



# DESIGN AND CONSTRUCTION CONSIDERATIONS FOR PRIVATE OWNERS

## DESIGN IS A SERVICE, NOT A DELIVERABLE PRODUCT

All too often, owners erroneously interpret what professional design services are, mistaking these services for a finite deliverable or a product, rather than it being the continuous flow of service that perpetuates the entire life cycle of the project.

When interpreted singularly as a product, the success of the project may ultimately be compromised as the professional's services are erroneously viewed as concluded with the mere submission of a set of drawings and specifications, or construction documents. This mentality is fraught with risk, as by their nature, professional design services do not end with document submission or the deliverable product. For design and follow-on construction to be successful, a multi faceted dialogue of interpretation, clarification, administration and observation is necessary for a design to end in a successful construction. Thus, design services are a flow of information, not a deliverable.

Proceeding without the professional services after completion of the deliverable may very well position the project for turmoil and questionable success from construction inception. When owners take the naïve view that the delivery of mere construction drawings is all they need to construct from, they proceed in opposition to Industry standard and pragmatic experience, which suggests that no set of construction documents is ever 100 percent complete.

The flow of information — or provision of service through dialogue, clarification, and administration — is necessary from the design professional in order to fill any voids in the interpretation of scope, quantity, quality, and configuration that may exist in the construction documents. Indeed, that is why they are typically referred to contractually as basic services, which following the schematic, design development and construction document deliverables, should also include bidding and negotiation, and contract administration.



## THUS DEPLOY FULL CONTRACT ADMINISTRATION SERVICES

Engaging the design professional for contract administration (C/A) is a wise choice in effectuating the notion of service, rather than a product. Owners have been known to dubiously attempt C/A with their own development team, and this is additionally fraught with risk. Who is better at interpreting design intent, and who is more attuned to the information in its construction documents than the design professional of record? Owners who administer their own Contract and interpret their own contract documents on behalf of their design professional risk project success.

The owner must expect and hold the design professional accountable to guard against defects in the work and to assure that the work is generally in conformance with the drawings and specifications. This duty works hand-in-hand with certification of the contractors' payment applications attesting to a representation that the work has progressed to the level of completeness as represented in the application.

An owner who elects **not** to engage the design professional for C/A is asking for trouble. The owner needs that third-party architect to bridge the communications between owner and contractor, to guard against defects, and to protect the health safety and welfare of the public as required by professional license.

In fact, the Architects Practice Act of some states is now making it nearly compulsory that the design professional provide certain minimum C/A services on projects, even requiring the professional to notify the board if any owner deviates from this mandate. For example, recently amended legislation in Alabama stipulates the required services of the design professional in contract administration: [Note the recurrent use of the term "services" in the example.]

## 100-X-5-.06 Construction Administration.

*(1) On a project where a building permit has been issued and the sealing architect has not been engaged, or is no longer engaged, to perform at least minimum construction administration **services**, as defined in subsection (2) below, **the sealing architect must report to the building official and the board that he or she has not been, or is no longer, so engaged.***

*(2) The minimum construction administration **services** expected of the sealing architect deemed **necessary to protect the health, safety, and welfare** of the public shall be periodic **site observations of the construction progress and quality, review of contractor submittal data and drawings, and reporting to the building official and owner any violations of codes or substantial deviations from the contract documents** that the architect observed. As with other architectural **services**, qualified employees of registered architects may perform construction administration **services** under the instruction and responsible control of their employers.*

## REQUIRE INDEPENDENT CONSTRUCTABILITY REVIEW APART FROM PEER REVIEW

Further to the notion of a service rather than a deliverable, coupled with deployment of contract administration, the owner should endeavor to gain peace of mind that its documents are "suitable for their intended purpose." To this end, the owner must ask questions such as:

- Are the documents for mere pricing or construction?
- Is the delivery approach negotiated or hard-dollar bid?
- Are we contracting under a guaranteed maximum price, lump-sum or do we employ a cost reimbursable approach?
- What degree of contingency are we carrying
- What degree of change tolerance do we have?

Questions such as these must be internally posed by the Owner to answer the suitability question. This answer can also come through an independent third-party *Constructability Review* which can aid in this assessment. Unlike a “peerreview,” which is customarily deployed by an Architect, who reviews the design professional’s work product from a Design Professional’s perspective; a constructability review is from a different perspective. A clean-eyes view from a diversified individual with a different lens is very beneficial in identifying omissions, vague scope, inconsistencies between drawing and specification, and often controversial considerations such as the differences in Design Coordination versus Construction Coordination.

A very meaningful constructability review may incorporate a diverse array of building industry professionals from designer, estimator, scheduler, field superintendent, project controls/contracts expert, to claims consultant. The diverse subject matter expertise these disciplines bring an owner in assessment of suitability of drawings and specifications is invaluable in mitigating surprises such as scope omissions, phasing and sequencing considerations, access restraints, erection tolerances and compatibility, limits of construction, and even activity duration considerations, that a design professional is not trained, or experienced in mitigating, in preparation of the contract documents.

Of course, a constructability review comes at a price, often more so in time than expenditure. An owner **must** give the time requisite for the necessary inter-disciplinary review, Q&A periods between the parties, and incorporation and back-checking by the design professional, rather than allowing the architect to merely meet the deadline, and hurriedly submit a flawed deliverable. The cost of time and money invested to execute the constructability review is typically off set many times over during construction when mitigation of changes, delays, and claims have been averted through the constructability review process.

## REQUIRE AND/OR PURCHASE ERRORS AND OMISSION INSURANCE COMMENSURATE WITH PROJECT COMPLEXITY

Once the owner embraces design as a service rather than a product, it deploys contract administration to guard against defects and assure conformance, all subsequent to an independent constructability review; the owner is wise to consider one additional risk mitigation factor, that being the level of professional liability or errors and omissions insurance (EO) coverage it requires of its design professional.

All too often the level of liability coverage is inadequately considered relative to the magnitude and/or complexity of the project’s design and construction. Simply stated, the customary industry default level for liability coverage by the design professional is on the magnitude of \$1 million to \$2 million. Nevertheless, in today’s increasingly litigious environment of complex construction undertakings, one needs to question if these limits are adequate for projects of \$100 million or \$500 million?

Accordingly, owners should work collaboratively with their risk management professionals and legal counsel to assure reasonable, adequate, and project proportionate levels of professional liability coverage are in place through the design team and/or an owner carried insurance program is deployed to mitigate risk.

The recognition that design is a service rather than a product; coupled with initiation of independent constructability reviews; followed by thoughtful deployment of contract administration services to guard against defects, assure conformance, protect health safety and welfare; and the compulsory requirement for proportional levels of professional liability/EO coverage; are each central considerations for ownership risk management protocols in the pursuit of project success.

## CONTACTS

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