



Municipal Projects: Unique Risks and Considerations with Angela Caffey, Esq.

For design professionals, the opportunity to provide services for municipalities can be both lucrative and a way for a firm to 'get their name on the map.' Projects for states, cities, townships, and villages can increase complexities and bring unique challenges. Whether the project is a school, library, park, or road, design professionals should be aware of special considerations. We have seen various claims issues involving municipal projects, often brought about by increased costs or scope, but also arising from situations where the municipality's leadership has changed or lost interest in the project.

Everest asked one of its A&E panel counsel, Angela Caffey, Esq. of Thompson, Coe, Cousins & Irons, LLP, to address some of the unique risks and considerations when design professionals are working on municipal projects.

Everest: What can our Insureds/Design Professionals do to minimize risk in their written contracts with municipalities?

Thompson Coe: It is extremely common for design professionals to find themselves with little to no bargaining power for favorable contract terms when performing work for municipalities. In those situations, design professionals should take great care in what they do draft during the contract formation stage – their scope of work. A design professional's scope of work, often incorporated into the contract, should list with as much detail as possible the design professional's scope of work included *and* the scope of work excluded for the project. A design professional's extra time spent on the front end specifying in detail the scope of work included and excluded is an effective risk management strategy to avoid unjustified requests from the municipalities to increase the scope of work without an increased fee, and potential issues in the event the municipalities' point of contact is replaced with someone new mid-project. For instance, if site visits and observations are included in the scope of work, design professional may consider identifying how many site visits are included in the proposal and specify the limited nature and purpose of the site visit. The design professional should consider providing the draft scope of work to the municipality and requesting comments from the municipality before providing the proposed fee. In other words, try to get an agreement on scope before addressing the design professional's fee.

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Everest: Are there any contract provisions our Insureds/Design Professionals should avoid in their written contracts with municipalities?

Thompson Coe: The short answer is yes. Most contracts presented to design professionals from municipalities are written by attorneys. Design professionals should consider having an attorney read the contract before execution. Such services can be provided by third-party vendors, and may be available through a design professional's insurance company. Everest offers a "Contract Review Service" to all Insureds for this type of coverage and provides the design professional an opportunity to have a design professional contract expert review the proposed contract before execution. Special consideration should be given to terms that attempt to heighten the design professional's standard of care (i.e. avoid language like the "most stringent standard of care" or language that goes beyond what an ordinary and prudent design professional would do in like or similar circumstances). A design professional should also be wary of language that attempts to increase its scope of work in a manner that is vague and not specified. For example, a design professional should avoid language that references scope of work attached to contract, but then includes "and all other services customarily provided by other consultants performing the same or similar services on projects of the same or similar size and complexity." Design professionals should also avoid indemnity language that includes the requirement to "defend" the municipality in the event a claim or suit is brought.

Everest: Are there any provisions or statements our Insureds/Design Professionals should avoid in their Statement of Qualifications?

Thompson Coe: First and foremost, the design professional should avoid allowing the municipality to incorporate the Statement of Qualifications into the contract. Most often, the Statement of Qualification is written as a type of marketing material. Many times, the design professional did not draft the statement or might not have even seen it. Further, the design professional should avoid overselling the number of people from its firm that will be available to work on the project and avoid listing qualifications of people from the firm that the design professional knows will not be on the project. If issues arise, the Statement of Qualifications could be used against the design professional.

Everest: Are there any special considerations our Insureds/Design Professionals should consider with a Guaranteed Maximum Price (GMP) project?

Thompson Coe: In any type of contract with a municipality, the design professional should consider providing an estimated order of magnitude before the contracts are executed. Even if the estimate has a built-in thirty percent contingency, the estimate can assist the municipality and design professional to begin the project on the same page. The design professional should consider its estimate, and its scope of work discussed above, as the best opportunities to set expectations and manage risk moving forward. Special consideration should be given to the schedule with GMP projects to ensure the design professional has sufficient time to provide the GMP set of plans. Many issues arise when the general contractor bases

the GMP on a forty or fifty percent complete set of plans as compared to a permit set of plans. Additionally, the design professional should carefully consider change order requests during construction of a GMP project. If the general contractor's request should have been included in the GMP, the design professional should withhold its recommendation to accept the request and fully discuss the proposed change order with its client. Claims against the design professional related to change orders most often arise after construction is complete, and it is difficult for the design professional to claim the general contractor should have included the cost in the GMP if it already recommended acceptance.

Everest: What should our Insured/Design Professional consider if they are requested to attend an informational or neighborhood meeting?

Thompson Coe: If the design professional is requested to attend an informational meeting open to the public, the design professional should always ensure a representative of the municipality will also attend. Even if the design professional is introduced by the municipality to the audience, it is best practice for the design professional to reintroduce themselves and specifically define its own role (i.e. "I was requested to attend this meeting because I'm the design professional retained by the municipality to provide drawings..."). The goal is for the design professional to make it abundantly clear that they are not attending the meeting as a function of being a part of the municipality. Further, the design professional should strongly consider preparing a written presentation (i.e. PowerPoint) before the meeting. The presentation should also specifically define the design professional's role and should be maintained in the project file. Informational meetings will often be documented with meeting minutes that could sometimes be limited or could misconstrue what was presented at the meeting. In the event something goes wrong, those meeting minutes could be used against the design professional. By having the presentation documented and in the project file, counsel has a way to contest potentially misleading meeting minutes in the future.