

AERISK REVIEW

A LOSS PREVENTION PUBLICATION FOR
THE DESIGN PROFESSIONAL COMMUNITY



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LIMITING CADD LIABILITIES PART 2: CONTRACTS AND OWNERSHIP ISSUES

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We gratefully acknowledge the assistance of professional liability specialist XL Design Professional, formerly DPIC Companies, in preparing this information.

As covered in Part I of this two-part report, virtually every design firm in North America uses computer-aided drafting and design (CADD) on its projects. Yet despite its advantages, the growth of CADD has been a mixed blessing for most design firms. While CADD increases productivity and enables firms to provide a wider range of services, it also poses new challenges — and liabilities.

Part I addressed the major areas of liabilities associated with CADD and provided procedural remedies for minimizing the risks. In this issue, we will cover protections you can build into your contracts that further limit liabilities and protect your rights of ownership.

Contractual Protection

There are several places in your standard service contracts where you can address CADD related issues — in the “Scope of Services” or “Ownership of Instruments or Services” provisions, for example. Better yet, you can add a specific CADD clause to your contracts.

Here is an example of such a CADD clause, provided by XL Design Professional. As always, consult with your attorney when drafting the specific language needed to fit your circumstances:

Delivery of CADD Files

In accepting and utilizing any drawings, reports and data on any form of electronic media generated and furnished by the Consultant, the Client agrees that all such electronic files are instruments of service of the Consultant, who shall be deemed the author, and shall retain all common law, statutory law and other rights, including copyrights.

The Client agrees not to reuse these electronic files, in whole or in part, for any purpose other than for the Project. The Client agrees not to transfer these electronic files to others without the prior written consent of the Consultant. The Client further agrees

to waive all claims against the Consultant resulting in any way from any unauthorized changes to or reuse of the electronic files for any other project by anyone other than the Consultant.

The Client and the Consultant agree that any electronic files furnished by either party shall conform to the software and hardware specifications listed in Exhibit _____. Any changes to the electronic specifications by either the Client or the Consultant are subject to review and acceptance by the other party. Additional services by the Consultant made necessary by changes to the electronic file specifications shall be compensated for as Additional Services.

The electronic files furnished by either party shall be subject to an acceptance period of ____ (____) days during which the receiving party agrees to perform appropriate acceptance tests. The party furnishing the electronic file shall correct any discrepancies or errors detected and reported within the acceptance period. After the acceptance period, the electronic files shall be deemed to be accepted and neither party shall have any obligation to correct errors or maintain electronic files.

The Client is aware that differences may exist between the electronic files delivered and the printed hard-copy construction documents. In the event of a conflict between the signed construction documents prepared by the Consultant and electronic files, the signed construction documents shall govern.

In addition, the Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors employees and subconsultants (collectively Consultant) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from any changes made by anyone other than the Consultant or from any reuse of the electronic files without the prior written consent of the Consultant.

Under no circumstances shall delivery of the electronic files for use by the Client be deemed a sale by the Consultant, and the Consultant makes no warranties, either express or implied, of merchantability and fitness for any particular purpose. In no event shall the Consultant be liable for indirect or consequential damages as a result of the Client's use or reuse of the electronic files.

Transferring Ownership

Some clients may demand that they receive ownership of the electronic CADD files. In such cases, try to discover why the client wants ownership of the design documents. If the owner is concerned about proprietary issues, perhaps a confidentiality agreement would suffice instead. If they need it for maintenance purposes, suggest that an as-built document would be a better option. Or you could grant them a license to use your copyrighted design for a specific purpose.

When all else fails, you can agree to this ownership transfer as long as you put extra protections in place. For example, you can require that the files be transferred only upon full and final payment of your fees. You should also refer to the files as "instruments of service." This will help protect against potential product defect claims. Also state that you do not provide any warranty or guarantee regarding the files' merchantability or fitness for any particular use or purpose. Finally, make sure you remove all of your electronic seals, signatures, logos, or other identifying marks from the files.

When transferring ownership, here is some recommended language you can use in place of the first two paragraphs of the previous sample clause:

Delivery of CADD Files

The Client acknowledges the Consultant's drawings and specifications, including all documents on electronic media, as instruments of the Consultants professional service. Nevertheless, the drawings and specifications prepared under this Agreement shall become the property of the Client upon completion of the services and payment in full of all monies due to the Consultant. The Client shall not reuse or make or permit to be made any modifications to the drawings and specifications without the prior written authorization of the Consultant. The Client agrees to waive any claim against the Consultant arising from any unauthorized transfer, reuse or modification of the drawings and specifications.

Providing Files to Contractors

If you should be required to provide your electronic files directly to contractors for their use in preparing shop drawings, protect yourself with a letter of agreement. In light of the added risk, you should also demand an appropriate fee. The sample letter below, provided by XL Design Professional, includes language you and your attorney can consider and adapt for use.

Letter of Agreement with Contractors

Dear (Contractor's name)

At your request, we will provide electronic files for your convenience and use in the preparation of shop drawings related to (*name of project*), subject to the following terms and conditions:

Our electronic files are compatible with (*software/hardware specifications*). We make no representation as to the compatibility of these files with your hardware or your software beyond the specified release of the referenced specifications.

Data contained on these electronic files are part of our instruments of service and shall not be used by you or anyone else receiving these data through or from you for any purpose other than as a convenience in the preparation of shop drawings for the referenced project. Any other use or reuse by you or by others will be at your sole risk and without liability or legal exposure to us. You agree to make no claim and hereby waive, to the fullest extent permitted by law, any claim or cause of action of any nature against us, our officers, directors, employees, agents or subconsultants that may arise out of or in connection with your use of the electronic files.

Furthermore, you shall, to the fullest extent permitted by law, indemnify and hold us harmless against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs arising out of or resulting from your use of these electronic files.

These electronic files are not construction documents. Differences may exist between these electronic files and corresponding hard copy construction documents. We make no representation regarding the accuracy or completeness of the electronic files you receive. In the event that a conflict arises between our signed and sealed hard-copy construction documents and the electronic files, the signed or sealed hard-copy construction document shall govern. You are responsible for determining if any conflict exists. By your use of these electronic files, you are not relieved of your duty to fully comply with the contract documents, including, and without limitation, the need to check, confirm and coordinate all dimensions and details, take field measurements, verify field conditions and coordinate your work with that of other contractors for the project.

Because of the potential that the information presented on the electronic files can be modified, unintentionally or otherwise, we reserve the right to remove all indicia of ownership and/or involvement from each electronic display.

We will furnish you electronic files of the following drawing sheets: (list here.)

A service fee of \$ ____ (____ dollars) per sheet shall be remitted to us prior to delivery of the electronic files

Under no circumstances shall delivery of the electronic files for use by you be deemed a sale by us, and we make no warranties, either express or implied, of merchantability and fitness for any particular purpose. In no event shall we be liable for any loss of profit or any consequential damages as a result of your use or reuse of these electronic files.

Copyright Basics

Prior to 1990, design professionals had only limited protection under copyright laws. Basic copyright law defines "architectural work" as the design of a building as expressed in plans or drawings. The owner of a copyright to an architectural work has the exclusive right to reproduce the plans and drawings, to make derivative works from them, to grant licenses to others to use the work or to sell the work outright. In general these rights last 50 years beyond the life of the owner.

The 1990 Architectural Works Copyright Protection Act extended ownership rights for design professionals. The Act specifically prohibits unauthorized construction of buildings depicted in copyrighted drawings created on or after December 1, 1990. However, it only applies to architectural works intended for human use or occupancy. Thus, while residential or commercial buildings are covered, structures such as roads, bridges and dams are not.

These copyrights come into effect as soon as your plans and drawings are created. However, it is advisable to state your intentions of retaining ownership of these rights in your contract. A simple contract clause might read:

Ownership of Instruments of Service

All reports, plans, specifications, computer files, field data, notes and other documents and instruments prepared by the Consultant as instruments of service shall remain the property of the Consultant. The Consultant shall retain all common law, statutory and other reserved rights, including the copyright thereto.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.

FOR MORE INFORMATION, CONTACT:

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