

What to Do When the **CONTRACTOR** Is Asked to Become the **DESIGNER**

By Robert J. Kaler, Esq

On a traditional Design-Bid-Build job, the contractor's primary role is to implement a design provided to it by the owner, which has typically used a professional design firm to prepare the plans and specifications which make up the design. The level of detail of those plans and specifications can vary widely, however, depending on the nature of the project, how much the owner was willing to spend on design services, and how much of the design could be finalized before construction commenced.

As a result, in many cases, there are "design gaps"—areas of the design that either could have or arguably should have been made more complete before the contractor was selected, or construction started. Whether they involve unselected products, undetermined systems, or unsettled ways of satisfying certain known performance requirements, these design gaps can create major construction problems and issues if they are not flagged as open issues early on, and a procedure for resolving them established. They can also create an "identity crisis" for the contractor: Is it the contractor, the designer, or both?

DEALING WITH DESIGN GAPS

Theoretically, the owner should determine how "design gaps" are filled independently of the contractor, either by consulting

the designer that prepared the plans and specifications for the project, or utilizing a separate design professional specially assigned to perform this function during the project. This is not always practical, however, especially on smaller jobs or when dealing with relatively minor "design" issues. As a result, the contractor is often asked by the owner to make recommendations to the owner on what the contractor views as being "design issues." This raises the question: What should the contractor do when asked for such recommendations? The answer

depends to some extent on the nature of the issues involved, and whether they truly are "design" issues, or simply design implementation issues.

DEALING WITH SPECIFICATIONS

Specifications created by design professionals, for example, generally fall into two categories: "design specifications" and "performance specifications." Design specifications identify specific dimensions, materials, products, or processes for the contractor to follow or provide, leaving the contractor with little or no discretion as to what it must build or use on that part of the relevant project. Performance specifications, on the other hand, identify what performance characteristics the relevant component or portion of the project needs to have, or to be able to display or withstand, and leave it to the contractor to select which products, systems, or construction techniques will satisfy those performance characteristics.

BUILDER NOT DESIGNER

It is part of the contractor's function to provide advice to the owner on how to satisfy performance specifications; but deciding what those performance specifications should be, and creating particular design specifications where they are needed, involves genuine design expertise. If there are gaps in these areas of the owner's design, and the contractor is asked to fill them,



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the first response should be for the contractor to recognize that whenever it is asked for a recommendation on how to fill such design gaps, it is in essence being asked to become the designer of that portion of the structure being built—something for which it is typically not insured, and often is not qualified except by reason of experience building other structures with similar designs. In those situations, therefore, the safest course is for the contractor to first make clear to the owner that it is not the designer, and that although he, she, or it can describe what they have seen in other designs addressing the relevant issue, and can talk about how those designs seem to have worked out in other structures—if they know—they cannot actually make the design recommendation or decision for this structure.

OWNER TO DO RESEARCH

Typically, the issue for the owner in these situations is whether it is willing to make the design decision itself, based on its own assessment of all risks involved, and informed by

whatever information it can get from the contractor, or whether it is willing to spend the time and money to “run it by” a design professional, and seek formal advice. The contractor can help by explaining to the owner the trade-offs involved in making this decision, and providing whatever information it has on the use of a particular product or design, but it should encourage the owner to do its own research as well.

Fortunately, with the advent of the Internet, opportunities abound for an owner to research almost every imaginable design issue and process, and every type of product with design implications. Commercial roofing designs, for example, and their associated drainage systems, can be compared and contrasted on the web, and flooring and HVAC system components can be evaluated, and their specifications obtained. Commercial chemical products, and their associated risks and performance characteristics, can also be evaluated in ways that they never could be as recently as 30 years ago. Contractors should take advantage of the availability of such information

to encourage owners to take control of and responsibility for design gaps that they choose not to ask a design professional to resolve.

KNOW WHO IS RESPONSIBLE

There should also be provisions in the contractor’s standard contract providing that the owners for whom it works acknowledge that they are responsible for all design decisions on the project, and that any information concerning design issues communicated to them by the contractor is not intended by the parties to be, and will not be treated by the owner as, design advice or recommendations. Also, when design gaps are recognized and being addressed, there should be a written record, in some form, of what the parties’ communications about those design issues were, and how they were resolved. Email is a simple way to create that record, to set forth in writing whatever information the contractor has provided to the owner to help it address those issues, and to make clear that the contractor is not the designer. ■



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