

ELECTICAL AND ELECTRONICS ENGINEERS PROFESSIONAL LIABILITY INSURANCE INSIGHTS

Limit Your Risk Through Careful Contracting

One of the most common reasons for a dispute over an alleged design error is disagreement over what is required by the contract.

- Contractual issues very often result from a problem with documentation: either no contract at all, or a poorly-drafted contract.
- A thorough, well-drafted contract may be your best asset in the event of a design dispute.

What's important when entering into a design contract, including a contract where design obligations are imposed on a construction contractor/subcontractor?

- **Always** have a written contract, making certain it addresses the various issues that may come up. A simple purchase order is insufficient, as it does not address the many contingencies that may arise.
- Communicate with your customer to define your duties and meet their expectations, as possible.
- When you can, provide your own contract form, understanding what local and state laws require, along with local custom and practice.
- Take the time to read and understand the contract.
- Make certain the contract is executed by both (or all) parties and keep a copy of it.
- Keep copies of any communications that may impact the contract, including (but not limited to) correspondence regarding your scope of work, change orders, etc.

What are some of the most important contractual provisions to consider?

- **Scope of Work:** Thoroughly setting out your scope of work (both what you are doing, and what you are **not** doing) is critical. Fully discuss and make certain both parties are aware of the contractual scope of work before you enter into the contract. Where possible, include the scope of work as an exhibit to the contract so that the scope can be described fully and thoroughly.
- Do not rely on contractual provisions that in turn require your compliance with another contract (for example, as a subcontractor, do not consent to a scope-of-work clause that requires you to comply with the terms of the primary contractor's agreement with the owner).
- **Indemnity Clauses:** Indemnity obligations seek to shift risk. The design professional may indemnify its client for claims that arise out of or pertain to the design professional's own negligence. Always tie any indemnity obligation to your (design professional's) independent negligent acts, errors or omissions. Do not consent to indemnify the other party for their own negligence. Doing so presents potentially uncontrollable risks, and many states prohibit such indemnification.
- Where possible, do not agree to undertake the indemnitee's defense, but only agree to indemnify (for both defense costs and damages) where the design professional's negligence has been established and/or proven. Some states require one to specifically carve out the duty to defend. For example, one might state that the "[design professional] shall indemnify (but shall have no immediate duty to defend...").
- **Insurance Requirements:** Make certain that you are aware of, and can satisfy, the contract's requirements concerning Additional Insured status, types of coverage, minimum limits, etc. It's usually a good idea to speak with your agent concerning the contract's insuring requirements and whether your insurance program satisfies them.



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