



Risk Tip 1.

Risk Considerations When Your Firm Replaces the Original Design Firm for an Ongoing Project

*Provided as a courtesy by the ACEC/MA Risk Management Forum
November 2011*

Given the current economy, your firm may be called upon to replace another design firm midway through a project for a host of reasons. The project may have been suspended by the owner due to funding problems and when it was time to restart, the original design firm may have been unable to continue its services. Ownership may have changed and the new owner looking for a fresh set of eyes. Perhaps, unfortunately, the original designer may no longer be around. There may also have been disputes over quality, cooperation, timeliness of service or payment. Whatever the reason, should your firm consider replacing the original designer on a project, it is essential to assess all the potential risks and put an effective plan in place.

Competent legal counsel assisting your firm with contract negotiations and providing legal advice is, of course, recommended for any project. When replacing the original designer of a project, do not even consider proceeding without the advice of counsel. Possible waivers of liability for past design work as well as indemnification from the client for liability arising from this past work, must be carefully crafted and recognize any jurisdictional limitations on their effects. Without qualified counsel's assistance, the protections you think you may have could very well be illusory.

As a starting point, find out the reason why your firm is being called upon to replace another firm, whether the original firm has been formerly terminated or whether the owner is just "shopping around". If possible, don't just seek the reason from your client, the owner, but get in contact with the previous designer. Review your state's code of ethics and determine whether reaching out to the former design professional is appropriate. If the owner forbids such contact then as a minimum speak with the construction contractor and any other design professionals who may already be involved with the project. Determining the actual reason, at the very least, will be helpful in drafting contract language and determining steps to take to avoid unmanageable liability. Depending upon what you find out, you may choose to avoid the project altogether.

If you will be basing your services off the original designs and drawings, be sure that you are not violating any copyrights or ownership rights of the previous designer. Does the owner have the rights to these instruments of service and free to transfer them to you to use? Review and understand your obligations and the principles of "reviewing and adopting" the work of others. Be certain to provide fair credit for that work performed by others.

Draft a very clear scope for your services and a statement in the contract that you have no responsibility for the previous designer's errors. Certainly you will want to conduct a general review of the drawings and designs for their overall conformity to the stated design parameters. The owner however should be willing to indemnify you for any work performed by others which you were allowed to rely on.

Will you be able to rely upon the original design drawings or previously collected data as complete and accurate with the owner providing a warranty of their suitability? Build into your fee the cost associated with doing a complete detailed review and collecting any necessary additional data.

Seek a waiver from the owner for all liability associated with any defects or errors in the original design. In addition, seek a defense and indemnification from the owner for any claim that might be made by the previous design firm alleging your firm did not have the right to use their work product.

If the expectation is that your firm is to become the designer of record, certainly the level of effort increases as does your risk. You must do a sufficient review to become that designer of record as the state may define that obligation. Be sure compensation is adequate for this level of effort and don't cut corners in performing the review.

As the owner is reaching out to your firm, you should be in a very good bargaining position. In addition to being able to get an adequate fee, you should be able to clearly define exactly the role your firm will play and get a limitation of your risk to only those damages actually caused by your firm's services. Consider seeking an indemnification from the owner against claims, including claims that may be brought by the original designer, and the contractor, except for those that are caused solely by your services.

Third parties are not limited in their ability to make claims against your firm arising out of injury or loss they may suffer as a result of using the project. Understand what could be the risks to third parties who might be using the project and be sure that you can effectively control those risks when performing your services. If not and it is a risk outside of your firm's control, seek an indemnity from the owner for that risk.

In summary, be aware of the position that you are in when taking over from a previous design firm, be sure to carefully negotiate an appropriate contract and implement a plan during the performance of your services that effectively manages the added risk.

This Risk Tip is intended to provide current and accurate information to assist the reader in becoming more familiar with the subject matter. It is informational only and not intended to substitute for technical, legal, or risk management professional advice. The reader is encouraged to consult with an attorney or appropriate professional consultant to explore this information further.

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