Legal Counsel for the Design Professional
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Legal Counsel for the Design Professional addresses current legal developments affecting architects, engineers, design professionals and related trades in the construction industry. Since its founding in 1981, LBC&C has been serving the design profession and has been a recognized leader in the field of architects' and engineers' professional liability defense. As a full service law firm, LBC&C provides legal counseling, as well as litigation services, on matters affecting its clients from business issues to employment and labor practices.

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Submittal Review – It's Not All on the Design Professional (The Contractor has Requirements Too)

05.27.21 | BY PAULA M. GART

As attorneys representing design professionals, we want to convey an industry standard that few architects seem to be aware of or put in practice. Many architects and engineers are surprised to learn that it is standard in construction that the project's contractor should be obligated to review and approve all submittals before conveying them to the project's architect or designing engineer. This industry-wide obligation is described in AIA Document General Conditions A201, Sections 3.12.5 and 3.12.6 in the most current edition - 2017. The obligation is in the differing versions of the AIA General Conditions as well.

Section 3.12.5 requires the contractor to review shop drawings for compliance with the Contract Documents and approve and submit them to the architect. By the act of submitting them, the contractor warrants that it has (1) reviewed and approved the shop drawings; and (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so.

In Section 3.12.6, the contractor represents that it has checked and coordinated the information contained within the shop drawing with the requirements of the Work and the Contract Documents.

We typically recommend that if such submittals do not exhibit a contractor's review stamp showing "approved", the architect or engineer should return them to the contractor. The contractor's review is to make sure that all contract requirements are being met since the contractor is in a much better position than the architect or designing engineer to make determinations relating to physical field conditions. This is in addition to assuring that realistic field conditions and dimensions are reflected. In projects where the architect is not retaining the engineering consultants, the submittals provided to the architect for review should only be for the project's architectural elements.

Because the project's architect and designing engineers cannot be certain that the contractor will be bound by the requirements of the AIA's General Conditions, and to avoid referencing a document that may not be part of the project's contract documents, we recommend that these requirements are provided to contractors in the form of General Notes in the architect's or engineer's design documents. The recommended provisions, written for the project's architect, are below, with the italicized phrase to be included if the engineering consultants are not retained by the architect. The project's designing engineers should revise the provisions to require submission to them accordingly.

"The Contractor shall review for compliance with the Contract Documents and approve and submit to the Architect all shop drawings, product data, samples and similar submittals required by the Contract Documents (for the architectural elements of the Work) promptly and in sequence as to cause no delay in the Work. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor will be returned by the Architect without action."

"By approval and submittal of such shop drawings, product data, samples and similar submittals to the Architect, the Contractor represents that it has determined and verified materials, field measurements and field construction criteria related thereto and has checked and coordinated the information contained therein with the requirements of the Work and the Contract Documents."

In projects where there is a Construction Manager, a contractor's review and approval of shop drawings should be for submission to the Construction Manager. In those projects, the General Notes used could be those below.

"The Contractor shall review for compliance with the Contract Documents and approve and submit to the Construction Manager all shop drawings, product data, samples and similar submittals required by the Contract Documents in accordance with the schedule and sequence approved by the Construction Manager. The Contractor shall cooperate with the Construction Manager in coordination of its submittals with similar submittals submitted by other contractors."

"By approval and submittal of shop drawings, product data, samples and similar submittals to the Construction Manager, the Contractor represents that it has determined and verified materials, field measurements and field construction criteria related thereto and has checked and coordinated the information contained therein with the requirements of the Work and the Contract Documents."

Further, since a serious concern of all design professionals is the possibility of inadvertently approving hidden errors or unidentified revisions in shop drawings, many architects and engineers rely on these types of provisions to require the contractor to disclose all deviations from the Contract Documents. In this regard, the AIA relieves the contractor of responsibility for deviations from requirements only if the contractor specifically informs the architect of the deviations in writing, and the architect has given specific approval of the deviation in writing. Design professionals may wish to consider these General Notes as well:

"The Contractor shall not be relieved of responsibility for deviations from Contract Documents requirements by the Architect's approval of shop drawings or other submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of the submittal and such deviation has been approved in writing. The Contractor shall not be relieved of responsibility for errors or omissions in such submittals by the Architect's approval thereof."

"The Contractor shall direct specific attention in writing on shop drawings and similar submittals to revisions other than those requested by the Architect on previous submittals. In the absence of the Contractor's written notice, the Architect's approval of a resubmission shall not apply to such revisions."

In addition to the foregoing, the project's design professionals should take no action on, and return, the submittals provided to them by contractors that were not specified in the Contract Documents by them or their consultants. As recommended in The Architect's Handbook of Professional Practice – Fifteenth Edition: "Do not review submittals that are the responsibility of other design professionals and return submittals without review when they are not required by the contract documents". This is sound advice that design professionals may be well served to adhere to.

Design Professional Fee Sharing Explained – Avoiding Misconduct

05.27.21 | BY DOUGLAS R. HALSTROM

Despite clear rules on the books, there are many misconceptions held by New York design professionals regarding those whom they are legally permitted to share professional fees with. The New York State Board of Regents' regulations provide that a design professional may not share fees earned from the professional services they perform with any person *other than* a partner, an employee, or an associate in a professional firm or professional corporation, a subcontractor, or a consultant.

Typically, sharing earned professional fees with other design professionals generally follows these regulations, because design professionals are permitted to form a business entity (and thus, share professional fees) with other licensed design professionals. And, if the design professional forms or joins a New York Design Professional Corporation, earned professional fees may be shared with those not licensed, if the unlicensed shareholder(s) own less than 25% of the corporation's shares. Similarly, design professionals in a grandfathered corporation, in which shares may be owned by non-licensed individuals, may share earned professional fees with the non-licensed shareholders to a greater extent than allowed in a Design Professional Corporation, although only a few grandfathered corporations currently exist.

However, a design professional or registered firm or entity authorized to perform design professional services is *not* permitted to share earned professional fees with a person or entity that is not licensed or is not properly registered and authorized to provide design professional services. It is when the design professional becomes employed or retained by a person or entity that is not licensed or is not registered and authorized to provide professional services and performs professional services for the public, misapprehending that this professional practice is legal because of that design professional's license to do so, that the trouble to the design professional often begins.

Although the licensed design professional is permitted to practice the profession licensed, that employer, or the person or entity that retained the licensed design professional is not. Under those circumstances, the New York State Education Department and its professional disciplinary arm, the Office of Professional Discipline, can become quite critical, charging the licensed design professional with unprofessional conduct resulting from "fee-sharing" and often, in "aiding and abetting the unlicensed practice of" the profession, resulting from the design professional simply practicing the profession licensed with no intent to fee-share or aid and abet the unlicensed practice of that licensed profession.

We see this occur when an unregistered and unauthorized entity employs a design professional and then holds itself out as being able to practice and provide the services

of that design professional's discipline. It is important that the design professional not allow the employer to use the design professional's license in this manner to avoid jeopardizing the license and professional record of the design professional, due to the likelihood that the Office of Professional Discipline will find that the design professional participated in fee-sharing, and by practicing the profession by or through an unauthorized entity, aided and abetted the unauthorized entity in the practice of that profession. Both fee-splitting and aiding and abetting the unlicensed practice of the profession are grounds for a finding of professional misconduct under the regulations, a finding of which may subject the design professional to suspension or revocation of the professional license and/or a monetary fine. Criminal charges could also result if the conduct is repeated.

While it is common that contractors needing a licensed engineer or architect to prepare an underpinning drawing or provide some other such professional service retains an engineer to perform professional services necessary for the contractor to complete its work, this does not protect the design professional retained to do so. The contractor, including in the bid the cost of the professional services, is sharing in the design professional's fees that will be earned by the design professional, thus establishing the very circumstance the Board of Regents is legislating against - the sharing of professional fees with the non-professional contractor and allowing the contractor to offer to provide professional services to the client, thereby aiding and abetting the unlicensed practice of the profession.

Of course, certain exceptions to these rules exist permitting design professionals to be engaged by contractors rather than directly by the client. Design-Build is an alternate project delivery method in which the contractor may legally retain the design professional. However, in New York, the design-build project delivery method is only statutorily allowed for certain municipal projects or under only certain circumstances and it is not generally allowed in all projects, as it may be in many other states.

As such, the risks of a finding of professional misconduct through a finding of fee sharing or aiding the unlicensed practice of the profession are to be avoided. It is important that the design professional performing professional services must be organized and practice separate and apart from the unlicensed person or entity that is performing non-professional services, and each of them should have separate and independent contractual and payment relationships with the client. The Office of Professional Discipline has indicated in its adjudication of disciplinary matters that this is the preferred method of providing design professional and non-professional services to the client. This way, there should be little doubt as to the lack of fee sharing with a non-professional, and no indication of aiding and abetting the unauthorized practice of the profession. Importantly, there would be no reason to doubt that the design professional is exercising its professional, independent judgment, which is the stated goal and purpose of these regulations.

Mechanic's Liens - What a Design Professional Needs to Know

10.16.20 | BY LEE J. SACKET

The COVID-19 Pandemic has impacted countless individual businesses and virtually every industry. The construction industry was no exception. Regardless of whether work was considered essential and allowed to proceed (albeit under very different circumstances), suspended, or even cancelled, a common theme has been delayed payment or non-payment of invoices. In this financial climate, design professionals should refamiliarize themselves (or in many instances, become familiar) with the basics and benefits of filing a mechanic's lien. Please note that the requirements and elements of a mechanic's lien vary by state. This article focuses on New York Lien Law and some of the more basic but misunderstood requirements.

A mechanic's lien is a statutory lien, codified under the New York Lien Law §3, created in favor of contractors, laborers, design professionals and materialmen who have performed work or services, or furnished materials in the development, construction or repair of a building or other real property. The lien attaches to the real property improved by the labor and/or material and has the effect of encumbering the property, thereby theoretically providing a payment source for the lienor's unpaid services, materials, or equipment.

Only services for permanent improvements to property may be used to calculate the lien amount. The preparation of designs, plans and specifications, even if the project is not ultimately constructed, are usually considered services for permanent improvements. Supervision, inspection, and oversight services of construction work, including demolition and/or new construction are also appropriate to support a lien. Examples of costs that may not be sought in a mechanic's lien include reimbursement for filings for building permits and approvals, obtaining construction bids, negotiating contracts, reimbursement of attorneys' fees, interest or late charges on the unpaid amounts, and any indirect or consequential damages. Keep in mind that an owner can, and typically will, make a demand for an itemized statement of the design professional's services provided pursuant to Lien Law Section 38 so only those appropriate services should be included in the lien amount. A lienor must be careful when calculating the lien amount. The penalties for a willful exaggeration of a lien include cancellation of the lien, responsibility for attorneys' fees, bond sums and additional damages equivalent to the amount by which the lien has been exaggerated.

For private projects, a mechanic's lien may be filed at any time during the progress of the work and the furnishing of services, or within eight months from the date of the last substantive service provided for the benefit of the project and development of the property. However, if the project is a one-family residence, the deadline to file a mechanic's lien is four months from the last date of substantive service performed. The notice of lien must be filed in the clerk's office of the county where the property is

situated. New York lien law also requires that a copy of the lien be served on the owner of the property within 5 days before, or within 30 days after the filing of the lien. The failure to file proof of the service of a copy of the lien with the county clerk within 35 days after the lien is filed is fatal to the lien.

The filing of mechanic's lien does not guarantee the immediate payment of the outstanding fees. On a private project in New York, a mechanics' lien places an encumbrance on the property (similar to a mortgage) that makes it difficult to resell or refinance the property without first removing the lien. Unless the matter is resolved through settlement, the lienor must "foreclose" on the lien, which involves the commencement of a lawsuit, to seek its unpaid fees for services performed.

Significantly, there is relief available to the owner to remove the lien from the real property. A mechanic's lien may be bonded under the Lien Law to remove the lien from the real property. The bond must be posted in the amount of 110% of the value of the mechanic's lien. The ability to remove the lien gives the owner, amongst other things, the ability to sell the property. Significantly, the bond does not extinguish or dismiss the lien. The lien is essentially shifted from the property to the bond. The lienor may still enforce the mechanic's lien after it has been bonded by foreclosing upon the lien. Importantly, even if bonded, the lien will still expire if it is not extended or foreclosed upon within the required time frame.

A mechanic's lien is valid for one year. Liens in New York may be extended once, for a one year extension, without a court order by filing an extension of the lien before the original lien expires. Liens on single family residences cannot be extended without a court order. The extension of the lien gives the lienor an extra year before it is required to foreclose on the property.

New York also permits the filing of amendments to a mechanics' lien. An amendment is typically needed when there is an increase or reduction in the amount due to the lienor. Not all changes can be addressed through an amendment to the lien. For example, where the wrong property is identified in the original lien, a new lien would need to be filed.

If and when payment is made, whether in the full amount of the lien, or in a negotiated amount, a satisfaction or discharge of the lien should be filed. The mechanics' lien is a valuable tool for the design community to secure a source of funding for unpaid fees for its professional services. In the past underutilized by design professionals, the economic uncertainties resulting from the Pandemic have many design professionals reconsidering their previous reluctance to file a mechanics' lien.

New York City Local Law 97 – Impact of the Green New Deal on Design Professionals

05.27.21 | BY KEITH J. STEVENS

New York City enacted Local Law 97 in 2019 with the intention of reducing building-based emissions 40% by 2030 and 80% by 2050. Commonly referred to as the "Green New Deal", Local Law 97 imposes limits on carbon/greenhouse gas emissions for buildings in excess of 25,000 gross square feet. Local Law 97 will affect over 50,000 existing residential and commercial buildings across the City. Notably, Local Law 97 incorporated many of the recommendations set forth by AIANY, ACECNY and the Urban Green Council.

Carbon emissions, sometimes known as the "carbon footprint", are measured by calculating the carbon dioxide emitted by a building into the atmosphere during the production of the energy that is consumed to heat, cool, light and power the activities of the building's occupants. These emissions are typically created by fuel combustion caused by an onsite boiler or an offsite power plant. Significantly, Local Law 97 applies to both internal and external sources of fuel combustion.

Starting in 2024, most buildings in excess of 25,000 gross square feet must comply with defined carbon intensity limits, which are based on building type and prorated for mixed-use buildings (buildings with 35 percent or fewer rent-regulated units have until 2026). Certain building types, including city-owned buildings, hospitals, and houses of worship, will have alternative compliance options if they cannot meet the carbon intensity limits. The Climate Advisory Board, which consists of many of the city's leading building professionals, was formed to refine Local Law 97 and oversee its implementation. However, the Department of Buildings will permit buildings with high emissions intensities to request adjustments to their annual carbon limits.

To demonstrate compliance, a building owner will be required to submit an annual emissions intensity report stamped by a registered design professional. Building owners that fail to comply with Local Law 97 will be required to pay an annual fine of $268 per metric ton in excess of the carbon intensity limits. Building owners who fail to submit the required emissions intensity report or submit a false report will likewise be fined.

Local Law 97 undoubtedly will benefit design professionals, in addition to the environment, by creating new avenues of business. All buildings should start developing long-term energy and carbon reduction strategies to meet or exceed the emissions performance requirements. In addition to preparing and certifying annual emissions intensity reports, design professionals will be relied upon by building owners to: evaluate the costs and feasibility of different energy and carbon initiatives; prepare energy and carbon management plans; and, when necessary, retrofit existing buildings

to achieve compliance with emissions limits. In fact, many design firms in the private sector are already preparing for what they hope will be an abundance of new long term work as a result of this “Green New Deal”.