

# Client Expectations of Perfection

## THE CURRENT SITUATION

Design professionals are required by law to meet the existing standard of care in the performance of their professional services. Many clients have elevated expectations of performance to a level beyond the legal definition of standard of care; to the extent it is becoming more common for clients to expect design professionals to produce “perfect” deliverables. This is evident in both public and private contracts in which clients request or demand contract terms that: 1) establish an unreasonably high standard of care; 2) indemnify the client for anything connected with design services; and/or 3) require any and all “deficiencies” be corrected at no cost to the client.

Furthermore, client expectations of perfection are not limited to claims the client may have under the contract. Without contractual justification, clients are refusing to pay for professional design services until the design professional fixes or compensates for “things” to be fixed “to their satisfaction.” These expectations of perfection have resulted in clients viewing the design professional as a source of cost recovery on projects that have run over budget, have encountered changed conditions, or have a construction contractor that submits frivolous or weak change orders to increase compensation.

## “NEGLIGENCE” vs “ERRORS AND OMISSIONS”

One major aspect of this problem is the term “errors and omissions.” Clients know design professionals purchase professional liability insurance, which to the client should cover any deviation that could be deemed an error or omission. But, clients do not attach the term “negligent” to qualify an “error or omission.” Clients argue any deviation that has caused a loss or cost is an “error or omission” and the design professional needs to be monetarily accountable, regardless of the actual responsiveness of the insurance policy. (*Professional liability insurance policies typically have significant deductibles and exclude coverage for warranties, penalties, liquidated damages, and other liabilities design professionals assume by contract alone.*)

In addition to educating clients about the essence of professional liability insurance coverage, design professionals need to inform clients about the imprecise and judgmental nature of the design business and on how inaccuracies may creep into design documents without “negligence.” For example:

- Using inaccurate or incomplete data provided by others that design professionals have a right to rely on.
- Scope of services specifically being reduced by the client to save money in a situation where a more complete scope could have prevented or mitigated the loss or cost.
- Reliance on a vendor’s data that is misleading.
- Unforeseen site conditions that were not detected through normal investigations.
- Changes in the ownership structure that introduce new parties and new expectations.

- Code and standard changes which become effective during the design process, resulting in design changes.
- Interpretations by building officials and inspectors, which may differ from the actual text of the building ordinance or from previous interpretations.
- Contractors/owners misinterpreting design documents or missing construction elements.

There are numerous examples of contract language from clients that illustrate the problem. One glaring example from a public agency contract on errors and omissions reads:

*... The Engineer is responsible for damages caused by its errors and omissions. Errors and omissions include any item that is incorrect in or missing from the construction documents or any actual quantity that is 10% or more above the amount shown in the construction documents.*

While this contract language may be better than “*fixing things or paying for things to be fixed to the client’s satisfaction,*” the 10% variance is unreasonable in many situations – negligence should be the standard, not an artificial variance.

## **PUBLIC CLIENT EXPECTATIONS**

Public and private clients are equally entrenched in their demands for perfection. However, they are discussed separately here because of their different perspectives.

Included in the list of public clients who may demand perfection are state departments of transportation, city/county governments, utility/service districts, transportation agencies, school districts, and the like. This list could also include program management firms hired by public clients to manage their projects.

Occasionally, agencies will call “sister” agencies to determine what policies and systems they may have in place to control consultant costs and avoid paying for “deficiencies.” Clear examples of this trend are found in agency policies/rules:

- Design professional held accountable for errors/omissions that exceed 1% of construction costs or \$10,000, whichever is less.
- Design professional being required to pay for all additional costs caused by “any” error or omission.
- Standard of care beyond the normal negligence standard.
- Various studies underway to develop and implement procedures to recover cost from design professionals on some basis other than professional negligence.
- Invoices sent to design professionals to pay for construction cost increases – *after the fact*, with no justification to do so, and with no involvement of the design professional in resolving the problem or settling the claim between the client and the construction contractor.
- Withholding payment pending resolution of a potential claim.
- Design professionals being required to correct “any” deficiency, without further compensation when the agency determines, *at its sole discretion*, the services are “unacceptable.”

## **PRIVATE CLIENT EXPECTATIONS**

Many private sector clients (e.g., residential developers, institutions, health care providers, private utilities, industry, high tech clients) exhibit the same expectations of perfection. Often private sector clients demand design professionals fix imperfections to their satisfaction at no extra cost to them – *it does not matter whether contractual terms support their position*. This attitude is fostered by a general inclination on the part of private clients to equate design professionals with construction contractors for purposes of contractual requirements and performance expectations. Frequently, private sector clients request/require design professionals to sign “standard subcontract” agreements that contain onerous indemnity and satisfaction requirements, creating uninsurable performance requirements.

Furthermore, some private clients view the design professional’s insurance portfolio as an asset to be made available for purposes of resolving claims, offsetting increased costs, or resolving defect litigation. For example, some private clients may want to be named as an “additional insured” on the design professional’s professional liability insurance policy, even though such endorsements are not available. The motives for clients that develop properties for sale or lease – *as compared to those that develop facilities for their own use* – are often oriented toward personal gain for the members of the clients’ development team.

## **DESIGN PROFESSIONAL NOT INCLUDED AS PART OF THE TEAM**

Often public and private clients do not consider the design professional to be part of their team. This is especially true when cost control issues arise during the construction phase. Design professionals frequently find themselves in situations where the client has accepted construction contractor claims without involving the design professional in the evaluation process. Or worse yet, based on the theory there must have been an “error” or “omission”, the client demands the design professional answer and defend all contractor claims. This forces the design professional to spend a significant amount of time in defending themselves and trying to get paid. Sadly, these situations lead to strained and deteriorating relationships between design professionals and their clients.

## **DRIVING FACTORS**

Design professionals need to fully understand the client mentality and driving factors that promote an expectation of “perfection.” Only then can design professionals address the issue.

Many clients simply do not understand the nature of the design professional’s business. Clients may not realize each project is unique – *the first and only one exactly like it* – not to be compared with a manufactured product that will be fixed for “free” or replaced if there is a flaw. Other clients simply believe demanding “perfection” at no cost to them is an appropriate business model.

Client misconceptions include:

- Contract documents are 100% complete, free of any defects, and contain everything needed for the construction contractor to do the job.
- No change orders are expected; thus, none will be allowed.
- No contingency budgets are necessary.

- Any construction change order probably stems from a design fault.
- Once there is a construction contract, the client only has to pay for changes in the work that the client initiates.
- All extra costs are damages – even to the extent that the owner expects the design professional to pay for “betterment” (*project improvements that benefit the owner and that the owner rightfully should pay for*).
- Design professionals are responsible to see that the construction contractor builds it right.
- Professional liability insurance is a no-fault policy.
- Design documents or construction contract documents are “guaranteed” or come with a “warranty” to be free from defects and fit for the intended use.
- Design professionals should know and anticipate the applicability of every federal/state/local and industry published code or standard. They should be able to anticipate the evolving nature of some codes and standards (*e.g., Americans with Disabilities Act*).
- More than a few “RFIs” on any project are clear evidence of errors and omissions in the design.

## **WHAT DESIGN PROFESSIONALS CAN DO**

In project/client-specific situations:

- Establish the design professional as the “faithful advisor” to the client, without guaranteeing specific results or perfection.
- Document marketing, negotiation and continuing project communication with the client – including issues concerning quality of deliverables, standard of care, project schedule, and mutual expectations.
- Candidly discuss with the client that design or construction documents typically contain some errors and omissions – *no set of documents is perfect* – and the remedy is to identify and correct each problem as it arises, normally during construction, with the participation of the design professional.
- Educate clients during negotiations on reasonable expectations.
- Agree only to perform to the existing standard of care for the professional services. Never agree to unreasonable contract terms that explicitly or implicitly require perfection, such as warranties, guarantees of error-free plans, fitness for a particular purpose, etc.
- Review with clients their contingencies and, if necessary, the need for an adequate contingency to pay for design enhancements or unexpected conditions.
- Foster a team approach on projects to include the client and construction contractor.
- Arrange for the client to participate in all constructability reviews and develop a team approach for early recognition of issues.
- Negotiate for a design professional to be part of the client’s dispute resolution team.

- Make sure the contract includes provisions for alternative dispute resolution short of arbitration or litigation. Recommended dispute resolution techniques can include, but are not limited to, “good faith” senior management discussion of disputed issues, mediation, “mini-trials,” and peer-review of design documents/project issues.
- If a client is unwilling to strike or negotiate over certain “deal breaker” contractual provisions, the design professional must be prepared to walk away from the contract. Design professionals must resist the argument that “If I don’t sign it, someone else will.” Often, this is untrue. There is no reason to compromise on fairness and professionalism.
- Share contract review comments through state member organizations.

#### To assist clients:

- Provide research and education for estimating project costs – Too frequently, project budgets become slanted toward what the public or other constituents may guess, instead of on the basis of true and accurate cost projections allowing for completing facilities, inflation, and contingencies.
- Educate clients on:
  - The imprecise and judgmental nature of the design business.
  - How inaccuracies can creep into design documents without negligence.
  - Standard of care/negligence issues.
  - Professional liability insurance issues.
  - Quality-price-schedule tradeoffs.
  - Roles and responsibilities of “engineer-of-record.”

#### Improve the design professional’s skills:

- Provide significant, broad-based training on negotiating – Design professionals who negotiate contracts need to understand and handle the client mentality and driving factors that encourage clients to expect perfection.
- Educate design professionals and their firms on:
  - Good communication documentation practices.
  - Standard of care/negligence issues.
  - Insurance issues.
  - Indemnification issues.
  - Quality-price-schedule tradeoffs.
  - Roles and responsibilities of “engineer-of-record.”
  - What it takes to keep the client satisfied.
  - How to handle construction phase issues.

## Advocacy efforts supported by ACEC:

- Share contract review comments through state member organizations.
- Advocate for design professionals to serve on dispute resolution boards.
- Advocate for “engineer-of-record” to also provide construction phase services, especially where the practice is barred.
- Advocate for legislative or regulatory reform to combat “perfection” standards in public contracts.
- Advocate for tort reform including certificate of merit requirements, limitations on indemnities, and other legislative measures to reduce risk associated with expectations of perfection.

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