

# Breaking Ground

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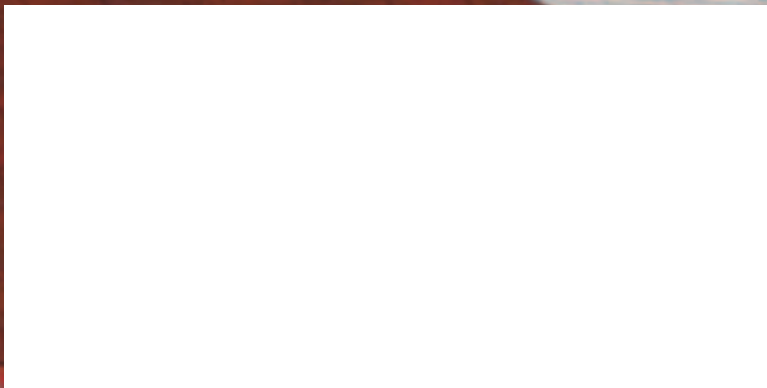
## HOUSING MARKET UPDATE

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# Legal Perspective

## Hidden Design Delegations Raise Risks to Contractors

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Nearly 100 years ago, in *United States v. Spearin*, 248 U.S. 132 (1918), the United States Supreme Court ruled that if a contractor performs according to the plans or specifications furnished by the owner, the contractor will not be responsible for damages related solely from defects in the plan or specifications. This ruling has become known as the Spearin doctrine. Based on this doctrine and the traditional design-bid-build project delivery system, contractors often assume that they have no design responsibility. As a result of attempts by architects to minimize their own potential liabilities, contractors may now be unintentionally accepting some degree of design risk as a result of the language of their bids and contracts.

The 2007 version of the AIA A201 provides that the contractor will not be required to provide "professional services that constitute the practice of architecture or engineering" unless specifically identified in the contract (section 3.12.10). However, even when no other design responsibilities are identified, the A201 also requires the contractor to perform the following obligations which necessarily implicate some degree of professional services: (1) "carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner"; (2) "take field measurements of any existing conditions related to that portion of the Work"; (3) "observe any conditions at the site affecting it"; and (4) "promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor" (section 3.2.2). The A201 further provides that the contractor will be liable for all costs and damages that the owner suffers as a result of its failure to perform these obligations (section 3.2.4). In other words, the contractor, rather than (or in addition to) the design professional, may be responsible for any design defects of which the contractor was aware and failed to report.

Recent bid documents for a local school construction project (the "Project") attempted to make an even greater, and possibly illegal, delegation of design responsibility

to contractors. A questionnaire which all bidders were required to complete contained the following question, which presumably must be answered in the affirmative for a bid to be considered responsive: "Does the Bidder agree that the Contract Documents are clear, understandable and successfully convey the Architect's intentions of the design; and provides the information necessary for the complete and functioning system?"

At the most basic level, an unqualified, affirmative response to this question is impossible since a bidder is incapable of knowing the "Architect's intentions." Furthermore, if a bidder were to answer the question in the affirmative, the significance of such answer is manifold. First, the owner and/or design professional for the Project could argue that as a result of certifying the accuracy and effectiveness of the design the contractor has accepted the responsibility for any defects in that design, thereby eliminating any defense the contractor may have under the Spearin Doctrine. Such certification goes even further than the AIA A201 provision by transferring the risk of design defects to the contractor before a contract is even awarded. Essentially, a contractor who responds to the question in the affirmative may be accepting the risk associated with a design-build contract without being given the opportunity to actually provide the design services or receive compensation reflecting the assumption of that risk.


Second, assumption of the risk of design defects may prohibit the contractor from pursuing change orders necessitated by errors or omissions in the original design. The owner may take the position that the contractor's affirmative answer to the design question is, in essence, a representation that no design-based changes will be necessary on the project, thereby eliminating the contractor's right to request such change orders.

Third, a contractor who affirmatively responds to the question may be engaging in the unlicensed practice of a design professional. Pennsylvania law requires those engaged in the practice of professional engineering or architecture to be licensed by the state. See 63 P.S. §34.1 et seq. and 63 P.S. §148 et seq. While there are exceptions for design-build contracts, those exceptions are only applicable if a design-build entity contracts with a properly licensed design professional to perform all design work on the project. Such a project delivery system is not contemplated by the Project.

An entity which engages in the unlicensed practice of engineering or architecture will be subject to both criminal and civil penalties, ranging from fines of up to \$5,000 and imprisonment of up to two years. An entity that engages in the unlicensed practice of architecture will also be required to return all fees associated with such work. In this context, the successful bidder for the Project could face the prospect of liability for design defects, civil and criminal penalties for its unauthorized practice, and the return of all fees associated with the Project. In addition, all unsuccessful bidders that make the requested certification could also be subject to the statutory penalties.

Finally, the transfer of risk associated with an affirmative response will require contractors to obtain sufficient insurance coverage for such risks. As the contractor will essentially be accepting the risks of a design-builder, the contractor should obtain both professional liability (E&O) and commercial general liability (CGL) insurance. The type of coverage under each policy will vary. For example, CGL policies exclude coverage for professional services, pure economic losses and the cost of repair or replacement of defective work. Because of the licensing issues discussed above, carriers may be unwilling to provide E&O coverage for the Project, leaving the contractor completely exposed to the types of claims specifically excluded by the CGL policy.

Contractors should be aware of the implications of the transfer of risk from design professionals inherent in all contracts. In the AIA A201, contractors should seek deletion of the obligations related to the review of the design or, at the very least, attempt to limit the types of damages recoverable for the breach of such obligations. Bidders responding to the questionnaires such as the one discussed in this article should carefully consider the potential for increased liability, limitations on change orders, statutory penalties and insurance coverage exclusions prior to providing an unqualified, affirmative response.

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