

What to Do When a Client Wants to Cut Construction Phase Services

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The construction phase is when your design comes to life. It's also where most claims rise to the surface. When you provide construction administration (CA) services, you are able to observe whether construction is progressing in general conformance with the Construction Documents, assist your client to identify and resolve problems and respond to requests for information (RFIs) to clarify your design intent.

Construction phase services are essential to managing your professional liability risk—and your client's overall project risk.

We frequently see projects where clients want to eliminate the design professional's construction phase services in a misguided attempt to save money. In this situation, you need to help your client understand that CA services are to their benefit and the overall success of the project—and, in fact, that these duties are an important part of a design professional's normal standard of care.

The Risks of Not Providing CA Phase Service

If you are not involved in CA, you won't be available or able to address issues that arise on the project including site observation, interpretation of the construction documents, addressing legitimate RFIs, processing submittals, certifying pay requests and issuing Certificates of Substantial Completion. What's more, contractors are typically dependent on the design professional for these activities, which are critical for the proper execution of the project during construction. The big question for your client is: How will the project be accomplished without you, as the design professional, providing these services?

Elimination of CA phase services is a red flag for potential claims. We've seen this scenario play out numerous times, particularly with inexperienced or nonprofit clients. Everyone is friendly at the beginning of a project, then a board member or a member of the client's staff convinces the decision maker that "We can save money if I provide the CA services." However, this rarely works out well for the design professional, the contractor or even the owner. Problems *will* come up during construction; and when they do, they'll typically become part of the allegations against you if the project goes bad and results in rework, delays or cost overruns—even if you were not involved in CA.

Best Practices

For projects involving construction, you should always include the level of construction administration phase services that your firm feels are required to provide services in accordance with the standard of care, and properly define them in your scope and fees. If your client balks at these services, you'll need to educate them on the value and benefits of your CA phase services.

In addition, there are many states—as many as 17—that require design professionals to provide CA phase services for projects they have designed. Be sure to check with the state practice act where the project is domiciled.

But What if the Client is Adamant about Eliminating Your CA Phase Services?

When faced with this situation, you will need to thoroughly evaluate your client's experience and sophistication level as well as the complexity of the project and its inherent risks to determine whether you can sufficiently protect your firm from liability through careful project management and contractual provisions.

If you agree to provide design without CA phase services, your contract will need to include the following protective elements:

- A statement in your scope of services that CA phase services will not be provided and are the responsibility of the client.
- Client acknowledgment that they are assuming responsibility for all construction phase responsibilities.
- A waiver of liability for interpretation of documents or any other customary services you would provide during the construction phase.
- A disclaimer and indemnification for services excluded from your scope.

Here is sample language adapted from the *Berkley Design Professional Contract Review Guide* for the last bullet point:

Reduction of Scope of Services Disclaimer:

Client has elected to not have Consultant provide Construction Phase services under this Agreement. Therefore, Client shall indemnify, defend and hold Consultant and its subconsultants harmless from and against damages, losses and judgments arising from claims by Client or any third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, related to the services or activities Consultant did not provide or in which Consultant did not participate.

Finally, you may need to exercise the ultimate risk management tactic: saying no to the project.

About the Author



Diane has more than 25 years of experience in professional liability insurance, focused on risk management and loss prevention education. Since joining Berkley Design Professional in 2014, Diane has led the development of the award-winning BDP Risk® Learning Management System and the creation of risk management resources, live workshops, on-demand courses and curated learning plans to help architects and engineers improve their business practices and mitigate loss.

In her career, she has led in-depth claim studies to reveal the breakdowns in business practices that can lead to risk exposure, translating that heightened awareness of the risks that design professionals face into meaningful and effective training programs.

Diane is a regular speaker at professional industry and association events. She reviews contracts and is the editor of the *BDP Contract Review Guide*, as well as the author of numerous articles, guides and courses on topics including communication, documentation, contracts, scope creep and more. She holds a Bachelor of Science degree in Organizational Behavior from the University of San Francisco and is also a certified instructional designer. Diane is based in Monterey, California. Contact Diane at dmika@berkleydp.com.



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