



"It's The Architect's Fault" – Or Is It?
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When issues arise on construction projects, particularly those in which the owner comes from a construction background or in which the construction manager is a contractor, declaring the deficiency a design issue is not unusual. Design professionals are often concerned that they will jeopardize relationships with developers and contractors who provide steady business if they pushback against such claims. Claims of design errors or omissions, however, usually require a closer look.

Owners budget funds for a project, and should account for contingencies to cover additional costs associated with unforeseen conditions, imperfections in the design (recognizing that design professionals do not promise perfection), and preferential changes made during construction. Often such contingencies are understated and expenditures of contingency funds is perceived as eating into the owner's profit. Contractors can purchase a builder's risk policy which will cover losses beyond their control, such as "acts of God" causing damage to work and stored material, or certain delays arising from covered losses; however, such policies do not cover negligent construction. Conversely, design professionals are insured for professional wrongdoing. Knowing this, owners and contractors sometimes seek to have the design professional's insurance carrier fund a portion of the project, oblivious to the long-term impact to the design professional's bottom line associated with such an outcome.

Design omissions are elements without which the project will not function as intended. Design errors include the incorporation of components intended by the designer to meet code or programming requirements that result in a change after the original design has been installed. The mere existence of an omission or an error may not rise to the level of a breach of the standard of care such that any liability for the costs to correct or remediate the issue should be borne by the design professional. Evaluating whether a project issue is attributable to the designer begins with three basic questions: (1) Is it a code requirement?; (2) Is it an upgrade to the project which the owner will receive the long-term benefit of?; and (3) Was work installed in accordance with the original design required to be demolished and redone after a corrective or remedial redesign? Only upon obtaining answers to these questions can standard of care issues, and the design professional's potential liability for the costs, be evaluated.

Is It A Code Requirement?

Preparing plans that meet the code within the professional's discipline is the starting point for most project designs. Constructing projects to meet the code is the contractor's responsibility. Paying the costs for a project to meet code is the owner's responsibility.

While there are occasions when a designer overlooks a particular or discrete code provision, it remains the owner's obligation to pay the costs necessary for a project to meet applicable codes.



For an omitted code-required element of a project, a designer may potentially be liable only for any increased costs the contractor may charge the owner over what the contractor would have charged had the missing code-required system or components been included within the original design as well as any rework required to bring the project up to code.

The fact that a code official concludes that a change is required to the design in order to meet code, however, does not mean that a design professional is liable for the cost of remedying that issue. The design professional's liability for a code issue will depend on whether the issue implicated a breach of the standard of care. If a code official interprets the code differently than the design professional, there are avenues available to an owner to challenge the code official's interpretation; however, the time/expense available for appealing a code official's interpretation may expose an owner to substantial delay costs, such that the owner may elect to proceed with following the code official's interpretation to avoid delaying the project. While just one example, the existence of a code issue does not – alone – create liability for a design professional.

Is It An Upgrade That Will Benefit The Owner Long-Term?

The second question is whether the issue is a “betterment” to the owner; that is, does the missing or added element add value to the project beyond what was originally designed, and/or is it necessary for the proper functioning of the project? If so, the owner – as the party who will receive the benefit of the upgrade – should pay for the upgraded element. As the saying goes, “there’s no such thing as a free lunch.”

For example, if the MEP designer omitted electrical panels and the contractor did not include panels in its bid, in addition to being a code requirement, the panels will add value to the project and be necessary for the project to function. The owner should bear the cost for the panels as always having been required, and the most that can be claimed against the designer is any delta in the costs for the contractor performing the work on a time and materials basis rather than having bid it as part of the base contract work.

Is Any Demolition Or Rework Required?

The owner should only have to pay once for work. If the contractor makes an installation error, he is not paid to demolish and reinstall the defective work. If the contractor demolishes otherwise acceptable work to correct or install something that should have been addressed in the original design, but was not, the designer may be responsible for those costs. Rework or remediation costs may be attributable to a design omission or they may arise from a design error. However, the scope of the rework necessary versus the work the contractor performed, the reasonableness of the contractor's claimed costs, and whether the contractor's sequencing of the work contributed to the need for rework are all factors to be considered when assessing whether or the extent to which the design professional may bear any responsibility for the costs.



Standard of Care and Other Considerations

Even if any of the answers to these foundational questions are in the affirmative or indicate some responsibility may lay with the design, there are additional inquiries to be made in evaluating the claim before the design professional should be held responsible:

- Does the error or omission rise to the level of a breach of the standard of care?
 - Perfection is not the standard the design professional must meet and correction of a design error or omission that is nothing more than a blip in the project budget is not a breach.
- Should the contractor have issued an RFI before proceeding with the work?
 - If the contractor was unclear about a design element or intent and proceeded without recourse to an RFI for clarification, the contractor did so at its own peril.
- Did the contractor proceed with installing the work without an approved submittal (which would have permitted the issue to be resolved prior to work being installed)?
- Was the issue created by the contractor's means and methods or sequencing of the work?
- Did the contractor or owner direct substitutions from what the designer specified?
- Was there a bid bust for an item or element included in the design that the contractor failed to account for (e.g., if there is a gas fireplace, but no gas line depicted running to the gas fireplace, was it reasonably inferable that a complete installation would have required installation of a gas line)?

These are all fact and project specific considerations to be evaluated before a design professional accepts any responsibility for what the owner has declared an error or omission.

So when the owner calls and says they conferred with the contractor and determined that an issue with the project resulted from a design error or omission, the prudent design professional will respond with: "I have some questions."

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