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The Problem With Assuming Too Much

As the economy begins to pick up, design professionals will increasingly come across opportunities to resume renovation or restoration projects that were previously put on hold.

However, tackling a project that was abandoned by the initial design team poses a host of challenges. "If a design professional is asked to come in and clean up someone else's mess, this is a scenario fraught with concerns," said Thomas M. Gambardella, an attorney with Wilson Elser of White Plains, NY who has represented architects and engineers for 33 years.

"They may be happy to just get the project because it is work, but they need to ask themselves if it's the right work," Gambardella said. "When a client asks you to assume design or continue a project, you need to understand the problems that precipitated termination of the prior contractor and/or design professionals, and if those issues have been resolved or are ongoing."

Dig for compatibility issues

Page Ayres Cowley, of Page Ayres Cowley Architects LLC, New York, NY, which specializes in historic preservation and building conservation, has taken over projects from other architects on several occasions. Cowley said that, in addition to the economy/money issues, other deep-seated reasons for the initial failure with the previous architect might include personality or "vision" conflicts between the owner and design team, and incompatibility between project complexity and the design firm's capabilities.

Identify any inherited problems

"Regardless of the reasons, if you choose to complete the project, you are responsible for the entire project," said Jim Schwartz, Beazley's U.S. A&E professional liability focus group leader.

"It is incumbent upon the new architect to audit the design, as well as the as-built construction, instead of relying on previous assumptions," added **Douglas J. Palandech**, a founding partner in the firm of Foran Glennon Palandech Ponzi & Rudloff of Chicago, Illinois. "Clearly, by virtue of being a completing architect, that project will have your seal. You want to make sure you identify conditions that are as-built or design, tell the owner about them, and clearly define those as inherited problems."

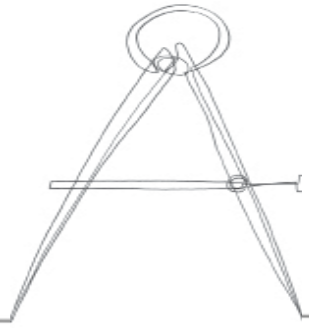
Current Developments in A&E Law

Design Professional Found in Breach of Contract, but Damages Limited Based on Contract Language

In a mixed result for design professionals, the United States District Court for the Southern District of Indiana issued an amended final decision following a bench trial with respect to a breach of contract claim filed by a corporate hotel owner ("SAMS") against an architectural design firm ("Environs"). SAMS Hotel Group, LLC v. Environs, Inc., 2012 WL 3139765 (S.D.Ind.).

SAMS retained Environs as its architectural design firm to provide services for a multi-story, steel frame hotel for a fee of $70,000. Pursuant to the contract, Environs agreed to provide architectural and engineering services and prepare construction documents including "all correspondence, drawing specifications and data" for the design of the hotel, and specifically the "structural drawings for steel framing system including design of specific structural members." Notably, the sole officer and president of Environs was a licensed architect, but had served as the structural engineer for numerous hotel projects, despite the fact that he was not a licensed professional engineer.

SAMS hired a geotechnical engineer to do a subsurface evaluation of the site, who concluded that much of the native soil had to be replaced with compact fill prior to construction. Environs subsequently submitted its full set of completed, signed design drawings for approval. The drawings did not provide for a lateral shear wall system that would resist lateral loads because Environs thought the wall system would be designed by the contractor. In addition, Environs' drawings did not provide guidance on how to comply with the geotechnical report, so the geotechnical recommendations were not followed.



Define the payment status

When approached by a client who wants her to submit a proposal on a project that was begun by another architect, the first question Cowley asks is: Has the architect been paid? "That not only addresses the issue of compensation to the architect who is being released from his contractual obligation, but apprises the successor architect of the status of the agreement with sub contractors," Cowley said. "The last thing you want to do is charge the client again for work they've already paid for."

Identify any copyright issues

It's also imperative to know the status of copyright issues on the original design. "If the owner is giving you designs that someone else has done, you want to get assurances from the owner that you can take the designs and make them your own," Schwartz said. "In the best-case scenarios, you can get assurances from the original designer that they are not exercising any copyright over the documents."

Conduct historical checks

If a historically significant landmark is involved, make sure the requirements surrounding your particular renovation/restoration are within your firm's capabilities. The contract language must be very specific to what makes the project historically significant, Palandech said.

Your project may be required to adhere to certain codes or certifications, as well as local/national historical preservation rules and regulations. Make sure the contractors you're working with have historical preservation experience and know about the guidelines for meeting any applicable certifications.

Set your fee accordingly

Keep in mind that, if the building is of historical significance and landmarked, there is a heightened expectation for performance that goes beyond the (industry) standard, to include emotional intangibles, as well as the satisfaction of certain certifying bodies, Palandech said. "Because there is a higher degree of risk here, your hourly rate must reflect that you are doing work that may have certification or historical landmark designation," Palandech said.

In general, your fee should reflect the inherent degree of difficulty that you assume exists within a project from which a design professional has been removed, Gambardella said. "Everything about the project will involve heightened awareness, attention and concern, and your fee should reflect that."

Ensure proper insurance coverage

Finally, if assuming a project, the design professional should seek to be an additional insured on other parties' and participants' insurance policies "wherever possible," Gambardella said.

Despite the challenges of assuming someone else's renovation/restoration project, many design professionals find the work quite rewarding. "I love the history, creating and reusing the historic fabric of buildings, and the fact that renovation is the ultimate in green building," Cowley said. "If you do it right, you get repeat work. Once we have gone through one preservation project, we are usually asked to do two or three more. That's the only way we've gotten through this recession."

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Six months after construction started, cracks were discovered in one of the building's stair towers. The contractor quickly fixed the cracks, but the cracks reappeared. An inspection revealed significant and wide-spread concrete cracking and settling of the building. SAMS subsequently hired a structural engineer who concluded that three towers of the hotel were designed improperly, did not include enough shear wall support, and had the wrong footings. The informal estimate to remediate and complete the project was $9.4 million, while the estimated cost to demolish and rebuild was $8.6 million. Ultimately, the County Building Department issued an order to demolish the building after it determined the foundation required immediate attention.

SAMS filed suit alleging Environs breached its contract by not designing the structure to adequately resist lateral loads and because Environs' design fell below the applicable professional standard of care. The Court outlined that for SAMS to prevail on its breach of contract claim, it must prove: 1. the existence of a contract; 2. Environs breached the contract; 3. SAMS suffered damages; and 4. Environs' breach of contract caused SAMS' damages.

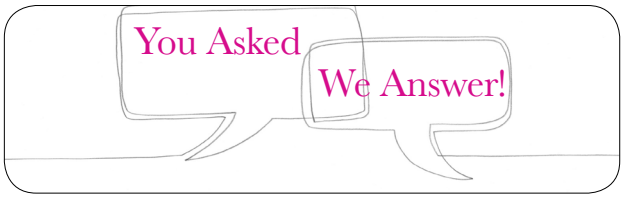
The Court confirmed the scope of services in the contract unambiguously required Environs to provide the structural engineering design. Further, since Environs' architect signed and stamped his seal on both structural and foundational drawings, Environs was responsible for the overall structural design of the building as the engineer of record. The Court then reviewed Environs' design drawings and found that Environs did breach its contract because the drawings did not adequately provide for a lateral shear wall design that resisted lateral loads.

The Court also found Environs failed to meet the professional standard of care. While Environs' architect could technically serve as an engineer of record under Indiana law, Environs breached the professional standard of care because Environs' architect's structural engineering experience was not sufficient to perform the complex structural design of the current project. Further, Environs fell below the standard of care by not involving an outside structural engineer when problems arose on the project.

Finally, the Court addressed the issue of causation. The Court dealt a blow to design professionals by clarifying that SAMS was required to show Environs' breach of contract was a *substantial* factor in causing SAMS' damages, not the *only* cause of SAMS' damages. Based on the experts' testimony, the Court concluded that it was more likely than not that Environs' inadequate design was a substantial factor leading to the order to demolish the building.

On a positive note, the Court reiterated its prior ruling that the contractual limitation of liability provision was valid and enforceable. The contract included a favorably drafted limitation of liability provision as follows:

> "[SAMS] agrees that to the fullest extent permitted by law, [Environs'] total liability to [SAMS] shall not exceed the amount of the total lump sum fee due to negligence, errors, omissions, strict liability, breach of contract or breach of warranty."



In this edition of "You Asked, We Answer!" we discuss what constitutes a binding contract and, specifically, whether a contract is enforceable if the parties do not sign it. Generally, a contract is binding when there has been an offer by one party (for instance, a client offering to pay the design professional a defined fee to provide certain services), acceptance of that offer by the other party, and mutual consideration between the parties. Consideration is defined as the bargained for exchange of something of value to bind the contract (e.g., the client agrees to pay the design professional for services rendered). Keep in mind that consideration does not need to be substantial; it just has to be negotiated and agreed upon between the parties.

Regular readers of the *A&E Reporter* know that we recommend you have a written, executed agreement for all projects on which you provide services. Further, we encourage you to negotiate and sign your agreement prior to providing services because it allows you an opportunity to interact with the client and gauge whether the client's expectations are reasonable. If a client is difficult to deal with and has unreasonable requests during the contract negotiation (such as requiring you to assume broad, non-negligent based indemnity obligations or provide guarantees of your services) it's likely that the client will have unreasonable expectations as the project proceeds. In short, the negotiation phase is often foreshadowing of your future relationship with the client.

Executing the contract prior to providing services may also help you avoid a fee dispute. The scenario goes something like this: you provide services and submit an invoice for payment. The client promptly informs you that the client is more than happy to pay your invoice as soon as you sign the client's contract. When you review the contract, you notice it includes problematic language from a risk management and professional liability perspective, such as inappropriately worded indemnity and standard of care provisions. Unfortunately, your negotiating position is weakened because you already provided services and the client is holding your payment hostage until you sign the contract!

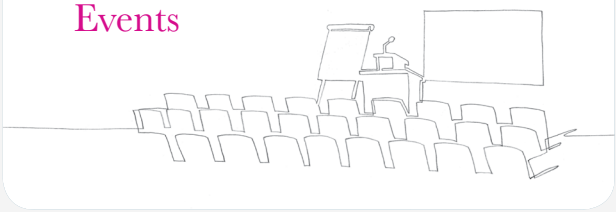
It is often at this juncture that design professionals ask us whether the unsigned contract is binding, both to ascertain whether they can collect payment and whether onerous contract language is enforceable. An unexecuted contract may be enforced when the circumstances suggest the parties intend to be bound by the contract, for example, if one or all of the parties have performed substantially in accordance with the terms and conditions of the unsigned agreement. However, keep in mind that a determination that the contract is enforceable under the scenario described above cuts both ways: while you may be entitled to payment, objectionable provisions included in the contract may also be enforced.

We recommend reviewing the agreement to see if there is language stating that performance constitutes acceptance of the agreement since such language may support the argument that an unexecuted agreement is binding on the parties. You may also want to consult with local counsel to discuss how the jurisdiction in which you performed services treats the issue. Of course, the best way to avoid this situation is to ensure you negotiate and execute the contract prior to providing services in the first place!

The Court noted that it previously incorrectly determined Environs' liability was limited to the lump sum fee paid as opposed to the total lump sum fee as called for in the provision. Therefore, the Court amended its prior entry and ruled that Environs' liability was limited to the lump sum fee of $70,000.

This decision highlights several risk management lessons. First, design professionals must ensure their scope of services is sufficiently detailed and defined and consistent with their understanding of the required scope. Second, they must make certain they are qualified to take on the scope of services. Third, design professionals should carefully negotiate limitation of liability provisions and pay close attention to the exact wording. In this case, the Court accurately pointed out that the provision limited the design professional's liability to the fee as opposed to the fee "paid." Although the difference between total fee and fee paid may not be significant in all instances, the discrepancy between these amounts could be considerable on large projects.

Events



Industry conferences

November 11 – 15:	International Risk Management Institute, Inc. (IRMI) 32nd Construction Risk Conference Orlando, FL

What's New in the Webinar World?

Beazley conducts quarterly risk management webinars for its insureds. The next topic is **A&E from A to Z: Everything you Always Wanted to Know about Risk Management but were Afraid to Ask**. Please join us on **Thursday, December 13, 2012** for that program. To be added to our invitee list, send your contact information including email to straightanswers@beazley.com.

Our previous webinar was titled **Risk Management Considerations for Small A&E Firms** and the presenters discussed the risk management issues and considerations small firms face in the A&E industry. The presentation focused on the importance of a written, well-drafted contract, and highlighted important aspects of the Beazley A&E policy form. See page 4 for some of the talking points from our last program.

Different Strategies for Different Clients

Different types of clients require different marketing strategies. These strategies also lead to different implications for managing risk. Gregg S. Hughes, Principal of Palmetto Engineering and Consulting LLC, provides a snapshot of a dozen typical client types design firms may encounter, and provides tips for managing relationships with these diverse customers. The information below is an excerpt of material provided by Gregg during our September 2012 A&E webinar titled "Considerations for small A&E firms."

Low Tech

Not technically savvy, this client needs plenty of hand-holding, with information carefully spelled out along the way.

A good strategy: Make sure they clearly understand the solution being provided and how to use it.

Disinterested

This client is overworked and stressed out, they may want the job "taken care of," and are eager to delegate. They may be anxious for completion, constantly asking "are we done yet?"

A good strategy: Set communications expectations upfront – and document, document, document.

Hands-on

This client knows what he wants – and is more interested in his own ideas than yours.

A good strategy: Go with the flow, letting the client know you are capable of going in a different direction. One caveat: Don't stretch outside your firm's expertise.

Paranoid

Everything with this client tends to raise the specter of a legal quagmire.

A good strategy: Weigh whether taking a project with such a potentially litigious client is worth it to your firm. It may not be, especially for small or low paying jobs.

Appreciative

This client makes life easy. Even if they are unsatisfied with something, communication is pleasant, issues are amiably remedied.

A good strategy: Welcome as many of these clients as you can!

Always Urgent

Making every communication a high priority, this demanding client can put intense stress on you and your staff. On the positive side, they typically provide approvals fast and move projects along quickly. Well taken care of, they can be loyal customers.

A good strategy: Since they require a lot of attention, you may consider limiting how many of this type you take on.

Good Deal

This client is a wheeler-dealer, always looking for a bargain.

A good strategy: Be a good negotiator and when providing a bid to this client, leave room to lower your price.

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Please log on to the risk management site to continue reading the webinar highlight sheet and view the on-demand presentation.

Feedback/Contact Information

We welcome your feedback on the *Beazley A&E Reporter*.

Send us your comments, observations or future topic requests.

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