

Design Professional Newsletter



Timely Tips for Avoiding Delay Claims

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When Benjamin Franklin coined the phrase “Time is money,” it was not directed toward design professionals. However, unfortunately for design professionals this adage rears its ugly head in the form of the dreaded delay claim. In this regard, public school projects present a significant risk for three key reasons. First, the failure to meet deadlines will likely impact the school’s ability to operate, thereby creating damages due to the need for alternatives. Second, school projects are heavily scrutinized by not only the administration, but also by their constituency, who often have no issues voicing their concerns publicly. To make matters worse, the jury will likely contain some members of these groups should the claims proceed to trial. Third, many states have acted to protect public entities, by removing the statute of limitations that typically limit the time period for filing claims. Thus, delay claims can be filed years after the conclusion of the project.

Fear not design professionals, we offer the following best practices for holistically seeking to avoid delay claims. Returning to Franklin, he offers the following sage advice “An ounce of prevention is worth a pound of cure.” We cannot stress enough that prevention begins before the project starts. The singular best protection against delay claims (or any claims for that matter) is earned at the negotiating table in the form of a well-drafted contract. If you are operating from anything short of this, you are already vulnerable to forces beyond your reasonable control.

For starters, “time is of the essence” clauses or hard deadlines should be stricken from the contract. These place the design professional in a precarious situation because they may remove the protections provided by the standard of care and leave the design professional strictly liable - even when ***not*** the cause of the delay. Accordingly, these provisions should be replaced by more ambiguous verbiage, specifically referencing the standard of care. The AIA B101 Standard Form Agreement Between Owner and Architect utilizes the following language, “The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.” Moreover, liquidated damages should never appear in a design professional’s contract.

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Design professionals would also be wise to ensure that the contract contains affirmative protections. Such provisions include a limitation of liability, waiver of consequential damages, a force majeure clause negating liability for delays outside of the design professional's control and a well-tailored indemnity provision.

Moving onto the scope of professional services, agreeing to obtain the necessary permits and approvals to complete the project introduces another thorny quandary for design professionals. Including this within your scope, places you at the mercy of the speed with which the authority having jurisdiction moves in the permitting process. A particularly finicky code official that acts without expediency could put you in a particularly vulnerable position. Instead, this task (and the risks associated with it) should be left to the owner.

During the project, the design professional must remain vigilant. If recording the meeting minutes, you should utilize this as a forum to identify any delays that have occurred during design and/or construction. Even if not, should a delay impact any component of the design professional's services, be sure to document this and, if applicable, submit an Additional Services Request ("ASR") detailing the delay and the impact. The latter is particularly important. For whatever reasons design professionals tend to be skittish when it comes to seeking payment for such services. In our legal experience, the consequences of not requesting an ASR extend beyond unpaid services. Should litigation arise, the absence of an ASR can be utilized as evidence of deficiencies in your design services, which will likely carry with it a delay component. These arguments can be difficult to defend against, because the logic is so simple – "if these services were not required by the contract, then why would the design professional perform them without getting paid?" Rather than being penalized for delays caused by others, the design professional should be compensated for any additional services that may be required. Furthermore, submitting an ASR with documentation identifying the basis provides a platform for defending against a delay claim.

In sum, delay claims represent a significant danger to the design professional. While the potential for such claims exist in all projects, the risks and potential damages are often exponentially higher on public school projects for the reasons illustrated above. A strong

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contract, coupled with a proactive, preventive approach during the project, can act to substantially limit these risks. Should you have any questions, please do not hesitate to contact us.



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