

# **PLAYING HIDE AND SEEK:**

FINDING THE HIDDEN DESIGN RESPONSIBILITY IN  
TODAY'S COMPLEX CONTRACTS

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# WHAT IS DELEGATED DESIGN

The shifting of liability for design issues to the General Contractor, outside of a formal Design-Build contract, by way of contract, specification, drawing, change order, or construction change directive




# WHY DELEGATED DESIGN MATTERS

## The Spearin Doctrine:

“... if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work...”

*Spearin v. U.S.*, 248 U.S. 132 (1918)



# SOURCES OF DELEGATED DESIGN

- The Contract
- The Construction Documents


# SOURCES OF DELEGATED DESIGN

- The Contract
  - Discuss:
    - AIA A201 § 3.2.2
    - AIA A201 §3.12.10
    - Contrast – ConsensusDocs 200 §2.3
    - Contrast – ConsensusDocs 200 §3.15
- The Construction Documents
  - Specifications
  - Drawings
  - Submittals

# SOURCES OF DELEGATED DESIGN

## AIA A201 §3.2.2

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.



# SOURCES OF DELEGATED DESIGN

## AIA A201 §3.12.2

§ 3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures. The Contractor shall not be required to provide professional services in violation of applicable law.

# SOURCES OF DELEGATED DESIGN

## CONSENSUSDOCS 200 §2.3


§ 3.15 DESIGN PROFESSIONAL Owner, through its Design Professional, shall provide all architectural and engineering design services necessary for the completion of the Work excluding, however, (a) design services delegated to the Constructor in accordance with §3.15, and (b) services within the construction means, methods, techniques, sequences, and procedures employed by Constructor, its Subcontractors and Subsubcontractors in connection with their construction operations.

# SOURCES OF DELEGATED DESIGN

## CONSENSUSDOCS 200 §3.15

§ 3.15 DESIGN DELEGATION If the Contract Documents specify that Constructor is responsible for the design of a particular system or component to be incorporated into the Project, then Owner shall specify all required performance and design criteria. Constructor shall not be responsible for the adequacy of such performance and design criteria.

As required by the Law, Constructor shall procure design services and certifications necessary to satisfactorily complete the Work from a licensed design professional. The signature and seal of Constructor's design professional shall appear on all drawings, calculations, specifications, certifications, shop drawings, and other submittals related to the Work designed or certified by Constructor's design professional.



# OTHER SOURCES OF DELEGATED DESIGN

## - PERFORMANCE BASED SPECIFICATIONS

A *performance specification* defines the *performance* characteristics of the final product and links them to construction, materials, and other items under contractor control. Keywords in identifying performance specifications include:

- Design
- Do all things necessary
- Match existing field conditions
- References to performance criteria in lieu of dimensional information

The key element in a performance specification is DISCRETION.



# OTHER SOURCES OF DELEGATED DESIGN


## – THE SUBMITTAL PROCESS

“Review of submittals is for general conformance is with Contract Documents and not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor.”

- Architectural Approval Stamp

# OTHER SOURCES OF DELEGATED DESIGN

## – BIM, PREFAB & DESIGN ASSIST

- BIM involves the use of computer modeling where multiple parties have the ability to make inputs and influence the model. Liability may exist when the contractor makes inputs that influence the model.
  - Requirements of prefabricated elements may impose liability to contractors for the proper operation or design as to the components of the prefabricated item.
  - “Design Assist” services may implicate a design responsibility depending on the specific undertaking accepted by the contractor.
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# RISKS OF DELEGATED DESIGN

- Construction Issues
- Liability Issues
- Licensure Issues
- Insurance Issues

# PROTECTING AGAINST DELEGATED DESIGN

- Close Contract and Insurance Review
  - Verify Design Liability Coverage
- Risk Checklists
- Flow Down Design Obligations to Subcontractors