

A&E briefings

Structuring risk management solutions

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Do you know where your money comes from?

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Money is money. It pays the bills. Simple. Right?

For the design professional, the answer may not be so simple. Where the money comes from to fund the design and construction of a project you're working on can affect your responsibilities and liabilities.

Federal funding

When Federal financial assistance is involved in any building, program or service, design professionals need to be concerned with two accessibility laws.

1. The Architectural Barriers Act of 1968 (Public Law 90-480) requires that facilities designed, constructed, altered or leased with Federal funds be accessible to, and usable by, individuals with disabilities. The specific language is in the United States Code at 42 USC Sections 4151-4157.
2. The Rehabilitation Act of 1973 (Public Law 93-112) enhanced the scope of the Architectural Barriers Act. The Rehabilitation

Act has been amended and enhanced several times, most recently in 1998, via the Workforce Investment Act. Specific sections of the Rehabilitation Act address different issues.

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Do you know where your money comes from?

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Section 502 established the Architectural and Transportation Barriers Compliance Board, now called the Access Board. As an independent Federal agency, the Access Board has two main charges: 1) develop design standards and guidelines for accessibility, and 2) enforce the Architectural Barriers Act. To assist design professionals, the Access Board has developed the Uniform Federal Accessibility Standards (UFAS) and the Americans with Disabilities Act Accessibility Guidelines (ADAAG). Both documents are available at the Access Board website (www.access-board.gov), which is an excellent resource for information.

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs and services receiving funding from the Federal government. As stated in 29 USC 794, "No otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program, service or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

Each Federal agency that provides financial assistance has its own set of Section 504 regulations in the Code of Federal Regulations (CFR). Some examples include:

- Department of Defense (DOD), 32 CFR Part 56,
- Department of Education, 34 CFR Part 104,
- Department of Health and Human Services (HHS), 45 CFR Part 84,
- Department of Housing and Urban Development (HUD), 24 CFR Part 8,
- Department of Justice (DOJ), 28 CFR Part 42,
- Department of Labor (DOL), 29 CFR Part 32, and

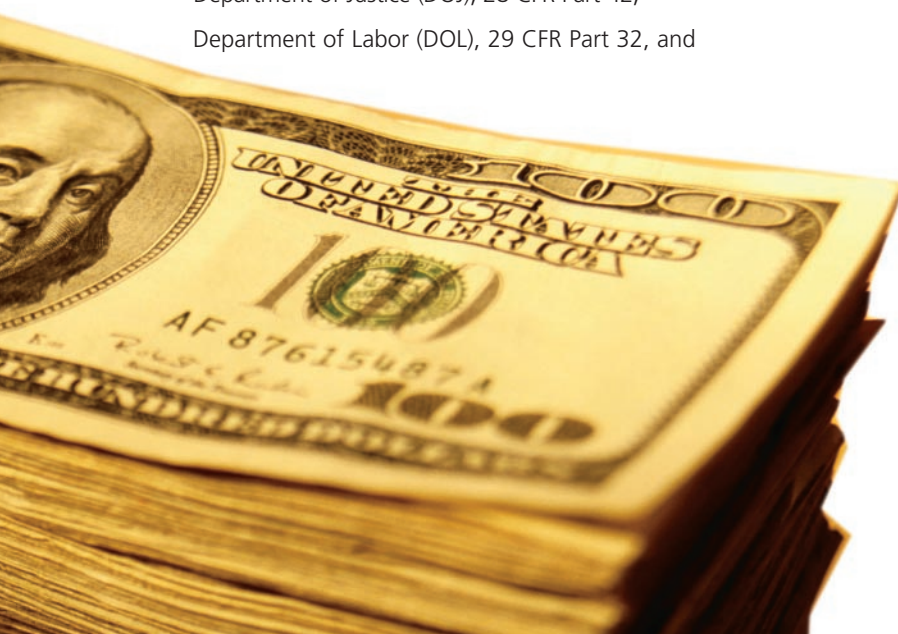
Department of Transportation (DOT), 49 CFR Part 27.

Each Federal agency is also responsible for enforcement, whether under the UFAS or the ADAAG. Federal agencies may provide at least partial financial assistance for various building types: housing, parks and recreation, prisons, hospitals and health care institutions, schools and other educational facilities, post offices, government and social service buildings, day care centers and transportation facilities such as airports. Asking good questions about Federal participation funding at the start of a project may greatly reduce your professional liability.

A "recipient" of Federal funding is any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization or other entity, or any person to which Federal financial assistance is extended for any program or activity directly or through another recipient, including any successor, assignee or transferee of a recipient, but excluding the ultimate beneficiary of the assistance (24 CFR 8.3). Federal financial assistance includes any grant, loan, contract or any other arrangement by which a Federal agency provides or otherwise makes available assistance (28 CFR 41.3(e)). Recipients can include colleges whose students receive Federal scholarships or Pell grants, and health care facilities that accept Medicare and Medicaid. However, the Rehabilitation Act does not apply to a private landlord receiving housing assistance payments such as Section 8 vouchers.

Section 508 of the Rehabilitation Act requires that all Federal agencies ensure that electronic and information technology that they develop, procure, maintain or use is accessible to

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employees with disabilities. This includes computers, fax machines, copiers, telephones and other equipment for transmitting, receiving, using or storing information. Section 508 impacts the design and layout of facilities to ensure access to this type of equipment by persons with disabilities.

Integration

A principal purpose of the Rehabilitation Act is “. . .to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society. . .” (29 USC 701)

Design professionals need to be sensitive to, and comply with the spirit of, this “integration mandate.” The concept of integration was more fully developed with the Americans with Disabilities Act of 1990. The United States Supreme Court, in the case *Olmstead v. L.C. Zimring*, 527 U.S. 581 (1999) stated: “The ADA stepped up earlier efforts in the developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973 to secure opportunities for people with developmental disabilities to enjoy the benefits of community living.”

For example, under Section 504, an educational system receiving Federal funding cannot design one school building or campus for accessibility, thereby segregating individuals with disabilities into a single setting. Likewise, “Accessible dwelling units. . .shall. . .be distributed throughout projects and sites and shall be available in a sufficient range of sizes and amenities so that a qualified individual with handicaps’ choice of living arrangements is, as a whole, comparable to that of other persons eligible for housing assistance under the same program.” (24 CFR 8.26) In a single elevator building, persons with disabilities may not be required to live only on certain floors or in



certain wings or sections. In multiple-building projects, accessible units should be distributed throughout. If this sounds vaguely familiar, you may be thinking of the Fair Housing Act (FHA). To differentiate: The Architectural Barriers Act and the Rehabilitation Act standards are more rigorous than the FHA, but usually apply to fewer units within a housing complex. The FHA may apply to more, or all, units of a housing complex.

Liability

The liability for noncompliance with the Architectural Barriers Act and the Rehabilitation Act rests with the design professional. Recipients of Federal funding will often require the design professional to sign certification forms attesting to compliance with Section 504, UFAS, ADAAG, and/or other pertinent requirements pertaining to accessibility for persons with disabilities. Remember the civil rights perspective: failure to provide accessibility is regarded as discrimination, not just a failure to meet building code requirements.

Federal funding may pass through several entities and change hands several times before it is applied to a project you’re working on. While design professionals don’t want to be lawyers or financiers or detectives, they must get a complete answer to the critical question “Where does the money come from?”

Specifications and Spearin

When you think of risk allocation in construction, the first thought is of contracts. Few design professionals think about risk allocation in specifications.

Too many times, a “cut-and-paste” methodology is employed to prepare a set of specifications. On large projects, the specification writing may be outsourced to a consultant. When was the last time you really, carefully read a set of specifications, all sixteen divisions?

Spearin

So who is Spearin and what does he have to do with construction specifications? Spearin was a contractor hired by the United States Navy to build a dry dock at the Brooklyn Navy Yard. Spearin contracted to build the dry dock in accordance with plans and specifications that had been prepared by the government. Before the work of constructing the dry dock could begin, it was necessary to divert and relocate a section of sewer. The plans and specifications provided that the contractor should do the work and prescribed the

dimensions, material and location of the sewer section to be substituted. All the prescribed requirements were fully complied with by Spearin and the substituted section was accepted by the government as satisfactory. About a year later, the sewer broke, flooding the excavation for the dry dock.

The government insisted that the responsibility for remedying existing conditions rested with the contractor. Spearin disagreed and stopped work. Eventually, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site. Under radically changed and enlarged plans, the dry dock was completed by other contractors. Spearin sued for damages and won.

The United States Supreme Court stated: “Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. But 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. The insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up on the plans, and to assume responsibility for the work until completion and acceptance.”¹

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In a continuum of risk allocation, design specifications and performance specifications are at opposite ends.

A continuum of risk allocation

Specifications are written instructions describing the material choices and quality, workmanship and installation procedures for construction items. Two basic types are design specifications and performance specifications. Design specifications are usually very precise in describing the product and work to be done, relying on brand names and manufacturer specifications. Performance specifications usually set an objective without stating methods for achieving results, leaving the details of design and construction to the contractor.

In a continuum of risk allocation, design specifications and performance specifications are at opposite ends. Design specifications carry an implied warranty (the Spearin doctrine) and place the risk on the owner and the owner's design professional who prepared the design specifications. Design specifications are typically associated with design-bid-build construction. At the opposite end, performance specifications carry no implied warranty, and the risk and responsibility for the end result are shifted to the contractor. The only exception for the contractor is if the performance specification requirements are impossible to attain. Performance specifications may be associated with design/build construction.

Very often, though, the character of specifications may fall somewhere along the continuum between design and performance. Disputes often arise when a project contains both types, or the specification falls somewhere between design and performance. Some of the factors to be considered in determining whether specifications are of the performance or design variety are:

- (a) The language of the contract as a whole.
- (b) The nature and degree of the contractors' involvement in the specification process.
- (c) The degree to which the contractor is allowed to exercise discretion in carrying out its performance.²

A design specification can become a performance specification if the owner is persuaded to change the specification to accommodate a contractor's idea. This is a situation which can become muddled if the contractor claims that the owner's approval constituted adherence to a design specification. Manage your risk: Document any changes in

specifications made by the owner and/or contractor, especially if you are not involved in the process. If you are called upon to approve changes in the specifications, carefully use your judgment and experience to determine whether this is the best course of action and how it affects your liability.

Another common scenario involves the words "or equal." If the contractor uses the brand name product or method specified, responsibility for the end result rests with the owner. If the contractor has discretion to select the "or equal" material or method used, responsibility rests with the contractor. However, if approval by the owner/design professional is required for the "or equal" substitute, responsibility shifts back. Manage your risk: As a design professional, be very careful of what you approve for use as an "equal" product or technique, and the corresponding liability inherent in that decision.

The bottom line: The next time you read or prepare a set of specifications, be aware of where you stand along the continuum of discretion and risk allocation.

Implied warranty

Implied warranty is a very critical issue for design professionals. According to Barron's Dictionary of Legal Terms, a warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely, intended precisely to relieve the promisee of any duty to ascertain the fact for himself; amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue. Such warranties are made either overtly (express warranties) or by implication (implied warranties).

¹ *United States v. Spearin*, 248 U.S. 132 (1918)

² *Pezza & Son v. New England Power Service*, (1995 U.S.D.C., R.I. Unpub.)

Risk tip: Site safety responsibility



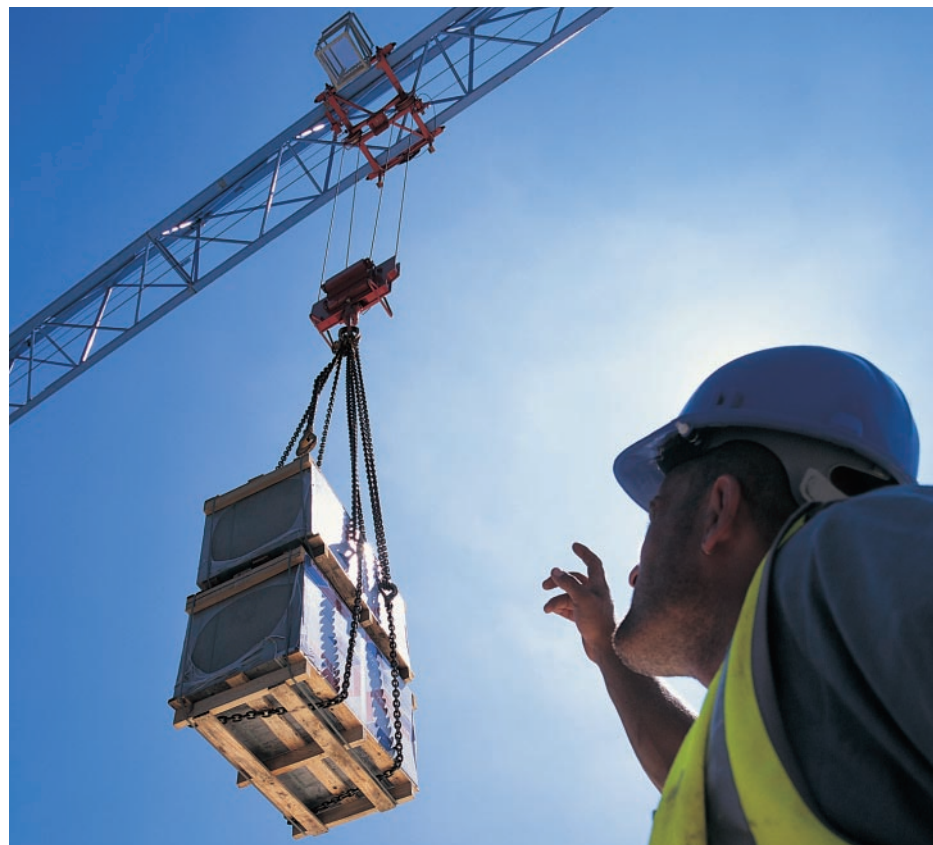
Liability for site safety is typically not the design professional's responsibility unless something about the contract, the design or the design professional's site activities subjects the design professional to liability. In general, owners have responsibility to keep and bear the risk of not keeping their property reasonably safe. When construction activities are ongoing, most owners transfer that risk to the party best able to maintain site safety during construction – usually the contractor.

But design professionals may find themselves with a liability they thought they did not have or, at best, liability for which they were not adequately paid. Contracts, events and conduct may change that allocation of liability. Therefore, you should review whether your onsite activities or role may bring your services into the realm of liability. Even if your contract expressly disclaims site safety responsibility, you may be judged responsible, in part, if you have:

- schedule oversight
- are on site daily
- have authority to stop work
- observe an unsafe site condition

Therefore, risk management training for field personnel on site safety issues is essential.

Rules vary from state to state and site safety claims against design professionals is an area in flux. To develop an effective strategy, you should consult with counsel in the jurisdiction in which services are to be performed or under which law your contract will be construed.



Zurich has recently updated our Architectural/Engineering Contracts Risk Management Guide. If you would like a copy, please send an email to a&ebriefings@zurichna.com with your name, company and mailing address. Also indicate if you would like a printed copy or the CD.

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