proceed with work without consulting the design team. This is less common on complex or public projects, but it happens on occasion. When verbal instructions are relayed and work "authorized" in real time, it is incumbent upon the contractor to document the owner's authorization in writing and submit to the design team immediately. Otherwise, when the owner has a change of heart or memories fade, the architect is left in the middle of a "he said, she said" conundrum. Since an architect's biases are routinely questioned by contractors, the matter can exacerbate if the architect denies a change order request that the owner may have actually authorized.

6. Waivers: The contractor failed to submit the change order request in writing or within the time prescribed by the contract. These "procedural" defenses are common and, typically, met with heightened discontent from the contractor.

C) Delays

Delays come in many shapes and sizes and are often the subject of litigation. Some of the more common causes of delay include inclement weather, inadequate prosecution of work, design omissions/errors, scope changes, and supply chain issues. While some delay is inevitable, there are ways to mitigate the effects of the delay on the overall project.

1. Project Schedule. It's one thing to say a project must be substantially complete in XX days. It's another to demonstrate how it will get there. Before ground is broken, the parties should agree to both the form and content of the schedule. Disagreements often arise as to whether a schedule has enough detail to enable the parties to determine whether: (i) the actual project completion coincides with the written schedule; and (ii) if the schedule is achievable. There are several recognized scheduling methodologies and even more software programs the parties can chose from. While some are no doubt better than others, it is critical that all parties buy-in to the chosen method. Consider a third-party scheduling consultant for particularly complex projects.

2. Know the Contract Documents. Contracts often do (and should) contain detailed requirements for submission and documentation of delay claims. The time for making a claim is typically shortly after the delay begins. This is to allow all parties to investigate the cause of the delay and remedy it as soon as possible. It also requires the parties to document the duration of the delay and costs associated therewith. This alleviates the submission of an omnibus and often vague delay claim at the end of the project. If a contractor fails to comply with the requirements of the contract documents relating to delay claims, it runs the risk of having them denied entirely.

3. Communication. An owner should never be surprised to learn that a project is behind schedule. Similarly, a contractor or design professional should never be surprised to learn that they are being blamed for a delay. The project schedule should be regularly updated and circulated among all parties. Any questions regarding the schedule should be timely answered. If delays are anticipated, they should

be discussed before they even occur.

4. Keep Moving. The parties should not allow a dispute over a delay claim to stop the project. Contracts should have a provision requiring the contractor to keep working while a dispute is ongoing. Contracts may also allow the owner to supplement the contractor's forces to get the project back on track and back charge the contractor for the costs of the additional forces. Realistic liquidated damage provisions can incentivize a contractor to keep moving toward the end.

D) Initial Decision Maker Quandaries

The AIA's owner-contractor contract (A201) implements the Initial Decision Maker (IDM) process in an effort to streamline claims between the owner and contractor while the project is ongoing. Here, the architect is appointed as the IDM to consider and, potentially, render a decision on the validity of the owner/contractor claims. It is important to stress "potentially" as the AIA form contract now allows the architect to abstain from making a decision – if it cannot do so or does not have sufficient information. Typical IDM issues relate to time extension requests, change orders, contract obligations, or scope of work disagreements.

When incorporating IDM provisions into the contract, the parties' common goal is to provide a mechanism for quick resolution of issue(s) without delaying the project or upsetting the project schedule. To this end, a successful IDM process results in the resolution of the dispute, the prevention of protracted litigation, and the avoidance of unnecessary legal fees.

However, the downside to having the architect serve as the IDM usually outweighs the potential benefits it aims to achieve. First, contractually, the architect must render decisions in good faith and without any bias to either party. In essence, the architect must be an unbiased "umpire calling balls and strikes". This should never be a problem for the architect. However, contractors are inclined to believe that architects, who have been retained to serve as the owner's representative and are being paid by the owner, will naturally lean in favor of outcomes that benefit the owner. Thus, despite the fact that architects must demonstrate that the claim was carefully evaluated in good faith to avoid liability for their decisions, contractors routinely assume the worst. So, any rulings in the owner's favor must be thoroughly conclusive for a contractor to accept the decision. This becomes even more difficult if the contractor believes that the architect is the cause of the issue at hand (i.e., delays to the project; omissions in design that require execution of change orders, etc.).

Either way, the architect's decision creates more tension and pins parties against the architect for the future of the project. If the architect rules against the contractor, not only is litigation still likely to occur since the decision is not binding, but the parties' working relationship could become untenable and/or negatively impact the progress of the project. Conversely, if the architect rules against the owner, the architect creates a tense relationship with its own client and, in effect, jeopardizes future business with the owner or other potential clients.

If an architect cannot abstain and is contractually required to render a decision, it should proceed with caution. While a timely decision is necessary within the deadlines provided in the contract, architects should seek any and all information, documentation, and advice from project team members or, possibly, retain a 3rd party consultant or expert to help evaluate the claim. Typically, the architect is asked to render decisions on claims which the architect does not have specialized knowledge – i.e., scheduling and critical path analysis. Thus, an independent consultant can assist in rendering a decision and help establish that the architect made a good faith, unbiased effort to evaluate the claim and separated itself from the perceived biases.

D. Post-Construction Battlegrounds

There are several proven "resolution tools" that can be used at various stages of a construction project that can help steer the project to a successful completion and avoid protracted litigation. Consideration should be given at the contract phase as to whether one or more of these tools should be a prerequisite to litigation/arbitration. Of course, absent a contractual requirement, the parties can always agree to pursue one of these tools before retreating to their respective corners.

1. In-Person Negotiation. Posturing through letters and emails very rarely leads to an amicable resolution. An in-person meeting requires parties to get out from behind the keyboard, look each other in the eyes, and talk through respective positions. One, if not the most, important element of a successful in-person negotiation is that the right people be in attendance. Many contracts will require that the meeting involve the parties' "principals." The principals in attendance must have decision-making authority without the need to call the home office. In addition to the decision makers, each party should have the person or persons with personal knowledge of the issues to be discussed. A meeting between decision makers alone will go nowhere if they are not intimately knowledgeable of the issues. Consideration should also be given to the location of the meeting. The project site is usually preferable. If, however, that is not practical, choose a neutral site.

2. Mediation. Many contracts require formal mediation before litigation/arbitration. While this can be successful, it brings the added cost of a mediator. If the parties decide to mediate, the discussion should include: (i) who pays mediation expenses; (ii) how the mediator is selected; (iii) required party representatives; and (iv) the location of the mediation. As with negotiation, it is important to have the decision makers and people with knowledge present. The mediator should have subject matter knowledge and be viewed as neutral among the parties. If the issues involve claims among multiple parties and contractor tiers, staged mediation should be considered (e.g. one session including subcontractors and the prime contractor and another session between the prime, design professional, and owner).

3. Expert/Third Party/Insurer Involvement. When the issue at hand is technical in nature, consider engaging a third-party to render an opinion on the issue. An opinion from a recognized industry expert can go a long way to move the needle towards resolution. In such a case, the parties generally agree to split the cost of the third-party. However, cost shifting provisions may be considered. The opinion is typically non-binding and, in many cases, the parties agree that the opinion cannot be used in any future ligation between them. Care should be taken to engage the proper expert with expertise in the issues and, importantly, the ability to respond in a timely manner.