

# Construction Contracts and Doing What You Agreed to Do and Not Being Responsible for the Rest: A Design Professional's Perspective

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Practice Area: Construction Law and Litigation

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It is fundamental that a written contract is central to risk management. Defining the scope of each party's obligations to the other is as important for a design professional providing professional services on a project as it is for a general contractor, subcontractor or supplier providing construction services, labor or material. But defining a design professional's scope of work and related legal "standard of care" can sometimes be much more difficult than simply specifying a completion date, particular material, piece of equipment, or building component. One difficulty in defining a design professional's applicable standard of care is that the legal standard is a fluid concept which varies upon the circumstance.

In Wisconsin, the standard of care to which a Designer is held under the law is that degree of skill and care ordinarily utilized by similar designers in similar circumstances. But what happens when the Designer's involvement is limited to a discrete component of the work but, while performing services within that scope, the Designer becomes or should become aware of a condition requiring attention but which is outside the Designer's contractual scope of services? If personal injury or property damage occurs because of that condition, an aggressive Plaintiff's attorney could argue that even though addressing the particular defect may not have been within the Designer's specific contractual obligations, the Designer is still liable because the applicable legal standard of care still required the Designer to attempt to mitigate its potential impact as part of their basic professional duties. In such an instance, the Designer could feel that they are unfairly being made to be responsible for risks and obligations for which they did not contractually agree.

Designers can use their contracts to corral and limit their risks. That is, as a way to keep the risks they are willing to take on (and, hopefully, be paid for) in and a way to try to keep all other risks out. There are cases involving a Designer's incorporation of provisions specifically defining the applicable standard of care in their contract with the Owner. In certain cases, the courts have limited the Designer's duties to that set forth in their contract, as opposed to using a much more expansive test of what a similarly situated designer would do in that particular circumstance absent that contract language.

The standard of care set forth in the AIA Owner-Architect form agreement provides a good, common starting point for many Designers. But, depending on the situation, that language can be revised to try and more accurately define and control the standard of care which will be applicable to the Designer for that project.

The upshot is that the applicable standard of care can be difficult to define and could be used to hold the Designer liable for more risks than they bargained for. When possible, using contract language to manage, control, and limit risks makes practical sense, especially when it could mean early extrication from a potentially long and expensive lawsuit.

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