

A Storm is Coming: A Primer on Protecting the Design Professional from Changing Economies and Tariffs

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The daily headlines and stock reports reflect a growing uncertainty arising from tariffs and the prospect of a global trade war. While the full impact remains to be seen, the construction industry will undoubtedly be affected, and ripples are already being felt within the Design Professional community. While tariffs can raise a number of issues for the Design Professional, the focus of this article is on avoiding or mitigating claims arising from tariff-induced escalating construction costs and helping to manage your Client's frustrated financial expectations.

So . . . “Who bears the cost of tariff-induced changes—the Design Professional, Contractor, or Client?” The answer largely lies in the Design Professional's contract, which should be tailored, now more than ever, to clearly allocate the risks. Failing to address cost escalation in your contract often results in unnecessary finger pointing and avoidable (and expensive) disputes.

If possible, Design Professionals should avoid or disclaim any responsibility for cost estimation, and should never provide detailed bid-level estimates. However, the following considerations are offered to help navigate projects where this is not viable.

1. **Avoid any Guarantees.** Since the Design Professional cannot control the costs or availability of labor, materials or building components, he or she should NEVER provide a guarantee or warranty as to project costs. Moreover, such guarantees are unlikely to be covered by professional liability insurance.
2. **Utilize the terminology “*Opinion of Probable Cost.*”** The word “Opinion” implies that you are utilizing your professional discretion, which is important as this triggers the standard of care which is likely to be covered by professional liability insurance. In addition, “Probable Cost” by its nature is not certain thereby creating some wiggle room should the costs be higher.
3. **Expressly Qualify Your Opinion.** Your contract should reflect the Design Professional's lack of control over costs. Section 6.2 of the AIA B101-2017 succinctly accomplishes this by asserting that the Architect's estimates:

“[R]epresent the Architect's judgment as a design professional. It is recognized; however, that neither the Architect nor the Owner has control over the cost of labor, materials, or equipment; the Contractor's methods of determining bid prices; or competitive bidding, market, or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that the bids or negotiated prices will not vary from the Owner's budget for the Cost of the Work, or from any estimate of the Cost of the Work, or evaluation, prepared or agreed to by the Architect.”

4. **Advocate for a Professional Cost Estimator in Your Contract.** Section of the EJCDC E-500 (2020) states the following: “If Owner requires greater assurance as to probable Construction Cost, then Owner agrees to obtain an independent cost estimate.” Including this statement in your contract is advantageous because it shifts the onus onto the Client. Thus, it is a great method for disarming any argument that the Design Professional did not adequately perform this role.
5. **Limit the Client’s Redress.** In situation where the Client insists on onerous language as to the Design Professional’s responsibility for costs, insert a provision limiting the Client’s redress to a redesign but only where the cost was exceeded by a certain percentage. This will limit the Design Professional’s potential exposure in the event of a budget bust.

In sum, the uncertain economic times represent a significant and multi-faceted risk to the Design Professional. A strong contract coupled with a proactive, preventive approach can act to substantially limit these risks. The Contract Workshop at Bardsley Law is happy to help you get your contracts ready to address future uncertainties.



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