

White Paper

When Being the Best May Not Be in the A-E's Best Interest

By Greg Burnard

Introduction

Humans are competitive by nature. We compete in school, in sports, and in business to be the best. Architect-Engineer professional design firms are no different and may seek to compete on the quality of their designs and/or services to distinguish themselves from other rival firms. Caution is advised before doing so.

Highlighting Versus Promising

Showcasing the quality of an A-E firm's designs or services deemed exceptional is one thing. Promising to provide such designs or services is something wholly separate and should be avoided. When an A-E firm highlights an award-winning design or the level of service provided on a project, it is pointing to past accomplishments and using the highlighted work to substantiate past levels of professional achievement. Inferences can be made that the quality achieved in the past may carry forward to future work or services, but no assurances are given.

When an A-E firm promises or commits to providing a certain level of quality or service, the firm is pointing to present or future accomplishments that may or may not be achieved or are even attainable. It has moved from simple inferences to stated commitments, setting expectations for which it is now liable.

Creating Unnecessary Liability

In contract agreements, avoidance of unnecessary liability and risk is among the most important if not the highest priority. A-E firms by nature of their work carry a given level of risk and liability. Professional design services are not tangible and precise machine stamped works but instead reflect the professional training and experience of the architects and engineers who created them. The training and experience lend themselves to professional

**Professional
Standard of
Care**

decisions and judgements that can vary by individual and/or firm, with lack of preciseness often a reflection of these variables. There is no reason to increase an A-E firm's level of risk by adding unnecessary liability.

To avoid unnecessary liability and risk, A-E firms should commit only to providing the same general level of service other A-E firms acting on similar projects and in the same or similar location would provide. Nothing greater. Such a commitment refers to the professional standard of care which can be quoted as:

"In providing services under this Agreement, the Consultant shall perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in the same or similar locality."

- XL Insurance Contract Guide for Design Professionals

Key words are "ordinarily exercised" to distinguish from a level of care that is superior, exceptional, or best; "currently practicing under similar circumstances" to establish current versus prior practices and similarity of project conditions and work type as the benchmarks for performance level; and "at the same time and in the same or similar locality" to reference the standards for time and project location in measuring services performed.

Professional liability insurance for A-E firms covers actions performed under the professional standard of care, not actions outside this standard. By committing to the professional standard of care, an A-E firm is agreeing to provide A-E services that reasonably can be expected of it without adding unnecessary risk and liability and moving beyond the coverage limits of its liability policy.

**Clear and Subtle
Deviations from
the Professional
Standard of
Care**

Some instances of deviations from the professional standard of care are obvious. Use of the words “best”, “superior”, or “highest” in service agreements are clear examples of contract requirements that elevate the professional standard of care. Typical of such agreements are below wordings extracted from contracts received.

“Contract for A/E services to design....using the best blend of cost, construction efficiency, system durability, ease of maintenance, and environmental compatibility.”

“Architect will use its best efforts, skill and judgment in performing its Services hereunder so that the Project may be completed in an expeditious and economical manner consistent with the interests of the Owner.”

“The Architect shall perform its Services consistent with the highest professional skill and care, mutual trust, good faith and fair dealing.”

Each of the above extracted contract terms requires the A-E firm to commit to a level of care that is above the professional standard by agreeing to provide the best or highest service level. Such clear deviations from the professional standard of care are relatively easy to spot and pick up on to remove from inclusion in any contract service agreement.

Other deviations are not as clear and are more subtle. Recognizing them is as important and fundamental to good contract understanding and review. Here are two examples of contract terms that fit this category:

“Time is of the essence”

“Comply with all laws, rules and regulations”

The phrase “Time is of the essence” is inserted with some regularity in A-E contracts. Variations of the phrase include the requirement to perform services expeditiously and/or without delay. While all parties to a contract should want and strive to perform services promptly and on schedule, delays should not be completely unexpected. Delays may be caused by a variety of factors, with some factors beyond the A-E firm’s control. Time is of the essence conveys schedule adherence is paramount without recognizing the degree of skill and care ordinarily exercised by A-E firms is adherence to schedules for factors only within their control. The phrase should be removed from any A-E contract before signing.

Like time is of the essence, the phrase “comply with all laws, rules, and regulations” is often found in A-E contracts. The intent is understandable: to ensure designs conform to code and law. The intent, however, overlooks the reality that codes, rules, and regulations often are set by different jurisdictions - federal, state, and municipal- as well as by industry regulatory groups, which can vary in purpose and may possibly conflict. Equally important, codes and regulations can change over time with update pronouncements. Requiring A-E firms to comply with every possible code and regulation when the codes may conflict, vary and change over time is inconsistent with the degree of skill and care ordinarily exercised. A-E firms should consider either removing these statements or qualifying them by, at a minimum, stating the A-E firm will exercise efforts to comply with codes, rules and regulations in effect as of the contract agreement date consistent with the professional standard of care. Note the removal of the qualifying “all” in reference to codes, rules and regulations

Conclusion

A-E firms have much to focus on when undertaking a new project: who on their team is best qualified and available to lead the design services; how to allocate resource time and schedules to accommodate the new project within existing and anticipated upcoming work; scope of service design requirements; equipment availability to meet drawings and specifications; and client management are among the top considerations. The focus to move to the schedule and design phases of a new project should not overlook, however, the less exciting and perhaps more tedious consideration of how a new project's contract is written and the terms that set performance requirements. The professional standard of care should be and remain a key component of those contract terms. In that way, A-E firms can focus on starting and creating exceptional designs for clients that can attest to their best efforts without subjecting A-E firms to undue liability.